THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

CASE NO: 604/06

Reportable

In the matter between:

DESMOND MENQA First Appellant
OWEN PETER ROUX Second Appellant

and

PATRICK MARKOM Respondents
and 7 Others

Coram**:** Scott, Cloete, Van Heerden, Jafta JJA et Kgomo AJA

Heard: 5 November 2007

Delivered: 30 November 2007

Summary: ***Sale in execution of residential property – s 66(1)(a) of Magistrates' Courts' Act 32 of 1944 – warrant of execution invalid as issued by clerk of magistrate's court without judicial oversight as required by Jaftha v Schoeman; Van Rooyen v Stoltz 2005 (2) SA 140 (CC) – sale in execution also invalid and not saved by s 70 of Act 32 of 1944 – sale in execution and all subsequent sales of property declared null and void – appropriate remedy***

Neutral citation: This judgment may be referred to as *Menqa & Another v Markom & Others* [2007] SCA 172 (RSA)

VAN HEERDEN JA:

Introduction

[1] This is an appeal against a judgment and order of the Cape High Court (Zondi AJ) confirming a rule *nisi* in terms of which, inter alia, the sale in execution of a certain residential property, namely erf 23584 Maitland, situated at 17 Camden Street, Maitland ('the property'), as well as all subsequent sales of the property, were declared to be null and void. The first respondent in this appeal – which is before us with the leave of the court a quo – was the applicant in the court a quo, while the first and second appellants were cited as the first and second respondents. For the sake of convenience, I shall refer to the parties either by their names or by their respective designations in the court below.

[2] The applicant, Mr Patrick Markom ('Markom'), bought the property from a deceased estate during 1995 for R120 000. It was occupied at the time by the sixth respondent, Mr Jules Tromp ('Tromp'), in terms of a lease with the previous owner. The executor of the deceased estate terminated the lease and gave Tromp notice to vacate the property by 1 June 2005, which the latter failed to do. On 4 June 1995, during a visit to the property by Markom, a scuffle broke out between him and Tromp which gave rise to a claim for damages for personal injury instituted by Tromp against Markom during September 1996. This culminated, on 19 November 1999, in a default judgment being granted by the magistrate's court against Markom for an amount of R98 665.45 together with interest and costs. It is that judgment which formed the basis of the sale in execution which is in issue in these proceedings.

[3] According to Markom, who had in the interim taken transfer of the property, he only became aware of the default judgment some four years later, when a notice was served at the property on Thursday 13 November 2003, notifying him of a sale in execution of the property scheduled for Monday 17 November 2003. Markom moved into the property some time before it was registered in his name and, since then, has been residing there with his family.

[4] On the morning of 17 November, Markom applied for and obtained, on an urgent basis, an interim order staying the sale in execution of the property, pending an application for rescission of the default judgment to be brought by him within ten days. By the time this interim order was received by the sheriff, the sale in execution had already taken place. The second respondent, Mr Owen Roux ('Roux'), bid for the property and signed the conditions of sale on behalf of the first respondent, Mr Desmond Menqa ('Menqa'). The selling price was R110 000.

[5] On 1 December 2003 Markom launched an application for rescission of the default judgment granted against him. The application was set down for hearing in the magistrate's court on 19 January 2004, but was dismissed on that date because of the non-appearance of either Markom or his attorney. On 29 February 2004 Markom gave notice of an appeal to the Cape High Court against the order dismissing his rescission application. He subsequently withdrew this appeal on 27 August 2004, on which date he applied for rescission of the judgment dismissing his first application for rescission. This second application was dismissed during November 2004 and written reasons for this order were furnished on 18 August 2005. On 9 September Markom, still not discouraged and now acting in person, noted an appeal to the Cape High Court against the dismissal of his second application. This appeal was set down for hearing on 25 November 2005. On that date, it was postponed *sine die* in order for *pro bono* counsel to be appointed to represent him.

[6] In the meantime, on 7 September 2005, the property was transferred to Menqa and the bond over the property in favour of Nedbank was cancelled.[1] Menqa paid the full purchase price of R110 000, plus interest in the amount of R22 941.78. In addition he paid arrear rates on the property in the amount of R1 812.24 and legal costs of R6 475.32. The total amount paid by

[1] In his answering affidavit filed in the court below, Menqa denied having any knowledge of the events preceding the sale in execution, as set out in para 4 above.

him was thus R141 229.32. The purchase price plus interest was paid over to the sheriff who in turn paid R103 331.33 to Nedbank to settle the bond over the property and R26 610.45 to Tromp's attorneys. On 6 December 2005, Menqa sold the property to Roux for the sum of R490 000. At the time of the institution of the proceedings in the court below, the transfer of the property to Roux was still pending and it was this transfer that Markom sought to interdict.

Judgment of the Cape High Court

[7] In consequence of the judgment of the Constitutional Court in *Jaftha v Schoeman & Others; Van Rooyen v Stoltz & Others*,[2] the court a quo held that the sale in execution was invalid as the warrant of execution pursuant to which the sale had taken place had been issued by the clerk of the magistrate's court, without judicial supervision as required by the provisions of s 66(1)*(a)* of the Magistrates' Courts Act 32 of 1944 ('the Act').[3]

[8] The Consitutional Court in *Jaftha* declared s 66(1)*(a)* of the Act (as it then read) to be 'unconstitutional and invalid' in that it failed to provide for judicial oversight over sales in execution of the immovable property of judgment debtors. In her judgment, Mokgoro J (writing for a unanimous court) held that the section constituted an unreasonable and unjustifiable limitation of the fundamental right of access to adequate housing protected by s 26(1) of the Constitution:

> 'I have held that s 66(1)*(a)* of the Act is over-broad and constitutes a violation of s 26(1) of the Constitution to the extent that it allows execution against the homes[4] of indigent debtors, where they lose their security of tenure. I have held further that s 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.'[5]

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[2] 2005 (2) SA 140 (CC).
[3] As amended by a 'reading in' of certain words by the Constitutional Court: see para 9 below.
[4] See in this regard *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W) para 22; *Nedbank Ltd v Mashiya & Another* 2006 (4) SA 422 (T) paras 10–11; *Standard Bank of South Africa Ltd v Saunderson & Others* 2006 (2) SA 264 (SCA) paras 15–17.
[5] *Jaftha* above para 52, and see also paras 39–44.

[9] In order to remedy this constitutional defect, the court ordered that s 66(1)*(a)* should be amended by a 'reading in' of the words underlined below:

'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.'[6] (Emphasis added.)

[10] Zondi AJ[7] held that the declaration of invalidity of s 66(1)*(a)* by the Constitutional Court applied retrospectively and that, accordingly, a warrant of execution obtained, prior to *Jaftha*, without judicial oversight and thus in violation of the law laid down in that case – without the court making any order limiting the retrospective effect of its declaration of invalidity[8] – was invalid. The learned acting judge held further that, in the present case, it was clear that the warrant of execution pursuant to which the property was sold in execution on 17 November 2003 had been issued by the clerk of the court without judicial supervision and was therefore invalid.

[11] The court below went on to consider the effect of this finding on the subsequent sale in execution. Section 70 of the Act provides as follows:

'70. Sale in execution gives good title

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[6] Paragraph 67.
[7] Following the judgment of Davis J in *Reshat Schloss v Gordon Taramathi & Others*, Case No 2657/2005, unreported judgment of the Cape High Court dated 10 October 2005.
[8] In terms of s 172(1)*(b)*(i) of the Constitution, the provisions of which read as follows:
'(1) When deciding a constitutional matter within its power, a court –
(a) . . .
(b) may make an order that is just and equitable, including –
(i) an order limiting the retrospective effect of the declaration of invalidity'.
See further in this regard *Ex Parte Women's Legal Centre: In re Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 1288 (CC) paras 11–13.

A sale in execution by the messenger shall not, in the case of movable property after delivery thereof or in the case of immovable property after registration of transfer, be liable to be impeached as against a purchaser in good faith and without notice of any defect.'

The court held that the provisions of s 70 do not apply to a situation, such as in this case, where the sale in execution took place pursuant to an invalid warrant of execution:

'To apply the provisions of section 70 in these circumstances would defeat the whole purpose of the Constitutional Court ruling in the *Jaftha* case.'

[12] Zondi AJ held that, as the sale in execution was invalid, it could not have served to pass any title to Menqa when the property was subsequently transferred to him. Relying on the judgment of McCall AJ in *Joosub v J I Case SA (Pty) Ltd (now known as Construction & Special Equipment Co (Pty) Ltd) &* Others,[9] the learned acting judge concluded that Markom, as the owner of the property, would be entitled to recover it by way of the *rei vindicatio.* He therefore confirmed the rule *nisi* granted on 10 February 2006 in its entirety, with costs. In view of several of the grounds of appeal and of the arguments advanced by counsel before us, it is necessary to set out the relevant terms of the rule *nisi*:

'1. A rule *nisi* is hereby issued calling upon all interested parties to show cause on 23 March 2006 why a final order should not be granted in the following terms:

1.1 Declaring as null and void a sale in execution of a property known as erf 23584 Maitland, Cape Town, situated at 17 Camden Street, Maitland, Cape Town, allegedly held on 17 November 2003, together with all subsequent sales of such property thereafter;

1.2 Interdicting and prohibiting the registration by the Fourth Respondent [the Registrar of Deeds] of the pending transfer from the First to the Second Respondent of the property known as erf 23584 Maitland, Cape Town, situated at 17 Camden Street, Maitland, Cape Town;

1.3 Suspending execution on a judgment obtained against the applicant in the Magistrate's Court for the District of Cape Town under case number 26081/1996 in terms of section 78 of

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[9] 1992 (2) SA 665 (N).

Act 32 of 1944, pending finalisation of an appeal against the judgment of the learned Magistrate Jaxa in the Magistrate's Court for the District of Cape Town of 18 August 2005 under case number A536/2004 in this Honourable Court, or finalisation of other proceedings to set aside such judgment instituted within one month of the final order;

1.4 Directing the Fourth Respondent to register the Applicant as owner of a property known as erf 23584 Maitland, Cape Town, situated at 17 Camden Street, Maitland, Cape Town; *alternatively* granting the Applicant leave to proceed to recover ownership of the said property by way of a *restitutio in integrum* or otherwise and thereafter to register such ownership with the Fourth Respondent; and

1.5 Ordering the First to Fourth Respondent/s, jointly and severally as the case may be, to pay the Applicant's costs on the scale as between party and party to the extent that this application is or was opposed by one or any of them.

2. Sub-paragraphs 1.1, 1.2 and 1.3 above shall together operate as an interim interdict pending the return day of the rule *nisi*.'

Lack of judicial supervision

[13] The first and second respondents assailed the judgment of the court a quo on two bases: first, the applicant had failed in his papers to establish that the warrant of execution had indeed been issued without the requisite judicial oversight; and second, on the basis that s 70 of the Act protects their title.

[14] In his founding affidavit, Markom stated explicitly that he was not aware of the circumstances under which the warrant of execution was obtained. Thus, so the respondents' argument went, it might well be that the warrant of execution against the property was *not* issued by the clerk of the court in circumstances prohibited by the *Jaftha* judgment, but was in fact issued by the court on good cause shown.

[15] There is no merit in this argument. In the answering affidavit deposed to by Menqa, reliance is placed on 'the re-issued warrant in respect of the immovable property containing the description of the immovable property' and a copy of this warrant is attached to the affidavit. It appears ex facie this copy that the warrant was issued by the clerk of the court without any judicial

oversight. On the respondents' own version, therefore, the relevant warrant was issued without any prior judicial intervention and so in contravention of the judgment in *Jaftha.* It follows that this ground of attack on the judgment of the court below falls to be rejected.

Section 70 of the Magistrates' Courts Act 32 of 1944

[16] For the purposes of s 70 of the Act,[10] there must be bad faith or notice of any defect at the time of the purchase; a sale in execution is not liable to be impeached where the purchaser became aware of a defect only *after* the sale in execution but before transfer into his or her name had been effected.[11]

[17] Ordinarily, therefore, an applicant wishing to impeach a sale must prove bad faith or knowledge of the defect on the part of the purchaser at the time of purchase. In the present matter it is common cause that Menqa has already taken transfer of the property and intends to further transfer it to Roux. There is no suggestion that Menqa was in bad faith or aware of any defect at the time of the sale in execution.

[18] As indicated above, the court a quo held that s 70 can have no application where the sale in execution was a nullity in that it had taken place in breach of the judgment debtor's constitutional rights. In coming to this conclusion, Zondi AJ relied on the Cape High Court judgment in *Schloss*[12] which concerned the sale of immovable property in execution of a default judgment obtained in March 2004. The sale in *Schloss* took place shortly before the Constitutional Court handed down its judgment in *Jaftha* and the property was transferred to the purchaser in execution and subsequently sold and transferred to Mr Taramathi. There the court found that there was no judicial oversight of the issue of the warrant of execution; that the law as set out in *Jaftha* operated retrospectively to the inception of the Constitution; and that,

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[10] The wording of which appears in para 11 above.
[11] *Modelay v Zeeman & Others* 1968 (2) SA 792 (D) at 795C–E, confirmed in *Modelay v Zeeman & Others* 1968 (4) SA 639 (A).
[12] Above n 7.

accordingly, the sale in execution took place pursuant to an invalid warrant and was also void.

[19] As regards the question of the implications of these findings for a *bona fide* purchaser of property pursuant to such an invalid sale in execution, the court in *Schloss* emphasised that any exercise of public power has to be carried out in terms of a valid rule of law. The court approved of the finding of McCall AJ in *Joosub*[13] to the effect that, where there was no sale in execution or where the sale in execution which purported to have taken place was a nullity, then it could not have served to pass any title to the property concerned to the purchaser or to any successor in title into whose name the property was subsequently transferred: 'the plaintiff [the judgment debtor], as owner of the property, would be entitled to recover the [property] by way of a *rei vindicatio*.'[14]

[20] In *Joosub* the default judgment granted in the High Court and the warrant of execution purportedly issued pursuant thereto reflected different judgment debtors and there was thus no valid judgment against the person whose properties were sold in execution (the plaintiff). Counsel for Menqa and Roux sought to distinguish that case inter alia on the basis that, in the present matter, there *was* a valid judgment against Markom and that the sale in execution was therefore protected by s 70 of the Magistrates' Courts Act even if the warrant of execution was null and void.

[21] I am not persuaded by counsel's submissions in this regard. Section 66(1)*(a)* of the Magistrates' Courts Act was declared to be constitutionally invalid in the *Jaftha* case on the ground that it unreasonably and unjustifiably limited judgment debtors' fundamental right of access to adequate

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[13] Above n 9 at 674G.

[14] *Joosub* has been followed in the High Court context in a number of cases: see *Sowden v Absa Bank Ltd & Others* 1996 (3) SA 814 (W) at 821H–I; *Kaleni v Transkei Development Corporation & Others* 1997 (4) SA 789 (TkS) at 792D–H; *Rasi v Madaza & Another* [2001] 1 All SA 498 (Tk) at 510g–j. See also *Van der Walt v Kolektor (Edms) Bpk & Andere* 1989 (4) SA 690 (T) at 696H–697D and the criticism of this case by Davis J in *Standard Bank of South Africa Ltd v Prinsloo & Another (Prinsloo & Another Intervening)* 2000 (3) SA 576 (C) at 586F–H.

housing entrenched in s 26(1) of the Constitution. The warrant of execution in the present case was invalid as it was issued without the judicial oversight required by the Constitutional Court in *Jaftha* and the absence of this procedural safeguard imperilled Markom's constitutional rights under s 26(1). The sale in execution to Menqa was invalid for the same reason. I agree with the court a quo that, if one were to hold that the provisions of s 70 of the Act rendered such a sale in execution unimpeachable, this would indeed 'defeat the whole purpose of the Constitutional Court ruling in the *Jaftha* case.'

[22] This being so, it follows that the sale cannot in these circumstances be 'saved' by an application of s 70 of the Magistrates' Courts Act[15] and the court a quo was correct in confirming paras 1.1 and 1.2 of the rule *nisi*.[16] I also have no problem with the confirmation of para 1.3 of the rule – as Markom's appeal against the dismissal of his second application for rescission of the default judgment obtained against him by Tromp is pending in the Cape High Court, it is logical that execution of this judgment should be suspended pending finalisation of that appeal.

[23] Paragraph 1.4 of the rule *nisi* is another matter altogether. Firstly, although this paragraph contains two forms of relief in the alternative, it was confirmed in its entirety. This is clearly wrong. Markom's counsel conceded this, but contended that we should simply modify the order of the court below to read that 'the rule *nisi* is confirmed in its entirety with costs, including the first alternative prayer in paragraph 2.4 of the notice of motion [para 1.4 of the rule]'. In my view, this would neither be 'appropriate relief' as required by s 38 of the

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[15] The grounds on which the warrant and the subsequent sale in execution are invalid in the present case renders it unnecessary to consider the correctness of the analysis by Van den Heever JA, in two old decisions of this court, of the Roman-Dutch authorities concerning the qualified inviolability (in our common law) of sales in execution, and the relationship between the common law position and s 70 of the Magistrates' Courts Act: see *Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (A) at 683F–684H and *Sookdeyi & Others v Sahadeo & Others* 1952 (4) SA 568 (A) at 571G–572G. See also *Gibson NO v Iscor Housing Utility Co Ltd & Others* 1963 (3) SA 783 (T) at 786G–787A; *Van der Walt* above n 14 at 696B–F; *Joosub* above n 9, especially at 672C–F, 674G–677H and 679D–681H; *Jones & others v Trust Bank of Afrika Ltd & Others* 1993 (4) SA 415 (C) at 419G–420D.

[16] See para 12 above.

Constitution, nor would it be a 'just and equitable order' in terms of s 172(1)*(b)*. I say this for the following reasons.

[24] The sheriff derives his or her duty and authority to transfer ownership pursuant to a sale in execution of immovable property from rule 43(13) of the Magistrates' Court Rules.[17] If the sale in execution is null and void because it violates the principle of legality, as in the present case, then the sheriff can have no authority to transfer ownership of the property in question to the purchaser who will thus not acquire ownership despite registration of the property in his or her name.

[25] It follows that, in the present case, the registration of the property in Menqa's name did not make him owner of the property. Theoretically, therefore, Markom is entitled to recover the property in vindicatory proceedings. However, simply to direct the Registrar of Deeds to re-register the property in Markom's name would not, in my view, properly take into account the fact that Menqa has paid more than R140 000 in respect of the property[18] and that, by virtue of the extinction of Markom's bond debt to Nedbank (and, at least while the default judgment in Tromp's favour stands, by virtue of the partial payment of Markom's judgment debt to Tromp), Markom appears to have been unjustifiably enriched at Menqa's expense.[19] It will be much fairer to both parties if these claims are dealt with, preferably simultaneously, in future proceedings which will no doubt be instituted in due course. Neither Markom nor Menqa requires the leave of any court to institute such proceedings. For

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[17] Cf *Ivoral Properties (Pty) Ltd v Sheriff, Cape Town & Others* 2005 (6) SA 96 (C) para 66, where the Cape High Court pointed out that 'a Sheriff may not sell immovable property attached pursuant to a duly issued warrant of execution otherwise than by way of public auction and his authority is created and circumscribed by the provisions of Uniform Rule 46 . . . .' The learned judge also stated that the sheriff has 'the duty to see that transfer is passed' and that the provisions of Uniform Rule 46(13) 'impose an obligation on him to do everything necessary to pass transfer'. See too *Mpakathi v Kgotso Development CC & Others* [2006] 3 All SA 518 (SCA) paras 4, 5 and 13.

[18] And has also presumably been paying rates and taxes in respect of the property since it was registered in his name in November 2005.

[19] See eg 9 *Lawsa* 2ed (2005) para 209.

these reasons, the confirmation by the court a quo of paragraph 1.4 of the rule *nisi* should be set aside.

[26] As regards costs, Menqa and Roux have succeeded in this court to the extent that an important part of the relief granted by the court below is to be set aside. On the other hand, they have failed in their attack on the rest of the order made by the court a quo. In light hereof, I am of the view that it would be appropriate to make no order as to the costs of appeal. The costs order made by the court below (appropriately amended to reflect the fact that only Menqa and Roux opposed Markom's application) should stand, but it should be noted that Markom was assisted in that court by *pro bono* attorneys and counsel.

Order

[27] For the reasons set out above, the appeal succeeds to the following extent:

1. The confirmation by the court below of paragraph 1.4 of the rule *nisi* issued on 10 February 2006 is set aside.

2. The order made by the court below is altered to read:

   'Paragraphs 1.1, 1.2 and 1.3 of the rule *nisi* are confirmed. The first and second respondents are ordered to pay the applicant's costs jointly and severally, the one paying the other to be absolved.'

B J VAN HEERDEN
JUDGE OF APPEAL

CONCUR:

SCOTT JA
JAFTA JA
KGOMO JA

CLOETE JA

[28] I have had the advantage of reading the judgment prepared by my colleague Van Heerden and concur in the order made. The *ratio*[20] of my colleague's judgment on the principal issue in the appeal may be summarised as follows: The warrant of execution in the present matter is invalid for the same reason as in the *Jaftha*[21] matter; the sale in execution was accordingly void; and s 70 of the Magistrates' Courts Act 30 of 1944 ('the Act') cannot be interpreted so as to negate the *Jaftha* decision. I agree with this conclusion. But it is in my view desirable to analyse the meaning of the section and provide a rational basis for its interpretation.

[29] The relevant facts and the principal issue on which the appeal turns can be briefly stated. The immovable property in question was owned by Markom; it was occupied by him and his family as their home; it was sold to Menqa at a sale in execution pursuant to a valid judgment granted against Markom by default in a magistrate's court; and it was registered in the name of Menqa, who subsequently sold it to Roux (in whose name it has not been registered). The warrant of execution was issued by the clerk of the court and therefore without judicial supervision ─ a procedure held by the Constitutional Court in *Jaftha* to be unconstitutional if the warrant of execution would compromise the judgment debtor's rights to access to adequate housing (in terms of s 26(1) of the Constitution) and would therefore need to be justified (as contemplated by s 36(1) of the Constitution). The limited ambit of the decision in *Jaftha* was emphasized by this court in *Standard Bank of South Africa Ltd v Saunderson*.[22] The order of the Constitutional Court requiring words to be read in to s 66(1)(a) of the Act to cure the unconstitutionality[23] was not limited in

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[20] Contained in paras 21 and 22.
[21] *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2005 (2) SA 140 (CC).
[22] 2006 (2) SA 264 (SCA) paras 15 -18 and 21.
[23] As set out in para 9 of the judgment of my colleague Van Heerden.

terms of s 172(1)(d)(i) of the Constitution.[24] The order accordingly has retrospective effect.[25] There is reason to believe[26] that Markom and his family's s 26(1) rights of access to adequate housing might have been compromised: Markom said in his founding affidavit that if he and his family were to be evicted,[27] they would be left 'effectively homeless'. Because the warrant of execution was issued by the clerk of the court, Markom had no opportunity to place his personal circumstances and those of his family before a court. The consequences, for the reasons which follow, are that the warrant was invalid and the sale, a nullity.[28] The principal question on appeal is whether s 70 of the Act protects Menqa, in circumstances where there is no suggestion that he acted in bad faith or had knowledge of the defect in the warrant.

[30] I shall repeat the wording of the section for convenience:

'A sale in execution by the messenger shall not, in the case of movable property after delivery thereof or in the case of immovable property after registration of transfer, be liable to be impeached as against a purchaser in good faith and without notice of any defect.'

Some defect in the sale is contemplated, otherwise the section would serve no purpose. On the other hand, the section should not be interpreted as meaning that any defect in the execution process renders a sale unimpeachable unless the purchaser did not act in good faith or had notice of the defect ─ for then the judgment debtor could be deprived of property without valid process of law, which would be unconstitutional for the reasons set out in para 47 below. The

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[24] The relevant part of which is quoted in footnote 8 of the judgment of my colleague Van Heerden.
[25] *Ferreira v Levin NO*; *Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) paras 25 to 30; *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) p 834 n 200; *Ex Parte Women's Legal Centre : In re Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 1288 (CC) para 11. It was submitted on behalf of Menqa that this would open the floodgates of litigation. But that is a question to be addressed by the Constitutional Court.
[26] Contrast *Standard Bank of South Africa Ltd v Saunderson*, above n 22, paras 20 and 21.
[27] Section 23 of the Constitution elaborated on by the Legislature in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 becomes relevant in the event of eviction consequent upon a sale in execution: *Ndlovu v Ngcobo*; *Bekker v Jika* 2003 (1) SA 113 (SCA). That was not in issue in *Jaftha* and is not in issue in this appeal.
[28] The Constitutional Court was not called upon in *Jaftha* to decide the validity of a sale pursuant to an invalid warrant of execution as the parties had consented to the setting aside of the sale ─ see para 8 of the *Jaftha* judgment.

line is in my view to be drawn where the defect results in the 'sale' being a nullity. In such a case s 70 would not find application. Put conversely, defects not rendering a sale void would not avail the judgment debtor and s 70 would protect the purchaser, save in the two situations it excludes. Such an interpretation accords with the common law and it is a well-established principle of statutory construction[29] that statute law does not alter law (including the common law) more than is necessary;[30] and it is also in accordance with the dictates of s 39(2) of the Constitution.[31] I shall begin with the common law.

[31] The most extensive treatment of the common law relating to sales in execution can be found in Matthaeus II's *De Auctionibus*.[32] The learned author, writing of the law in the mid-seventeenth century in the Netherlands, deals in chapter 16 of book 1 of the circumstances in which a sale in execution is void from the outset or can be set aside by a court. Examples of a sale being void from the outset are where it was based on fraud;[33] where the court lacked jurisdiction;[34] where the sale did not take place at the prescribed place;[35] where what was decreed did not take place on the day advertised;[36] where there was a failure to comply with other formalities[37] (although a distinction was drawn[38] between formalities which preceded the sale, which had to be complied with strictly, and formalities after the sale, for example, inability to deliver the goods sold to the purchaser, which did not); and[39] where the sale was not conducted as a sale in execution, or the auction was not conducted by the proper official,

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[29] Steyn *Die Uitleg van Wette* pp 97-100 and cases quoted in footnote 25.
[30] For a discussion of the application of this principle after the advent of the Constitution see Du Plessis, '*Statute Law and Interpretation*' LAWSA 1st reissue vol 25(1) para 328.
[31] Dealt with in para 47 below.
[32] *De Auctionibus Libri Duo*, *quorum prior Venditiones*, *posterior Locationes*, *quae sub hasta fiunt*, *exequatur: adjecto passim voluntarium auctionum jure*. The work was translated into Dutch in 1774. An incomplete copy of the translation (up to 1.11) is to be found in the library of this court, and a full copy, in the library of the Pretoria High Court.
[33] 1.16.2
[34] 1.16.3.
[35] 1.16.4.
[36] 1.16.5.
[37] 1.16.7.
[38] 1.16.8.
[39] 1.16.9.

or where the debtor and other interested parties were not notified of the sale. Matthaeus concludes his treatment of the topic by saying[40] that although all the requisite formalities must be strictly and precisely complied with, the proceedings are not vitiated by non-compliance with an insignificant formality which does not go to the root of the matter. Examples given of the latter type of formalities include where the official did not properly record a description of movable goods attached or for how much each article was sold, where the advertisements were put up on three and not four market days and where the King's standard was not displayed at the immovable property to be sold. In these and similar cases, says Matthaeus, the sale remains for value because the authorities do not have regard to trivialities and it would be contrary to good faith to split hairs over every small legal subtlety.[41]

[32] Matthaeus goes on[42] to deal with the question when a sale, validly conducted, can be set aside and points out that there are two methods of doing so: appeal and *restitutio in integrum*. According to the learned author,[43] regard being had to the practice current in his time, the appeal procedure should be followed even where the sale is null and void. Matthaeus then considers in what circumstances restitution can be granted, despite a valid sale in execution, to a minor[44] and to a major,[45] and concludes that both are possible in certain circumstances.

[33] In a later chapter Matthaeus says[46] that the owner of the goods ranks above all other creditors when he objects within the prescribed period and proves his ownership ─ in which case, says Matthaeus, he can even succeed in having the sale completely set aside. In other cases, says Matthaeus,[47] the

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[40] 1.16.11.
[41] Ibid.: '*His & similibus casibus non vitiates decretum : minima enim praetor non curat non congruit bone fidei de apicibus juris disputare*.'
[42] 1.16.20.
[43] Ibid.
[44] 1.16.23ff.
[45] 1.16.31ff.
[46] 1.18.1.
[47] 1.18.2.

owner still ranks above the creditors even although he took no steps to stop the attachment, if he can obtain restitution on equitable grounds. Matthaeus then raises the question[48] whether in such cases the owner can claim his property or its value, and answers that he has a choice. This, says Matthaeus, accords not only with what is written, but also with the current law because even at common law, the effect of a sale in execution is not so highly regarded that an owner who was not negligent was precluded from claiming his goods back.[49] The reason given by Matthaeus requires emphasis because of what is said in para 41 below.

[34] Other Roman-Dutch authors are to the following effect. Groenewegen in *De Legibus Abrogatis*[50] commenting on the Code of Justinian 4.44.16 (which is irrelevant for present purposes) says:[51]

'1. By inference from the present text many consider that public sales in execution are rescinded for harm beyond half the fair price . . .

2. But, seeing that nowadays sales in execution are conducted with the most exact formality, and the faith in state action ought not readily to be upset, therefore, the contrary rule applies in our customs . . . And Neostadius, *Decisiones supremi senatus*, decis. 75, reports that it has been so decided in the Supreme Court of Holland.

3. But, if, indeed, property has been sold by order of court but not with observance of all the formalities and arrangements of sales in execution, an opportunity to appeal is granted to a prejudiced party, and we follow this rule.'

[35] In the decision of the Hooge Raad reported by Neostadius[52] and referred to by Groenewegen a farm was put up for sale in execution. The lower court fixed the date for the auction at which it was to be sold to the highest bidder and directed that proclamations be made on two fixed days preceding the auction. On the day of the proclamation the voice of the cryer was not heard

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[48] Loc cit.
[49] '*Jure enim communi non est tanta subhastationis auctoritas, ut dominus cujus nulla negligentia argui potest, deneget vindicationem*.'
[50] *Tractatus de Legibus Abrogatis et Inusitatis in Hollandia Vincinisque Regionibus*.
[51] Translation by Beinart and Hewett vol 3 pp 209-210.
[52] Decision 75 in *Utriusque, Hollandiae, Zelandiae, Frisiaeque, Curiae Decisions* pp 229-230.

by anyone because of the noise of a storm. The property was sold very cheaply at the subsequent auction because few people attended. The Hooge Raad refused to set the sale aside. What is important for present purposes, however, is that the report begins:

'Fundo hastae subjecto, Hollandiae Curia Venditionis decretum, omni ordine observato interposuit'

which may be translated as:

'A farm having been put up for sale in execution the [lower court] issued the following order, every formality having been observed . . .'.

The decision is authority only for the proposition that if there has been compliance with the prescribed formalities, the fact that the result could have been better is irrelevant. The position would be the same, I venture to suggest, were the execution creditor to publish the notice of sale of immovable property[53] in a newspaper circulating in the district where the property is situated, and the newspaper had a very limited readership, with the result that fewer persons attended the auction that would have been the case had a newspaper with a wider circulation been chosen.

[36] Peckius in his *Verhandelinghe*[54] is to the effect that observance of formalities was required for the validity of sales in execution. The relevant passage is summarised in the 'Kort Inhoudt' at the beginning of part 9 as

'Der schuldenaerengoedt kan sonder behoorlijcke plechtinghe aen de schulteyschers niet overgaen',

ie the goods of debtors do not pass to creditors without proper formalities. The passage itself reads:

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[53] As required by rule 43(c) of the magistrates' courts rules.
[54] *Verhandelinghe van Handt – Opleggen ende Besetten : Dat is, Arrest op Persoon ende Goederen*; Part 19, pp 326-7.

'Door wie de besettinghe moet ghedaen werden, soude men moghen vraeghen. Want te vergeefs versoect ghy, seydt Gordianus in *1.si pacto quo poenam, 14 Cod. de pact*. het goedt van uwen wederdinger sonder plechtelijcke manier van doen, op uw overgedragen te werden.'

The passage may be translated as follows:

'One might ask by whom the attachment must be performed. Because you will ask in vain, says Gordianus . . . that the goods of your opponent be transferred to you without the necessary formalities.'

Van Leeuwen in his note to the second sentence of this passage says:[55]

'Hoedanighe solenniteyt in de materie van executie, ende verder manier van procederen wert vereyscht, hanght teenemael aen de Statuyten ende Ordonnantien van de plaets daer het geschiedt, daer toe by ons kunnen dienen de *Instructien van den Hoghen ende Provincialen Rade, de executorien van de gemene middelen, de Ordonnantie op't stuck van de Iustitie binnen de Steden ende te platten Lande van Hollandt*, nopende de praecijse onderhoudinghe ende naerkominghe van de welcke, ende de solenniteyten daer inne begrepen, by ons mede een algemeene practijcque is, dat het versuym van de minste solenniteyt, een executie, off een arrest (het welck soo veel de praecijse onderhoudinge van solenniteyten ten daer toe vereyscht, daer nefffens gereeckent werdt) geheel nul ende krachteloos maect, endeden aenlegger in de kosten condemneert'.

The relevant part of the note may be translated as follows:

'Whatever formalities in execution, and further procedure, are required depend in each case on the Statutes and Ordinances of the place where this is done. With us the [applicable legislation] requires the strictest observance and compliance with its provisions and the formalities therein contained. With us too the general practice is that failure to comply with the smallest formality renders the execution . . . entirely null and void, and the applicant is ordered to pay costs.'

Innes CJ, Wessels and Mason JJ referred to this part of Van Leeuwen's note in *Reinhardt v Ricker and David*[56] but were not prepared to go 'quite so far as that'.

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[55] Ibid.
[56] 1905 TS 179 at 188.

[37] Van der Keessel deals in his *Praelectiones* with the question of moveables[57] sold in execution:

'Daar is verder 'n belangrike vraag i.v.m. die *rei vindicatio* van roerende goed, nl. wat die regsposisie is indien ons saak uit oorsaak van bruikleen of 'n ander oorsaak, of selfs sonder 'n oorsaak maar uit hoofde van 'n gebrek soos diefstal, aangetref word onder die goed van iemand wie se goed ten behoewe van sy skuldeisers op bevel van die regter by openbare veiling verkoop is: kan ons ook hierdie goed wat reeds verkoop is met *rei vindicatio* terugvorder? Vir die bevestigende standpunt spreek die argumente wat ons hierbo aangevoer het.[58] Maar aan die ander kant dra die gesag van 'n openbare verkoop groot gewig, en dis in die belang van iedereen dat dit nie omvergewerp word nie. Matthaeus self het egter (t.a.p.) na dit skyn 'n juiste beslissing in die saak gegee deur 'n onderskeiding toe te pas; dit is dat indien die eienaar teen die verkoop kon geprotesteer het, sy nalatigheid hom ten kwade moet kom. Maar indien hy nie kon nie, moet hy die *rei vindicatio* hê, wat egter ingestel moet word met terugbetaling van die koopsom aan die koper, presies soos die skrywer by die volgende paragraaf sal aantoon i.v.m. diegene wie se goed te goeder trou op openbare markte gekoop is, egter met die voorbehoud dat die eienaar 'n verhaalsreg teen die skuldenaar sal hê vir die terugvordering van die koopsom wat hy aan die koper moes betaal.'

[38] J. Voet in his chapter on vindication says:[59]

'Certainly if moveable property has been sold without the knowledge of the owner at public auction by judge's order on the petition of creditors, it can hardly be that the customs of today would suffer the vindication of property so sold. Not even immovables, when sold by judge's order and legally delivered after the sale has been prefaced by formal notices, can be vindicated if the owner does not promptly intervene and oppose. But since I shall have expressly to deal elsewhere with such public sales and the need for intervention, I add no more at this point. Meantime let the author mentioned below be consulted.'

The author referred to is Matthaeus and the reference is to *De Auctionibus* Book 1 Ch 11.[60] In commenting on this passage and the decision of De Villiers

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[57] *Praelectiones Iuris Hodierni ad Hugonis Grotii Introductionem ad Iurisprudentiam Hollandicam*, Th 183, translated by Van Warmelo et al, vol 2 p 45.
[58] In the original text there is a reference at this point to Matthaeus' *De Auctionibus* 1.11.70, 71.
[59] *Commentarius ad Pandectas* 6.1.13, Gane's translation vol 2 p 225.
[60] Chapter 11 deals with opposition to sales in execution.

CJ in *Lange v Liesching*[61] McCall AJ said in *Joosub v J I Case SA (Pty) Ltd (now known as Construction & Special Equipment Co (Pty) Ltd)*:[62]

'It will be noted that the passage uses the words "sold by Judge's order" "after the sale has been prefaced by formal notices". It is not authority for the proposition that where immovable property has been sold without the valid authority of a Judge's order or without formal notice having been given, the property can nevertheless not be vindicated. De Villiers CJ also referred to *Matthaeus* 1.11.33. The passage referred to, to the effect that if the creditors of the heir sell his goods the fideicommissaries are bound to protest in order to preserve their rights, presupposes that the fideicommissaries are, or should be, aware of their rights, and has no bearing on the question as to whether a sale *sub hasta* of the heir's goods may be valid, notwithstanding the non-compliance with the required formalities. As I have already indicated above, *Matthaeus* deals expressly with the effect of non-compliance with the required formalities in chap 16.'

[39] In his earlier chapter on grounds for restitution of majors, Voet says:[63]

'Nor are majors less to be assisted by restitution when their properties have been openly sold off as belonging to third parties and have under decree of a judge been knocked down and delivered to buyers after the formalities of sale by auction, they themselves being ignorant by reasons of absence or other justifiable cause. This applies to their absence both when they were cherishing a domicile in some other place, and when they were travelling abroad though cherishing a domicile at the place of the auctioning. It is true that the power of the Treasury's spear is not slight, especially by the customs of the present day, and that confidence in it ought not readily to be destroyed. Still it is not going of itself to weigh so heavily that therefore a true owner, who from reasonable ignorance does not interfere at the selling off of his own properties, and thus is put beyond blame, would remain stripped of the ownership of his own properties which have been publicly knocked down to another. It follows that here too we must for a justifiable ground of ignorance certainly lay down of a major what we have already more fully stated of a minor.'[64]

[40] I wish to emphasise that although I have referred to the views of the old authors not only in regard to invalid sales in execution, but also in regard to the position where restitution could be obtained in certain cases on the grounds

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[61] (1880) Foord 55.
[62] 1992 (2) SA 665 (N) at 675F.
[63] 4.6.10, Gane's translation vol 1 p 723.

of fairness despite a valid sale in execution, it is only the former that are relevant for the purposes of this appeal. The reason I have referred to the latter will become apparent from what is said in the next paragraph of this judgment in regard to the status of sales in execution in the Netherlands. The question whether the Roman-Dutch law relating to restitution despite a valid sale in execution has been received in South Africa and what the effect of s 70 would be if that were to be the case, are questions which I expressly leave open.

[41] In view of the exposition of the law by the common law authors the statement by Van den Heever JA in *Messenger of the Magistrate's Court, Durban v Pillay*[65] that the provisions of s 70

'are in harmony with the dispositions of the Common Law which regarded sales *sub hasta*[66] as sacrosanct'

cannot be supported. I am further respectfully constrained to disagree with both propositions in the sentence which follows, namely:

'The words [of the section] are wide enough to cover not only situations such as that which arose in *Conradie v Jones*, 1917 OPD 112, where property not belonging to the judgment debtor was sold in execution, but every claim that the sale be rescinded.'

Nor with respect is the statement[67]

'Where the sale has been held and transfer has not yet been passed I can see no reason why he should be content to recover from the messenger that elusive surrogate, damages, which in such circumstances it is extremely difficult to prove and assess, rather than with the rescission of that which has been done unlawfully'

correct, to the extent that it may suggest that a sale in execution can only be impugned where transfer has not yet been passed. I am, however, in respectful agreement with the conclusion reached in that case, namely, that where the advertisement for the sale in execution was insufficient and invalid because it

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[64]Voet relies on, amongst others, Matthaeus' *De Auctionibus* 1.16.31, 32 for this statement.
[65] 1952 (3) SA 678 (A) at 683G.
[66] ie in execution.

did not contain a short description of the property and its situation,[68] the judgment debtor was entitled to an order setting the sale aside. It is important to note that as the property sold had not yet been transferred to the purchaser, s 70 could not find application in any event and all of the dicta which I have quoted were therefore *obiter*.

[42] Van den Heever JA dealt with s 70 again, three months after the *Pillay* case, in *Sookdeyi v Sahadeo*.[69] In that matter the immovable property sold in execution in a magistrate's court had been transferred to the purchaser and from him, to the respondents. As pointed out by this court in *Modelay v Zeeman*[70] the sole issue before the court in *Sookdeyi* was the incidence of the burden of proof when a judgment debtor seeks to impugn a sale in execution on the ground of the purchaser's bad faith or knowledge of a defect at the time when he bought the property at the sale in question. Much of what is contained in the passage from the judgment quoted below is accordingly obiter. Van den Heever JA in the course of his judgment did not repeat his previous statement in the *Pillay* case that sales in execution were 'sacrosanct' at common law. Instead, the learned judge held:[71]

'Our successive Magistrates' Courts Acts, 32 of 1917 and 32 of 1944, were enacted "to consolidate, and amend the law relating to magistrates' courts". Many of their provisions have the characteristics of codification, declaring, unifying and amending the law in force before. Sec. 70 is such a provision.

It was a principle in the Netherlands that a perfected sale in execution should after transfer or delivery of the subject matter not be lightly impugned *quoniam fiscalis hastae fides facile convelli non debeat*. (Groenewegen *de Legib*. *Abrogat*, *ad C*. 4.44.16; *ad C*. 8.44 (*sibi* 45)13; Neostad *Decisiones*, Decis. 75; Voet 6.1.13 and, dealing with execution *in rem*, Bynkershoek *Observ*. *Tumult*. Cas 45; *Cf Voet* 42.1.31 *verbis*: *Et quamvis nec arbiter* . . .)

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[67] At 684A-B.
[68] As required by the then applicable rule in the magistrates' courts quoted at 682A of the judgment; cf the present rules 43(6)(b) and (c).
[69] 1952 (4) SA 568 (A).
[70] 1968 (4) SA 639 (A) at 643.
[71] At 571G-572B and 572E-F.

This reluctance to rescind perfected sales *sub hasta* has been received in our case-law (*Lange and Others v Leisching and Others*, 1880 Foord 55; *S.A. Association v van Staden*, 9 S.C. 95 at p. 98; *Conradie v Jones*, 1917 O.P.D. 112).[72]

These authorities indicate that in certain exceptional circumstances a sale in execution may nevertheless be impugned. The rules in regard to this qualified inviolability of a sale in execution were in so far as magistrates' courts are concerned, codified in sec. 70. It has to be construed in harmony rather than in conflict with the Common Law.

. . .

Had the section not contained the words "in good faith and without notice of any defect", a sale in execution by the messenger would after delivery or transfer have been absolutely unassailable. These words, however, leave the purchaser open to attack where the judgment creditor [*sic*; *sc* "debtor"] can show that his acquisition was tainted with bad faith or with knowledge of any defect, but they do not in terms or by implication alter the normal incidence of the *onus* of proof.'

These dicta cannot be supported to the extent that they suggest that s 70 limits the circumstances under which a sale in execution in a magistrate's court can be impugned, after delivery of movables or transfer of immovables, to the two cases mentioned in that section. There are three reasons for this. First, as the learned judge pointed out, the section should be read so far as possible as being in accordance with the common law[73] but the learned judge apparently did not consider the views of Matthaeus, Peckius or Van Leeuwen referred to above in ascertaining what the common law was. Second, the interpretation given would create an anomaly in that the consequences of void sales in execution in magistrates' courts would differ fundamentally from the consequences in high courts, where the common law applies; and no reason for such a difference suggests itself. And third, the interpretation does not conform to the dictates of the Constitution for the reasons given below.[74]

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[72] The three cases referred to are analysed and explained by McCall AJ in *Joosub* above, n 62 at 674I-676G.
[73] See n 29 above.
[74] Para 47.

[43] For the same reasons, the following dictum of Galgut J in *Gibson NO v Iscor Housing Utility Co Ltd*[75] is, with respect, wrong:

> [Section 70] specifically states that a sale perfected by delivery or registration, as the case may be, cannot be impeached if the purchaser purchased in good faith. These words cannot refer to any minor irregularity or defect. Sec 70 was inserted, in my view, to cover the invalid or defective sale perfected by delivery or registration, because a valid sale, or one without defects, needs no protection, whether or not delivery has taken place.'

There is no warrant for interpreting s 70 as protecting an 'invalid', ie void, sale nor is any reason given why the section 'cannot' refer to any minor irregularity or defect.

[44] The correct approach was followed, in the case of magistrates' courts, in *Jones v Trust Bank of Africa Ltd*[76] and in the case of high courts, in *Van der Walt v Kolektor (Edms) Bpk*[77] and the *Joosub* case.[78] Although I do not wish to be understood as agreeing with everything that was said in the judgments in those three cases, I respectfully agree with the conclusions set out in the next paragraph below.

[45] In *Jones*[79] Friedman JP reasoned that:

> '[W]here there is no judgment there cannot be a valid sale in execution and consequently the protection afforded by s 70 to sales in execution cannot apply . . .'.

In *Van der Walt v Kolektor* De Villiers AJ concluded[80] that became a 'sale' in execution had not been conducted by the deputy sheriff as required by Uniform Rule of Court 45(7), but by his agent, a private firm of auctioneers, the principles set out in the *Sookdeyi*[81] and *Gibson*[82] cases were not applicable. The decision accords entirely with what Matthaeus says in 1.16.9, namely, that

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[75] 1963 (3) SA 783 (T) at 786C-D.
[76] 1993 (4) SA 415 (C).
[77] 1989 (4) SA 690 (T).
[78] Above, n 43.
[79] At 421H.
[80] At 695I-696H.
[81] Above, n 69.
[82] Above, n 75.

a 'sale' is void from inception where the auction was not conducted by the proper official. The criticism in *Van der Walt* by Davis J in *Standard Bank of SA Ltd v Prinsloo (Prinsloo intervening)*[83] that 'this judgment excessively reduces the protection afforded by s 70' is, with respect, for the three reasons set out at the end of para 42 above, misplaced. In the *Joosub* case[84] McCall AJ held:

'If . . . the sale which purported to have taken place was a nullity then . . . it could not have served to pass any title to the purchasers . . .'.

A failure to attach the property sold ─ the position in the present case, where the warrant of attachment was void ─ has this effect.[85]

[46] I therefore conclude that at common law, a sale in execution was void for want of compliance with an essential formality, but that non-compliance with non-essential formalities did not have this result; and that s 70 should be interpreted as being to the same effect, save that a sale in execution in a magistrate's court can be impugned even for want of non-essential formalities where the purchaser did not act in good faith or had notice of the non-compliance. It is not necessary for the purposes of this appeal to consider what are 'non-essential' formalities.[86] Because of the modern legislation which deals with formalities required for a valid sale in execution, resort to the old authorities would not necessarily be a safe guide. In each case regard would have to be had in particular to the reason for the formality, the extent of the non-compliance and the prejudice or potential prejudice caused to interested parties, especially the judgment debtor. But where, as here, the warrant of execution was invalid, the sale must be regarded as void and accordingly s 70 does not protect Menqa.

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[83] 2000 (3) SA 576 (C) at 586G-H.
[84] At 674G.
[85] *Joosub* above n 43 at 672G-673E; *Sowden v Absa Bank Ltd* 1996 (3) SA 814 (W) at 821H-I; *Kaleni v Transkei Development Corporation* 1997 (4) SA 789 (TkS) at 792D-H; *Rasi v Madaza* [2001] 1 All SA 498 (Tk) at 510g-j.
[86] Some of the instances appearing in *Standard Bank v Prinsloo (Prinsloo intervening)* above, n 83, at 585I-586D, may possibly fall into this category, but I make no finding in this regard.

[47] I reach the same conclusion by having regard to the Constitution, s 39(2) of which provides:

'When interpreting any legislation . . . every court . . . must promote the spirit, purport and objects of the Bill of Rights.'

The Constitutional Court held in *Investigating Directorate: SEO v Hyundai Motor Distributors (Pty) Ltd: in re Hyundai Motor Distributors (Pty) Ltd v Smit NO*[87] that this section provides a guide to statutory interpretation under the constitutional order. The court laid down the principle that where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, it should be given that meaning. Following this approach, s 70 should be interpreted as not protecting a 'sale' which is void for to do so would put it in conflict with the basic principle of legality (which requires public power to be properly exercised in terms of a valid law that authorises it) and s 25(1) of the Constitution which provides that 'no law may permit arbitrary deprivation of property'. Neither consequence could be justified in terms of s 36 of the Constitution ─ sales in execution were not sacrosanct at common law and there is no reason why they should be in the modern South Africa (save only in the two respects mentioned in s 70).

[48] It is for these reasons that I support the conclusion of my colleague Van Heerden and the court *a quo* that s 70 cannot be interpreted as rendering a sale in execution unimpeachable because this would defeat the whole purpose of the Constitutional Court ruling in the *Jaftha* case. In my judgment this is achieved by not interpreting s 70 as applying to 'sales' in execution that are void, whether because of the decision in *Jaftha* or for any other reason. I accordingly agree with my colleague that the court *a quo* was correct in confirming paras 1.1 and 1.2 of the rule *nisi*[88] declaring the sale in execution of the property null and void and interdicting the Registrar of Deeds from

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[87] 2001 (1) SA 545 (CC) paras 21 to 26.
[88] Set out in para 12 of the judgment of my colleague Van Heerden.

registering the property into the name of Roux. The question then arises: What happens next?

[49] Matthaeus discusses the position where a debtor succeeds in having a sale in execution set aside. He says[89] that if the debtor wishes to have the completed sale set aside for want of compliance with formalities, fairness dictates that he must return to the purchaser the money the latter disbursed. This is the situation, continues Matthaeus,[90] when the debtor sues the purchaser and demands the goods unlawfully awarded to him; because if he sues the creditors, he is not obliged to pay the purchase price to them, but must pay the debt he owes together with accrued interest ─ and in such a case the purchaser is required to obtain the money he paid, from the creditors. It is not necessary to consider the position at common law any further because to require Markom to pay Menqa the price paid by the latter for the property, or to pay the execution creditor the full debt owed together with accrued interest, as a prerequisite to his being allowed to recover the property, might altogether preclude him from obtaining the property and thereby possibly affect his and his family's constitutional right to access to adequate housing. That would be unconstitutional and therefore impermissible.[91]

[50] Section 38 of the Constitution confers the power on a court to grant 'appropriate relief' to Markom if his constitutional right to adequate housing was infringed. Section 172(1)(b) of the Constitution empowers a court deciding a constitutional matter to 'make any order that is just and equitable'. The relief sought in this court contained in the first part of paragraph 1.4 of the rule *nisi* ─ 'directing the Registrar of Deeds to register Markom as owner of the property' ─ may at first blush appear to be just and equitable so far as Markom is concerned; but his assertion that his and his family's right to access to adequate housing will be infringed, has not yet been tested, nor has Menqa been heard,[92]

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[89] Op cit 1.16.16.
[90] 1.16.17.
[91] See ss 39(2) and 172(1)(a) of the Constitution.
[92] See *Standard Bank of SA Ltd v Saunderson*, above n 22, para 20 at 275E-F.

and the factors[93] relevant for a decision whether to allow execution to proceed against Markom's immovable property have neither been considered by the magistrate nor do they appear from the record. Furthermore Menqa has paid over R140 000[94] in respect of the property and the order sought by Markom, which does not take account of this fact, would not be just and equitable so far as Menqa is concerned and therefore not appropriate either.

[51] I accordingly agree with my colleague that the claims of both Markom and Menqa should be dealt with, preferably simultaneously, in subsequent proceedings. The order of the court below in relation to paragraph 1.4[95] of the rule *nisi* must accordingly be set aside in its entirety as the first part should not have been granted and the alternative was not persisted in on appeal.

[52] I agree with the conclusions reached by my colleague in regard to para 1.3 of the rule *nisi* and the reasons given for making no order as to the costs of appeal.

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T D CLOETE

JUDGE OF APPEAL

CONCUR:

SCOTT JA

[93] Some of which are listed in para 60 of the *Jaftha* case, above, n 21.
[94] Calculated as set out in para 6 of the judgment of my colleague.
[95] Quoted in para 12 of my colleague's judgment.