

**IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)**

CASE NO: 4183/05

In the matter between:

NEDBANK LIMITED

Plaintiff

and

MORTINSON, DEBBIE-ANN

Defendant

J U D G M E N T

JOFFE, J:

[1] The plaintiff instituted action against the defendant. Its cause of action was monies lent and advanced by it to the defendant. The loan was secured by a first mortgage bond registered over

certain immovable property owned by the defendant. The plaintiff claims payment of the sum of R422 817,21 being the balance of the monies due and owing together with ancillary relief. In addition the plaintiff sought an order declaring the hypothecated property executable.

[2] Summons was served in terms of the Uniform Rules of Court (*"the Rules"*) at the defendant's chosen *domicilium citandi et executandi*, by fixing a copy thereof to the "*principal front gate*" of the hypothecated property. The defendant failed to enter appearance to defend. The plaintiff, as it was entitled and obliged to do if it wished to exercise that entitlement, applied pursuant to Rule 31(5) of the Rules to the Registrar for default judgment.

[3] The Registrar was aware of the decision of the Constitutional Court in *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) (*"the Jaftha judgment"*). As a result thereof he doubted his competence to declare the hypothecated property executable. He accordingly acted in terms of Rule 31(5)(b)(vi) of the Rules and required that the matter be set down for hearing in open court.

[4] The matter came to the attention of the Deputy Judge President of this Division. He determined and directed in terms of section 13(1)(a) of the Supreme Court Act, 59 of 1959, that a full court of this Division hear the matter. Four questions were formulated for determination. They were:

- “1. *Whether the Constitutional Court judgment in Maggie Jaftha v Schoeman and Others is applicable to applications for default judgments in terms of Rule 31(5)(a) of the Uniform Rules of the High Court in circumstances where the defendant has specially hypothecated immovable property as security for the debt and the plaintiff seeks default judgment against the defendant as well as an order to have the immovable property declared executable?*
2. *If the judgment is applicable, can such application for default judgment be heard by a judge in chambers or must it be heard in open court?*
3. *If such application can be heard in chambers what is the effect, if any, of the Transvaal Rule 3(2)?*
4. *Does the judgment in Maggie v Jaftha and Others apply to Rule 45(1) of the Rules of this court and if it does, how is that Rule to be applied?”*

This judgment deals with these issues.

[5] At the hearing Mr Lamont SC represented the plaintiff. Mr Farber SC together with Mr Sawma, appeared as *amici curiae*. At

the outset appreciation is expressed to all the counsel who appeared, and in particular, the *amici curiae* for their assistance.

[6] It is necessary to consider the *Jaftha* judgment in some detail and to place it in its correct perspective. The facts relevant to the judgment are these:

- Section 26 of the Constitution of the Republic of South Africa, 108 of 1996 (*“the Constitution”*) provides as follows:

“26 Housing

- (1) *Everyone has the right to have access to adequate housing.*
- (2) *The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.*
- (3) *No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”*

- *Jaftha* and Van Rooyen had incurred debts in small amounts.

In *Jaftha*’s case the original debt amounted to R250,00. In

Van Rooyen’s case the original debt amounted to R190,00.

- Neither *Jaftha* nor *Van Rooyen* were able to pay their debts. Action was instituted against them in the Magistrates' Court and default judgment was granted against them.
- Both *Jaftha* and *Van Rooyen* were the owners of homes in Prince Albert. Their houses had been acquired with the assistance of State housing subsidies.
- After unsuccessfully levying execution against *Jaftha's* and *Van Rooyen's* movable property their respective homes were attached and sold in execution pursuant to warrants of execution issued by the Clerk of the relevant Magistrates' Court acting in terms of section 66(1)(a) of the Magistrates' Court Act No 32 of 1944 ("*the Magistrates' Court Act*").
- By virtue of their loss of ownership of their homes pursuant to the sales in execution, *Jaftha* and *Van Rooyen* became disqualified from obtaining other State owned housing. No suitable alternative accommodation was available to them.

[7] This factual matrix served as the backdrop of the Constitutional Court's consideration of the constitutional validity of section

66(1)(a) of the Magistrates' Court Act. The section 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."

[8] The Constitutional Court held that section 66(1)(a) of the Magistrates' Court Act could not pass constitutional muster. It held that section 26 of the Constitution enjoins the State to *"strive to provide access to adequate housing for all and, where that exists, to refrain from permitting people to be removed (therefrom) unless it can be justified"* (para 29). The section establishes a socio-economic right which embodies a negative obligation not to prevent or impair existing access to adequate housing, which negative obligation applies to everyone, including private persons (para 31 and para 33). Any measure which permits a person to be deprived of adequate access to existing housing limits the right protected in section 26(1) of the Constitution (para 34). Although

section 36(1)(b) of the Constitution may afford a justification for such limitation, much will turn on the facts of the individual case under consideration and whether, based thereon, sales in execution are justified. Section 66(1)(a) of the Magistrates' Court Act was sufficiently broad to allow sales in execution to occur without judicial intervention and even where they were unjustifiable. To that end, the scheme for sales in execution created under section 66(1)(a) was overbroad, in that it, without any form of judicial scrutiny, allowed for sales in execution to occur in circumstances where debtors' rights had been unjustifiably violated. Given the trifling nature of the indebtedness of *Jaftha* and *Van Rooyen* and their irretrievable loss in consequence of the prohibition against them acquiring alternative housing through State subsidization, the court held that the sales in execution were not justifiable (para 40). The appropriate remedy lay in the provision of judicial oversight over the execution process – in short, it was only the court which was entitled to order execution against immovable property, and only if the circumstances of the case rendered it appropriate to do so.

[9] To redress the situation the Constitutional Court determined that section 66(1)(a) of the Magistrates' Court Act had to be recast in the following terms (para 64):

“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 a court, after consideration of all relevant circumstances, may order execution against the immovable property of the party against whom such judgment has been given or such order has been made.”

[10] In coming to the aforesaid conclusion the Constitutional Court was aware of and considered the provisions of sections 62 and 73 of the Magistrates' Court Act. The former section allows a court to set aside or stay a warrant of execution that had been issued on good cause shown. The debtor is obliged to approach the court and show good cause why the warrant ought to be set aside. The Constitutional Court held 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 ...” (para 47). As far as the latter section is concerned the Constitutional Court held that the same difficulties that arise in regard to the former section applied to the latter section (para 49). Accordingly neither section could save section 66(1)(a) of the Magistrates’ Court Act from unconstitutionality.

[11] In considering some of the circumstances that a court would consider in determining whether a warrant of execution could be issued in terms of section 66(1)(a) of the Magistrates’ Court Act as recast by the Constitutional Court, the Constitutional Court held as follows (para 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.”

[12] The origin and development of Rule 45(1) of the Rules of Court and the practice of immovable property being declared

executable must be considered. The commencement of this history is set out in the full bench judgment in *Gerber v Stolze and Others* 1951 (2) SA 166 (T) at 171H-172A.

[13] The practice in the old Transvaal Republic was that when a *nulla bona* return had been made in an attempt to execute against movable property it was usual to move the court to have the immovable property declared executable. In 1902 the High Court in the Transvaal was established. Rule 67(a) regulated the process of execution and, in its then form, it read as follows:

“The party in whose favour any final judgment of the Court has been pronounced may, at his own risk, sue out of the office of the Registrar one or more writs for execution thereof; provided that, except where by judgment of the Court immovable property has been specially declared executable, no such process shall issue against the immovable property of any person until any process which may have been issued against his movable property shall be first returned, and the Court shall perceive thereby that the said person had not sufficient to satisfy the exigency thereof ...”

[14] In *Re W J Jooste* 1902 TS 245, the Court recognised the practice which had prevailed under the Republican regime and

resolved not to interfere with it. Curial sanction was thus required for the attachment of immovable property.

[15] Despite this, and within a very short period thereafter, the court in *Harrison & Co v Reyneke* 1903 TH 316, declared that, in future, when a writ has been issued against the movables of the defendant, and a return of *nulla bona* had been made, the Registrar would have the authority and discretion, upon being satisfied of these facts himself, to issue a writ against the immovable property, without an order of court declaring such property executable.

[16] On 27 November 1903 and pursuant to the promulgation of Government Notice 1376 of 1903, Rule 67(a) was amended to provide for the Registrar to sanction the issue of the writ “*provided always that it shall be competent for the Registrar whenever he thinks that the circumstances of the case render such a course desirable, to refer any party to the Court for permission to issue a writ against immovable property which has not been specially declared executable*”.

[17] There were thus two recognised methods of attachment of immovable property by writ. First, after a writ against movables had been issued and the Registrar determined that the judgment had not been satisfied thereby. Second, where the court declared the immovable property executable and this would occur when the property had been specifically hypothecated. The rationale for this was set out in *Gerber* at 172F-H in the following terms:

“The only reason for applying to Court at all is to have a short-cut in the one case where a money judgment has been obtained and the money judgment is secured to the plaintiff by specially hypothecated immovable property; then, in the normal course, the Court is asked, in advance, to dispense with the circumlocution of having to take execution against the movable property first and only on that property failing to realise the money sum, then to have recourse against the immovable property. When an order is granted declaring executable the property specially hypothecated, that order permits the grantee, the creditor, to take his execution straightaway against the immovable property.”

[18] The next development in this regard occurred in 1991. Section 27(A) was inserted in the Supreme Court Act, 59 of 1959 by section 5 of Act No. 4 of 1991 and substituted by section 29 of Act No. 139 of 1992. It provided that the Registrar of the Court could in the manner and the circumstances prescribed in the Rules grant a default judgment and such a default judgment would be

deemed to be a judgment of the Court. Following hereon Rule 31(5) was added to the Rules of Court by Government Notice R2365 of 10 January 1994 and amended by Government Notice 417 of 14 March 1997. It reads as follows:

“Rule 31(5)

- (a) Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, if he or she wishes to obtain judgment by default, shall, where each of the claims is for a debt or liquidated demand, file with the registrar a written application for judgment against such defendant: Provided that when a defendant is in default of delivery of a plea, the plaintiff shall give such defendant not less than 5 days’ notice of his or her intention to apply for default judgment.*
- (b) The registrar may –*
 - (i) grant judgment as requested;*
 - (ii) grant judgment for part of the claim only or on amended terms;*
 - (iii) refuse judgment wholly or in part;*
 - (iv) postpone the application for judgment on such terms as he may consider just;*
 - (v) request or receive oral or written submissions;*
 - (vi) require that the matter be set down for hearing in open court.*
- (c) The registrar shall record any judgment granted or direction given by him.*

- (d) *Any party dissatisfied with a judgment granted or direction given by the registrar may, within 20 days after he has acquired knowledge of such judgment or direction, set the matter down for reconsideration by the court.*
- (e) *The registrar shall grant judgment for costs in an amount of R200 plus the sheriff's fees if the value of the claim as stated in the summons, apart from any consent to jurisdiction, is within the jurisdiction of the magistrate's court and, in other cases, unless the application for default judgment requires costs to be taxed or the registrar requires a decision on costs from the Court, R650 plus the sheriff's fees."*

[19] It is accepted that the prayer for a declaration that immovable property be declared executable is a "*liquidated demand*" within the meaning of Rule 31(5)(a) of the Rules of Court. See (by analogy) *Erf 1382 Sunnyside (Edms) Bpk v Die Chipi BK* 1995 (3) SA 659 (T) at 661H-I and *Entabeni Hospital Ltd v Van der Linde; First National Bank SA Ltd v Puckriah* 1994 (2) SA 422 (N) at 424G-I.

[20] In summary therefore at present Rule 45 of the Rules confers the competence on the Registrar of the Court to issue a writ of execution against the immovable property of the debtor and section 27(A) of the Supreme Court Act read with Rule 31(5) of the

Rules confers the competence on the Registrar of the Court to declare specifically hypothecated immovable property executable.

[21] Consideration can now be given to the first question referred to in paragraph 4 *supra*. At the outset it must be emphasised that the *Jaftha* judgment did not deal with section 27(A) of the Supreme Court Act and Rule 31(5) of the Rules. It dealt, as appears *supra*, with section 66(1)(a) of the Magistrates' Court Act. That section is analogous to Rule 45(1) of the Rules of Court. Accordingly the *Jaftha* judgment is distinguishable. The ratio of the judgment is however of great persuasive authority in any consideration of the constitutionality of section 27(A) of the Supreme Court Act and Rule 31(5) of the Rules. It establishes the principle that a scheme which permits of execution against immovable property without judicial sanction is a limitation of the rights contained in section 26 of the Constitution.

[22] It must be borne in mind that not all immovable property specifically hypothecated as security in a loan transaction is utilised as residential property. Commercial property is frequently hypothecated as security in loan transactions. In such cases section 26 of the Constitution would not come into consideration.

For purposes of this judgment it will however be assumed that all immovable property which the Registrar can potentially declare executable is residential property. It will further be accepted that such a declaration is a limitation of the rights protected in section 26 of the Constitution.

[23] What falls to be determined in terms of section 36(1) of the Constitution is whether the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including those referred to in section 36(1) of the Constitution. In the *Jaftha* judgment the limitation was found not to be reasonable and justifiable.

[24] Different to the considerations in the *Jaftha* judgment, regard being had to the jurisdiction of the Magistrates' Court, most applications for default judgment in terms of Rule 31(5) of the Rules are for amounts in excess of, and in many cases substantially in excess of, R100 000,00. For reasons that need not be considered some creditors however seek redress in the High Court despite the fact that the Magistrates' Court has jurisdiction for the amount claimed. These cases however constitute a minority

of the applications in terms of Rule 31(5). The smaller the amount claimed the greater the need for careful scrutiny and the more compelling the reasoning in the *Jaftha* judgment that the limitation is not reasonable and justifiable.

[25] In every matter where the Registrar is required to declare immovable property executable, the debtor has participated in a commercial transaction and has willingly utilised his or her immovable property as security and thus put it at risk. It has long been recognised that the consequence of the debtor failing to pay the debt is that the creditor is entitled to have the hypothecated immovable property sold in execution and to recover from the proceeds of the sale the amount due. See *Grotius* 2.48.41 and *Roodepoort United Main Reef GM. Co Ltd (in liquidation) and another v Du Toit* N.O. 1928 AD 66 at 71. It is for this reason that the Court when granting judgment for the payment of the secured debt will normally, if claimed by the creditor, declare the hypothecated immovable property specially executable (see *Marsh v Makein* (1882) 2 SC 104; *Goldfields Building Finance and Trust Corporation Ltd v Pienaar* 1928 WLD 211; and *Wille's Mortgage & Pledge* 3rd Edition p 232. This was recognised in the *Jaftha* judgment where it was held that a sale in execution should

ordinarily be permitted where the immovable property has been put up as security for the debt and there has been no abuse of court procedure (see para 11 *supra*).

[26] Furthermore, and different to the Magistrates' Court, Rule 31(5)(d) contains a valuable safeguard to protect in particular the debtor. It provides for the reconsideration by the court of a judgment or direction given by the Registrar within 20 days after the party concerned has acquired knowledge of such judgment or direction. This would obviously include an order declaring specially hypothecated immovable property executable. Other than in the case of section 62 of the Magistrates' Court Act the reconsideration does not cast any *onus* on the debtor. The court is required to consider the application for default judgment *de novo* without any *onus* on the debtor. Accordingly any order made by the Registrar declaring immovable property executable is open to reconsideration by the court, if brought to the attention of the court.

[27] The question arises whether the debtor would be aware of the provisions of Rule 31(5)(d) of the Rules. Debtors who participate in economic activity to the extent of hypothecating immovable property would normally have access to legal advice. However, in

order to provide for the eventuality that the debtor is unaware of Rule 31(5)(d), a rule of practice could be prescribed that the writ of execution which is presented to the Registrar for signature must contain a note advising the debtor of the provisions of Rule 31(5)(d).

[28] It appears that there are between 300 and 400 applications for default judgment where immovable property is sought to be declared executable in this Division each week. If these applications were heard in open court and each application was disposed of in five minutes approximately 30 hours of court time would be utilised per week. In effect one court would do nothing else but hear these applications. In the overwhelming majority of cases the application for default judgment and the application for the immovable property to be declared executable would be a formality and would not require judicial oversight. The *dictum* of the Constitutional Court referred to in para [11] *supra*, must also be kept in mind. Where the judgment debtor willingly puts his or her house as security for a debt, a sale in execution should ordinarily be permitted, absent an abuse of court procedure.

[29] Another safeguard for the debtor is contained in Rule 31(5)(b)(vi) of the Rules. The rule confers the right on the Registrar to refer an application for default judgment for hearing in open court. In *Standard Bank of SA Ltd v Ngobeni* 1995 (3) SA 234 (VSC) the court held at 235C-E:

“The purpose of the amended Rule was clearly to relieve the burden resting on the Judges of the Supreme Court by delegating to the Registrar the right (and duty) to grant or refuse judgment in uncomplicated default matters where he simply checks that all administrative and formal steps have been taken to justify a judgment. He is not expected to decide extraordinary or obscure points of law or fact. The golden rule is: If the Registrar has any legitimate doubt whether judgment should be granted or not, it is his duty to refer the matter for hearing in terms of Rule 31(5)(b)(vi).”

The dictum applies equally to orders declaring immovable property executable.

[30] Section 34 of the Supreme Court Act provides for the appointment of Registrars and Assistant Registrars by the Minister of Justice. Clearly when making such appointments the Minister will have due regard to the functions and duties which they would have to perform. These functions and duties would include making orders of the kind under consideration in this judgment. Accordingly it must be expected that appropriate appointments

have and will be made of persons well able to perform this function. They should be able to discern abuses and either refuse the application to declare the immovable property executable or to refer it to Court for determination.

[31] In an unreported judgment in the matter of *The Standard Bank of S A Limited v Elizabeth Snyders* (Case No 10067/04) and eight other matters which was delivered on 21 July 2005, it was accepted by Blignault J that the *Jaftha* judgment does apply to applications to have specially hypothecated immovable property declared executable in terms of Rule 31(5). It was held that only the Court and not the Registrar would “*have the power to grant such an order*”. No reasons were provided for this conclusion (para [7]). With respect the learned Judge’s conclusion cannot be followed.

[32] In the matter of *The Standard Bank of SA Ltd v Snyders and Eight Others* it was further held that the creditors “*summons should contain a suitable allegation to the effect that the facts alleged by it (which should be identified) are sufficient to justify an order in terms of section 26(3) of the Constitution*” (para 24). However earlier in the judgment the learned Judge indicated that he was

“inclined to agree with plaintiff’s counsel that the facts referred to in the summons would probably, in the absence of opposition, be sufficient ...” (para 19) (for the immovable property to be declared executable). On a reading of the judgment these facts would be no more than allegations relating to the existence of the loan, that the full amount of the loan has become repayable by virtue of the debtor’s default and the loan has been secured by immovable property which has been specially hypothecated. These facts are no different to the allegations contained in any non-excipiable summons for this relief. As to the reference to section 26(3) of the Constitution it was held in *Fundstrust (Pty) Ltd (in Liquidation) v van Deventer* 1997 (1) SA 710 (A) at 725H-I that a pleader need not refer in terms to a statute upon which is relied. Accordingly the ruling in the above case should not be followed.

[33] Regard being had to all of the foregoing it appears that where the debtor specifically hypothecated his or her immovable property and there is no abuse of the court procedure, the limitation is reasonable and justifiable as contemplated in section 36(1) of the Constitution. What is required are rules of practice to alert the Registrar and assist him or her in determining abuses and

referring those applications for consideration by the court. To this end the following rules of practice are laid down in this court:

33.1 In all applications for default judgment where the creditor seeks an order declaring specially hypothecated immovable property executable the creditor shall aver in an affidavit filed simultaneously with the application for default judgment:

33.1.1 The amount of the arrears outstanding as at the date of the application for default judgment.

33.1.2 Whether the immovable property which it is sought to have declared executable was acquired by means of or with the assistance of a State subsidy.

33.1.3 Whether to the knowledge of the creditor the immovable property is occupied or not.

33.1.4 Whether the immovable property is utilised for residential purposes or commercial purposes.

33.1.5 Whether the debt which is sought to be enforced was incurred in order to acquire the immovable property sought to be declared executable or not.

33.2 All applications for default judgment where the creditor seeks an order declaring specially hypothecated immovable property executable where the amount claimed falls within the jurisdiction of the Magistrate's Court shall be referred by the Registrar for consideration by the court in terms of Rule 31(5)(b)(vi).

[34] A further rule of practice is laid down that a warrant of execution which is presented to the Registrar for issue, pursuant to an order made by the Registrar declaring immovable property executable, shall contain a note advising the debtor of the provisions of Rule 31(5)(d).

[35] Turning to the second question it is apparent that its ambit has been substantially limited by the conclusion reached above. It will only relate to those matters referred to the court by the Registrar.

[36] Section 16 of the Supreme Court Act 59 of 1959 reads as follows:

“Save as is otherwise provided in any law, all proceedings in any court of a division shall, except in so far as any such court may in special cases otherwise direct, be carried on in open court.”

There is no basis for exercising the discretion referred to in the section in cases of default judgment. See generally *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another* 1984 (4) SA 149 (T) at 155B-I. The applications must therefore be heard in open court.

Implicit in the second question is that the Court has jurisdiction to hear the matter. Nothing said in *Erf 1382 Sunnyside (Edms) Bpk v Die Chipi BK (supra)* indicates that the Court's jurisdiction to hear default judgment applications is in anyway impaired by Rule 35(5).

Applications for default judgment to the Registrar are however the preferred route.

[37] The third question raised falls away.

[38] Finally the final question raised falls to be considered. As far as Rule 45(1) relates to the issue of writs after immovable property has been declared executable by the Registrar it need not be considered further. Clearly if the Registrar has declared immovable property executable the writ may be issued. As far as Rule 45(1) of the Rules refers to the issue of a writ after an attachment of movables insufficient to satisfy the debt is concerned it would appear that the *Jaftha* judgment is applicable and that there is no basis on which that judgment can be distinguished.

[39] To remedy the defect contained in Rule 45(1) of the Rules the rule is to be read as though the words “*and a court, after consideration of all relevant circumstances, has authorised execution against the immovable property*” were inserted after the words “*movable property*” in the third last line of the rule.

[40] In view of this judgment the application for default judgment is referred to the Registrar to be dealt with in terms of Rule 31(5) of the Rules of Court.

M M JOFFE
JUDGE OF THE HIGH COURT

I agree:

P M MOJAPELO
DEPUTY JUDGE PRESIDENT

I agree:

C J CLAASSEN
JUDGE OF THE HIGH COURT

Date of Hearing:

Date for Judgment: 23 August 2005

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Mr. Farber SC

Mr. Sawma