IN THE HIGH COURT OF SOUTH AFRICA
CAPE OF GOOD HOPE PROVINCIAL DIVISION

In the matters between

The Standard Bank of S A Limited Plaintiff

and

Elizabeth Snyders Defendant in case no 10067/04

Rudiger Marshall Saunderson Defendant in case no 646/05

Selwyn Lester Losper 1st defendant in case no 1473/05

Alida Wendy Losper 2nd defendant in case no 1473/05

Richmond Heerenhuis CC 1st defendant in case no 1476/05

Louis Jacobus Botha 2nd defendant in case no 1476/05

George Schlunz Ballot 3rd defendant in case no 1476/05

Allistair Sean Bergstedt Defendant in case no 2019/05

Molotov Johnson 1st defendant in case no 2383/05

Anna Martha Johnson 2nd defendant in case no 2383/05

Henry Trevor Adonis 1st defendant in case no 2560/05

Carol Ann Adonis 2nd defendant in case no

2560/05

Mogamat Zain van der Vent Defendant in case no 3607/05
Ruth Coffee Defendant in case no 642/05

JUDGMENT DELIVERED ON 21 JULY 2005

BLIGNAULT J:

[1] The decision of the Constitutional Court in *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) ("the *Jaftha* judgment") has wide implications with regard to the sales in execution of judgment debtors' homes. The present judgment is concerned with its effect on claims, as part of applications for default or summary judgments, for orders that specific immovable property be declared executable.

[2] Plaintiff in all nine matters is The Standard Bank of South Africa Limited, a public company registered as a bank in terms of the Banks Act 94 of 1990. Each of the defendants in these matters was sued by plaintiff for payment of a sum of money, said to be the balance due in respect of monies lent and advanced, plus interest thereon. The debt due to plaintiff is in each case secured by a mortgage bond registered over immovable property of the defendant in question. A copy of the mortgage bond is annexed to the summons. In each case plaintiff seeks, in addition to its monetary claims, an order declaring the immovable property executable for the sums claimed by it.

[3] In all these cases the summons was duly served upon the defendant. In eight of the cases the defendant did not deliver any notice of intention to defend the matter. In some of the cases plaintiff filed a written application with the registrar for default judgment in terms of rule 31(5)(a) of the Uniform Rules ("the rules"). In the light of the decision of the Constitutional Court in the *Jaftha* matter, however, the registrar took up the attitude that she did not have the power to grant an order declaring immovable property to be executable. Plaintiff accordingly enrolled the eight matters in this court as unopposed applications for default judgment. In the case of Ms Coffee (no 642/05), she filed a notice of intention to defend the matter. Plaintiff brought an application for summary judgment against her and this was set down for hearing on the same day as the other eight cases.

[4] In view of the uncertainty created by the *Jaftha* decision all these matters were set down together for full argument on 18 July 2005. Mr Burger appeared with Mr Sievers for plaintiff. Mr Katz, together with Mr Borgström, appeared as *amici curiae* for all the defendants. The Court wishes to express its appreciation to counsel for their assistance.

The Jaftha judgment

[5] In the *Jaftha* case the Constitutional Court was concerned with the constitutionality, in the light of section 26 of the Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution"), of the execution procedures in the magistrates' courts which allowed the sales in execution of the debtors' residential properties. Section 26 of the Constitution reads as

follows:

> "***26 Housing***
>
> *(1) Everyone has the right to have access to adequate housing.*
>
> *(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.*
>
> *(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."*

[6] The Constitutional Court held that a sale in execution of residential immovable property was subject to the provisions of section 26 of the Constitution and that the failure to provide, in section 66(1)(a) of the Magistrates' Courts Act 32 of 1944, for judicial oversight over sales in execution of immovable residential properties of judgment debtors, was unconstitutional and invalid. To remedy this defect section 66(1)(a) of the Magistrates' Courts Act has 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."*

[7] Counsel for plaintiff and the *amici curiae* were agreed that the decision in the *Jaftha* case does have implications for the kind of relief that is being sought in the present cases. As all the loans in question were advanced by plaintiff's home loans office, it appears safe to assume that the immovable properties in question are the homes of the debtors concerned. An order that such immovable property be declared executable, would be subject to the provisions of section 26(3) of the Constitution. Only a court, and not the registrar, would therefore have the power to grant such an order.

Applications for default judgment

[8] I propose to deal first with the applications for default judgment. The *amici curiae* advanced two main grounds for submitting that the court should refuse the orders sought by

plaintiff. The first is that the court has no power in terms of rule 31, as presently worded, to grant the relief sought by plaintiff. The second ground is that there should have been some kind of notification to the defendants of their rights in terms of section 26 of the Constitution.

The powers of the court under rule 31

[9] I proceed to consider whether the court has the power under rule 31 to grant an order declaring immovable property to be executable. The relevant provisions of rule 31 are set out hereunder (sub-rule 31(1) deals with judgment on confession and is not presently relevant):

> "***31 Judgment …by Default***
>
> *(1)… …*
>
> *(2) (a) Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff*

may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as to it seems meet.

(b) A defendant may within 20 days after he has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet.

(3) Where a plaintiff has been barred from delivering a declaration the defendant may set the action down as provided in subrule (4) and apply for absolution from the instance or, after adducing evidence, for judgment, and the court may make such order thereon as to it seems meet.

(4) The proceedings referred to in subrules (2) and (3) shall be set down for hearing upon not less than five days' notice to the party in default: Provided that no notice of set down need be given to any party in default of delivery of notice of intention to defend.

(5) (a) Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the

plaintiff, if he or she wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the registrar a written application for judgment against such defendant: Provided that when a defendant is in default of delivery of a plea, the plaintiff shall give such defendant not less than 5 days' notice of his or her intention to apply for default judgment.

(b) The registrar may-

i) grant judgment as requested;

ii) grant judgment for part of the claim only or on amended terms;

(iii) refuse judgment wholly or in part;

(iv) postpone the application for judgment on such terms as he may consider just;

v) request or receive oral or written submissions;

(vi) require that the matter be set down for hearing in open court.

(c) The registrar shall record any judgment granted or direction given by him.

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

[10] The *amici curiae* did not dispute that a claim for an order that immovable property be declared executable, is one for "*a debt or liquidated demand"* within the meaning of rule 31(5)(a). I agree in this regard with the following statement of Howard JP in *Entabeni Hospital Ltd v Van der Linde; First National Bank of SA Ltd v Puckriah* 1994 (2) SA 422 (N) at 424H-I:

> "*In any event, even if the prayer for a declaration of executability*

is to be regarded as a separate claim, it seems clear that, like a claim for transfer of immovable property or for ejectment, it is a claim for a liquidated demand (see Clayton v Pullen 3 EDC 231; Van der Hoven v Potgieter 1928 TPD 724; Fred and Another v Keelan 1951 SR 7; Morris v Stern 1970 (1) SA 246 (R) at 247).”

[11] The argument advanced by the *amici curiae* is that sub-rule 31(5) cannot be employed in the present circumstances as the registrar does not have the power to grant the relief sought by plaintiff. According to their argument rule 31 does not contain any other provision authorising a court to grant this kind of relief, nor for that matter does any other rule. Unless rule 31(5) is therefore declared to be invalid and certain provisions are read into it, the court would not have the power to grant the relief sought by plaintiff.

[12] In my view, however, it is not necessary to declare rule 31 or any part thereof invalid. All that is required is that it be interpreted in a practical and sensible manner. The following passage in Van Winsen *et al Herbstein & Van Winsen: The Civil Practice of the Supreme Court of South Africa* (1997) at 33 has often been cited by the courts. It reflects an eminently reasonable approach:

> "*The rules of court, which constitute the procedural machinery of the courts, are intended to expedite the business of the courts. Consequently, they will be interpreted and applied in a spirit which will facilitate the work of the Courts and enable litigants to resolve their differences in as speedy and inexpensive a manner as possible."*

[13] It appears from the provisions of sub-rule 31(5)(b)(vi) that the lawmaker had no intention to exclude the court from dealing with applications of this kind. The registrar has a seemingly unfettered discretion in terms of this sub-rule to refer matters of this nature to the court and the court is obviously empowered to deal with them. The only question then is whether a referral of an application to the registrar is to be regarded as a pre-requisite for a creditor's approach to the court. In my view it is clearly not. A prior referral to the registrar of a case where the registrar does not have the power to deal with it, would serve no purpose at all. In fact the rather absurd result would follow that a creditor would be forced to approach the registrar, knowing full well that the registrar will be obliged to refer the matter to the court. The costs of this unnecessary exercise would then presumably be added to the bill

for which the debtor will ultimately be liable. It would certainly not assist the debtor's financial ability to hold on to his home.

[14] I am aware that Spoelstra J, in *Erf 1382 Sunnyside (Edms) Bpk v Die Chipi BK* 1995 (3) SA 659 (T), decided that in cases falling within the ambit of rule 31(5), the registrar should be approached first before the matter is enrolled in the High Court. The question of the proper construction of rule 31, however, was apparently not argued before him. To the extent that this decision is in conflict with my own views expressed above, I must respectfully disagree with it.

[15] On the first issue raised by the *amici curiae,* I conclude therefore that this court does have the power in terms of rule 31 to deal with the present applications for default judgment.

Notification to defendants

[16] The second main issue is whether the defendants should not have been notified of their rights under section 26(3) of the Constitution. It is common cause that the summons makes no reference to this provision or its terms.

[17] Counsel for plaintiff submitted that the summons in each case contained sufficient averments to justify the relief sought by it. They pointed out that the mortgage bonds in question contain a specific clause in terms of which the debtor agrees that his property may be declared executable in the event of foreclosure by plaintiff. In the *Jaftha* case the Constitutional Court provided guidelines in regard to the factors that would be relevant in the exercise of the court's discretion. These were summarised in para [60] of the judgment, at 163A-B:

> "*[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."*

Counsel for plaintiff drew particular attention to the following remarks, in para [58] of the judgment, at 162E-F:

> "*[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."

[18] Counsel for plaintiff argued further that plaintiff would not have any knowledge of all the personal circumstances of the debtor. In this regard they drew attention to the judgment of the Supreme Court of Appeal in *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA). That case dealt with ejectment and the following remarks, at 124EF, they submitted, also apply to the present cases:

"*[19] Another material consideration is that of the evidential onus. Provided the procedural requirements have been met, the owner is entitled to approach the court on the basis of ownership and the respondent's unlawful occupation. Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction. Relevant circumstances are nearly without fail facts within the*

> *exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties. Whether the ultimate onus will be on the owner or the occupier we need not now decide."*

[19] I am inclined to agree with plaintiff's counsel that the facts referred to in the summons would probably, in the absence of opposition, be sufficient to enable a court to grant the relief sought. The question, however, remains: Should there not have been at least a reference to section 26 of the Constitution in the summons? In considering this issue it seems to me that it is important that the relief sought by plaintiff, namely a declaration that particular immovable property be declared executable, has, as a consequence of the applicability of section 26(3) of the Constitution, acquired a significance which is very different from what it had before.

[20) The effect of such an order, before the advent of the Constitution, was simply of a procedural nature. It allowed a judgment creditor to execute against the immovable property of the debtor without first having to execute against his movable property.

In *Ledlie v Erf 2235 Somerset West (Pty) Ltd* 1992 (4) SA 600 (C) Conradie J, at 601G-H, described it as follows:

> "*It is clear from a long-standing practice in the Supreme and in the magistrates' courts that hypothecation of immovable property as security entitles a creditor to have such immovable property declared executable. In such a case a creditor proceeds immediately to satisfy his judgment out of the proceeds of the property which had been hypothecated to him for that very purpose. Colonial Mutual Life Assurance Society Ltd v Tilsim Investments (Pty) Ltd 1952 (4) SA 134 (C) at 135C. It is also clear that a Court may declare immovable property executable if it has been shown to the satisfaction of the Court that the debtor does not have sufficient movable property to satisfy the writ. Cape Town Town Council v Estate Jaliel 1911 CPD 11; Lansdowne Concrete, Etc, Co v Davids 1927 CPD 132; Dorasamy v Messenger of the Court, Pinetown, and Others 1956 (4) SA 286 (D) at 290C-F."*

[21] In *First National Bank of SA Ltd v Ngcobo* 1993 (3) SA 490 (D) Didcott J dealt with an application for summary judgment. At 492D he said that the prayer of the plaintiff for a declaration of executability:

> "…*did not amount in the true sense to a claim of any kind. It was*

merely a request for a direction with regard to the execution of the judgment claimed summarily and simultaneously, and in essence ancillary to the claim for such."

See also *Entabeni Hospital Ltd v Van der Linde; First National Bank of SA Ltd v Puckriah, supra,* at 424G-H, where this line of reasoning was followed.

[22] Under section 26 of the Constitution, as interpreted in the *Jaftha* judgment, the remedy in question has now acquired a very different significance. It is no longer simply a matter of procedural law. In effect section 26(3) of the Constitution has introduced a pre-requisite for the granting of such an order, namely that the court must consider all relevant circumstances. This created important rights for defaulting debtors.

[23] I revert then to the question whether plaintiff should not have referred expressly in the summons to the provisions of section 26 of the Constitution. It seems to me that this issue can be resolved in terms of the general principles relating to pleading. The purpose of pleadings, it has been said, is to define the issues with

precision, not only for the benefit of the opposite party, but also for the court. See *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107C - E:

"*At the outset it need hardly be stressed that:*

> *"The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed."*
> *(Durbach v Fairway Hotel Ltd 1949 (3) SA 1081 (SR) at 1082.)*

This fundamental principle is similarly stressed in Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice 22nd ed at 113:

> *"The object of pleading is to ascertain definitely what is the question at issue between the parties; and this object can only be attained when each party states his case with precision."*"

There is also a rule of pleading that a party who wishes to rely upon a statute must indicate this with clarity in his pleading. It has been said that a pleader need not cite the name and number of the statute in question provided he makes it clear what he is relying upon. In *Fundstrust (Pty) Ltd (in Liquidation) v Van Deventer* 1997 (1) SA 710 (A), for example, the court referred, at 725H – I, with

approval to the following passage:

> "*It is not necessary in a pleading, even where the pleader relies on a particular statute or section of a statute, for him to refer in terms to it provided that he formulates his case clearly (see Ketteringham v City of Cape Town 1934 AD 80 at 90) or, put differently, it is sufficient if the facts are pleaded from which the conclusion can be drawn that the provisions of the statute apply (see Price v Price 1946 CPD 59; Wasmuth v Jacobs 1987 (3) SA 629 (SWA) at 634I). In my view, the plaintiff has pleaded all the factual allegations so as to justify reliance on 53(b).*"

See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism* 2004 (4) SA 490 (CC) at 507C-D.

[24] In the present case plaintiff must comply with a requirement that is contained in a statutory provision, namely section 26(3) of the Constitution. Without express reference in the summons to section 26 of the Constitution the defendant will probably not know about section 26 or the protection that he enjoys in terms thereof. It seems to me therefore that in order to comply with the ordinary principles of pleading, plaintiff's summons should contain a suitable allegation to the effect that the facts alleged by it (which

should be identified) are sufficient to justify an order in terms of section 26(3) of the Constitution.

[25] As presently formulated plaintiff's summons in each of these matters lacks this essential allegation. Plaintiff's prayers for orders permitting execution against the immovable properties of the defendants can accordingly not succeed.

Summary judgment

[26] The one application for summary judgment remains to be dealt with. The general considerations mentioned above would apply with equal force to summary judgment applications. There is, furthermore, an additional complication. Although, strictly speaking, it is not necessary to deal with it, I shall do so briefly. Rule 32(1) differs from rule 31(5) in regard to the description of the claims falling within its ambit. It provides as follows:

> "*(1) Where the defendant has delivered notice of intention to defend, the plaintiff may apply to court for summary judgment on each of such claims in the summons as is only-*
>
> *(a) on a liquid document;*
>
> *(b) for a liquidated amount in money;*
>
> *(c) for delivery of specified movable property; or*

(d) for ejectment;

together with any claim for interest and costs."

[27] Counsel for plaintiff relied firstly upon the decision of Didcott J in *First National Bank of SA Ltd v Ngcobo, supra.* I have pointed out above, however, that Didcott J regarded a claim for an order declaring immovable property executable, as a request which was procedural in nature. In the light of section 26(3) of the Constitution the order sought in these cases is substantive in its effect.

[28] Counsel for plaintiff submitted in the alternative that the mortgage bond in question could be regarded as a liquid document. The difficulty in this regard is that the definition of liquid document appears to be narrower than *"debt or liquidated demand".* Courts appear to have been reluctant to regard claims which are not for a fixed and determinate sum of money, as adjunct claims arising out of liquidated documents. See Van Winsen *et al, op cit,* at 964-965.

[29] It seems to me, however, that the matter can be approached on a different basis. A creditor can apply by way of summary judgment for *"ejectment"*. A claim for an order declaring specific immovable property executable is akin to ejectment. It is indeed as a result of this similarity that the Constitutional Court decided that claims for execution against immovable property are subject to section 26(3) of the Constitution. Construing rule 32(1)(d) in a practical and sensible manner (see para [12] above), it seems to me that a creditor would be entitled to apply for summary judgment for an order that immovable property be declared executable.

Conclusion

[30] Plaintiff's claims for the right to execute against the immovable properties of the defendants are accordingly dismissed. There is, however, no reason why default judgment (or, in the one case, summary judgment) for the monetary claims of plaintiff against the various defendants and for costs should not be granted. I also grant leave to plaintiff to apply again, in each of these cases, on amplified papers and after notice to the defendant concerned, for an order permitting execution against the immovable property of the defendant.

[31] In the result, I grant the following orders in favour of plaintiff:

1. In **case no 10067/04**, against defendant Elizabeth Snyders:
   (a) Payment of the amount of R56 200,84;
   (b) Interest on that amount at the rate of 11.50% *per annum*

from 1 November 2004, such interest to be capitalised monthly in arrear;

(c) Costs of suit (on an unopposed basis) on the attorney and client scale.

2. In **case no 646/05**, against defendant Rudiger Marshall Saunderson:

(a) Payment of the amount of R652 477,90;

(b) Interest on the amount claimed as follows:

i) on R520 000,00 at the rate of 9,30% *per annum;*

ii) on the balance at the rate of 10,80% *per annum;*

such interest to be calculated from 1 January 2005 and capitalised monthly in arrear;

(c) Costs of suit (on an unopposed basis) on the attorney and client scale.

3. In **case no 1473/05**, against defendants Selwyn Lester Losper and Alida Wendy Losper, jointly and severally:

(a) Payment of the amount of R104 556,64;

(b) Interest on that amount at the rate of 11,00% *per annum* from 1 February 2005, such interest to be capitalised monthly in arrear;

(c) Costs of suit (on an unopposed basis) on the attorney and client scale.

4. In **case no 1476/05**, against defendants Richmond Heerenhuis CC, Louis Jacobus Botha and George Schlunz Ballot, jointly and severally:

   (a) Payment of the amount of R59 039,92;

   (b) Interest on that amount at the rate of 11,00% *per annum* from 14 January 2005, such interest to be capitalised monthly in arrear;

   (c) Costs of suit (on an unopposed basis) on the attorney and client scale.

5. In **case no 2019/05**, against defendant Allistair Sean Bergstedt:

   (a) Payment of the amount of R97 901,29;

   (b) Interest on that amount at the rate of 11,00% *per annum* from 1 January 2005, such interest to be capitalised monthly in arrear;

   (c) Costs of suit (on an unopposed basis) on the attorney and client scale.

6. In **case no 2383/05**, against defendants Molotov Johnson and Anna Martha Johnson, jointly and severally:

   (a) Payment of the amount of R82 998,68;

   (b) Interest on the amount claimed as follows:

      (i) on R80 352,00 at the rate of 10,25% *per annum*;

   (ii) on the balance at the rate of 11,75% *per annum;*

   such interest to be calculated from 1 February 2005 and capitalised monthly in arrear;

(c) Costs of suit (on an unopposed basis) on the attorney and client scale.

7. In **case no 2650/05**, against defendants Henry Trevor Adonis and Carol Ann Adonis, jointly and severally:

(a) Payment of the amount of R272 796,68;

(b) Interest on the amount claimed as follows:

(ii) on R65 000,00 at the rate of 4,5% *per annum*;

(ii) on the balance at the rate of 8,5% *per annum*;
such interest to be calculated from 1 March 2005 and capitalised monthly in arrear;

(c) Costs of suit (on an unopposed basis) on the attorney and client scale.

8. In **case no 3607/05**, against defendant Mogamat Zain van der Vent:

(a) Payment of the amount of R200 669,88;

(b) Interest on the amount claimed as follows:

(i) on R152 000,00 at the rate of 10,55% *per annum*;

(ii) on the balance at the rate of 12,00% *per annum;*
such interest to be calculated from 1 April 2005 and capitalised monthly in arrear;

(c) Costs of suit (on an unopposed basis) on the attorney and client scale.

9. In **case no 642/05**, against defendant Ruth Coffee, summary judgment for:

(a) Payment of the amount of R284 735,65;

(b) Interest on that amount at the rate of 11,00% *per annum*

from 1 January 2005, such interest to be capitalised monthly in arrear;

(c) Costs of suit (on an unopposed basis) on the attorney and client scale.

A P BLIGNAULT