IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 8617/01

In the matter between:

MAGGIE JAFTHA Applicant

And

STEPHANUS SCHOEMAN 1st Respondent

MIETJIE SKAARNEK 2nd Respondent

MARKOTTER ATTORNEYS 3rd Respondent

MR CHRIS BOTES 4th Respondent

THE MINISTER OF HOUSING IN THE NATIONAL GOVERNMENT OF SOUTH AFRICA 5th Respondent

THE MINISTER OF HOUSING FOR THE PROVINCIAL ADMINISTRATION OF THE WESTERN CAPE 6th Respondent

THE CLERK OF THE MAGISTRATE'S COURT: PRINCE ALBERT 7th Respondent

THE REGISTRAR OF DEEDS: CAPE TOWN 8th Respondent

THE MINISTER OF JUSTICE 9th Respondent

And

CASE NO: 8618/01

CHRISTINA VAN ROOYEN	Applicant
And	
JACOBUS STOLTZ	1st Respondent
CATHERINE GOLIATH	2nd Respondent
MARKOTTER ATTORNEYS	3rd Respondent
MR C BOTES	4th Respondent
THE MINISTER OF HOUSING IN THE NATIONAL GOVERNMENT OF SOUTH AFRICA	5th Respondent
THE MINISTER OF HOUSING FOR THE PROVINCIAL ADMINISTRATION OF THE WESTERN CAPE	6th Respondent
THE CLERK OF THE MAGISTRATES' COURT: PRINCE ALBERT	7th Respondent
THE REGISTRAR OF DEEDS: CAPE TOWN	8th Respondent
THE MINISTER OF JUSTICE	9th Respondent

JUDGMENT: 25 JUNE 2003

VAN REENEN, J:

1] Prince Albert, a small town in the Little Karoo, is the home town of Ms Maggie Jaftha (Jaftha) and Me Christina van Rooyen (Van Rooyen).

2] Jaftha is the registered owner of Erf 1825 Prince Albert on which a dwelling has been erected.

3] One Mietjie Skaarnek (Skaarnek), under case number 160/98, obtained judgment by default against Jaftha in an amount of R632,45, interest thereon and costs in respect of monies lent and advanced. Jaftha's immovable property was attached pursuant to a warrant of execution issued on 22 January 2001 and sold in execution to Mr Stephanus Schoeman (Schoeman) on 17 August 2001 for an amount of R5000.

4] Four other creditors have obtained judgments by default against Jaftha but have not as yet issued any writs of execution.

5] Jaftha alleges that the sheriff of Prince Albert, Mr Christoffel Andreas Botes (Botes), shortly after the sale in execution, coerced her to vacate the property which at the time was occupied by herself and her two children, the younger whereof is 20 years old. This allegation has not been placed in issue.

6] Van Rooyen, a widow, is the registered owner of Erf 1248, Prince Albert on which a dwelling has been erected.

7] On 10 May 1995 one Catherine Goliath (Goliath) under case number 96/95 obtained judgment by default against Van Rooyen in an amount of R198,30 and costs in respect of goods sold and delivered. A warrant of execution against her movable property was issued but as the sheriff, when executing it, could not find sufficient attachable movables, a return of **nulla bona** was rendered. Van Rooyen's immovable property was attached on 11 May 2001 pursuant to a warrant of execution and sold in execution to Mr Jacobus Stolz (Stoltz) on 18 August 2001 for an amount of R1000.

8] Also Van Rooyen alleges that Botes, shortly after the sale in execution, coerced her to vacate the property which was occupied by herself and her two adult children. This allegation has not been placed in issue.

9] Two other creditors have obtained judgments by default against Van Rooyen but have not as yet issued any writs of execution.

10] Botes has not as yet transferred ownership in the aforementioned immovable properties to Stoltz and Schoeman respectively.

11] Jaftha, under Case No 8617/01 (the Jaftha application), and Van Rooyen under Case No 8618/01 (the Van Rooyen application), brought applications in which they, in addition to the respective judgment creditors who took steps to sell their properties in execution and the respective purchasers thereof, cited Markotter Attorneys (third respondent); Botes (fourth respondent); the Minister of Housing in the National Government of South Africa (fifth respondent); the Minister of Housing for the Provincial Administration: Western Cape (sixth

respondent); the Clerk of the Magistrates' Court Prince Albert (seventh respondent) and the Registrar of Deeds, Cape Town (eighth respondent) as parties. The Minister of Justice and Constitutional Development was subsequently joined as a party (nineth respondent).

12] The said judgment creditors and purchasers gave notice of their intention to oppose the respective applications. Of those judgment creditors and purchasers only Schoeman subsequently advised the applicants' attorney that he was not opposing the Jaftha application on condition that no costs were claimed against him. Although Skaarnek, Goliath and Stoltz did not formally withdraw their notices of opposition they did not oppose the relief claimed against them and were not represented by an attorney or counsel at the hearing.

13] Markotter Attorneys is the only firm of attorneys in Prince Albert. It, in addition to being a judgment creditor in an amount of R243,04 against Van Rooyen, acted as attorneys for all the

judgment creditors with claims against Jaftha and Van Rooyen. It also represented Goliath and Skaarnek in effecting execution against the immovable properties of Jaftha and Van Rooyen. Markotter Attorneys opposed the relief claimed against it, but did not file any answering affidavits. It subsequently withdrew its opposition and in the Jaftha application consented to an order being granted in the following terms:

> "Third Respondent consents to the Applicant obtaining the following orders at the hearing of this matter:
>
> "4.1 An order setting aside the warrant of execution against property issued by the Seventh Respondent (the Clerk of the Prince Albert Magistrate's Court) in Prince Albert Magistrate's Court Case No. 160/98 on 22 January 2001.
>
> 4.2 An order declaring that the sale in execution by the Fourth Respondent (Mr Botes, the Sheriff for Prince Albert) of Applicant's home on 17 August 2001, is null and void.
>
> 4.3 An order interdicting Third Respondent from evicting or attempting to evict Applicant from her home pursuant to the sale in execution referred to in paragraph 4.2 above."

14] Markotter Attorneys consented to the granting of a similar order

in the Van Rooyen application save that paragraph 4.1 thereof provides as follows:

> "4.1 An order setting aside the warrant of execution against property issued by the Seventh Respondent (the Clerk of the Prince Albert Magistrate's Court) in Prince Albert Magistrate's Court Case No. 96/95 on 22 January 2001 and re-issued on 9 April 2001."

15] That Markotter Attorneys consented to those orders is not surprising as it is common cause that there were material irregularities in one or more of the procedural steps which preceded the sales in execution of the properties of Jaftha and Van Rooyen.

16] Markotter Attorneys has also entered into agreements of settlement with Jaftha and Van Rooyen in respect of its liability for their costs up to and including 12 February 2002.

17] Jaftha and Van Rooyen, in prayer 2 of their amended notices of

motion, claimed orders declaring that the sales in execution of their respective immovable properties by Botes on 17 August 2001, infringed their rights "in terms of" section 26 of the Constitution (Section 26). As in terms of the agreements of settlement referred to in paragraphs 13 and 14 above the specific sales in execution have been declared null and void, the necessity to consider the granting of the relief sought in that prayer has fallen away.

18] Botes filed notices in terms whereof he signified that he abides the decision of the court.

19] The Ministers of Housing in the National Government of South Africa and the Minister for Housing for the Provincial Administration of the Western Cape, opposed the granting of the relief claimed in prayers 3.9 and 3.11 of the unamended notice of motion in the Van Rooyen application. They afterwards reached an agreement with Van Rooyen in terms whereof she undertook not to seek the relief claimed in

paragraph 16 of the amended notice of motion in the application brought by her, and they in turn, undertook not to oppose the application and to provide assistance with certain investigations that Van Rooyen's legal representatives required to be undertaken. The said Ministers, the Clerk of the Magistrates' Court, Prince Albert and the Registrar of Deeds: Cape Town filed a notice to the effect that they did not intend opposing the Van Rooyen application and would abide the decision of the court.

20] The applicants' counsel in their heads of argument and during argument intimated that their clients were not persisting with prayers 8, 9, 13, 14 and 15 of their amended notices of motion.

21] As a result of what has been set out above the only prayers in the amended notices of motion that remain to be considered are the following:

"2. …

3. …

4. Declaring section 66(1)(a) of the Magistrates' Courts Act 32 of 1944 inconsistent with the Constitution to the extent that it authorises and obliges the clerk of the court, if insufficient movable property has been found to satisfy the judgment debt, to issue a warrant of execution against immovable property constituting the home of the judgment debtor, where the debt is trifling or there are other and less invasive means of satisfying the judgment debt;

5. Declaring that section 66(1)(a) of the Magistrates' Courts Act 32 of 1944 is to be read as though the following words appears at the end of that subsection:

> '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 in 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' Court Act 32 of 1944 is to be read as though the following words appear after the word 'paragraphs':

'(b), (c), (e), (f) and/or (g)';

8. …

9. …

10. Referring the orders in paragraphs 4, 5, 6, 7 and 8 to the Constitutional Court in terms of section 8(1)(a) of the Constitutional Court Complementary Act 13 of 1995;

11. …

12. …
13. …
14. …
15. …
16. …

17. …

18. Alternatively to 17 above, directing the third and fourth Respondents to pay the costs of this application on the attorney and client scale, jointly and severally together with any of the further Respondents who oppose the relief sought."

(The quoted prayers are those in the Van Rooyen application.

Jaftha did not seek relief similar to prayers 16 and 17 and accordingly the costs prayer in her application is numbered as 15).

22] As the remaining issues in the Jaftha and Van Rooyen applications 8617/01 and 8618/01 are identical they were heard together.

23] In terms of an agreement between Mr Hathorn (who represented Jaftha), Mr Budlender (who represented Van Rooyen) and Ms Bawa (who represented the Minister of Justice) an agreed statement of the facts in the application of Me Dina Johanna Koot and Mr Piet Koot (Koot) vs Mr F. van Zyl and Others, Case No 8616/01, was placed before the court. It contains the following relevant facts. Koot's immovable property, Erf 1063 Prince Albert, was on 17 August 2001 sold in execution to Mr F. van Zyl, (Van Zyl junior) one of the two partners in Markotter Attorneys, for an amount of R500. The sale in execution took place pursuant to warrants of execution

based on judgment debts in favour of Sales Protection Bureau for R2445,40, interest and costs and in favour of Mr J.M. Eloff for R158,41 (inclusive of costs) plus interest. Markotter Attorneys represented both judgment creditors. That application, in which relief similar to that claimed in the Jaftha and Van Rooyen applications were sought, has been settled.

24] It is common cause that the State, as part of a national housing scheme and during June 1997 to August 1998, caused a number of low cost houses to be built in Prince Albert at a cost of approximately R16000 / 17250 each. Jaftha, Van Rooyen and Koot were each provided with one of such houses. It is further common cause that if the recipient of such a house loses ownership thereof he or she is disqualified from obtaining other state-aided housing and that because of the financially straightened circumstances in which Jaftha and Van Rooyen find themselves - they and the other members of their families are unemployed or work sporadically - they will not be able to acquire suitable alternative housing.

25] Sales in execution of state-aided houses in Prince Albert increased dramatically during 2001. On 15 May 2001 five such houses were sold at prices ranging from R5000 to R8000 per house. On 15 June 2001 two such houses were sold for R4500 and R6000 respectively. On 17 August 2001 eight such houses were sold at prices that ranged between R500 and R5000. On 14 September 2001 four such houses were sold at prices ranging from R1000 to R2000. Of the 19 houses that were sold eight were sold to Van Zyl junior and one to Mr E van Zyl (the other partner in Markotter Attorneys). According to Botes only two other state-aided houses were sold in execution and that happened during 1996. It is apparent from what has already been said thereanent, that the immovable properties of Jaftha and Van Rooyen were sold in execution for the satisfaction of insubstantial judgment debts and that the proceeds yielded by the sales in execution were substantially less than their initial cost to the State.

26] To the extent that the above facts may be susceptible of an

inference that the execution process provided by section 66(1)(a) of the Magistrates' Court Act (section 66(1)(a)) is being abused it does not follow that it should for that reason alone be characterised as infringing section 26 which entrenches the right of access to adequate housing (Cf: **Bernstein and Others v Bester and Others NNO** 1996(4) BCLR 449 (CC); 1996(2) SA 751 (CC) paragraph 52).

27] Prayers 5, 6, 7, 8 and 9 of the amended notices of motion in the Jaftha and Van Rooyen applications are clearly dependant upon a favourable finding in respect of prayer 4 thereof namely, that section 66(1)(a) is inconsistent with section 26 on the basis alleged by the applicants.

28] Counsel for the Minister of Justice, contending that Jaftha and Van Rooyen had succeeded in obtaining the substantive relief that they had claimed namely, to have the warrants of execution pursuant to which their respective immovable properties has been attached, set aside and the ensuing sales in execution declared null and void, submitted that they are precluded from raising the constitutional issue raised in prayer 4 of the amended notices of motion. She did so on the basis of

the principle that where it is possible to decide any case without reaching a constitutional issue thát is the course that should be followed (See: **National Coalition for Gay & Lesbian Equality and Others v Minister of Home Affairs and Others** 2000(2) SA 1 (CC); 2000(1) BCLR 39 (CC); paragraph 21).

29] Jaftha and Van Rooyen's counsel countered that argument by submitting that their clients' prayers were not limited to the setting aside of the warrants of execution and the sales in execution but that the order sought namely, that specified sections of the Magistrates' Court Act should be declared as being inconsistent with section 26, formed part of the substantive relief claimed by them, the purpose whereof was to protect them against further attempts to have their immovable properties sold in execution in the future. It is not in dispute that Jaftha has four unsatisfied judgments against her, namely by Prince Albert Kontantlenings in an amount of R252,56; Swartberg Spar in amounts of R687,77 and R258,03 respectively and Cheap Cheap in an amount of R551,30.

Similarly, Van Rooyen has two unsatisfied judgments against her namely, by Mr M Pienaar in an amount of R196,00 and by Markotter Attorneys in an amount of R243,04. On the basis of the well documented and unrefuted uncaring past conduct on the part of one or more of the partners in Markotter Attorneys in relation to debts owed to its clients, it is fair to infer that there is a real risk that in the future the applicants' immovable properties may again be attached and sold in execution. The likelihood of another infringement of the applicants' rights of access to adequate housing, in my view, is a material issue independent of the issues that have been resolved by means of the settlement agreements referred to in paragraphs 13 and 14 above. I accordingly incline to the view that both applications are incapable of being decided without reaching the said constitutional issue. That conclusion disposes of the submission that Jaftha and Van Rooyen lack **locus standi** as they, in my view, are clearly acting in their own interests as contemplated in section 38(a) of the Constitution.

30] Van Rooyen in the notice of motion as originally formulated

sought an order granting her, assisted by her attorney, "leave to act in the public interest as representative of those residents of Prince Albert in occupation of low cost housing who since 1994 have received or benefited from low cost housing subsidies or grants made by the state to members of previously disadvantaged communities ("the members of the class"), in the further conduct of these proceedings, provided that the order will not be binding on other members of the class." In view of the conclusion arrived at herein and leaving aside whether in the absence of legislative on other directions regarding certain substantive and procedural aspects thereanent it is open to a court to entertain a class action, it is not necessary to consider whether Van Rooyen should be given leave to act in the interest of a group or class of persons or in the public interest as contemplated in subsections 38(c) and/or (d) of the Constitution.

31] Jaftha and Van Rooyen's counsel submitted that the state, in terms of section 7(2) of the Constitution, is obliged to "respect" and "protect" the right of access to adequate housing of their clients entrenched by section 26(1). They also submitted that the meanings assigned to those terms in the General Comments of the United Nations Committee of Economic, Social and Cultural Rights, in the context of the International Covenant on Economic, Social and Cultural Rights, are in harmony with the context in which they have been used in the Constitution. The applicants' counsel, on the basis of such meanings, contended that the State, in order to respect the right of access to adequate housing has to refrain from any

action that would serve to deprive individuals of that right and that the duty to protect such right requires that the State should take measures which would prevent third parties from interfering therewith. Although the Magistrates' Court Act became law long before the Constitution came into being, the applicants' counsel submitted that the State through the enactment of section 66(1)(a), which authorises the enforcement of unsatisfied judgment debts against the immovable property of a judgment debtor as well as the issuing by clerks of the court of warrants of execution for such a purpose, fails to protect and respect the right of access to adequate housing of individuals. The submission that the State fails to respect such rights is based thereon that the said execution process enables a sale of immovable property, which could constitute the home of an individual, for trifling judgment debts and at unrealistic prices and could result in the loss of existing access to housing. The submission that the State fails to protect such rights is based on the submission that the said execution process enables third parties to buy such houses;

evict the occupiers therefrom; and by doing so deprive them of their right of access to housing.

32] The applicants' counsel did not raise an objection to the principle of the attachment- and sale in execution of immovable property, including houses, in order to satisfy judgment debts. Their fundamental objection is that although the purpose of section 66(1)(a) is unobjectionable the procedure established by it has an unconstitutional effect (See: **Coetzee v Government of the Republic of South Africa** 1995(10) BCLR 1382 (CC); 1995(4) SA 631 (CC) paragraphs 12, 65 and 67) in that it could result in persons being unnecessarily and disproportionately deprived of their homes. It is the applicants' case that any constitutional objectionability will be addressed if a) the exercise of a judicial discretion is introduced before a judgment debtor is deprived of his or her home as in terms of section 66(1)(a) the clerk of the court is obliged to issue a warrant of execution once a **nulla bona** return has been rendered and that the court does not play any role in the

decision to issue it; b) that the immovable property constituting the home of a judgment debtor should enjoy immunity against execution up to a value determined by the Minister of Justice on the same basis as the other classes of goods which in terms of the provisions of section 67 of the Magistrates' Court Act enjoy immunity despite the fact that they are not constitutionally protected; and c) that the immovable property constituting the home of a judgment debtor should not be sold in execution unless the proceeds yielded thereby is sufficient to justify depriving such a judgment debtor of his or her home.

33] The Minister of Justice's counsel disputes that section 66(1)(a) is in conflict with the provisions of section 26. She submitted that the state has taken reasonable legislative and other measures within its available resources to progressively realise the right of access to adequate housing of persons such as the applicants, by having provided them with state aided residential properties and that the issuing of a warrant of execution and the sale of such properties does not automatically result in the

occupiers thereof being evicted therefrom and being rendered homeless. For eviction to ensue there has to be further legal proceedings in which the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No 19 of 1998 (the PIE Act) must be complied with so as to ensure that any eviction is effected in a fair and dignified manner. She, in the alternative, submitted that if section 66(1)(a) infringes the provisions of section 26, it can be justified as a reasonable limitation of the right of access to adequate housing in terms of section 36 of the Constitution.

34] Whether section 66(1)(a) is in conflict with section 26 must be objectively determined (See: **Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others** 1996(1) BCLR 1 (CC); 1996(1) SA 984 (CC); paragraphs 25 – 30; **New National Party of South Africa v Government of the RSA and Others** 1999(5) BCLR 489 (CC); 1999(3) SA 191 (CC) paragraph 22). That enquiry entails firstly, a determination of the meaning, nature and ambit of the

fundamental right encapsulated by section 26 and secondly, whether section 66(1)(a) breaches the boundaries of the right so delineated. The delineation of the fundamental right entrenched by section 26 necessitates a process of interpretation (See: **Ferreira v Levin NNO and Others and Vryenhoek and Others v Powell NO and Others** (supra) paragraph 46) which entails an analysis of the text in the context i.e. the historical background to the Constitution and the particular right and the reason for its inclusion; the concepts enshrined in the right and its elaboration under our own as well as comparative systems of law; the other provisions of the constitution and more particularly the other fundamental rights; and the foundational values enshrined in the constitution (See: **Halton Cheadle** (**South African Constitutional Law: The Bill of Rights** (Editors: **HM Cheadle** et al)) at 698). The right must further be construed in a way that secures the full measure of its protection for individuals (See: **S v Makwanyane and Another** 1995(6) BCLR 665 (CC); 1995(3)

SA 391 (CC); 1995(2) SACR 1 (CC) paragraph 10).

35] The textual setting and the social and historical context against which section 26 must be interpreted have been set out by Yacoob J in **Government of the RSA and Others v Grootboom and Others** 2000(11) BCLR 1169 (CC); 2001(1) SA 46 (CC) at paragraphs 21 – 25, and need not be repeated.

36] Section 26 provides as follows:

> "(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 realization 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."

37] As regards the manner in which section 26 has been structured, Yacoob J in **Grootboom** (supra) paragraph 2, said the following:

> "The section has been carefully crafted. It contains three subsections. The first confers a general right of access to adequate housing. The second establishes and delimits the scope of the positive obligation imposed upon the State to promote access to adequate housing and has three key

> elements. The State is obliged: (a) to take reasonable legislative and other measures; (b within its available resources; (c) to achieve the progressive realization of this right … The third subsection provides protection against arbitrary evictions."

38] As regards the meaning and the socio-economic ambit of that section the learned judge said the following at paragraph 34 and following:

> "Subsections (1) and (2) are related and must be read together. Subsection (1) aims at delineating the scope of the right. It is a right of everyone including children. Although the subsection does not expressly say so there is, at the very least, a negative obligation placed upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing. The negative right is further spelt out in ss (3) which prohibits arbitrary evictions ….

35] The right delineated in s 26 (1) is a right of 'access to adequate housing' as distinct from the right to adequate housing encapsulated in the Covenant. This difference is significant. It recognizes that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in s 26. A right of access to adequate housing also suggests that it is not only the State who is responsible for the provisions of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The State must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.

[36] In this regard, there is a difference between the position of those who can afford to pay for housing, even if it is only basic though adequate housing, and those who cannot. For those who can afford to pay for adequate housing, the

State's primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance. Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. State policy needs to address both these groups. The poor are particularly vulnerable and their needs require special attention…

> [37] The State's obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person. Some may need access to land and no more; some may need access to land and building materials; some may need access to finance; some may need access to services such as water, sewage, electricity and roads. What might be appropriate in a rural area where people live together in communities engaging in subsistence farming may not be appropriate in an urban area where people are looking for employment and a place to live.
>
> [38] Subsection (2) speaks to the positive obligation imposed upon the State. It requires the State to devise a comprehensive and workable plan to meet its obligations in terms of the subsection. However ss (2) also makes it clear that the obligation imposed upon the State is not an absolute or unqualified one…

39] In terms of the provisions of section 7(2) of the Constitution the State is required to respect, protect, promote and fulfil the right entrenched by section 26. The duty to respect that right entails that the State must refrain from depriving people of access to housing unjustifiably and from passing laws or engaging in

conduct which denies or obstructs such access. The duty to protect the right of access to adequate housing places an obligation on the State to intervene where the conduct of other persons threatens or undermines that right. The duty to promote and fulfil such right imposes a duty on the state to take positive measures to secure access to housing to those in need thereof by the progressive realization thereof as provided by section 26(2) (See: **Dennis Davis** et al: **Fundamental Rights in the Constitution,** 345 et seq; **Sandra Liebenberg: Constitutional Law of South Africa** (Editors Chaskalson et al) 41 – 27 et seq). Because of the magnitude of the need for housing; population growth; the unavoidable physical deterioration of existing residential structures; and the changing needs of people who already have access to housing, the State's obligation to provide access to housing would appear to be an ongoing and never-ending one. Section 26(1) does not give rise to a self-standing and independent right enforceable irrespective of the considerations enumerated in section 26(2) (Cf: **Minister of Health v Treatment Action**

Campaign and Others **(**No 2) 2002(10) BCLR 1075 (CC); 2002(5) SA 721 (CC) paragraph 39). When the provisions of sections 26(1) and (2) are read together, as they should, the scope of the right entrenched by section 26(1), in my view, could best be described as the correlative of the positive and negative obligations imposed thereby on the State as well as all other entities and persons. The content and ambit of that right may vary from person to person, place to place and time to time because of the different social strata and economic levels prevailing in our society. What does not admit of any doubt is that the right of access to housing does not encompass an entitlement to the ownership of housing; an entitlement to a particular form of housing; or an entitlement to the occupation of a specific residential unit.

40] The purpose of section 26(3) is to provide protection against arbitrary eviction (See: **Grootboom's** case (supra) paragraph 21). That subsection has three principal components. The first is a guarantee against the eviction of persons from their homes

or the demolition thereof without an order of court and reflects the common law principle that no-one is allowed to take the law into his or her own hands (See: **Nino Bonino v De Lange** 1906 TS 120 at 122, 125). The second is the requirement that courts should consider "all the relevant circumstances" before granting an order for the eviction of anyone from his or her home or the demolition thereof and is an innovation not recognized in common law (See: **Human v Rieseberg** 1922 TPD 157 at 163 – 6; **Oatorian Properties (Pty) Ltd v Maroun** 1973(3) SA 779 (A) at 785 C). The third is a prohibition against the passing of legislation which permits arbitrary evictions. Subsection 26(3) which applies horisontally (See: **Brisley v Drotsky** 2002(4) SA 1 (SCA) at 20 F – G), encompasses all evictions and not only those following upon the attachment and sales in execution of immovable properties which are persons' homes. The mischief against which subsection 26(3) is directed namely, the eviction of occupants from their homes or the demolition thereof in an unfair manner

and without due process of law, has been addressed by the substantive and procedural requirements of the PIE Act which in **Ndlovu v Ngcobo; Bekker v Jika** 2003(1) SA 113 (SCA); [2002] 4 All SA 334 (SCA) has been held to apply also to persons whose once lawful occupation of land has subsequently become unlawful.

41] What must be considered next is whether the execution procedure authorised by section 66(1)(a), to the extent that it involves immovable property constituting the home of any person, infringes the fundamental right encapsulated in section 26.

42] It appears from the manner in which prayer 4 of the amended notices of motion in the instant applications has been formulated that the basis on which the applicants contend that section 66(1)(a) is inconsistent with section 26 is that it authorises and obliges the clerk of the court, if insufficient movable property has been found to satisfy the judgment debt,

to issue a warrant of execution against immovable property which might be the home of the judgment debtor even where the judgment debt is trifling or where there are other and less invasive means of satisfying it. As will appear from what is set out below, the issuing of a warrant of execution against immovable property constituting a judgment debtor's home, does not negatively impact upon his or her right of ownership therein or occupation thereof. What is more, such a warrant may be set aside in terms of section 62 of the Magistrates' Court Act on good cause shown which may include payment of the judgment debt at any stage prior to the sale in execution taking place. I accordingly intend approaching the matter on wider basis namely, whether the consequences of the process of execution authorized by section 66(1)(a) are constitutionally objectionable and not merely the signing and issuing of a warrant of execution.

43] Section 66(1)(a) provides 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."

44] It is apparent from a reading of subsection 66(1)(a) that it authorises execution of a judgment debt sounding in money against the immovable property of a judgment debtor only after a **nulla bona** return against movables has been rendered - which accords with the position under the common law - or if a court on good cause shown, orders execution against such property without execution against movables first. The only other case where a warrant of execution against immovable property may issue under the Magistrates' Court Act is where a court at a financial enquiry in terms of section 65(A)(1) authorises its attachment if satisfied that the judgment debtor

owns immovable property capable of being attached and sold in satisfaction of a judgment debt or part thereof. On my reading of section 66(1)(a) a judgment creditor is not under any obligation to attach the immovable property of a judgment debtor and nothing precludes such a creditor from making use of any of the other methods designed to procure the payment of a judgment debt sounding in money eg. a financial enquiry in terms of section 65; an emoluments attachment order in terms of section 65 J; and a garnishee order in terms of section 72 of the Magistrates' Court Act. However, if a judgment creditor elects to exercise the right to execute against a judgment debtor's immovable property - a litigant's entitlement to enforce a court order or judgment granted in his or her favour is encapsulated in the right of access to courts entrenched by section 34 of the Constitution (See: **Chief Lesapho v North West Agricultural Bank and another** 2000(1) SA 409 (CC) paragraph 13) - the clerk of the court in terms of the provisions of magistrates' court rule 36 is obliged to issue and sign the warrant of execution presented to him or her by or on

behalf of the judgment creditor (See: **Erasmus & Van Loggerenberg: The Civil Practice of the Magistrates Court in South Africa** (9th Edition) Volume 1, 287 and the cases referred to in footnotes 3 and 4) provided it is in conformity with the court order on the basis whereof it is issued (See: **Le Roux v Yskor Landgoed (Edms) Bpk en Andere** 1984(4) SA 252 (T) at 257 G). The performance of that function by the clerk of the court is clearly in discharge of the State's obligation to assist its subjects to enforce their rights and more in particular their claims against debtors through the courts. (See: **De Lange v Smuts NO and Others** 1998(7) BCLR 779 (CC); 1998(3) SA 785 (CC); paragraph 31.

45] A warrant of execution against immovable property authorises and requires the sheriff to attach and sell it in execution in accordance with the provisions of subsections 62(2) - (8) and section 68 of the Magistrates' Court Act and magistrates' court rule 43. The sheriff in attaching and selling immovable property

in execution acts as "an executive of the law" (See: **Sedibe and Another v United Building Society and Another** 1993(3) SA 671 (T) at 676 A – B). An attachment brings about a **pignus judiciale** which does not affect the judgment debtor's **dominium** in the attached property but merely places it in the hands or under the custody of the sheriff (See: **Liquidators Union and Rhodesia Wholesale Ltd v Brown & Co** 1922 AD 549 at 558/9). A sale in execution of immovable property entails two distinct transactions namely, the sale of the property and the transfer thereof (See: **Schoerie NO v Syfrets Bank Ltd and Others** 1997(1) SA 764 (D & CLD) at 778 A – B). Unless the sheriff in the conditions of sale - which he concludes **eo nomine -** contractually binds himself to the purchaser to do so (See: the **Sedibe** case at 676 C – D) his duty is to see to it that transfer is passed to the purchaser and not the guaranteeing of **vacua possessio** (See: **Goedhals v Deputy Sheriff of Albany** 1913 CPD 108 at 110).

46] It is clear from the above that until an immovable property that has been sold in execution has been transferred into the name of the purchaser, the judgment debtor's ownership therein remains undisturbed as does his or her right, **qua** owner, to the use thereof. Although the transfer of ownership of such property to the new owner brings about an end to the legal basis of the judgment debtor's right to the use thereof, the impact of the transfer of ownership or the continued use of such property will depend on the identity of the occupant and the legal basis of his or her occupation. If occupation is by a person other than the judgment debtor in terms of, for instance, a lease or a right of **precarium,** the transfer of ownership does not bring an automatic end to the right of occupation. In the case of a lease, the rule **huur gaat voor koop** applies and protects a tenant's continued occupation, subject to the prior rights of any mortgagee (See: **Absa Bank Ltd v Sweet and Others** 1993(1) SA 318 (C) at 324 B – F) and, if it is held **precario,** by application of the principle of **qui prior est**

tempore potior est jure, after reasonable notice of termination (See: **Adamson v Boshoff and Others** 19753) SA 221 (C) at 229 B). Although after transfer of ownership the purchaser's right to the use thereof, **qua** owner, displaces the judgment debtor's right to do so, the former's use may manifest itself in different ways. The purchaser may want to occupy it personally or permit others to do so in terms of a contractual or other arrangements that need not necessarily exclude the judgment debtor. The judgment debtor, once the legal basis for his or her occupation of an immovable property namely, his or her **dominium** therein, has come to an end, has a choice. He or she may elect to vacate the property voluntarily or simply continue to occupy it without having entered into any contractual or other arrangements with the purchaser. In the event of the former, the loss of access to housing in respect of the particular residential unit is the result of a volitional act on the part of the judgment debtor and not the execution process. In the event of the latter, there will be a holding over by the judgment debtor, in which case the new owner will be obliged to

institute legal proceedings for the eviction of the judgment debtor. Similarly a sheriff who has contractually bound himself to provide **vacua possessio,** will have to institute eviction proceedings. In such proceedings the substantive and procedural requirements of the PIE Act will have to be complied with. Accordingly, if the judgment debtor is evicted from immovable property that constitutes his or her home and in the process is deprived of the right of access to that particular residential unit, such eviction will not have been brought about by the execution process but by separate legal proceedings instituted by the new owner based on a **causa** totally independent of the proceedings pursuant to which the execution had taken place and then only after the court, in accordance with the provisions of the PIE Act, has taken all the relevant circumstances into account.

47] The transfer pursuant to a sale in execution of immovable property, constituting the home of a judgment debtor, clearly brings about an end to his or her ownership therein. As the

ownership of immovable property is not encapsulated in the right of access to housing entrenched by section 26, the loss thereof as a consequence of the execution process does not violate the right of access to adequate housing. It is self-evident that if the right of access to adequate housing does not encompass ownership of housing, any act that brings about the loss thereof cannot be characterised as an infringement of any of the obligations imposed upon the State and other entities by subsections 26 (1) and (2). Despite the fact that the State's obligations are so circumscribed it has brought about the promulgation of the Housing Amendment Act, No 4 of 2001 (which came into operation on 1 February 2002), section 10 (B) whereof places restrictions on the involuntary sale by "successors in title" or "creditors in law" of any person who is the recipient of state-aided housing, and thereby brought about a truncation of judgment creditors' entitlement to execute against immovables.

48] In view of the above I am of the view that the consequences of

the sale in execution and the transfer of immovable property that constitutes the home of a person in terms of section 66(1)(a) do not conflict with the provisions of section 26. It follows logically that if a tranfer pursuant to a sale in execution of such immovable property does not conflict with the right of access to adequate housing encapsulated in section 26, the issuing by the clerk of the court of a warrant of execution against such property, **a fortiori,** does not do so either, irrespective of the amount of the judgment debt and whether other less invasive means of satisfying it are available.

49] I accordingly would in both applications refuse prayer 4 of the amended notices of motion as well as prayers 5, 6, 7 and 10 thereof, the granting whereof was dependent upon a favourable finding in respect of prayer 4.

50] The Constitutional Court in **Motsepe v Commissioner for Inland Revenue** 1997(2) SA 898 (CC); 1997(6) BCLR 692 (CC) paragraph 30, said that courts should be cautious in awarding costs against litigants who seek to enforce constitutional rights against the state, especially where the

constitutionality of a statutory provision is assailed, lest such orders have an unduly inhibiting or chilling effect on other potential litigants in the same category. Although Ackerman J in **Ferreira v Levin N.O. and Others** (supra) paragraph 49, warned against that approach being allowed to develop into an inflexible rule it was applied in **Sanderson v Attorney-General, Eastern Cape** 1997 (12) BCLR 1675 paragraphs 43, 44 and in **Harksen v President of the Republic of South Africa and Others** 2000(5) BCLR 478
(CC) paragraph 30. Although the applicants have failed to establish the constitutional claim advanced on their behalf it in my view was a genuine complaint on a point of substance and accordingly they should not be mulcted in costs. I accordingly would make no order as regards costs.

51] All that remains is to commend Mr Matthew Walton, a Cape Town attorney, for having professionally come to the aid of the applicant's herein when, because of their impoverished circumstances and lack of education, access to the courts was beyond their reach. His conduct is worthy of the honourable profession of which he is a member. Unfortunately the same

cannot be said of those responsible for the actions of Markotter Attorneys.

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D. VAN REENEN

NEL, J:

I agree.

Accordingly the following orders are made.

a) Prayers 4, 5, 6, 7 and 10 of the amended notices of motion are refused.

b) No order is made as regards costs.

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H.C. NEL