THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 314/2018

In the matter between:

NPGS PROTECTION AND SECURITY SERVICES CC **FIRST APPELLANT**

LLEWELLYN RWAXA **SECOND APPELLANT**

and

FIRSTRAND BANK LIMITED **RESPONDENT**

Neutral citation: *NPGS Protection and Security Services CC & another v FirstRand Bank Ltd* (314/2018) [2019] ZASCA 94 (6 June 2019)

Coram: Navsa ADP, Mbha and Makgoka JJA and Mokgohloa and Davis AJJA

Heard: 6 May 2019

Delivered: 6 June 2019

Summary: Summary judgment – whether bona fide defence established – execution against primary home of debtor – no facts placed before court – whether court entitled to order execution without such facts – loan secured by mortgage over surety's property – judgment debtor failing to provide court with any information relative to the asserted right to housing save for a statement from the bar which is required to conduct the mandated inquiry.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Wepener J) sitting as court of first instance:

The appeal is dismissed with costs on a scale between attorney and client.

JUDGMENT

Makgoka JA

[1] This appeal, with leave of this court, is about whether the court a quo, the Gauteng Division of the High Court (Johannesburg) was correct in granting summary judgment against the first and second appellants. If summary judgment was properly granted, an ancillary question is whether the court a quo was correct in declaring the immovable property of the second appellant specially executable.

[2] The first appellant, NPGS Protection and Security Services CC (NPGS) is a close corporation whose main business is the provision of security services. Its sole member is the second appellant, Mr Llewellyn Rwaxa. On 6 May 2009, the respondent and NPGS concluded a written credit facility agreement in terms of which the respondent advanced an amount of R250 000 to NPGS as 'working capital'. The second appellant bound himself as surety and co-principal debtor on behalf of NPGS in favour of the respondent for payment of all amounts due by NPGS to the respondent. The credit facility was repayable upon demand and subject to annual review.

[3] The loan under the credit facility was further secured by a covering mortgage bond registered by the second appellant over his immovable property, in favour of the respondent. At the time that the credit facility was advanced to NPGS, the second appellant had already, in January 2007, registered a mortgage bond in

favour of the respondent in the sum of R2 000 000, over his immovable property (the property).

[4] On 4 May 2017 the respondent issued combined summons in the court a quo against the appellants for payment of an amount of R649 197.39. It alleged that NPGS had defaulted on its repayment obligations in terms of the credit facility and had been in default for more than 20 days. The respondent invoked the suretyship signed by the second appellant in its favour, as well as the mortgage bond registered in its favour over the immovable property of the second appellant. It accordingly, sought judgment against the appellants, jointly and severally, for payment of the claimed amount, interest, costs and an order declaring the immovable property of the second appellant specially executable.

[5] The appellants served their notice of intention to defend on 17 May 2017, which was followed by an application for summary judgment by the respondent, supported by a pro-forma affidavit in terms of rule 32(2) of the Uniform Rules of Court (the uniform rules). In an affidavit resisting summary judgment on behalf of the appellants, deposed to by the second appellant, the appellants initially relied on three grounds in an endeavour to establish a bona fide defence necessary to stave off summary judgment. One of those grounds, prescription, was not persisted with.

[6] The remaining grounds concerned the failure by the respondent to attach a certificate of balance to its particulars of claim, and the alleged failure by the respondent to demonstrate how the claimed amount was made up. Regarding the first ground, it was stated that had the certificate of balance been attached, the appellants 'might possibly have started to glean how the amount of R649 197.39 claimed by the plaintiff is made up'. Absent such certificate, it was said, it was not possible to determine how the amount claimed was made up.[1]

[7] Secondly, it was submitted that the alleged failure by the respondent to explain how the claimed amount was made up, rendered the respondent's

[1] In papers before us, the certificate of balance appears as annexure 'A'. We were informed from the bar that the certificate had been sent to the appellants as part of the documents in terms of s 129 of the National Credit Act 34 of 2005.

particulars of claim excepiable as failing to disclose material facts on which the appellants could reasonably be expected to plead. In this regard, it was argued that the credit facility agreement was capped at R250 000. In the light of that, the appellants claimed that it was unclear how the amount of R649 197.39 was made up.

[8] The application for summary judgment came before Wepener J in the court a quo on 12 September 2017. The learned judge, in an *ex tempore* judgment, rejected the two contentions by the appellants as not constituting a bona fide defence. He accordingly granted summary judgment for the payment of the sum of R649 197.39, interest and costs. Furthermore, the learned judge declared the second appellant's immovable property specially executable.

[9] In this court, the appellants advanced essentially the same arguments they did in the court a quo, albeit with a slightly different emphasis on the absence of the certificate of balance. In this regard, counsel for the appellants pointed out that the respondent had, in its particulars of claim, specifically relied on the certificate of balance, where it was pleaded that the amount of indebtedness would be determined and proved by it. In its absence, submitted counsel, the appellants were unable to determine how the amount claimed was calculated, especially given that the credit facility was limited to R250 000.

[10] Counsel for the appellants also submitted that the respondent had not 'revealed a statement of material facts' as to when the credit facility was increased beyond that amount. Without this, the appellants were not able to determine the capital amount advanced, including interest charged. A further contention advanced on behalf of the appellants was that the respondent had failed to state when the loan was advanced to NPGS. Thus, the sum total of the arguments advanced by the appellants is this: they did not know how the claimed amount is made up. Firstly, because of the absence of the certificate of balance and secondly, because the respondent had not stated the date on which the credit facility was increased.

[11] Rule 32(3) of the uniform rules requires an opposing affidavit to disclose fully the nature and grounds of the defence and the material facts relied upon therefor. To stave off summary judgment, a defendant cannot content him or herself with bald denials, for example, that it is not clear how the amount claimed was made up. Something more is required. If a defendant disputes the amount claimed, he or she should say so and set out a factual basis for such denial. This could be done by giving examples of payments made by them which have not been credited to their account.

[12] In this case, if monies in terms of the credit facility were not advanced and extended to NPGS, as alleged by the respondent, it would have been easy for the appellants to say so, and unequivocally deny the allegation. One expects a defendant in the appellants' position to know whether or not they received money from a bank and if so, in what amount.

[13] As counsel for the respondent correctly submitted in his heads of argument, the appellants did not deny the respondent's allegation that monies were lent and advanced to NPGS in terms of the credit facility, or that the credit facility was increased at the special instance and request of NPGS. Furthermore, the appellants have not complained that NPGS never received statements showing the balance of the monies owed. It is also instructive that the appellants do not assert that any repayment of these monies lent and advanced, has been made. Their silence leads ineluctably to the conclusion that they were unable to meet the respondent's allegations. In my view, the defences raised by the appellants fall within those characterised as 'sham defences' by this court in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* [2009] ZASCA 23; 2009 (5) SA 1 (SCA) paras 31 and 33. There is no merit in any of them.

[14] Indeed, the court would be remiss in its duties if such defences, clearly devoid of any bona fides, stand in the way of plaintiffs who are entitled to relief. The ever-increasing perception that bald averments and sketchy propositions are sufficient to stave off summary judgment is misplaced and not supported by the trite general principles developed over many decades by our courts. See for example, the well-

known judgment of this court in *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) where the proper approach to applications for summary judgments is stated.[2]

[15] It follows that the court a quo was correct in granting summary judgment against the appellants. The appeal against that order must accordingly fail.

[16] I turn now to the order of the court a quo declaring the immovable property of the second appellant specially executable. In the summons, in compliance with the order in *Standard Bank of South Africa Limited v Saunderson & others* [2005] ZASCA 131; 2006 (2) SA 264 (SCA), the appellants' attention was drawn to the provisions of s 26 of the Constitution, and to rule 46(1) of the Uniform Rules. They were invited to place facts before the court, if they wished to contend that the right enshrined in s 26 would be implicated, and that the second appellant would be rendered homeless by the order of execution against his home. I shall revert fully to these provisions.

[17] In the affidavit resisting summary judgment, the second appellant did not deal at all with the prayer for the execution against his immovable property. However, during argument before the court a quo, counsel for the appellants submitted from the bar that the immovable property was the primary residence of the second appellant. In its judgment, the court a quo summarily dismissed counsel's submission and granted the order declaring the second appellant's immovable property specially executable. The court reasoned:

'The surety's [the second defendant's] defences are based on the successful raising of defences by the principal debtor, save that [he] also argued that the property which falls to be declared executable, is the surety's primary home. This argument is raised because the plaintiff [the respondent] had followed the requirements for judgment and execution as if the first defendant is entitled to due compliance with the provisions of the National Credit Act 34 of 2005. But the allegations are superfluous as the first defendant [NPGS], the borrower, is a

[2] See also *Herb Dyers (Pty) Ltd v Mahomed & another* 1965 (1) SA 31 (T) at 31H-32A-B; *Caltex Oil (SA) Ltd v Webb & another* 1965 (2) SA 914 (N) at 916D-H; *Arend & another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 303F-H; *Shepstone v Shepstone* 1974 (2) SA 462 (N) at 467A-H and *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T).

juristic person and it is trite that a surety is not entitled to rely on the provisions of the National Credit Act in order to protect a primary residence in these circumstances.'

[18] In this court, it was enquired of counsel for the appellants as to why the affidavit opposing summary judgment did not deal with the execution order. Counsel's response was that the issue was 'a matter of law', which, in his view, entitled him to raise it during argument without setting it out in the affidavit. Counsel was unable to provide any meaningful response to why there had not been an application to adduce further evidence on appeal to introduce this issue. He was nevertheless given an opportunity to state what factors would have been contained in such an affidavit to militate against declaring the appellant's immovable property specially executable. Counsel was unable to inform us of the would-be contents of such an affidavit, and whether the execution would leave the second appellant homeless.

[19] Two things went wrong in the court a quo concerning the issue of primary residence. The first is that the appellants' legal representatives were of the view that the issue of primary residence 'was a matter of law' which could be raised from the bar, without setting it out in the affidavit opposing summary judgment. The second is that the learned judge misconstrued the issue. It was not whether the provisions of the National Credit Act availed NPGS. The issue was whether the execution against the second appellant's immovable property could potentially jeopardise his right to have access to adequate housing enshrined in s 26(1) of the Constitution which provides that everyone has the right to have access to adequate housing. Section 26(3), on the other hand, reads:

'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.'

[20] In my view, once it is found that the basis on which the court a quo declined to exercise execution oversight was erroneous, the matter should be remitted to that court for it to consider the matter afresh, on the correct basis. This is where I part ways with my colleague, Davis AJA, whose judgment (the majority judgment) I have had the privilege of reading. My colleague agrees that the court a quo misdirected

itself when it ruled that the second appellant was not entitled to judicial oversight regarding execution against his home. Despite this, he concludes that the execution order should stand because '. . . it is equally clear that the court was unimpressed with the mere submission from the bar about the loss of a primary residence without any further information being presented. It was clearly seen by the court below as a ruse to escape the consequences of default'.

[21] I am in respectful disagreement with how the reasoning of the court a quo is explained. I have quoted in full the excerpt from its judgment. It is clear that the court declined to exercise its oversight role on the basis that, in the circumstances of the case, the second appellant was not entitled to such oversight because the principal debtor was a juristic person. It is on that basis alone, that judicial oversight was not exercised. The court a quo did not rely on the manner in which the issue was raised, as its reason for not exercising oversight role. We must therefore accept what the court a quo said in its own words.

[22] Therefore, but for the misdirection, we do not know what the court a quo's attitude would have been to counsel's submission. It could have adopted either of the following courses. It could have concluded that, in view of the unsatisfactory manner in which the issue was raised, the second appellant's home was liable to be executed against, without judicial oversight (which would have been wrong in my view). It could also have adjourned the prayer for execution and set out directives as to the manner in which those circumstances should be placed before it, as well as time frames therefor, coupled with a suitable costs order against the appellants. The latter would have been the proper approach, in my view.

[23] As to what such enquiry would reveal, one would never know beforehand. There are pertinent issues that would come into consideration in such an enquiry. Among them would be whether indeed the property is the primary home of the second defendant, as it appears to be. If it is, the court, exercising its judicial oversight, would consider whether the principal debtor, NPGS, or the second appellant, own any or sufficient moveable assets which can be realised to meet the judgment debt. This is particularly important in light of the obiter remark of a single

Judge of the Gauteng Division of the High Court, Pretoria, in *Nedbank Ltd v Molebaloa* [2016] ZAGPPHC 863 para 10, footnote 2, that the word 'or' appearing at the end of rule 46(1)(*a*)(i)[3] is now in practice read and interpreted as 'and'.

[24] If that interpretation is correct, the effect is that execution against immovable property of a judgment debtor is not competent unless there has first been execution against movable property, and a nulla bona return had been made in respect thereof. I express no view as to the correctness of that interpretation, as the issue is not before this court.[4] However, if that is the practice in the Gauteng courts, the question is whether the court a quo was not obliged to follow that practice when considering the execution order in this case.

[25] The majority judgment concludes that the second appellant is not entitled to judicial oversight enshrined in s 26(3) of the Constitution for two reasons. First, because the loan in question was obtained by the second appellant to finance his business, and not to purchase his home. Second, because the appellants were legally represented in the court a quo, and that the provisions of s 26(3) and 46(1)(*a*) were brought to the second appellant's attention in the summons. The second appellant has had ample opportunities to place the relevant circumstances before the court: in the affidavit opposing summary judgment; during the argument in the court a quo; in this court in which they could have sought leave to apply to adduce further evidence; and during the hearing of the appeal in this court. I conclude, on the facts of the case, that none of the above considerations disentitles the second appellant of the right to judicial oversight.

[26] The jurisprudential foundation for judicial oversight was laid in *Jaftha v Schoeman & others; Van Rooyen v Stoltz & others* [2004] ZACC 25; 2005 (2) SA 140 (CC) where the Constitutional Court declared that the failure to provide judicial oversight over sales in execution against immovable property of judgment debtors in

[3] Rule 46(1) is quoted in full in paragraph 27 of this judgment.
[4] In *Nkola v Argent Steel Group (Pty) t/a Phoenix Steel* [2018] ZASCA 29; 2019 (2) SA 216 (SCA), this court's attention was drawn to the remarks in *Molebaloa*. However, this court did not deem it necessary to express any firm view about it. It distinguished the matter before it on the basis that *Molebaloa* concerned execution of a primary home, which was not implicated in the case before it.

s 66(1)(*a*) of the Magistrates' Courts Act 32 of 1944 was unconstitutional and invalid. It remedied the defects by reading in words into the subsection providing for judicial oversight of the process of execution against immovable property. With the reading in, only the court, after consideration of all relevant circumstances, was empowered to order execution against the immovable property of the party against whom judgment had been given.

[27] Following *Jaftha*, rule 46, which provides for execution against immovable property, was amended with effect from 24 December 2010, by the addition of a proviso to sub-rule 1, to provide for judicial oversight over execution of immovable property which is the primary residence of a judgment debtor. The amended rule 46(1)(*a*) read, at the time,[5] as follows:

'No writ of execution against the immovable property of any judgment debtor shall issue until – (i) a return shall have been made of any process which may have been issued against movable property of the judgment debtor from which it appears that the said person has not sufficient movable property to satisfy the writ; or (ii) such immovable property shall have been declared specially executable by the court or, in the case of a judgment granted in terms of rule 31(5), by the registrar: *Provided that, where the property sought to be attached is the primary residence of the judgment debtor, no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property.*'

(My emphasis.)

[28] The object of judicial oversight was emphasised in *Mkhize v Umvoti Municipality & others* [2011] ZASCA 184; 2012 (1) SA 1 (SCA) para 26, as being to determine whether rights in terms of s 26(1) of the Constitution are implicated. This court went on to explain:

'In the main a number of cases grappling with *Jaftha* sought to arrive at that determination without accepting that judicial oversight was required in every case. How, it must be asked, can a determination be made as to whether s 26(1) rights are implicated, without the requisite judicial oversight? We are unable to understand the difficulty of applying the

[5] Rule 46 was further amended on 22 December 2017, by amongst others, the introduction of a new rule 46A, to regulate the procedure which a judgment creditor has to follow when applying to court to declare a judgment debtor's primary residence executable. It provides for the following aspects: judicial oversight; procedure; contents of the application; supporting annexures; respondent's options; powers of the court; and the setting of a reserve price. These provisions are not applicable to this case as it was finalised before the new amendments came into effect on 22 December 2017.

principle that it is necessary *in every case* to subject the intended execution to judicial scrutiny to see whether s 26(1) rights are implicated. To not undertake such an enquiry would in fact render the procedure unconstitutional. . . . ' (My emphasis.)

[29] As stated already, the majority concludes that the second appellant is not entitled to the judicial oversight of s 26 because the loan was not acquired for the purpose of purchasing his home, but for financing the business of NPGS. A similar argument was raised, and rejected, in *Gundwana v Steko Development CC & others* [2011] ZACC 14; 2011 (3) SA 608 (CC). There, it was contended that a mortgaged property was not affected by judicial oversight because mortgagors were willing to accept the risk of losing their property when entering into the mortgage loan agreement.[6]

[30] The Constitutional Court, at para 44, rejected the proposition. It held that the particular willingness to provide the property as security for the loan did not imply that the mortgagor accepts that the mortgage debt may be enforced without court sanction; or that the mortgagor has waived his or her right to have access to adequate housing or eviction only under court sanction of ss 26(1) and (3). Froneman J observed at para 47 that mortgage bonds do not ordinarily contain clauses describing the purpose for which the mortgage is held. See also *Mkhize* para 16 where this court (in a separate concurring judgment), with reference to *Gundwana*, held that a mortgagee is in the same position as other creditors.

[31] Similarly, I can conceive of no legal basis for treating differently, judgment debtors who secure business loans by providing their property as security, and disentitle them to the protection of s 26(3) when their homes are sought to be executed against. It could well be that in those circumstances, the remarks of Mokgoro J in *Jaftha* para 58, would weigh with the court exercising its judicial oversight whether execution should be ordered:

'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

[6] The contention was based on a passage in para 18 of *Standard Bank of South Africa Ltd v Saunderson & others* [2005] ZASCA 131; 2006 (2) SA 264 (SCA).

debt, a sale in execution should ordinarily be permitted where there has not been an abuse of court procedure.'

[32] Needless to say, this passage does not mean that where loans were obtained for purposes other than purchasing a home, judicial oversight is not required. Instead, it reinforces the proposition that in all circumstances where there is an application for an order of execution against a primary residence of a judgment debtor, judicial oversight is required, irrespective of the purpose for which the debt was incurred.

[33] The only way to determine whether execution 'should ordinarily be permitted' and to determine whether there was an abuse, is to have 'some preceding enquiry', which is necessary to determine whether the facts of a particular matter are of the *Jaftha*-kind, as per *Gundwana* para 43. Therefore, a court must provide judicial oversight in all cases, including when the property has been provided as security for a business loan, as is the case here. See *Mkhize* para 18, where the opinions of Max du Plessis and Glenn Penfold,[7] in their discussion of *Jaftha* and *Sauderson*, were cited with approval. The learned authors make the point, with reference to *Jaftha*, that the 'only way to determine whether s 26(1) will be breached is on a case-by-case basis; hence the need to ensure judicial oversight of the process in *all* cases'. (My emphasis.)

[34] The determinative test is whether the judgment debtor is likely to be deprived of the right to access to adequate housing should the immovable property in question be executed against. The court's oversight role is triggered as long as the loan is secured by an immovable property which is the primary home of a judgment debtor, and there is an application to declare that property specially executable. Accordingly, I conclude that it is immaterial to the court's oversight role whether the loan was obtained to finance the purchase of a home or to finance a business venture. Apart from being at odds with the general thrust of s 26(3), it is doubtful

[7] M du Plessis and G Penfold 'Bill of Rights Jurisprudence' (2005) *Annual Survey of South African Law* 27 at 77 to 81; 2006 *Annual Survey of South African Law* 45 at 83-93.

whether the differentiation sought to be made would be compatible with the equality provisions of s 9 of the Constitution.

[35] This bring me to the next consideration. It is whether the court is entitled to shirk its oversight role where there is no opposition to an order of execution, despite a judgment debtor being legally represented. In a slightly different but relevant context, when it considered the constitutionality of rule 31(5) of the uniform rules in *Gundwana* (whether the registrar of a high court is competent to order immovable property specially executable), the Constitutional Court held at para 43 that the constitutional validity of the rule cannot depend on the subjective position of a particular applicant.

[36] Once more, in *Mkhize* at para 18, the learned authors Du Plessis and Penfold, are quoted as follows:

'At no point in its reasoning did the Constitutional Court [in *Jaftha*] suggest that this constitutional duty only arose when there was formal opposition from the defendant. Nor did it allow application for such orders that were not opposed to continue to take place before the registrar. Instead, it required judicial oversight in all cases to ensure that the orders being granted did not violate s 26(1) of the Constitution. In any event, the idea of formal opposition as the trigger for constitutional justification appears to miss the point. There are many reasons why a defendant may not formally or informally oppose such an order, not least of which may be a lack of funds and a lack of knowledge about the legal process – something the Constitutional Court adverted to in *Jaftha*. In our view there are also undoubtedly circumstances in which a court would, despite the lack of opposition, be fulfilling its constitutional duty by refusing to grant such an order.'

[37] There is indeed force in these remarks. In addition to the lack of funds and lack of knowledge of legal processes, I would add another reason why a judgment debtor may not formally oppose the order of execution, namely wrong advice or remissness of legal representatives. We have a classic example of that in the present case. I am of the view that in those circumstances the court's oversight role is neither displaced nor diminished. A court cannot remain supine in the face of potential infringement of a constitutional right. It must proactively seek to establish

the relevant circumstances before it declares a primary home specially executable. This is what the Constitution demands in s 26(3).

[38] Anything less would lead to unintended results. For example, two judgment debtors who both face the risk of losing their primary homes when action is instituted, would be treated differently, depending on how they react to the summons. The one who elects not to defend the action, and default judgment is taken against him or her, will be assured of judicial oversight in terms of the prevailing rules and jurisprudence when their property is sought to be executed against. On the other hand, the one who elects to defend the action, albeit through a not so diligent legal representative, enjoys no such benefit, and his or her property would summarily be executed against, without judicial oversight. It is untenable.

[39] It follows in the context of the present case that the enjoyment and protection of fundamental rights, such as the one enshrined in s 26, cannot depend on subjective factors such as the quality of one's legal representation. The court is enjoined by the Constitution to exercise judicial oversight in all matters where orders for execution against primary homes of judgment debtors are sought. It is only after considering 'relevant circumstances' that a court would arrive at a constitutionally appropriate decision.[8] It is by no means suggested that legally represented judgment debtors do not have a duty to place the relevant information before the court as to why the execution against their primary homes should not be ordered. By all means they do. This calls for diligence and proper advice on the part of their legal representatives. In the present case, there was no such. The legal representatives provided the second appellant with incorrect legal advice as to how the issue of primary residence should be raised. However, the consequence of their wrong

[8] For analogous circumstances where the Constitutional Court set aside evictions granted without the court considering all relevant circumstances as required in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), see *Machele & others v Mailula & others* [2009] ZACC 7; 2010 (2) SA 257 (CC); *Pitje v Shibambo & others* [2016] ZACC 5; 2016 (4) BCLR 460 (CC).

advice – losing the primary home without the constitutionally required judicial oversight – should not be visited upon the second appellant.

[40] The insistence on judicial oversight does not mean that execution against a judgment debtor's primary home can never be authorised. It simply means that if it occurs, it must be within the constitutional dictates of s 26(3). On the face of it, it might appear that the circumstances of the second appellant, a businessman, are not of the *Jaftha*-type. Therefore, it could well be that he is abusing the mechanism of judicial oversight. My colleague in para 65 makes a definitive conclusion that the issue of primary residence was raised as stratagem to avoid the consequences of the second appellant failing to fulfil his obligations.

[41] Without a proper enquiry into all the relevant circumstances, it is difficult to accept that conclusion. I attribute the unsatisfactory state of affairs to the wrong advice given to the second appellant by his legal representatives that the issue of primary residence could be raised in argument without dealing with it fully in the opposing affidavit. As explained in *Mkhize* para 22 '[c]ourts cannot *ante omnia* decide whether s 26(1) rights have been implicated without conducting a proper investigation in discharging its oversight role'.

[42] It is true that *Gundwana* and *Mkhize* both concerned applications for default judgment, and not summary judgment. It is also true that the majority of cases where judicial oversight is exercised, followed judgments granted by default. Difficulties seldom occur in applications for summary judgment. That is because in the majority of those cases, the defendants receive proper advice from their legal representatives. That is not the case here. The second appellant was clearly given wrong advice that he did not have to set out the relevant factors in an affidavit concerning his primary home. That attitude persisted in this court. It became clear that, until the possibility of applying to adduce further evidence on appeal was raised from the bench during argument, no thought had been given to it by the appellants' legal representatives.

[43] There is therefore nothing preventing a court, in suitable cases such as the present, to play an active role to ensure that in a given case, its execution order is constitutionally compliant. This is particularly true here, given that in the summons it was foreshadowed that the property against which execution was sought, was the primary home of the second appellant. Upon perusal of the summons, this should have been flagged by the learned judge as potentially triggering judicial oversight. Upon noticing that the affidavit opposing summary judgment was silent on it, the learned judge should, at the very least, enquired whether the second appellant had waived the protection afforded in s 26(3) and rule 46(1).

[44] A court must always be reluctant to deprive a judgment debtor of the right and protection of s 26(3) except in the clearest case that the judgment debtor had waived that right. Such waiver must not be easily inferred. In the present case, it can hardly be said that the second appellant had waived his right his right. For all these reasons, I would dismiss the appeal against the granting of the summary judgment, but remit the prayer for execution against the second appellant's immovable property to the court a quo, for it to conduct an enquiry envisaged in s 26(3) of the Constitution, in the light of this judgment. In this regard, each of the parties should be afforded an opportunity to place whatever information before the court regarding the executability of the second appellant's immovable property.

_____

T M Makgoka
Judge of Appeal

Davis AJA (Navsa ADP, Mbha JA and Mokgohloa AJA concurring)

[45] I have had the privilege of reading the judgment of my colleague Makgoka JA. I respectively disagree with the approach that he has adopted in respect of one critical issue whether the order of the court a quo regarding the execution of

immovable property stands to be set aside and his proposed order that the prayer for execution be remitted to the court a quo for it to conduct an inquiry envisaged in s 26(3) of the Constitution 1996.

[46] The facts giving rise to this appeal have been meticulously set out by Makgoka JA. The difference between us turns on the following part of the order:
'The immovable property described as Erf 66 Elton Hill, extension 1, Township, the province of Gauteng, measuring 1767 square metres in extent and held under deed of transfer number T93029/1999 is declared especially executable.'

[47] The respondent claimed R649 197.39 against the principal debtor, being the first appellant of which the second appellant is the sole member. The claim was based on a loan advanced to the first appellant by the respondent for the purpose of financing its business. The second appellant stood surety for the first appellant's obligations in respect of this loan. As security for the first appellant's loan, a first mortgage bond over second appellant's immovable property was registered.

[48] The appellants opposed the application for summary judgment on the basis of what they averred to be bona fide defences. The court a quo found that none of these averments raised in their affidavit opposing summary judgment set out sufficient facts to show that the appellants had a bona fide defence. Makgoka JA has found that, save for the declaration of special execution of the property, the court a quo's findings should not be disturbed. As indicated it is with the latter finding that I find myself in disagreement.

[49] In its summons, the respondent drew to the second appellant's attention the provisions of ss 26(1) and 26(3) of the of the Constitution that he may not be evicted from his home, or his home may not be declared executable and sold in execution, without a court order, which can only be granted after a court has considered all the relevant circumstances. The summons drew further attention to the provisions of rule 46(1)(*a*)(ii) of the uniform rules of Court, which applied prior to an amendment to the uniform rules on 22 December 2017, which amendment set out in greater detail the protection afforded to a debtor as sourced in ss 26(1) and (3) of the Constitution.

[50] Since 22 December 2017 rule 46(A) applies to all applications for special execution as well as proceedings that were pending on that date. To the extent relevant, rule 46(A) provides as follows:

'(1) This rule applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor.

(2)(a) A court considering an application under this rule must –

(i) establish whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor; and

(ii) consider alternative means by the judgment debtor of satisfying the judgment debt, other than execution against the judgment debtor's primary residence.

(b) A court shall not authorise execution against immovable property which is the primary residence of a judgment debtor unless the court, having considered all relevant factors, considers that execution against such property is warranted.

(c) The registrar shall not issue a writ of execution against the residential immovable property of any judgment debtor unless a court has ordered execution against such property.'

[51] The protection afforded to a judgment debtor by this rule, whenever an execution creditor seeks to execute against the former's residential home, stems from the interpretation of s 26(3) of the Constitution in the judgment of Mokgoro J in the Constitutional Court in *Jaftha v Schoeman & others; Van Rooyen v Stoltz & others* [2004] ZACC 25; 2005 (2) SA 140 (CC) paras 55-56.

'It is my view that this is indeed an appropriate remedy in this case. Judicial oversight permits a magistrate to consider all the relevant circumstances of a case to determine whether there is good cause to order execution . . . It would be unwise to set out all the facts that would be relevant to the exercise of judicial oversight. However, some guidance must be provided. If the procedure prescribed by the rules is not complied with, a sale in execution cannot be authorised. If there are other reasonable ways in which the debt can be paid an order permitting a sale in execution will ordinarily be undesirable. If the requirements of the rules have been complied with and if there is no other reasonable way by which the debt may be satisfied, an order authorising the sale in execution may ordinarily be appropriate unless the ordering of that sale in the circumstances of the case would be grossly disproportionate. This would be so if the interests of the judgment creditor in obtaining

payment are significantly less than the interests of the judgment debtor in security of tenure in his or her home, particularly if the sale of the home is likely to render the judgment debtor and his or her family completely homeless.'

[52] In *Jaftha* the court found that s 66(1)(*a*) of the Magistrates' Court Act 32 of 1944 violated s 26(1) of the Constitution to the extent that it allowed execution against the home of indigent debtors whenever, as result thereof, they stood to lose the security of tenure.

[53] Rule 46(1) and its replacement rule 46(A) afford a judgment debtor an opportunity to oppose the grant of an order of special execution against residential home. In *Standard Bank of South Africa Ltd v Bekker and Four Similar Cases* 2011 (6) SA 111 (WCC) a full bench at para 30 in respect of rule 46(1) said:

'Allegations that execution against the hypothecated property would infringe the defendant/ judgment debtor's constitutional rights or that the application for a writ of execution to issue is an abuse should, in principle, be pleaded by the defendant/ judgment debtor, and any rebutting allegations by the plaintiff/ judgment creditor.'

[54] The requirements now contained in rule 46(A) make it clear that a judgment debtor must be informed before an application to execute is heard, that he or she has a right to set out grounds of opposition to such an application. Faced with an application to execute in respect of a residential home, a court is required to examine the specific circumstances of the debtor, as they apply at the time the order is to be made, whether there are alternative means by which the debt may be repaid taking into account whether the remedy to be granted meets a test of proportionality between the legitimate contractual rights of the creditor and the rights of the debtor in terms of s 26(1) of the Constitution. See *Standard Bank v Hendricks & others* [2018] ZAWCHC 175 para 39.

[55] From this review of the relevant jurisprudence, it is clear that in a case of an application for default judgment, a court, in its discretion, needs to ensure that it is possessed with adequate information to enable it to grant a remedy which complies with these requirements. In the case of an application for summary judgment,

provided the creditor has complied with the requirements of rule 46(A), there is an onus on the debtor, at the very least, to provide the court with information concerning whether the property is his or her personal residence, whether it is a primary residence, whether there are other means available to discharge the debt and whether there is a disproportionality between the execution and other possible means to exact payment of the judgment debt.

[56] In his judgment Makgoka JA relied heavily on the proposition that there is no legal basis for treating differently judgment debtors who secure business loans by providing their property as security, which distinction would disentitle them to the protection of s 26(3) of the Constitution as well as rule 46, when their homes are sought to be executed against. For this proposition he has relied on the judgments in *Gundwana v Steko Development* [2011] ZACC 14*;* 2011 (3) SA 609 (CC) and *Mkhize v Umvoti Municipality* [2011] ZASCA 184; 2012 (1) SA 1 (SCA). In both cases the courts were dealing with default judgments. In *Gundwana,* the court found that the Registrar of the high court was not competent to make an execution orders when granting default judgments in terms of rule 31(5)(b) of the Uniform Rules. In *Mkhize*, judgment by default was entered against the plaintiff by the clerk of the magistrate's court and a warrant of execution was issued against his immovable property leading to nulla bona return of service. A clerk thereafter issued a warrant to execute against the immovable property which was sold at a sale in execution. Notwithstanding that both of these cases dealt with default judgment, it is significant that Navsa and Snyders JJA held in *Mkhize* at para 26:

'We are unable to understand the difficulty of applying the principle that it is necessary in every case to subject the intended execution to judicial scrutiny to see whether s 26(1) rights are implicated. To not undertake such an inquiry would in fact render the procedure unconstitutional.'

However the court issued the caution that 'the validity of executions will depend on the circumstances of each case.' (para 27).

[57] This dictum implies that care should be taken by a court to examine the circumstances of each case. It must follow that the circumstances pertaining to a

default judgment are generally different to those which apply with regard to a summary judgment, a point which is luminously illustrated in this case.

[58] In the present case in its summons the respondent drew the attention of the appellants to the significance of ss 26(1) and (3) of the Constitution together with the implications of rule 46(1)(*a*)(ii). Notwithstanding that the appellants were duly represented and deposed to an affidavit, opposing summary judgment, not a word was said about the property which would be employed as security for the loan of the first appellant. The second appellant is a businessman and, judging by the extent of the first appellant's indebtedness at the time that the summons were issued, which was probably also not the full extent to which the facility was extended, his security business that was conducted must have been quite extensive.

[59] It is apparent from the judgment of the court below that the only, and limited, manner in which the question of the property being the primary residence of the second appellant was raised, was by way of a submission from the bar by counsel representing him. Nothing more. Before the court below, no attempt was made to provide even the most basic information in relation thereto. A further affidavit could have been submitted. An opportunity could have been sought for the second appellant to testify. The court could have been told whether he was now a businessman without means and whether he had accommodation of any sort. This was not done.

[60] Moreover, at the stage before the hearing of the appeal, no attempt was made on behalf of the second appellant to have further evidence admitted on appeal by way of an application to that end. Furthermore, before us, during oral argument, a further opportunity presented itself, when counsel was asked about the failure to resort to what is set out above. That opportunity, too, was spurned.

[61] The present case is neither one of default judgment nor does it involve a mortgage bond needed to acquire a personal residence. The relevant loan was a commercial loan, to be employed in the business of the first appellant. These facts alone may not be sufficient to justify a full inquiry into whether an execution of a

residential property should take place. It is notable however that this case stands to be classified differently to the impecunious litigant who sought leave in *Jaftha* or an unrepresented debtor. See also the observation of Froneman J in *Gundwana* at para 53 concerning the scope of the oversight role of a court in this cases: 'What it does is to caution courts that, in allowing execution against immovable property, due regard should be taken of the impact that this may have on judgment debtors who are poor and at risk of losing their homes'.

[62] When courts issue an order of execution against immovable property, due regard should be had to the impact that this may have on judgment debtors who are poor and at risk of losing their homes. In *Gundwana* at para 54 Froneman J said the following about execution of immovable property:

'It must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided.'

[63] In the present case this court is asked to find that but one mention by counsel from the bar in the court below is sufficient to avoid an order of execution. The summary judgment procedure enables essential information to be placed before a court to enable it to fulfil its function in adjudicating on defences raised. In the present case, extensive facile defences, which were dressed up as being technically proficient, were the only ones presented resisting summary judgment. One would have thought that a business person in the position of the second appellant, when faced with the loss of his home, would, at the very least, have expressed his anxiety about the consequences thereof. It is the one thing that is conspicuously absent from the affidavit. While it is true that the court below misdirected itself in relation to whether or not an individual rather than a company was affected, it is equally clear that the court was unimpressed with the mere submission from the bar about the loss of a primary residence without any further information being presented. It was clearly seen by the court below as a ruse to escape the consequences of default.

[64] Judicial oversight continued before us. We were required to consider whether the circumstances were such as to preclude an execution order. The second appellant was provided with yet another opportunity to present relevant information. This aspect was specifically raised with counsel at the hearing. If the second appellant was genuinely at risk of losing his primary residence, it would have taken no more than a few lines in an affidavit to put before us the required information. This is not an instance of a vulnerable individual being subjected to the evils that might be perpetrated by an unscrupulous lender. It is not correct to characterise the second appellant as being placed in a vulnerable position by his legal representatives being remiss.

[65] Having taken the point from the bar concerning the loss of a primary residence, it could not have escaped the second appellant or his legal representatives, as pointed out in the summons with the references to his constitutional rights and the need to place information before the court, that certain basic information had to be provided. The failure to do so, in the light of all the circumstances set out above, leads to the compelling conclusion that the point was raised as a stratagem to avoid the consequences of failing to fulfil his obligations in respect of a commercial loan. One is left with the distinct impression that the second appellant was unable to attest to that which could have avoided the execution order. This is fortified by the unlikelihood that the second appellant would have put his primary residence at risk purely to secure a commercial loan. It should be borne in mind that there was already an existing bond in place, which was then used for the further purpose of securing the loan.

[66] The duty of a court to investigate a debtor's position may well be different, even on the facts of this case if it involved an unrepresented litigant, the loan was not exclusively of a commercial nature or where, at least, some evidence suggests that the execution was in respect of a debtor's primary residence. As was made clear in *Standard Bank of South Africa Limited v Saunderson & others* [2005] ZASCA 131; 2006 (2) SA 264 (SCA) para 23, a judgment creditor only has to justify the grant of a writ where the debtor has contested its validity because of an alleged infringement of s 26(1) of the Constitution. In their judgment Cameron and Nugent JJA held that the

determination of whether the grant of a writ of execution is constitutionally justified only arises where the defendant defends or at least lodges an informal objection to a writ of execution.

[67] On the facts of this case, the complete failure by the second appellant to avail himself of rights which were expressly drawn to his attention in the summons issued by the respondent dictates to the contrary. It bears repeating that there was a specific prayer in the summons requesting an order of execution. In imposing an obligation upon a court in this case when one vague and unspecified mention of a personal residence without more suffices as a defence or even a justification for remitting a case back to the court a quo, would in my view, cause significant uncertainty, and arguably serious damage to the efficient provision of credit in the economy.

[68] In this case the second appellant was afforded a number of opportunities to lodge an objection to the application to execute. From the time of the deposition of the affidavit resisting summary judgment to the time of the appearance of the hearing before the court a quo and then before the hearing of the appeal, added to which a further opportunity at the hearing of the appeal, the second appellant spurned four opportunities to provide the necessary information.

[69] For the reasons set out above together with those set out by Makgoka JA in respect of the other defences, I would dismiss the appeal with costs.

[70] In the result:

The appeal is dismissed with costs on a scale between attorney and client.

_____

D Davis

Acting Judge of Appeal

APPEARANCES:

For the Appellants:	VP Ngutshana Instructed by: Maoba Attorneys, Pretoria Mogaswa Inc., Johannesburg Van der Berg Van Vuuren Attorneys, Bloemfontein
For the Respondent:	C Moreno Instructed by: Marais Muller Hendricks Inc., Tyger Valley Mervyn Joel Smith Attorneys, Johannesburg Bezuidenhout Inc., Bloemfontein