

SOUTH AFRICA / JUDGMENT

Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others (CCT74/03) [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) (8 October 2004) [2004] ZACC 25

COURT

Constitutional Court

BEFORE

Mokgoro, Chaskalson, Langa, Moseneke, Ngcobo,
O'Regan, Sachs, Skweyiya, Van der Westhuizen,
Yacoob

CASE / FILE NUMBER

CCT74/03

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Case CCT 74/03

MAGGIE JAFTHA Appellant

versus

STEPHANUS SCHOEMAN First Respondent

MIETJIE SKAARNEK Second Respondent MARKOTTER ATTORNEYS Third Respondent CHRIS
BOTES Fourth Respondent MINISTER OF HOUSING IN THE NATIONAL GOVERNMENT Fifth
Respondent MINISTER OF HOUSING FOR THE PROVINCIAL ADMINISTRATION OF THE
WESTERN CAPE Sixth Respondent CLERK OF THE MAGISTRATES' COURT: PRINCE ALBERT
Seventh Respondent REGISTRAR OF DEEDS:

CAPE TOWN Eighth Respondent

MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT Ninth Respondent and
CHRISTINA VAN ROOYEN Appellant versus

JACOBUS STOLTZ First Respondent CATHERINE GOLIATH Second Respondent MARKOTTER
ATTORNEYS Third Respondent CHRIS BOTES Fourth Respondent

MINISTER OF HOUSING IN THE NATIONAL GOVERNMENT Fifth Respondent

MINISTER OF HOUSING FOR THE PROVINCIAL

ADMINISTRATION OF THE WESTERN CAPE Sixth Respondent

CLERK OF THE MAGISTRATES' COURT:

PRINCE ALBERT Seventh Respondent

REGISTRAR OF DEEDS: CAPE TOWN Eighth Respondent MINISTER FOR JUSTICE AND
CONSTITUTIONAL

DEVELOPMENT Ninth Respondent

Heard on : 11 May 2004 Decided on : 8 October 2004

MOKGORO J:

[2]

Specifically, the case concerns the constitutional validity of sections 66(1)(a) and 67 of the Magistrates' Courts Act 32 of 1944 (the Act) which deal with the sale in execution of property in order to satisfy a debt. The appellants, Ms Maggie Jaftha (Ms Jaftha) and Ms Christina van Rooyen (Ms van Rooyen), approach this Court in terms of rule 19 of the Constitutional Court Rules, 2003 appealing against the judgment of the Cape High Court (the High Court) in the related matters of Jaftha v Schoeman and Others Case no 8617/01.

Factual background [3]

The facts of the two cases are similar. Ms Jaftha is unemployed, of ill health and poor. She has only a standard two education. She suffers from heart problems and high blood pressure which prevent her from working. In 1997 she applied for and was granted a state housing subsidy with which she bought a home where she lived with her two children.

[4]

In 1998, Ms Jaftha borrowed R250 from the second respondent in the Jaftha matter (Ms Skaarnek), which was to be repaid in instalments. Although Ms Jaftha had paid some of the instalments, Ms Skaarnek referred the matter to the third respondent in both matters (Markotter Attorneys), the only firm of attorneys in Prince Albert, on the grounds that Ms Jaftha had not repaid her debt. Judgment was taken against Ms Jaftha in the Prince Albert Magistrates' Court in an amount which had escalated to R632,45 including interest and costs. Thereafter, and during the course of 2000, she made a further few payments through Markotter Attorneys. According to Ms Jaftha's affidavit, she made at least five payments of R100 to Markotter Attorneys during that period.

[5]

Ms Van Rooyen is also an unemployed woman. She has three children. She too is poor and has never been to school. In 1997 her husband acquired their home with a state subsidy of approximately R15 000. After her husband died in 1997, she inherited the home. In 1995 she purchased vegetables on credit to the value of approximately R190 from the second respondent in the Van Rooyen matter (Ms Goliath). In this case too, Ms Van Rooyen was unable to repay the

debt and Ms Goliath instituted proceedings which were also initiated by Markotter Attorneys against Ms Van Rooyen in the Prince Albert Magistrates' Court. The amount claimed was R198,30 plus interest and costs. Ms Van Rooyen's home was sold in execution for R1 000 on the same day as that of Ms Jaftha. It is common cause that both appellants have unsatisfied judgments against them obtained by other creditors; in the case of Ms Jaftha four others and in the case of Ms Van Rooyen two others.

Proceedings in the High Court [6]

Assisted by a lawyer from Cape Town who heard of their plight, Ms Jaftha and Ms Van Rooyen launched proceedings in the High Court. The essence of the relief that they sought was the setting aside of the sales in execution and interdicts restraining certain of the respondents from taking transfer of the appellants' homes pursuant to the sales in execution. Both appellants sought a costs order against Markotter Attorneys. In addition, Ms Van Rooyen sought orders:

and:

[7]

[8]

Although Markotter Attorneys initially opposed the granting of relief, it subsequently withdrew its opposition and consented to an order setting aside the sale in execution of Ms Jaftha's home; an interdict restraining Markotter Attorneys from attempting to evict Ms Jaftha from her home pursuant to the sale in execution; and similar orders in respect of the home of Ms Van Rooyen. Markotter Attorneys also reached agreement with Ms Jaftha and Ms Van Rooyen as to their liability for costs. As a consequence, only the constitutional challenges were determined by the High Court.

[9]

Only the Minister for Justice and Constitutional Development, the ninth respondent in both matters (the Minister), opposed the applications in the High Court. Counsel for the Minister contended that once the parties had settled the non-constitutional issues in the case, there was no need for the court to decide the constitutional questions, on the basis of the principle that where a matter can be decided without reaching the constitutional issues, it is best to do so. *S v Mhlungu and Others*

[1995] ZACC 4; 1995 (3) SA 867 (CC) ; 1995 (7) BCLR 793 (CC) at para 59 ; *Zantsi v Council of State, Ciskei, and Others*

[1995] ZACC 9; 1995 (4) SA 615 (CC) ; 1995 (10) BCLR 1424 (CC) at para 2; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*

[1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 21.

[10]

Ms Van Rooyen had originally sought leave in the High Court to act in the public interest and on behalf of all those who had benefited from low-cost housing. In view of its finding that the constitutional question had to be decided in order to resolve the appellants' position and that the appellants therefore had a direct and personal interest in the case, the court did not find it necessary to decide whether the second appellant could act in the public interest. Id at para 30.

[11]

The approach of the High Court to standing must be supported. It is clear that the appellants, who owe other debts and could in the future find themselves in the same position, have standing to prosecute their claim in their own right. Therefore, although the appellants urge this Court to find that they have standing in the public interest, given that they have standing in their own right it is not necessary to decide the question of public interest standing.

[12]

In the High Court it was common cause that if a recipient of a state housing subsidy loses ownership of the home in a sale in execution, he or she will be disqualified from obtaining other state-aided housing. It was also common cause that if the appellants had been evicted because of sales in execution, they would have had no suitable alternative accommodation. Id at para 24.

[13]

Regarding the content of the right to adequate housing the High Court was of the view that

The court held that if the sheriff issues what is termed a nulla bona return showing that insufficient movables exist to satisfy the outstanding debt, the clerk of the court is obliged, in terms of rule 36 of the Magistrates' Courts Rules, to issue and sign a warrant of execution against the immovable property of the debtor. Id at para 44.

In this Court the appellants seek the same relief as they sought in the High Court. This is reflected in the amended Notice of Motion of Ms Van Rooyen where she sought an order in the following terms :

'Provided that no immovable property which constitutes the home of the judgment debtor shall be subject to execution unless the court has so ordered, on good cause shown, with due regard to the provisions of the Constitution.';

6. Declaring that section 67 of the Magistrates' Courts Act 32 of 1944 is to be read as though the following words appear after the words 'his equipment':

'(h) the home of the judgment debtor, if it does not exceed in value the amount determined by the Minister from time to time by notice in the Gazette: Provided further that if the value of the said home exceeds the amount so determined, the property shall nevertheless not be sold in execution if at the sale of execution it does not realise a price which exceeds the amount determined by the Minister from time to time in the Gazette';

7. Declaring that the proviso to section 67 of the Magistrates' Courts Act 32 of 1944 is to be read as though the following words appear after the word 'paragraphs': '(b), (c), (e), (f) and (g)';"

"Whenever a court gives judgment for the payment of money or makes an order for the payment of money in instalments, such judgment, in case of failure to pay such money forthwith, or such order in case of failure to pay any instalment at the time and in the manner ordered by the court, shall be enforceable by execution against the movable property and, if there is not found sufficient movable property to satisfy the judgment or order, or the court, on good cause shown, so orders, then against the immovable property of the party against whom such judgment has been given or such order has been made."

Section 67 reads as follows:

- (a) the necessary beds, bedding and wearing apparel of the execution debtor and of his family; (b) the necessary furniture (other than beds) and household utensils in so far as they do not exceed in value the amount determined by the Minister from time to time by notice in the Gazette; (c) stock, tools and agricultural implements of a farmer in so far as they do not exceed in value the amount determined by the Minister from time to time by notice in the Gazette; (d) the supply of food and drink in the house sufficient for the needs of such debtor and of his family during one month; (e) tools and implements of trade, in so far as they do not exceed in value the amount determined by the Minister from time to time by notice in the Gazette; (f) professional books, documents or instruments necessarily used by such debtor in his profession, in so far as they do not exceed in value the amount determined by the Minister from time to time by notice in the Gazette; (g) such arms and ammunition as such debtor is required by law, regulation or disciplinary order to have in his possession as part of his equipment:

Provided that the court shall have a discretion in exceptional circumstances and on such conditions as it may determine to increase the amounts determined by the Minister in respect of paragraphs (b), (c), (e) and (f)."

[15]

- (i) any sum not exceeding the sum claimed in the summons or for other relief so claimed; (ii) the costs of the action; and (iii) interest at the rate specified in the summons to the date of payment or, if no rate is specified, at the rate prescribed under section 1(2) of the Prescribed Rate of Interest Act, 1975 (Act 55 of 1975)."

[16]

Section 66(1)(a) of the Act prescribes the process from the time a court gives judgment in favour of a creditor until the ultimate sale in execution of the debtor's immovable property. The sheriff calls at the home of the debtor and attaches movable property sufficient to settle the debt. If insufficient movables exist the sheriff issues a nulla bona return, which reflects that there is insufficient movable property to settle the debt. On the strength of the fact that no movables are found, the clerk of the court is obliged to issue a warrant of execution against the immovable

property. Rule 43 deals with execution against immovable property.

[17]

The appellants rely on the right of access to adequate housing as protected under section 26(1) of the Constitution. They argue that in terms thereof both the state and private parties have a duty not to interfere unjustifiably with any person's existing access to adequate housing and that section 66(1)(a) of the Act is unconstitutional to the extent of its over-breadth in that it allows a person's right to have access to adequate housing to be removed even in circumstances where it is unjustifiable. This is particularly so in the circumstances of this case, they argue, where the debtor is a recipient of state-subsidised housing and such a person is barred from receiving such assistance in the future, if he or she loses a house pursuant to a sale in execution.

[18]

Section 67 of the Act serves to limit the range of movables that may be attached. The section lists certain movables that are exempt from execution in all cases. It is clear from the list that the Act seeks to insulate from execution certain items necessary for the debtor to survive. Although the appellants commend the section, they argue that it is unconstitutional in that it fails to shield from execution the home of a debtor, which is now constitutionally protected. They argue that the section should be read to protect the homes of debtors below a particular value.

[19]

In response to the appellants' argument in respect of section 66(1)(a), the Minister points to sections 62 Section 62 reads as follows:

"The court may, upon the application of any judgment debtor or under section 65E(1)(a)(ii) or 65E(1)(c) and if it appears to the court that the judgment debtor is unable to satisfy the judgment debt in full at once, but is able to pay reasonable periodical instalments towards satisfaction thereof or if the judgment debtor consents to an emoluments attachment order or a garnishee order being made against him, suspend execution against that debtor either wholly or in part on such conditions as to security or otherwise as the court may determine."

[20]

Before the High Court, the appellants sought to rely on section 26 of the Constitution only. Before this Court, however, they seek to amplify their argument. They challenge the impugned sections on the basis that they are in conflict with the right to dignity under section 10 Section 10 of the Constitution reads:

[21]

This Court has made it clear that any claim based on socio-economic rights must necessarily engage the right to dignity. *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) ; 2000 (11) BCLR 1169 (CC) at para 83.

[22]

The question of section 25(1) of the Constitution is different. The structure of section 25(1) and its protection of ownership, as well as the uncertainty about the scope of the negative obligation in terms of section 26, mean that section 25(1) could add a new dimension to this case. However, in the light of the conclusion that I reach regarding the scope of section 26 below, it is unnecessary to consider the challenge under section 25(1).

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and (c) may consider foreign law.”

[26]

The history of the legislative scheme under apartheid and the grave injustices perpetrated in the context of land have been dealt with in detail elsewhere. See O’Regan “No More Forced Removals? An Historical Analysis of the Prevention of Illegal Squatting Act” (1989) 5 SA Journal on Human Rights 361; Van der Walt “Dancing with Codes – Protecting, Developing and Deconstructing Property Rights in a Constitutional State” (2001) 118 SA Law Journal 258; and Van der Walt “Exclusivity of Ownership, Security of Tenure and Eviction Orders: A Model to Evaluate South African Land-Reform Legislation” (2002) Tydskrif vir Suid-Afrikaanse Reg

254. See also the recent decision of this Court in *P ort E lizabeth Municipality v Various Occupiers* CCT 53/03, 1 October 2004 , as yet unreported, where Sachs J discusses the various pieces of apartheid legislation which have dealt with the occupation of land at paras 8-10.

[27]

The situation under apartheid demonstrates the extent to which access to adequate housing is linked to dignity and self-worth. Not only did legislation permit the summary eviction of people from their land and homes which, in many cases, had been occupied for an extremely long time, it branded as criminal anyone who was deemed to be occupying land in contravention of it. See O’Regan id.

[28]

Against this backdrop, it is important to emphasise that section 26 of the Constitution must be read as a whole. Section 26 reads as follows:

[30]

Before turning to a more detailed consideration of section 26, I emphasise that t he underlying problem raised by the facts of this case is not greed, wickedness or carelessness, but poverty. What is real l y a welfare problem gets converted into a p r operty one. Pe o ple at the lower end of the market are quadruply vulnerable : the y lack income and savings to pay for the necessities of life; they have poor prospects of raising loans, since their only asset is a state-subsidised

house; the consequences of inability to pay, under the law as it stands, can be drastic because they live on the threshold of being cast back into the ranks of the homeless in informal settlements, with little chance of escape; and they can easily find themselves at the mercy of conscienceless persons ready to abuse the law for purely selfish gain .

Section 26(1) and the negative aspect of the right of access to adequate housing [31]

In all the socio-economic rights cases previously dealt with in this Court, *Soobramoney v Minister of Health, KwaZulu-Natal*

[1997] ZACC 17; 1998 (1) SA 765 (CC) ; 1997 (12) BCLR 1696 (CC); *Grootboom above n 27; Minister of Health and Others v Treatment Action Campaign and Others*

[2002] ZACC 15; 2002 (5) SA 721 (CC) ; 2002 (10) BCLR 1033 (CC) ; *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others*

[2004] ZACC 11; 2004 (6) BCLR 569 (CC).

[32]

In rejecting the contention that there is a negative aspect to the rights in section 26, the High Court held that section 26(1) “does not give rise to a self-standing and independent right irrespective of the considerations enumerated in section 26(2).” Above n 2 at para 39.

[34]

It is not necessary in this case to delineate all the circumstances in which a measure will constitute a violation of the negative obligations imposed by the Constitution. However, in the light of the conception of adequate housing described above I conclude that, at the very least, any measure which permits a person to be deprived of existing access to adequate housing, limits the rights protected in section 26(1). Such a measure may, however, be justified under section 36 of the Constitution.

Limitation analysis [35]

The appellants argue that section 66(1)(a) is unconstitutional to the extent that it has the potential of rendering a person permanently homeless because of his or her failure to pay a trifling debt. On the test set out above it is important to note that the fact that trifling debts can lead to sales in execution is not relevant to the question whether the right to adequate housing has been limited by the section 66(1)(a) measure but is relevant to the justifiability of this particular measure. It is to this question that I now turn.

[36]

Section 36(1) reads:

Of the factors that section 36 enjoins the courts to consider, the nature of the right and the nature and extent of the limitation are of great importance when weighed against the importance of the purpose of the limitation.

In the present matter, the Minister, while not conceding that the impugned provisions violate the rights of the appellants, has advanced argument to the effect that the measures are reasonable and justifiable. She contends that debt recovery is an important government purpose. The procedure put in place to allow for execution in order to recover money owed is reasonable and, without it, the administration of justice would be severely hampered. She argues that it is not possible for every execution order to be overseen by a magistrate and that the process provided by section 66(1)(a) facilitates collection of debt in the most viable manner.

[38]

It is further contended that to strike down section 66(1)(a) would in fact hinder commercial transactions benefiting persons in the same position as the appellants. This is because for poor people with few assets other than low-cost housing, often the only way to raise capital to improve their living conditions is to take out loans against security in the form of their homes. Absent a convenient and foolproof mechanism to execute against such property, creditors, so the argument goes, will be reluctant to provide loans to people similarly situated to the appellants. She points out that not all creditors are themselves wealthy and that there might be circumstances in which creditors deprived of the execution procedure would be left in a difficult financial situation because of outstanding debts which they might otherwise be unable to recover.

[40]

The purpose of the limitation is important, as the Minister contends. However, when the focus is on the trifling nature of the debt the importance of the purpose is diminished. It is difficult to see how the collection of trifling debts in this case can be sufficiently compelling to allow existing access to adequate housing to be totally eradicated, possibly permanently, especially where other methods exist to enable recovery of the debt. This is not to say that every sale in execution to satisfy a trifling debt will be unreasonable and unjustifiable. There are a number of difficulties with such a conclusion. In the first place, it is not easy to adopt a uniform definition of the concept of a “trifling debt”. What might seem trifling to an affluent observer might not be trifling to a poor creditor reliant on his or her ability to recover debts. Indeed, not all creditors are affluent and to many who use the execution process, it constitutes the only mechanism to recover outstanding debts.

[41]

Another difficulty is that there may be other factors which militate against a finding that execution is unjustifiable. Such factors will vary according to the facts of each case. It might be that the debtor incurred debts despite the knowledge of his or her inability to repay the money and was reckless as to the consequences of incurring the debt. While it will ordinarily be

unjustifiable for a person to be rendered homeless where a small amount of money is owed, and where there are other ways for the creditor to recover the money lent, this will not be the case in every execution of this nature.

[42]

The interests of creditors must not be overlooked. There might be circumstances where, notwithstanding the relatively small amount of money owed, the creditor's advantage in execution outweighs the harm caused to the debtor. In such circumstances, it may be justifiable to execute. It is in this sense that a consideration of the legitimacy of a sale in execution must be seen as a balancing process.

[43]

However, it is clear that there will be circumstances in which it will be unjustifiable to allow execution. The severe impact that the execution process can have on indigent debtors has already been described. There will be many instances where execution will be unjustifiable because the advantage that attaches to a creditor who seeks execution will be far outweighed by the immense prejudice and hardship caused to the debtor. Besides, the facts of this case also demonstrate the potential of the section 66(1)(a) process to be abused by unscrupulous people who take advantage of the lack of knowledge and information of debtors similarly situated to the appellants. Execution in these circumstances will also be unjustifiable.

[44]

The section is therefore sufficiently broad to allow sales in execution to proceed in circumstances where it would not be justifiable for them to be permitted. In the light of the view which I take on the appropriate remedy, it is not desirable for this judgment to provide an exhaustive account of those factors which would justify the sale in execution and those that would not. However, I return to a more detailed account of these factors in the discussion on the remedy below.

[45]

The appellants have argued that the obligation not to interfere with pre-existing rights under section 26(1) attaches to everyone, not only to the state. In the light of the conclusion I have reached, it is not necessary to consider this argument.

[46]

A further matter must be addressed. The Minister has argued that section 66(1)(a) is not unconstitutional because it is part of the scheme of the Act, which must be assessed as a whole. She points to sections 62 See above n 23 for the text.

[47]

The crux of section 62, for the purposes of this case, is that it allows a court to set aside or stay a warrant of execution that it has issued on good cause shown. This, however, places a burden on a debtor whose home has been subject to a warrant of execution to approach a court and show

good cause why the warrant ought to be set aside. This being the case, the problem with the Minister's argument is that it overlooks the fact that many debtors in the position of the appellants are unaware of the protection offered by this section. Even where there is awareness, it would generally be difficult for indigent people in the position of the appellants to approach a court to claim protection. They are a vulnerable group whose indigence and lack of knowledge prevents them from taking steps to stop the sales in execution, as is demonstrated by the facts of this case.

[48]

The Minister argues that the practical difficulties that accompany the use of a legislative scheme cannot render that scheme unconstitutional. This might be so in many cases. In this case, however, it is clear that section 66(1)(a) is so broad that it permits sales in execution to occur without judicial intervention and even where they are unjustifiable. The fact that a permissive measure which must be invoked by the debtor exists does not change the potentially unjustified executions that may occur when the process envisaged by section 66(1)(a) is initiated by creditors. So long as the possibility exists within the legislative scheme for sales in execution to occur in circumstances where debtors' rights have been unjustifiably violated, the scheme is overbroad.

[49]

Similar considerations apply to section 73. That section provides for a debtor to approach a court and request that the debt be repaid in instalments. The same difficulties that arise regarding section 62 follow from the argument in respect of section 73. Here too, the section is invoked only when a debtor approaches the court. The same problem of an absence of knowledge and the indigence of those similarly situated to the appellants applies here. The section 73 measure can therefore also not save section 66(1)(a) from unconstitutionality.

Section 67 of the Act [50]

As part of their challenge, the appellants argue that section 67 of the Act is also unconstitutional. See para 14 above for the text.

[51]

It is my view that a blanket prohibition of the sort suggested by the appellants is not appropriate. A blanket prohibition against sales in execution below a particular value might well lead to a poverty trap – preventing many poor people from improving their station in life because of an incapacity to generate capital of any kind. Additionally, to impose a blanket prohibition as suggested would pay insufficient attention to the interests of the creditor. It would potentially foreclose the possibility of creditors recovering debts owed to them by owners of excluded properties. Section 67 cannot be unconstitutional to the extent that it does not provide for a blanket prohibition against sales in execution of a house below a certain value.

Remedy [52]

I have held that section 66(1)(a) of the Act is overbroad and constitutes a violation of section 26(1) of the Constitution to the extent that it allows execution against the homes of indigent debtors, where they lose their security of tenure. I have held further that section 66(1)(a) is not justifiable and cannot be saved to the extent that it allows for such executions where no countervailing considerations in favour of the creditor justify the sales in execution. I now turn to the appropriate remedy.

[53]

As already indicated, it would be inappropriate for this Court to attempt to delineate all the circumstances in which a sale in execution would not be justifiable. There are countless ways in which the facts of a case might differ and it would not be possible to anticipate all these permutations. An appropriate remedy should be sufficiently flexible, therefore, to accommodate varying circumstances in a way that takes cognisance of the plight of a debtor who stands to lose his or her security of tenure, but is also sensitive to the interests of creditors whose circumstances are such that recovery of the debt owed is the countervailing consideration, in a context where there is a need for poor communities to take financial responsibility for owning a home.

[54]

In the appellants' submissions and in oral argument it was suggested that an appropriate remedy would be the provision of judicial oversight over the execution process. At present, judicial oversight occurs only at the first stage in the debt recovery process, when the creditor seeks judgment against the debtor. In fact, where a creditor institutes an action against a debtor who does not enter an appearance to defend, and where the claim is for a liquidated amount, the creditor may obtain default judgment from the clerk of the court, without any judicial intervention at all. See the discussions in para 15 and n 17 above.

[55]

It is my view that this is indeed an appropriate remedy in this case. Judicial oversight permits a magistrate to consider all the relevant circumstances of a case to determine whether there is good cause to order execution. The crucial difference between the provision of judicial oversight as a remedy and the possibility of reliance on sections 62 and 73 of the Act is that the former takes place invariably without prompting by the debtor. Even if the process of execution results from a default judgment the court will need to oversee execution against immovables. This has the effect of preventing the potentially unjustifiable sale in execution of the homes of people who, because of their lack of knowledge of the legal process, are ill-equipped to avail themselves of the remedies currently provided in the Act.

[56]

It would be unwise to set out all the facts that would be relevant to the exercise of judicial oversight. However, some guidance must be provided. If the procedure prescribed by the rules is not complied with, a sale in execution cannot be authorised. If there are other reasonable ways in

which the debt can be paid an order permitting a sale in execution will ordinarily be undesirable. If the requirements of the rules have been complied with and if there is no other reasonable way by which the debt may be satisfied, an order authorising the sale in execution may ordinarily be appropriate unless the ordering of that sale in the circumstances of the case would be grossly disproportionate. This would be so if the interests of the judgment creditor in obtaining payment are significantly less than the interests of the judgment debtor in security of tenure in his or her home, particularly if the sale of the home is likely to render the judgment debtor and his or her family completely homeless.

[57]

It is for this reason that the size of the debt will be a relevant factor for the court to consider. It might be quite unjustifiable for a person to lose his or her access to housing where the debt involved is trifling in amount and significance to the judgment creditor. However, this will depend on the circumstances of the case. As has been pointed out above, See para 40 above.

[58]

Another factor of great importance will be the circumstances in which the debt arose. If the judgment debtor willingly put his or her house up in some or other manner as security for the debt, a sale in execution should ordinarily be permitted where there has not been an abuse of court procedure. The need to ensure that homes may be used by people to raise capital is an important aspect of the value of a home which courts must be careful to acknowledge.

[59]

A final consideration will be the availability of alternatives which might allow for the recovery of debt but do not require the sale in execution of the debtor's home. At present, section 73 of the Act provides for a judgment debtor to approach a court with an offer to pay off a debt in instalments. As pointed out above, this section does not constitute sufficient protection for indigent debtors because they are generally unaware of its potential to protect them and their inability to invoke it. However, the concept of paying off the debt in instalments is important and the practicability of making such an order must be ever present in the mind of the judicial officer when determining whether there is good cause to order the execution. The balancing should not be seen as an all or nothing process. It should not be that the execution is either granted or the creditor does not recover the money owed. Every effort should be made to find creative alternatives which allow for debt recovery but which use execution only as a last resort.

[60]

In summing up, factors that a court might consider, but to which a court is not limited, are: the circumstances in which the debt was incurred; any attempts made by the debtor to pay off the debt; the financial situation of the parties; the amount of the debt; whether the debtor is employed or has a source of income to pay off the debt and any other factor relevant to the particular facts of the case before the court.

Reading in [61]

Once the Court has found constitutional inconsistency, it must declare invalidity to the extent of the inconsistency. Section 172(1)(

a) of the Constitution provides:

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.”

[62]

This brings me to the appropriate manner for providing judicial oversight over the process of execution. At present, section 66(1)(a) of the Act reads as follows:

“Whenever a court gives judgment for the payment of money or makes an order for the payment of money in instalments, such judgment, in case of failure to pay such money forthwith, or such order in case of failure to pay any instalment at the time and in the manner ordered by the court, shall be enforceable by execution against the movable property and, if there is not found sufficient movable property to satisfy the judgment or order, or the court, on good cause shown, so orders, then against the immovable property of the party against whom such judgment has been given or such order has been made.” (Emphasis added.)

As the section is currently worded, execution may occur without court intervention only once insufficient movables exist to discharge the debt. If execution is to occur without first showing that insufficient movables exist to discharge the debt, the creditor is to approach a court to obtain such an order. Only the first of these two situations has been found to be unconstitutional. In the second situation there is no possibility of the debtor losing his or her home without court oversight because execution may only be ordered by a court on good cause shown also taking into account all the relevant circumstances of the case as discussed above. [63]

Once this addition has been made the process See para 15 above.

The conduct of Markotter Attorneys [65]

In the papers before this Court there are various allegations levelled at Markotter Attorneys. Included in these are that they imposed unreasonable deadlines on Ms Jaftha and Ms Van Rooyen for the payment of their debts, sought the attachment of homes without a mandate from their clients and that members of the firm acted in an aggressive and obstructive manner towards the appellants’ attorney. It is neither appropriate nor desirable for this Court to seek to confirm the veracity of these allegations. Given the seriousness of the allegations they are referred to the Law Society to be investigated.

Costs [66]

In the original matter before the High Court the appellants did not challenge the constitutionality of the sections of the Act and, as such, did not join the Minister in the proceedings. After Ms Van Rooyen amended her notice of motion she sought to join the Minister and the proceedings were

postponed. In oral argument before this Court counsel for the appellants correctly conceded that it would only be appropriate, should they be successful, to order costs in favour of the appellants in respect of the main application from the 13 February 2002, as well as the costs of the application for joinder. Therefore, since the appellants have successfully prosecuted an important constitutional claim, they are entitled to their costs from the 13 February 2002, as well as the costs of the application for joinder.

The order [67]

The following order is made: 1.

The order of the High Court is set aside and replaced with the following order: 1.1

The failure to provide judicial oversight over sales in execution against immovable property of judgment debtors in section 66(1)(a) of the Magistrates' Courts Act 32 of 1944 is declared to be unconstitutional and invalid. 1.2 To remedy the defect section 66(1)(a) of the Magistrates' Courts Act 32 of 1944 is to be read as though the words "a court, after consideration of all relevant circumstances, may order execution" appear before the words "against the immovable property of the party". 2.

The Registrar of this Court shall forward a copy of this judgment to the Law Society of the Cape of Good Hope. 3. The ninth respondent is ordered to pay the appellants' costs in the main application from 13 February 2002, as well as the costs of the application for joinder. Such costs shall include the costs of two counsel.

Chaskalson CJ, Langa DCJ, Moseneke J, Ngcobo J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Mokgoro J.

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Prepared on 11 October 2026 · Esheria