

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO. 9840/2014

NEDBANK LIMITED

Applicant

and

BLUE SANDS TRADING 537 CC

First Respondent

SAINT MICHAEL SCHUTTE

Second Respondent

RIANA SCHUTTE

Third Respondent

JUDGMENT

Delivered on January 2016

CHETTY J

1. The applicant brought an application in terms of Rule 46(1)(a)(ii) of the Uniform Rules for an order declaring that the immovable property of the first respondent being the Farm, K 96, number 15488 and held under deed of transfer number: T 33 4664/07, be declared specially executable, and that the Registrar of this Court be authorised to issue a writ of execution to attach the said property.
2. The application brought against the respondent's stems from the hypothecation of the immovable property in terms of a mortgage bond on 15 November 2011, in favour of the applicant, as security for the first respondent's obligations as surety for money is lent and advanced to DDK Systems. In addition, the

applicant lent and advanced certain monies to the first respondent, for which second and third respondents stood surety. The summons issued against the respondents sets out the detail of an overdraft facility advanced by the applicant to DDK Systems Services CC. At the time when the overdraft was granted, the second and third provided unlimited suretyship for the due fulfilment of the first defendant's (DDK) obligations in respect of the overdraft facility. The initial amount of the overdraft was for R270 000.00. This amount then grew exponentially, and as at August 2013 the first defendant was indebted to the plaintiff in the amount of R935 162.24 plus interest at the rate of 20.50% per annum. Despite demand, the first defendant failed to pay the amount due in respect of its overdraft.

3. The second claim, as set out in the summons, relates to an amount due in terms of a loan agreement in terms of which the plaintiff loaned an initial amount of R1,755 700.00 to Blue Sands Trading CC (cited as the second defendant). This amount was used by the first respondent (Blue Sands Trading) to effect improvements to the immovable property. The terms of the agreement was that Blue Sands Trading would repay the loan in installments of R15 182, 43 and would further register a covering mortgage bond in favour of the plaintiff in the sum of R3 505 700.00 in respect of the property at Erf K96 Kwambonambi (the immovable property being the subject of the Rule 46(1)(a) application).
4. In terms of a further agreement between the applicant and the first respondent, the applicant advanced a further amount of R 1 290,000.00 in order to carry out further improvements to the property. The second respondent (S M Schutte)

being the third defendant in the action, resides on the immovable property in question. He is also the sole member of Blue Sands Trading as well as DDK Systems and Aludair 94 CC, the latter two entities being close corporates which are cited as first and fifth defendants in the summons. The second respondent (SM Schutte) is married to the third respondent (R Schutte), she being cited as the fourth defendant in the action. The third respondent resides on the immovable property together with the second respondent and their son, who accordingly to the papers before me, would be completing high school in 2016.

5. The second and third respondents concluded a deed of suretyship with the applicant in terms of which they bound themselves for the payment of all amounts owed by the first respondent to the applicant. The first respondent failed to honour the terms of the loan agreement, in failing to pay the installments of R26 127.80. As at February 2014 the arrears on the loan account stood at R79 766.37.
6. Following on from the default by the first respondent to honour its repayment of the loan agreement and the overdraft facility, the applicant's representatives met with the third respondent in enduring April 2014, in an attempt to conclude an arrangement to enable the first and second respondents to settle the overdraft facility as well as the arrears accumulated on the loan agreement.
7. At the meeting in April 2014, at which the third respondent represented her husband as well as the first respondent, the third respondent informed the representative of the applicant that the first respondent would be disposing of two immovable properties and would utilize the surplus funds from the sale, projected at R300,000.00 to settle the overdraft. The applicant was assured that this would take place before 31 July 2014. In respect of the overdraft, the

third respondent indicated that as from 30 April 2014, payments would be made in the amount of R30 000.00 per month until the liquidation of the debt in January 2015. In respect of the loan account, the respondent's undertook to liquidate this at the rate of R35 000.00 per month, and that all of the arrears would be eliminated by 31 October 2014.

8. The agreement was reduced to writing in terms of an email addressed by the applicant's representative to the third respondent, on 15 April 2014. The third respondent was furthermore notified that in the event of a failure to perform in terms of the agreement reached with the applicant, the applicant would, without prior notification, institute legal action against all parties concerned. In addition, the applicant's representative confirmed that the agreement to liquidate the second and third respondent's obligations did not constitute a novation of the original undertaking in terms of the loan agreement and the overdraft facility.
9. At the time of the institution of the action in August 2014, DDK Systems Services, the first defendant in the action, was overdrawn in respect of the overdraft facility to the amount of R 935,162.24, with the arrears in respect of the loan account standing at R124,247. 70. The outstanding balance on the loan agreement was R2 985,996.04.
10. Following the institution of the action against the defendants, with the summons being served at the address provided by the defendants in the agreements concluded with the applicant, and in light of no appearance to defend, the applicant proceeded to apply for default judgement before the Registrar in respect of claims 1 and 2 as set out in the summons, being the monetary claims in respect of the overdraft facility and the loan agreement.

11. In addition, the applicant further sought an order that the property registered in the name of the first respondent be declared executable, but adjourned this part of the relief to open Court, clearly mindful of the Constitutional Court's ruling in *Gundwana v Steko Development & Others* 2011 (3) SA 608 (CC) that the registrar was precluded from granting an order to declare the immovable property specially executable.
12. On 19 November 2014 the registrar granted default judgement against the first to the fifth defendants, jointly and severally, the one paying the others to be absolved. Pursuant thereto, the applicant issued writs of execution against each of the defendants in an attempt to attach immovable property in satisfaction of the claims against the defendants. These attempts were unsuccessful as the address for service, given by the defendants, were locked and unattended. Having been unsuccessful in attempting to pursue the judgement against the first second and fourth defendants, the applicant subsequently ascertained that the first respondent, Blue Sands Trading, had two immovable properties registered in its name, comprising two sectional title units in a scheme known as SS Rock of Ages, and the second being a vacant piece of land in Kwambonambi.
13. Efforts by the applicant to first proceed with a writ against movables resulted in the Sherriff producing an inventory of goods totaling approximately R80,000, excluding a 2010 Toyota Fortuner, for which no value was recorded. Even if one included the full market value of the motor vehicle, the total value of goods attached was significantly less than the amount for which the applicant had secured judgement.

14. In light of the lack of options available to it, the applicant was left with no alternative but to proceed against the second and third respondents in their capacity as sureties for the obligations of the first respondent. The immovable property in question is the family residence of the second and third respondents and according to the valuation conducted by a professional valuer of, the total value of the property together with improvements, based on a sale in the open market, is R8m. The applicant submits that if the immovable property in question is declared specially executable in terms of Rule 46 and disposed of in satisfaction of the judgment debt, the first and second respondent's constitutional right to housing would not be adversely affected.
15. The sale of the immovable property would be sufficient to satisfy the judgment as well as leave the second and third respondents with a surplus of approximately R3m, enabling them and their family to acquire another home, albeit smaller and not as expensive as the property sold in execution. Alternatively, in light of the first respondent being the owner of the sectional title units in the Scheme known as Rock of Ages, the second and third respondents could conveniently relocate into one of these units in the event that their primary residence is declared executable and sold. To that extent, any decision declaring the immovable property of the second and third respondent would have no prejudice or potential to render them homeless.
16. Despite default judgment having been granted against the first second and third defendants in respect of claim one, and against the second, third, fourth and fifth defendants, jointly and severally, in respect of the second claim, no steps had been taken by the defendants to liquidate their indebtedness to the applicant. On 6 February 2015, the applicant's attorney telephoned the second

and third respondents to discuss payment of the judgement debt. According to the applicant, the third respondent indicated that they were not in a position to settle the debt, and did not respond to an invitation from the applicant's attorney to provide details regarding their own financial status as well as that of the other three execution debtors, namely DDK Systems Services, Blue Sands Trading and Aludair 94 CC.

17. The application to declare the immovable property executable was brought after repeated attempts to get the respondents to comply with their obligations in respect of the judgement. I have no doubt that the application was brought after all else had failed. On 13 March 2015, after repeated attempts to serve a writ of execution in respect of movables, a writ was finally served on the respondent's.
18. On 8 May 2015 the applicant filed its application in terms of rule 46(1)(a)(ii) to have the second and third respondent's immovable property declared executable. On 20 May 2015 the defendants gave notice of their intention to oppose the application to have the immovable property declared executable. On 10 June 2015, almost 9 months after judgement was obtained, the respondents gave notice of their intention to defend the relief sought in the summons to have the property of the second and third respondents executable. It is prudent to note that the notice of intention to defend specifically records that the defendant intends to defend only the relief sought in prayer 3 of the plaintiff's particulars of claim. At the same time, the respondent's attorney wrote to the applicant's attorneys on 8 June 2015 contending that notwithstanding the monetary judgement having been granted against the respondents, in terms of rule 19 (5) it was entitled to deliver a notice of intention to defend. The

respondents' attorneys further tended to pay the applicant's costs in respect of the default judgement.

19. The position of the respondents, consistent with the argument advanced by Mr. Ramdhani, who appeared on their behalf, was that notwithstanding the granting of a monetary judgement against the first second and third respondents, the issue of the decision to declare the respondent's property executable was still before the Court, and therefore a live issue. He submitted that the application for default judgement should have been withdrawn, alternatively the present application by the applicant should be referred to trial and that the respondent's be granted the opportunity, in terms of a counter application brought by them to file a plea in relation to the relief sought in prayer 3 of the summons.
20. During the course of argument I pointed out to Mr Ramdhani that I considered this to be a novel approach to an application under Rule 46(11). My reasoning for this observation is that the respondents have put up no proof that they are not liable for the amounts in terms of the default judgement. Their opposition is restricted to the contention that it is not just and equitable for this Court to grant the order declaring the immovable property executable.
21. Ms. Thobela-Mkhulisi, who appeared for the applicant, correctly submitted that the respondents are hamstrung by the default judgment granted against them. In light of the default judgment, the applicant is entitled to pursue various means in order to satisfy the debt. It had already ascertained that the respondents possess no movables of any value that would be capable of satisfying the debt. Accordingly, the only option at its disposal was to pursue an order declaring the immovable property executable, the property being valued well in excess of the amount of the judgment.

22. Counsel for the applicant further pointed out that the respondent chose not to bring an application for rescission. Their approach to the Rule 46(11) application is to contend that while the default judgment was granted by the Registrar, this was only in respect of prayers 1 and 2. The relief sought in prayer 3 was referred, in accordance with the *Gundwana* decision, to open Court. Accordingly, the respondents contend, that it is still open to them to defend the action in respect of the relief in prayer 3. The respondents placed reliance on the wording of Rule 19(5) which reads as follows :

(5) Notwithstanding the provisions of subrules (1) and (2) a notice of intention to defend may be delivered even after expiration of the period specified in the summons or the period specified in subrule (2), before default judgment has been granted: Provided that the plaintiff shall be entitled to costs if the notice of intention to defend was delivered after the plaintiff had lodged the application for judgment by default.

23. The argument advanced by the respondents is that even though the notice to defend has been filed outside of the time periods prescribed by the Rules, the Rules permit late filing. In my view, the respondents' reliance on Rule 19(5) is misplaced. The rule permits a defendant to file a notice to defend even outside of the period prescribed. However, this may be allowed any time *before* default judgment has been granted. In the present default judgment *has already been granted*, rendering any other Court unable to deal with the merits of the monetary claim. In this regard, *Erasmus, Superior Court Practice*, Vol.2, D1-562 states :

"An order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done, the court order must be obeyed even if it may be wrong; there is a presumption that the judgment is correct. A person may even be barred from approaching the court until he or she has obeyed an order of court that has not been properly set aside. An order

could only be set aside under rule 42, rule 31(2)(b), on appeal or on common-law grounds.

The general well-established rule is that once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it—it becomes *functus officio*. The inherent jurisdiction of the High Courts does not include the right to interfere with the principle of finality of judgments, other than in the circumstances specifically provided for in the rules or the common law.”

See *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) at 229B–C; *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at 242C–244A; *MEC for Economic Affairs, Environment and Tourism v Kruisenga* 2008 (6) SA 264 (CKHC) at 277C; *Jacobs v Baumann NO* 2009 (5) SA 432 (SCA).

24. Counsel for the applicant submitted that the issue of the notice to defend is a red herring as there is simply nothing left for the respondent to defend. I am in agreement that in respect of claim 1 and 2 of the summons, and in the absence of an application for rescission, this Court is obliged to treat the default judgment granted by the Registrar as final. That then leaves the relief sought in respect of declaring the immovable property executable. Mr Ramdhani referred me to a decision of Ploos van Amstel J in *Bettercredit (Pty) Ltd v Johannes Zinsiwa Mbokazi* (case 8347/2011, KZP) as authority for the proposition that where a notice of intention to defend had been delivered in an action, it was not permissible to proceed with an application for default judgment to declare a property executable. Counsel did not furnish me with a copy of the judgment (or the transcript thereof, as I was informed that an *ex tempore* judgment was handed down). I am therefor unable to make any observation regarding the judgment, save to point out that this matter appears to be distinguishable from that in *Bettercredit* as default judgment has already been granted, albeit not in relation to the prayer declaring the property executable.

25. The respondents further complained of a procedural irregularity in that summons was served at an address which the applicant and its representatives were aware, was no longer occupied by the first and second respondents. Notwithstanding, the respondents concede in their opposing affidavit that the loan agreements concluded with the applicant required that they inform the applicant in writing if they had changed their *domicilium* from that recorded in the loan agreements. While the opposing affidavit refers to an application for a rescission of the judgement granted against the respondents, no such application was filed at the time of the hearing of this matter. As such issued, the default judgment by the Registrar must stand. I failed to find any basis for the procedural irregularity alleged.
26. I am also not persuaded by the argument that the filing of a notice of intention to defend the action, after judgement has been given in respect of claims 1 and 2, justifies that the relief sought in prayer 3 (to declare the immovable property executable) should proceed by way of action, with the respondents being Permitted to file their plea.
27. In any event, the present application required the respondents to place facts before Court as to why it would not be just and equitable to grant an order declaring the immovable property specially executable. The second and third respondents have, in their opposing affidavit have placed facts constituting “relevant circumstances” before this court. It would appear that the property was purchased in 2007 for an amount of R360 000.00. The respondents thereafter carried out improvements to the property, utilising their own funds. In February 2011, they secured a loan from the applicant in the amount of R1,75m, and thereafter took another loan for a further amount of R1,29m in

December 2011. According to the respondents, they paid an amount of R981,257.00 to date towards their bond and have effected substantial improvements to the property on which they reside with their teenage child as well as certain other employees.

28. The movables attached by the Sherriff on 13 March 2015 pursuant to a writ issued by the applicant's attorney, were due to be sold by way of public auction on 21 August 2015. On 17 August 2015 the respondents launched an urgent application in this Court for as *rule nisi* for the sale in execution to be stayed. They sought, and were granted, an order in terms of which they committed themselves to pay the applicant R100 000.00 monthly, as from 15 September 2015 and to continue for each and every successive month until the judgment debt of R2 985 996,04 plus costs was fully extinguished. The order, granted by Mokgohloa J on 19 August 2015 further provided that in the event of the applicants (the Schutte's) failing to comply with their obligation, the stay of the writ of execution would fall away. That order was taken by consent.
29. Prior to the hearing of this application, the Recoveries Manager employed by the applicant, Ms. Ntshangase, deposed to an affidavit detailing the undertaking to pay off the debt as set out in the Order above, as well as the steps taken by the respondents to settle their debts. In summary, the affidavit of Ntshangase reflects that the respondents breached their undertaking and terms of the Order granted on 19 August 2015 in that they failed to adhere to the timetable by when they had to pay the installments, and furthermore paid amounts less than what they had undertaken to pay. The affidavit states that after default judgment was granted, and almost coinciding with the issuing of the Rule 46

application, from 7 May 2015 to 12 August 2015, the respondents paid a total of R392 000,00 towards the liquidation of their outstanding debt.

30. Following upon the Order of 19 August 2015, Ms. Ntshangase recorded that the first and second respondents paid two installments on 11 September 2015 and 12 October 2015 in the amounts of R30 000.00 and R21 000.00 respectively. In a replying affidavit to that of Ms. Ntshangase, the third respondent pointed out that in addition to the amounts alluded to by Ms. Ntshangase, the respondents paid an amount of R108 000.00 on 10 September 2015; R21 000.00 on 19 October 2015 and R79 000.00 on 30 October 2015. The respondent acknowledge that they have been in breach of the Order of 19 August 2015, but point out that they have made payments totaling R208 000.00 since the Order. In total, since May 2015, they contend that they have paid approximately R600 000.00 towards liquidating their debt to the applicant. These payments are not disputed by the applicant.
31. Mr Ramdhani submitted that the payments made by the respondents is evidence that they are not recalcitrant in terms of their undertaking to liquidate their indebtedness. On the other hand, counsel for the applicant submitted that the history of the matter reflects a tale of broken promises by the respondents to liquidate a substantial debt. In this regard, it was pointed out that the applicant had bent over backwards to accommodate the respondents, and twice before the respondents have made undertakings to pay, only for these undertakings to be breached.
32. What is particularly relevant is that in respect of the urgent application which the respondent's launched in order to prevent the sale and execution of the movable property, they voluntarily place themselves under an obligation to pay

the amount of R 100,000 per month in order to extinguish their debt. The affidavit of the third respondent, in response to that filed by Ms. Ntshangase, reflects that while payment has been made since the order of 19 August 2015, these payments have not been for the full amount in terms of the order, nor have they been made timeously. It bears noting that the Constitutional Court in *Jaftha v Schoeman; Van Rooyen v Stolz* 2005 (2) SA 140 (CC) noted the following with regard to the resort to selling a primary residence in execution :

[56].... 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 authorizing the sale in execution may ordinarily be appropriate unless the ordering of that sale in the circumstances of the case would be grossly disproportionate."

33. Measured against this background, the primary issue before this Court is whether the respondents have discharged the evidentiary burden on them to show why execution against immovable property would infringe his or her right to adequate housing. Similarly to the evidentiary burden borne by tenants or unlawful occupiers in eviction applications under the Prevention of Illegal Eviction Act, where an application is brought to declare immovable property executable, the judgment debtor is ordinarily in the "best position to advance contentions as to the unjustifiability such execution". See *Neveling v Reichmans (Pty) Ltd & another* (14070/2013) [2014] ZAKZPHC 46 (5 August 2014) para 36; *First Rand Bank Limited v Folscher and Another, and similar matters* 2011 (4) SA 314 (GNP) para 42.
34. The respondents were no doubt aware of this evidentiary burden and placed facts before the Court as to the amounts borrowed from the applicant, the nature of the improvements made to the property and the current value of the

property. The factors fall within the ambit of the factors elucidated in *Folscher* (para 40-41). The respondents however have been unable to displace the weight of the contention advanced by the applicant that they (the respondents) own other immovable property which they can dispose of in the event of their primary residence being declared specially executable and sold. The undisputed fact is that the second and third respondents own 2 sectional title units. No argument has been advanced either on affidavit or in argument before me as to why the second and third respondents would not be able to occupy one of those units in the event of relief being granted in favour of the applicant. It should be borne in mind that the respondent had prior to the launching of the Rule 46 application undertook to sell one of these properties to settle their debts. They failed to pursue those options.

35. An even stronger argument advanced by the applicant is that the value of the property in question far outstrips the amount of the judgement debt. Even if the second and third respondents were unwilling or unable to take occupation of one of their sectional title units if their primary residence were to be sold in execution, they would still be left with a surplus of approximately R4,5m which they could use towards the purchase of alternative accommodation. While the respondent's oppose the application in terms of Rule 46, and have advanced arguments relating to the improvements which they have effected to the immovable property, it is equally apparent that their movable property will not attract a value capable of being realised in full and final satisfaction of the judgement debt. Accordingly, in light of the amount of the judgement debt at just over R3m, the non-availability of sufficient movables that can be sold in satisfaction of the debt, the application to declare the immovable property

specially executable cannot be construed as An abuse of process by the bank, not a disproportionate remedy. In this regard, the Court in *Jaftha v Schoeman* noted the following at para 56-57

“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 it may often be difficult to conclude that a debt is insignificant. In this regard, it is important too to bear in mind that there is a widely recognised legal and social value that must be acknowledged in debtors meeting the debts that they incur.”

36. Moreover, it is equally pertinent to point out that nowhere in their opposing affidavit do the respondents provide any indication of the period which they would require to satisfy the amount of the judgement debt, or what property if any they intend disposing of or of other ways in which the debt could be settled, thereby avoiding a sale in execution. While it is correct to note that the respondents have carried out significant improvements to the property over the years, and at substantial costs, the applicant is a financial institution, which has advanced significant amounts to the respondents on the basis that their immovable property constituted the security for the indebtedness. As the Constitutional Court pointed out in *Gundwana v Steko* at para 54 :

“In *Jaftha*, Mokgoro J, before listing some relevant factors that needed to be considered in judicial oversight of the execution process, warned that 'it would be unwise to set out all the facts that would be relevant to the exercise

of judicial oversight'. Mindful of that warning, I would merely add the following. It must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided.

37. In dealing with the judicial oversight required before immovable property is declared executable, in *Nedbank v Fraser* 2011 (4) SA 363 GSJ the Court held that :

“[23] The context of the judicial oversight provided in section 26(3) of the Constitution is a matrix of factors. There are: the existence of the social need for housing, the constitutional right to access to adequate housing embodied in section 26(1), the need for people to honour their debts, the need for debts to be enforced by a court process and the need for execution, all of which serve the housing need, as well as the drastic nature and far reaching consequences of executing against a person's home and the scope for the abuse of the process of execution.

[24] Seen in this context, the purpose of the judicial function required in section 26(3) is to act as a filter or check on execution that does not serve the social interests and which is an abuse. Expressed simply, the function of the court is to safeguard against abuse of the execution process. It is with the consideration of this context and purpose that a determination is made whether or not to declare a person's home executable.”

38. The amended Rule 46(1) was described in *Mkhize v Mvoti Municipality* 2012 (1) SA 1 (SCA) as a “legislative interpretation of *Jaftha* demonstrating the policy of the legislature”. What it does require the court to do is to consider “*all relevant circumstances*” before an order may be made declaring a primary residence of a debtor to be specially executable. As set out above, the respondents have placed various factors before the court as to why their property should not be declared executable. Various courts have expressed the view that it is not possible to set out every potential circumstance that may be considered in

deciding whether or not to issue a writ. The court in *FirstRand Bank v Folscher* (supra) set out a detailed list of factors to be considered.

39. For the purpose of the present application apart from the factors already considered, the issue of the debtors' payment history, particularly after default judgement had been granted, was a factor that weighed heavily with me. It was for this reason that I requested counsel at the hearing of the application to file further submissions dealing with the issue of whether this court should suspend the execution of an order, if I were inclined to declare the property specially executable. I raised the issue as I considered it to be part of the matrix of factors that a court should take cognizance of to determine whether or not to issue a writ.
40. It is clear that in terms of Rule 45A, a court may suspend the execution of any order for such period as it may deem fit. The discretion is wide however it must be exercised judicially. It was submitted on behalf of the applicant that the power to suspend an order ought to be exercised exceptional cases only and not on the basis of abstract ideas such as justice and equity. I am not persuaded by the last mentioned submission, as I am of the view that notions of justice and equity permeate an application to declare a primary residence specially executable, as one of the inevitable consequences (in the ordinary course) is that the debtor would lose their home. I am mindful however that Koen J in *Neveling v Reichmans (Pty) Ltd & another* held at para [42]

“The availability or otherwise of alternative accommodation is not a factor to be considered. It has not been referred to as such a factor in either *Jaftha* or *Gundwana*. The debate at this stage is ownership and whether a writ should be issued which could result in the termination of an ownership. Continued occupation and available alternative accommodation might only become relevant thereafter and could form the basis of a PIE application....., indigency is not the test. More correctly it is disproportionality. “

This view was perhaps informed by the dictum in *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA) where Cameron JA and Nugent JA stated at para 15 that

“[15].....What was in issue in *Jaftha* was not s 26(3) of the Constitution but rather s 26(1) - which enshrines a right of access to adequate housing - and the impact of that right on execution against residential property. (Section 26(3), as elaborated by the Legislature in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, becomes relevant in the event of eviction consequent upon a sale in execution, and was not in issue in *Jaftha*.) Nor did the Constitutional Court decide that s 26(1) is compromised in every case where execution is levied against residential property. It decided only that a writ of execution that would deprive a person of 'adequate housing' would compromise his or her s 26(1) rights and would therefore need to be justified as contemplated by s 36(1). The premise on which the Court below proceeded was thus incorrect.

[16] It must be borne in mind that s 26(1) does not confer a right of access to housing *per se* but only a right of access to 'adequate' housing; and this concept of necessity is relative.”

41. The applicant has not contended in its opposing papers or in argument before me that a decision to declare their primary residence executable will lead to homelessness. On the contrary, as set out above, they have other immovable property they can occupy should I grant the order prayed. In considering whether to stay an order for execution, I would have to be satisfied that an injustice would otherwise be done. What is undisputed in this case is that the respondents are not indigent. They have other immovable property that they can move into if an order to declare their property was issued. The applicants have sought the order because all other options to get the respondents to settle their arrears, have failed. While the amount paid by the respondent since the default judgment is not insubstantial, one must not lose sight that the amount of the judgment debt is in excess of R3m. As the Court in *Gundwana* at para 7 pointed out

“It must be accepted that execution in F itself is not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality between the means used in the execution process to

exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided.”

42. After careful consideration of all the facts of the matter and the written submissions of counsel, I find no basis for the exercise of my discretion for the suspension of the order I issue below. The fact that the respondents have paid certain amounts towards their debt since default judgment is not, in and of itself, a basis for suspension of an order for execution. Moreover, the respondents have breached their own undertaking to this Court to pay off their arrears, on terms which they imposed on themselves. The granting of the order sought will not affect their right of access to housing. The applicant has not acted in any manner that could be described as an abuse of process and on the contrary has given the respondents every opportunity to settle their debt.
43. I accordingly make the following order :
 - a. The immovable property of the first respondent being the Farm K96, Number :15488, Registration Division GV, Province of KwaZulu-Natal, 2 8037 hectares in extent and held under deed of transfer : t33464/07 be and is hereby declared executable;
 - b. The Registrar of this Court is authorized to issue a writ of execution for the attachment of the immovable property referred to in (a)
 - c. The counter application of the respondents dated 3 July 2015 is dismissed;
 - d. The Rule Nisi issued on 19 August 2015 for the stay of execution of the writ, is discharged;

- e. The respondents are directed to pay the costs of this application, including those costs in relation to the urgent application dated 17 August 2015, jointly and severally, the one paying the others to be absolved, such costs to be on an attorney client scale.

M R CHETTY

Appearances:

For the Applicant : Adv. Jabu Thobela-Mkhulisi
 Instructed by : Legator Mckenna Incorporated,
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For the Respondent : Adv. D Ramdhani
 Instructed by : Du Toit Incorporated
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Date of Hearing : 10 November 2015
 Date of Judgment : 15 February 2015