CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 74/03

MAGGIE JAFTHA	Appellant
versus	
STEPHANUS SCHOEMAN	First Respondent
MIETJIE SKAARNEK	Second Respondent
MARKOTTER ATTORNEYS	Third Respondent
CHRIS BOTES	Fourth Respondent
MINISTER OF HOUSING IN THE NATIONAL GOVERNMENT	Fifth Respondent
MINISTER OF HOUSING FOR THE PROVINCIAL ADMINISTRATION OF THE WESTERN CAPE	Sixth Respondent
CLERK OF THE MAGISTRATES' COURT: PRINCE ALBERT	Seventh Respondent
REGISTRAR OF DEEDS: CAPE TOWN	Eighth Respondent
MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Ninth Respondent
and	
CHRISTINA VAN ROOYEN	Appellant
versus	
JACOBUS STOLTZ	First Respondent
CATHERINE GOLIATH	Second Respondent

MARKOTTER ATTORNEYS	Third Respondent
CHRIS BOTES	Fourth Respondent
MINISTER OF HOUSING IN THE NATIONAL GOVERNMENT	Fifth Respondent
MINISTER OF HOUSING FOR THE PROVINCIAL ADMINISTRATION OF THE WESTERN CAPE	Sixth Respondent
CLERK OF THE MAGISTRATES' COURT: PRINCE ALBERT	Seventh Respondent
REGISTRAR OF DEEDS: CAPE TOWN	Eighth Respondent
MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Ninth Respondent

Heard on : 11 May 2004

Decided on : 8 October 2004

JUDGMENT

MOKGORO J:

[1] This matter is about the question whether a law which permits the sale in execution of peoples' homes because they have not paid their debts, thereby removing their security of tenure, violates the right to have access to adequate housing, protected in section 26 of the Constitution.

[2] Specifically, the case concerns the constitutional validity of sections 66(1)(a) and 67 of the Magistrates' Courts Act 32 of 1944 (the Act) which deal with the sale in execution of property in order to satisfy a debt. The appellants, Ms Maggie Jaftha (Ms Jaftha) and Ms Christina van Rooyen (Ms van Rooyen), approach this Court in terms of rule 19 of the Constitutional Court Rules, 2003 appealing against the judgment of the Cape High Court (the High Court) in the related matters of *Jaftha v Schoeman and Others* (the *Jaftha* matter) and *Van Rooyen v Stoltz and Others* (the *Van Rooyen* matter).

Factual background

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

[4] In 1998, Ms Jaftha borrowed R250 from the second respondent in the *Jaftha* matter (Ms Skaarnek), which was to be repaid in instalments. Although Ms Jaftha had paid some of the instalments, Ms Skaarnek referred the matter to the third respondent in both matters (Markotter Attorneys), the only firm of attorneys in Prince Albert, on the grounds that Ms Jaftha had not repaid her debt. Judgment was

taken against Ms Jaftha in the Prince Albert Magistrates' Court in an amount which had escalated to R632,45 including interest and costs. Thereafter, and during the course of 2000, she made a further few payments through Markotter Attorneys. However, Ms Jaftha was then hospitalised and when she returned home she discovered that her house was to be sold in a sale of execution to pay her outstanding debt to Ms Skaarnek. In March 2001 she was informed by Markotter Attorneys that she would need to pay R5 500, including accrued interest, to prevent the sale of her home. Having made two further payments to Markotter Attorneys of R300 and R200 respectively, she went to their offices in July 2001 only to discover that she would have to pay R7 000 to prevent the sale of her home. This amount was way beyond her means and Markotter Attorneys were not willing to give her another chance to pay. Ms Jaftha was forced to vacate her meagre property following its sale in execution for R5 000 on 17 August 2001 to the first respondent in the *Jaftha* matter (Mr Schoeman).

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

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

Proceedings in the High Court

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

> "Interdicting the First, Third and Fourth Respondents from evicting any of those previously disadvantaged residents of Prince Albert who have acquired ownership of immovable properties since 1994 with the assistance of state low cost housing subsidies ('the members of the class') from their homes";

and:

> "Directing the Fifth and Sixth Respondents to review all sales in execution of immovable properties in Prince Albert purchased by members of the class with the assistance of low cost housing subsidies or grants provided by the state since 1994, as well as all evictions of members of the class from such immovable properties, and to assist members of the class in instituting legal proceedings to set

> aside such evictions or sales in execution where it appears that they have taken place in violation of rights entrenched in the Bill of Rights".

[7] Mr Schoeman, having initially indicated his intention to oppose the application, subsequently withdrew it. Although Ms Skaarnek, Mr Stoltz (the first respondent in the *Van Rooyen* matter) and Ms Goliath did not formally withdraw their opposition, they did not persist in their application nor were they represented by counsel. Mr Botes, the Sheriff of Prince Albert and the fourth respondent in both matters, gave notice of his intention to abide the decision of the court. The Minister of Housing in the National Government (the fifth respondent in both matters), the Minister of Housing for the Provincial Administration of the Western Cape (the sixth respondent in both matters), the Clerk of the Magistrates' Court in Prince Albert (the seventh respondent in both matters) and the Registrar of Deeds: Cape Town (the eighth respondent in both matters) all filed notices indicating their intention to abide the decision of the High Court.

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

the High Court.

[9] Only the Minister for Justice and Constitutional Development, the ninth respondent in both matters (the Minister), opposed the applications in the High Court. Counsel for the Minister contended that once the parties had settled the non-constitutional issues in the case, there was no need for the court to decide the constitutional questions, on the basis of the principle that where a matter can be decided without reaching the constitutional issues, it is best to do so. The High Court rejected this contention and was of the view that both of the appellants had further unpaid debts and, based on the previous conduct of Markotter Attorneys, it was fair to infer that the appellants' property might be attached in the future. While the impugned provisions remained on the statute books, the appellants would always be in jeopardy of having their homes sold in a sale of execution. The question of the constitutionality of the impugned provisions was therefore deemed an independent and necessary aspect of the application.

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

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

[12] In the High Court it was common cause that if a recipient of a state housing subsidy loses ownership of the home in a sale in execution, he or she will be disqualified from obtaining other state-aided housing. It was also common cause that if the appellants had been evicted because of sales in execution, they would have had no suitable alternative accommodation. The High Court pointed to an alarming increase in the sales in execution of state-aided houses in Prince Albert and to the fact that the houses were often sold for substantially less than their value. However, according to the High Court, if the inference could be drawn that this increase is due to the procedures for execution of immovable property provided for in the Act being abused, section 66(1)(a) was not necessarily unconstitutional.

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

> "[w]hat 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."

The court held that if the sheriff issues what is termed a nulla bona return showing that insufficient movables exist to satisfy the outstanding debt, the clerk of the court is obliged, in terms of rule 36 of the Magistrates' Courts Rules, to issue and sign a warrant of execution against the immovable property of the debtor. The High Court pointed out that a warrant of execution may be set aside on application to a court by the owner of the immovable property on good cause shown. The court held that once execution takes place, the judgment debtor has two options: either he or she can vacate the premises voluntarily or can remain in occupation, even though the legal basis for occupation has terminated. If he or she chooses to vacate the premises, the effective loss of his or her home is caused by the exercise of the debtor's own free will and not by the execution process. If the judgment debtor chooses not to vacate the premises, he or she would be "holding over" and the purchaser would be required to use the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 to secure eviction. In this case, the eviction would be caused by the separate legal proceedings instituted by the new owner and not the execution process. On this reasoning, the High Court held that the loss of the right of the appellants to occupy their homes was not caused by the sale in the execution process. Although the court acknowledged that the execution process brings the ownership of the judgment debtor to an end, it held that this does not violate section 26 of the Constitution

because that section does not contain a right to ownership.

Proceedings before this Court

[14] In this Court the appellants seek the same relief as they sought in the High Court. The appellants challenge the constitutionality of section 66(1)(a) and section 67 of the Act. Section 66(1)(a) provides:

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

Section 67 reads as follows:

> "In respect of any process of execution issued out of any court the following property shall be protected from seizure and shall not be attached or sold, namely:
>
> (a) the necessary beds, bedding and wearing apparel of the execution debtor and of his family;
>
> (b) the necessary furniture (other than beds) and household utensils in so far as they do not exceed in value the amount determined by the Minister from time to time by notice in the Gazette;
>
> (c) stock, tools and agricultural implements of a farmer in so far as they do not exceed in value the amount determined by the Minister from time to time by notice in the Gazette;
>
> (d) the supply of food and drink in the house sufficient for the needs of such debtor and of his family during one month;
>
> (e) tools and implements of trade, in so far as they do not exceed in

value the amount determined by the Minister from time to time by notice in the Gazette;

(f) professional books, documents or instruments necessarily used by such debtor in his profession, in so far as they do not exceed in value the amount determined by the Minister from time to time by notice in the Gazette;

(g) such arms and ammunition as such debtor is required by law, regulation or disciplinary order to have in his possession as part of his equipment:

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

[15] It would be convenient at this point to discuss briefly the procedure by which a debt is recovered in the Magistrates' Courts. If the defendant fails to enter an appearance to defend, the plaintiff is entitled to lodge with the clerk of the court a request for default judgment. After this request has been lodged, and where the claim is for a liquidated debt, the clerk of the court, as opposed to a magistrate, enters judgment in favour of the plaintiff. Rule 36 deals with the process in execution, which occurs when the judgment in the plaintiff's favour has not been satisfied. The process of execution starts with a warrant prepared by the judgment creditor's attorney and which is issued and signed by the clerk of the court and addressed to the sheriff. The process does not need to involve the courts at all in circumstances where the original judgment was entered by consent or default but, if this is not the case, the process in execution may only be issued with leave of the court, which is sought at the same time as the granting of the judgment. Therefore,

if the judgment is entered by default because of, for example, the non-appearance of the defendant and where the debt is for a liquidated amount, the entire process occurs without any oversight by the courts. If judgment is not entered by default and is granted after a hearing, court oversight occurs only at that initial hearing because rule 36(7) provides for the application which initiates the process of execution to occur simultaneously with the granting of judgment and not at a later date.

[16] Section 66(1)(a) of the Act prescribes the process from the time a court gives judgment in favour of a creditor until the ultimate sale in execution of the debtor's immovable property. The sheriff calls at the home of the debtor and attaches movable property sufficient to settle the debt. If insufficient movables exist the sheriff issues a nulla bona return, which reflects that there is insufficient movable property to settle the debt. On the strength of the fact that no movables are found, the clerk of the court is obliged to issue a warrant of execution against the immovable property. It is for him or her to decide whether, in the light of the sheriff's nulla bona return, insufficient movables exist to satisfy the judgment. Once he or she is satisfied of this fact, it follows that the debtor's immovable property will be sold in execution.

[17] The appellants rely on the right of access to adequate housing as protected under section 26(1) of the Constitution. They argue that in terms thereof both the

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

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

[19] In response to the appellants' argument in respect of section 66(1)(a), the Minister points to sections 62 and 73 of the Act. Under section 62, a debtor may approach a court and seek, on good cause shown, that a warrant of execution be stayed or set aside. Section 73 permits a debtor to approach a court for an order

entitling him or her to pay the judgment debt in instalments. The Minister argues that the Act therefore contains built-in safeguards which serve to protect the debtor should he or she avail him or herself of these. The Minister acknowledges that indeed many people similarly situated to the appellants might not have the wherewithal to use those provisions of the Act, but the Minister argues that this fact in itself does not render the Act unconstitutional.

[20] Before the High Court, the appellants sought to rely on section 26 of the Constitution only. Before this Court, however, they seek to amplify their argument. They challenge the impugned sections on the basis that they are in conflict with the right to dignity under section 10 and the right against unlawful deprivation of property under 25(1) of the Constitution. The Minister contends that this is undesirable in that there are no special circumstances which justify this Court sitting as a court of first and final instance in relation to these rights.

[21] This Court has made it clear that any claim based on socio-economic rights must necessarily engage the right to dignity. The lack of adequate food, housing and health care is the unfortunate lot of too many people in this country and is a blight on their dignity. Each time an applicant approaches the courts claiming that his or her socio-economic rights have been infringed the right to dignity is invariably implicated. The appellants' reliance on section 10 as a self-standing right therefore does not add anything to this matter making it unnecessary to

consider the attempted amplification of their case in this regard.

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

The right to adequate housing in international law

[23] Although the concept of adequate housing was briefly discussed in *Government of the Republic of South Africa and Others v Grootboom and Others* this Court has yet to consider it in any detail. This subject has however been dealt with by the United Nations Committee on Economic, Social and Cultural Rights (the Committee) in the context of the International Covenant on Economic, Social and Cultural Rights, 1966 (the Covenant). In terms of section 39(1)(b) of the Constitution, this Court must consider international law when interpreting the Bill of Rights. Therefore, guidance may be sought from international instruments that have considered the meaning of adequate housing.

[24] Article 11(1) of the Covenant reads as follows:

> "The States Parties to the present Covenant recognize the right of everyone to an

> adequate standard of living for himself and his family, including *adequate food, clothing and housing*, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent." (Emphasis added.)

In its General Comment 4, the Committee, giving content to article 11(1) of the Covenant, emphasised the need not to give the right to housing a restrictive interpretation and to see it as "the right to live somewhere in security, peace and dignity". The position of the Committee reflects the view adopted by this Court in *Grootboom*, that the right to dignity is inherently linked with socio-economic rights. It is important, for the purposes of this case, to point to the Committee's recognition that "the concept of adequacy is particularly significant in relation to the right to housing". While acknowledging that adequacy "is determined in part by social, economic, cultural, climatic, ecological and other factors", it has identified "certain aspects of the right that must be taken into account for this purpose in any particular context." Of relevance is the focus on security of tenure. The Committee points out that security of tenure takes many forms, not just ownership, but that "all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats."

Security of tenure in our historical context

[25] The international law concept of adequate housing and its central theme of security of tenure reinforce the notion of adequate housing in section 26 as

understood in the light of our particular history of forced removals and racist evictions in South Africa. The focus on security of tenure in section 26 of the Constitution marks an intention to reject that part of our history where invasive legislation was used to remove people from their land and homes forcefully and to intimidate and harass them with senseless evictions rendering them homeless.

[26] The history of the legislative scheme under apartheid and the grave injustices perpetrated in the context of land have been dealt with in detail elsewhere. It is not necessary here to go into great detail on this subject. It is important to emphasise, however, that the need for the protection of security of tenure in section 26 must be viewed in the light of the injustices of forced removals from land and evictions from homes perpetrated in the past.

[27] The situation under apartheid demonstrates the extent to which access to adequate housing is linked to dignity and self-worth. Not only did legislation permit the summary eviction of people from their land and homes which, in many cases, had been occupied for an extremely long time, it branded as criminal anyone who was deemed to be occupying land in contravention of it. In this sense a person was made to suffer double indignity – the loss of one's home and the stigma that attaches to criminal sanction.

[28] Against this backdrop, it is important to emphasise that section 26 of the

Constitution must be read as a whole. Section 26(3) is the provision which speaks directly to the practice of forced removals and summary eviction from land and which guarantees that a person will not be evicted from his or her home or have his or her home demolished without an order of court considering all of the circumstances relevant to the particular case. The whole section, however, is aimed at creating a new dispensation in which every person has adequate housing and in which the state may not interfere with such access unless it would be justifiable to do so. The words of Mahomed J, writing with reference to the death penalty, have been quoted in many contexts. They also bear repetition here because they are particularly relevant to an analysis of the purpose of section 26:

> "All Constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future. In some countries the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic."

[29] Section 26 must be seen as making that decisive break from the past. It emphasises the importance of adequate housing and in particular security of tenure in our new constitutional democracy. The indignity suffered as a result of evictions from homes, forced removals and the relocation to land often wholly inadequate for housing needs has to be replaced with a system in which the state must strive to provide access to adequate housing for all and, where that exists, refrain from permitting people to be removed unless it can be justified.

[30] Before turning to a more detailed consideration of section 26, I emphasise that the underlying problem raised by the facts of this case is not greed, wickedness or carelessness, but poverty. What is really a welfare problem gets converted into a property one. People at the lower end of the market are quadruply vulnerable: they lack income and savings to pay for the necessities of life; they have poor prospects of raising loans, since their only asset is a state-subsidised house; the consequences of inability to pay, under the law as it stands, can be drastic because they live on the threshold of being cast back into the ranks of the homeless in informal settlements, with little chance of escape; and they can easily find themselves at the mercy of conscienceless persons ready to abuse the law for purely selfish gain.

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

[31] In all the socio-economic rights cases previously dealt with in this Court, the applicants approached the Court claiming a positive obligation on the part of the

state to provide access to the socio-economic rights in the Constitution. In some of those cases this Court made reference to the negative aspect of socio-economic rights without considering it in any detail. In this matter, however, the appellants, in their claim, distinguish between the positive and the negative aspects of the right to housing. They argue that it is the negative aspect of the right which has been violated. Relying on the decision of this Court in *Grootboom*, the appellants contend that the negative obligation under section 26 is not to prevent or impair existing access to adequate housing and while the positive obligations fall only on the state, the negative obligation applies to everyone, including private persons. The appellants argue that the positive obligations are clearly subject to progressive realisation but that it would make no sense to say the same of the negative ones. In this case the appellants already have their homes and the state has a duty to protect their right of access to adequate housing. The availability of state resources is not an issue.

[32] In rejecting the contention that there is a negative aspect to the rights in section 26, the High Court held that section 26(1) "does not give rise to a self-standing and independent right irrespective of the considerations enumerated in section 26(2)." As authority for this proposition, the High Court cited the remarks made by this Court in *Minister of Health and Others v Treatment Action Campaign and Others* where the following was said:

"We therefore conclude that section 27(1) of the Constitution does not give rise to

> a self-standing and *independent positive right* enforceable irrespective of the considerations mentioned in section 27(2). Sections 27(1) and 27(2) must be read together as defining the scope of the *positive rights* that everyone has and the corresponding obligations on the state to "respect, protect, promote and fulfil" such rights. The rights conferred by sections 26(1) and 27(1) are to have "access" to the services that the State is obliged to provide in terms of sections 26 (2) and 27(2)." (Emphasis added.)

The appellants seek to distinguish this reasoning on the grounds that the Court was considering the question whether an "independent positive right" existed. The Court's reasoning there, according to the appellants, cannot be used for authority that there is no negative obligation under section 26(1).

[33] The appellants are indeed correct. The interpretation adopted by the High Court fails to take cognisance of this Court's various statements that there is a negative content to socio-economic rights.

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

Limitation analysis

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

[36] Section 36(1) reads:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that 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—
>
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

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

[37] In the present matter, the Minister, while not conceding that the impugned

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

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

[39] The importance of access to adequate housing and its link to the inherent

dignity of a person, has been well emphasised by this Court. In the present matter access to adequate housing already exists. Relative to homelessness, to have a home one calls one's own, even under the most basic circumstances, can be a most empowering and dignifying human experience. The impugned provisions have the potential of undermining that experience. The provisions take indigent people who have already benefited from housing subsidies and, worse than placing them at the back of the queue to benefit again from such subsidies in the future, put them in a position where they might never again acquire such assistance, without which they may be rendered homeless and never able to restore the conditions for human dignity. Section 66(1)(a) is therefore a severe limitation of an important right.

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

who use the execution process, it constitutes the only mechanism to recover outstanding debts.

[41] Another difficulty is that there may be other factors which militate against a finding that execution is unjustifiable. Such factors will vary according to the facts of each case. It might be that the debtor incurred debts despite the knowledge of his or her inability to repay the money and was reckless as to the consequences of incurring the debt. While it will ordinarily be unjustifiable for a person to be rendered homeless where a small amount of money is owed, and where there are other ways for the creditor to recover the money lent, this will not be the case in every execution of this nature.

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

[43] However, it is clear that there will be circumstances in which it will be unjustifiable to allow execution. The severe impact that the execution process can have on indigent debtors has already been described. There will be many instances

where execution will be unjustifiable because the advantage that attaches to a creditor who seeks execution will be far outweighed by the immense prejudice and hardship caused to the debtor. Besides, the facts of this case also demonstrate the potential of the section 66(1)(a) process to be abused by unscrupulous people who take advantage of the lack of knowledge and information of debtors similarly situated to the appellants. Execution in these circumstances will also be unjustifiable.

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

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

[46] A further matter must be addressed. The Minister has argued that section 66 (1)(a) is not unconstitutional because it is part of the scheme of the Act, which must

be assessed as a whole. She points to sections 62 and 73 of the Act and argues that these provisions provide sufficient protection for debtors who wish to avoid the sale of their homes in execution.

[47] The crux of section 62, for the purposes of this case, is that it allows a court to set aside or stay a warrant of execution that it has issued on good cause shown. This, however, places a burden on a debtor whose home has been subject to a warrant of execution to approach a court and show good cause why the warrant ought to be set aside. This being the case, the problem with the Minister's argument is that it overlooks the fact that many debtors in the position of the appellants are unaware of the protection offered by this section. Even where there is awareness, it would generally be difficult for indigent people in the position of the appellants to approach a court to claim protection. They are a vulnerable group whose indigence and lack of knowledge prevents them from taking steps to stop the sales in execution, as is demonstrated by the facts of this case.

[48] The Minister argues that the practical difficulties that accompany the use of a legislative scheme cannot render that scheme unconstitutional. This might be so in many cases. In this case, however, it is clear that section 66(1)(a) is so broad that it permits sales in execution to occur without judicial intervention and even where they are unjustifiable. The fact that a permissive measure which must be invoked by the debtor exists does not change the potentially unjustified executions that

may occur when the process envisaged by section 66(1)(a) is initiated by creditors. So long as the possibility exists within the legislative scheme for sales in execution to occur in circumstances where debtors' rights have been unjustifiably violated, the scheme is overbroad.

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

Section 67 of the Act

[50] As part of their challenge, the appellants argue that section 67 of the Act is also unconstitutional. Their argument is that the section protects certain assets belonging to a debtor from execution because it is recognised that they constitute necessities without which it would be unduly difficult for the debtor to survive. While supporting the protection afforded to those assets, the appellants argue that the section is unconstitutional to the extent that it fails to provide similar protection to the homes of debtors, which also constitute necessities. The argument is that the right of access to housing is constitutionally protected and the impugned

provisions ought to protect the homes of debtors in circumstances where the loss of a home will render the debtor permanently homeless. To remedy this defect, the appellants contend that words should be read into section 67 to prohibit sales in execution against houses below a particular minimum value.

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

Remedy

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

favour of the creditor justify the sales in execution. I now turn to the appropriate remedy.

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

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

before a magistrate, the entire process from attempted execution against movables until the final stage of the sale in execution against the immovable property of the debtor is administered by various officers of the court and the sheriff. It was the appellants' contention that an appropriate remedy would require that once insufficient movable property to satisfy the debt has been found a creditor should approach a court to request execution against the immovable property of the debtor. It would then be for the court to order execution and only if the circumstances of the case make it appropriate.

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

[56] It would be unwise to set out all the facts that would be relevant to the exercise of judicial oversight. However, some guidance must be provided. If the

procedure prescribed by the rules is not complied with, a sale in execution cannot be authorised. If there are other reasonable ways in which the debt can be paid an order permitting a sale in execution will ordinarily be undesirable. If the requirements of the rules have been complied with and if there is no other reasonable way by which the debt may be satisfied, an order authorising the sale in execution may ordinarily be appropriate unless the ordering of that sale in the circumstances of the case would be grossly disproportionate. This would be so if the interests of the judgment creditor in obtaining payment are significantly less than the interests of the judgment debtor in security of tenure in his or her home, particularly if the sale of the home is likely to render the judgment debtor and his or her family completely homeless.

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

[58] Another factor of great importance will be the circumstances in which the

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

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

[60] In summing up, factors that a court might consider, but to which a court is not limited, are: the circumstances in which the debt was incurred; any attempts

made by the debtor to pay off the debt; the financial situation of the parties; the amount of the debt; whether the debtor is employed or has a source of income to pay off the debt and any other factor relevant to the particular facts of the case before the court.

Reading in

[61] Once the Court has found constitutional inconsistency, it must declare invalidity to the extent of the inconsistency. As this Court held in *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others*, "[w]hen courts consider a remedy following a declaration of invalidity of a statute, the question of remedial precision, which relates directly to respect for the role of the legislature, is an important consideration." I have held that section 66(1)(a) is unconstitutional only to the extent that it allows for sales in execution in unjustifiable circumstances and without judicial intervention. I have held further that the most appropriate way to remedy this over-breadth is to provide for judicial oversight at the point of sale in execution against the immovable property. What remains is to determine the most precise remedy to match the limited unconstitutionality of the provision.

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

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

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

[63] The Minister has argued that an appropriate remedy would be to suspend the order of invalidity so as to allow the legislature to correct the defect in section 66 (1)(a). It would, however, not be in the interests of justice and good governance to strike down the impugned section and suspend the order of invalidity. Other than to provide for judicial oversight, the options of the legislature would be limited. Reading the remedying words into section 66(1)(a) of the Act is in my view more appropriate.

[64] The most precise way to remedy the lack of judicial oversight over the process is to add the phrase "a court, after consideration of all relevant circumstances, may order execution" so that it applies to sales in execution over immovable property where insufficient movables have been found to satisfy the judgment or order. Section 66(1)(a) will then read 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 *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." (Emphasis added.)

Once this addition has been made the process of obtaining a judgment and execution against movables will remain the same. However, once the sheriff has issued a nulla bona return indicating that insufficient movables exist to discharge the debt, the creditor will need to approach a court to seek an order permitting execution against the immovable property of the judgment debtor. The court will decide whether or not to order such execution having considered all relevant circumstances.

The conduct of Markotter Attorneys

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

Costs

[66] In the original matter before the High Court the appellants did not challenge the constitutionality of the sections of the Act and, as such, did not join the Minister in the proceedings. After Ms Van Rooyen amended her notice of motion she sought to join the Minister and the proceedings were postponed. In oral argument before this Court counsel for the appellants correctly conceded that it would only be appropriate, should they be successful, to order costs in favour of the appellants in respect of the main application from the 13 February 2002, as well as the costs of the application for joinder. Therefore, since the appellants have successfully prosecuted an important constitutional claim, they are entitled to their costs from the 13 February 2002, as well as the costs of the application for joinder.

The order

[67] The following order is made:

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

    1.1 The failure to provide judicial oversight over sales in execution against immovable property of judgment debtors in section 66(1)(a) of the Magistrates' Courts Act 32 of 1944 is declared to be unconstitutional and invalid.

    1.2 To remedy the defect section 66(1)(a) of the Magistrates' Courts Act 32 of 1944 is to be read as though the words "a court, after consideration of all relevant circumstances, may order execution" appear before the words "against the immovable property of the party".

2. The Registrar of this Court shall forward a copy of this judgment to the Law Society of the Cape of Good Hope.

3. The ninth respondent is ordered to pay the appellants' costs in the main application from 13 February 2002, as well as the costs of the application for joinder. Such costs shall include the costs of two counsel.

Chaskalson CJ, Langa DCJ, Moseneke J, Ngcobo J, O'Regan J, Sachs J, Skweyiya J,

Van der Westhuizen J and Yacoob J concur in the judgment of Mokgoro J.

For the appellants: G Marcus SC, P Hathorn and K Pillay instructed by M L Walton (Cape Town) & Legal Resources Centre (Cape Town).

For the ninth respondent: I Jamie SC and N Bawa instructed by the State Attorney (Cape Town).