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IS THERE A NEED FOR A UNIFORM APPROACH TO JUDICIAL OVERSIGHT OVER THE EXECUTION OF THE IMMOVABLE PROPERTY OF A JUDGMENT DEBTOR?

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CHAPTER 1: INTRODUCTION

On 8 November 2004 the Constitutional Court, in *Jaftha v Schoeman; Van Rooyen v Stoltz*,[1] found section 66(1)(a) of the Magistrates' Courts Act,[2] which provides for the issuance of a warrant of execution against immovable property by a court, to be in conflict with section 26(1) of the Constitution of the Republic of South Africa.[3]

Section 66(1)(a) of the Magistrates' Courts Act provides as follows:

> 66(1)(a) Whenever a court gives judgment for the payment of money or makes an order for the payment of money in instalments, such judgment, in case of failure to pay such money forthwith, or such order in case of failure to pay any instalment at the time and in the manner ordered by the court, shall be enforceable by execution against the movable property and, if there is not found sufficient movable property to satisfy the judgment or order, or the court, on good cause shown, so orders, then against the immovable property of the party against whom such judgment has been given or such order has been made.

The Constitutional Court declared the failure to provide judicial oversight over sales in execution of immovable property of judgment debtors in section 66(1)(a) to be unconstitutional and invalid.[4] To remedy this defect, the Constitutional Court ordered that section 66(1)(a) was to be read as if the words "a court, after consideration of all relevant circumstances, may order execution", appeared before the words "against the immovable property of the party in the section".[5]

Consequently, section 66(1)(a) is to be read as follows:

> 66(1)(a) 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

1 2005 2 SA 140 (CC) ("*Jaftha*").
2 32 of 1944 ("*the Magistrates' Courts Act*").
3 1996 ("*the Constitution*").
4 Before the Constitutional Court decision, the *Jaftha* cases served before the Cape High Court and were reported as *Jaftha v Schoeman; Van Rooyen v Stoltz* [2003] 3 All SA 690 (C). The Cape High Court held that section 66(1)(a) did not conflict with the provisions of section 26 of the Constitution.
5 *Jaftha* at [64]. See Van Heerden & Boraine "Reading procedure and substance into the basic right to security of tenure" 2006 *De Jure* 319 and Steyn "Safe as houses? Balancing mortgagee's security interest with homeowner's security of tenure" (2007) 11 *Democracy and Development* 101. Both articles offer useful earlier commentary about the effect which *Jaftha* had on our procedural law.

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> 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 the relevant circumstances, may order execution][6] against the immovable property of the party against whom such judgment has been given or such order has been made.

Jaftha had a dramatic effect on execution against immovable property. It not only caused the Rules Board for Courts of Law to amend Uniform Rule of Court 46(1)[7] with effect from 19 November 2010, but eventually brought about numerous conflicting decisions pertaining to the execution process in High Court practice. In reaction to the decision various divisions of the High Court adopted practice directions that offer some practical guidance to creditors and practitioners upon the manner in which effect would be given to the findings in *Jaftha*.

Uniform Rule of Court 46(1) in its amended form reads as follows:

> 46 Execution - immovables
>
> (1)(a) 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 the movable property of a 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 to be specifically 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.
>
> (b) A writ of execution against immovable property shall contain a full description of the nature and situation (including the address) of the immovable property to enable it to be traced and identified by the sheriff; and shall be accompanied by sufficient information to enable him or her to give effect to subrule (3) hereof.[8]

Immediately after *Jaftha* it became apparent that not only Uniform Rule of Court 46(1), but also Uniform Rule of Court 31(5) would be influenced by the decision. In at least two cases that followed shortly after *Jaftha*, namely, *Standard Bank of South Africa Ltd*

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6 Reading in the wording of the Constitutional Court.

7 Substituted in terms of GN R981 of 19 November 2010. The wording of the amended rule 46(1) appears in *Erasmus Superior Court Practice*, Service 43 at B1-331.

8 Emphasis added.

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Snyders & 8 similar cases[9] and *Nedbank Ltd v Mortinson*,[10] Uniform Rule of Court 31(5) was scrutinised in order to determine whether the rule was in conflict with section 26(1) of the Constitution.[11] In general it can be said that Uniform Rule of Court 31(5) authorises the registrar to grant default judgments. In the strictest sense the effect of *Jaftha* was to make judicial oversight compulsory over the process of execution against the home of the debtor. In *Snyders* it was held that only the court (and not the registrar) could grant an order declaring executable a debtor's immovable property which is his home.[12] *Mortinson* took a different view and held that if the immovable property (home) had been put up as security, and if there had been no abuse of court procedure, a sale in execution should normally be allowed by the registrar.[13]

In an apparent attempt to promote uniformity, at least in the High Courts, Uniform Rule of Court 31(5) was amended on 16 August 2013. The amendment now disallows the registrar from declaring executable any residential property. The amended rule reads as follows:[14]

> (5)(a) Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, if he or she wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the registrar a written application for judgment against such defendant: Provided that when a defendant is in default of delivery of a plea, the plaintiff shall give such defendant not less than 5 days' notice of his or her intention to apply for default judgment.
>
> (b) The registrar may-
>
> (i) grant judgment as requested;
>
> (ii) grant judgment for part of the claim only or on amended terms;
>
> (iii) refuse judgment wholly or in part;
>
> (iv) postpone the application for judgment on such terms as he or she may consider just;
>
> (v) request or receive oral or written submissions;
>
> (vi) require that the matter be set down for hearing in open court:

9 2005 (5) SA 610 (C).
10 2006 (6) SA 462 (W).
11 *Snyders* which was decided in the Cape High Court and *Mortinson* which was decided in the Witwatersrand Local Division (now known as the Gauteng Division of the High Court of South Africa, with its local seat at Johannesburg).
12 *Snyders* at [7].
13 *Mortinson* at [25].
14 GN R471 of 12 July 2013.

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Provided that if the application is for an order declaring residential property specially executable, the registrar must refer such application to the court.

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

(d) Any party dissatisfied with a judgment granted or direction given by the registrar may, within 20 days after **[he]** such party has acquired knowledge of such judgment or direction, set the matter down for re-consideration by the court.

(e) The registrar shall grant judgment for costs in an amount of R200 plus the sheriff's fees if the value of the claim as stated in the summons, apart from any consent to jurisdiction, is within the jurisdiction of the magistrate's court and, in other cases, unless the application for default judgment requires costs to be taxed or the registrar requires a decision on costs from the Court, R650 plus the sheriff's fees.[15]

It should be noted that section 26(1) of the Constitution aims at protecting the right to "adequate housing". Section 66(1)(a) of the Magistrates' Courts Act, read with the words of the Constitutional Court, does not specify what type of immovable property is intended to be subject to judicial oversight. The amended Uniform Rule of Court 46(1) requires judicial oversight over the execution against the "primary residence" of a debtor, and the amended Uniform Rule of Court 31(5) prohibits the registrar from declaring executable immovable property which is "residential property". *Jaftha* probably intended that judicial oversight, as a procedural prerequisite, should be limited to those instances which involve the home of a debtor. However, the wording of the applicable legislation is not consistent and does not clearly denote this meaning.

A number of cases decided after *Jaftha* attempted to give practical effect to the *Jaftha* requirement of judicial oversight over the process of execution against immovable property of a debtor.[16] From these cases it appears that:

(a) not all courts applied the principles in the same manner;

15 The underlined words were introduced with the amendment and words in square brackets were deleted from Uniform Rule of Court 31(5).

16 The cases include *Snyders* (*supra*); *Nedbank Ltd v Mashiya and Another* 2006 (4) SA 422 (T); *Absa Bank Ltd v Ntsane and Another* 2007 (3) SA 554 (T); *Mkhize v Umvoti Municipality and Others* 2010 (4) SA 509 (KZP); *Gundwana v Steko Development CC & Others* 2011 (3) SA 608 (CC); *Firstrand Bank Ltd v Folscher & Another and similar matters* 2011 (4) SA 314 (GNP); *Nedbank Ltd v Fraser & Another and Four Other Cases* 2011 (4) SA 363 (GSJ); *Standard Bank of South Africa v Bekker & Another and four similar cases* 2011 (6) SA 111 (WCC).

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(b) there is discourse about whether the requirement of judicial oversight applies to only the home of a natural person or whether it includes the home of a person who registered the home in the name of a corporate entity;

(c) although most cases recognised the principle that a person whose home may be affected by litigation must be informed about the right to adequate housing as contemplated in section 26(1) of the Constitution, there are different approaches to (i) the manner in which the debtor must be informed about this right, (ii) the contents of such notice and (iii) the manner of service of the notice or process with which the litigation commences;

(d) *Jaftha* caused an apparent dichotomy between sub-sections 26(1) and (3) of the Constitution, and this contrast led to different interpretations of the requirements to be satisfied when the values in these sub-sections are used to determine what is fair during the execution process against immovable property of a debtor.

The jurisprudential and legislative responses to *Jaftha* raise the question whether a need exists for a uniform approach to judicial oversight over execution against immovable property of a judgment debtor.[17]

The response to this question requires a consideration of the following:[18]

(a) The procedural law regarding execution and judicial oversight which preceded *Jaftha* in order to determine to what extent *Jaftha* affected the process of execution against immovable property. Attention will be afforded to what was allowed at common law. The jurisdictional capabilities of the High and Magistrates' Courts will be investigated to determine how our courts had controlled the execution procedure before *Jaftha* was decided.

(b) The factual issues, the legal questions and the findings in *Jaftha* in order to contextualise the requirement of judicial oversight before and after the decision of the Constitutional Court.

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17 The research topic of this dissertation.

18 Performing a study of trends within comparative jurisdictions can be a useful tool with which to search for an answer to the research question. Sources which deal with the regulation of the procedural law on execution in England and the United States were considered (see the bibliography below) because since 1806 our procedural law was shaped along English lines (see *LAWSA*, Volume 7, Second Edition, par 5; *LAWSA*, Volume 2(2), Second Edition, par 343) and the procedural law in the United States also had as its foundation the English law. Having considered present-day developments in both jurisdictions it was found that in both jurisdictions there are limited instances of judicial oversight over the process of execution against immovable property and that those instances did not offer a solution to the research problem.

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(c) The rationale behind *Jaftha* which will provide insight into whether or not the present legislation and judicial precedents exhibit a uniform approach to execution against immovable property of a debtor.

(d) *Jaftha* inspired an avalanche of High Court decisions, not all of which were consistent in their interpretation and application of the *Jaftha* requirement of judicial oversight over execution against immovable property. The precedent system allowed the development of South African law and it remains a cornerstone of the legal system in South Africa.[19] Investigating and considering the possibility of a uniform approach to execution against immovable property will most certainly be influenced by this legal phenomenon.

(e) The question raised by *Jaftha* as to whether the requirement of judicial oversight over execution against immovable property is limited to the home of certain debtors.

(f) The question whether *Jaftha* has retrospective application.

(g) Various cases decided after *Jaftha* required that a creditor who intended enforcing his debt against the home of a debtor had to inform the debtor about the right to adequate housing.[20] When a debtor has been given proper notice of his rights and the procedure with which to prevent execution against his home, and that debtor does not make use of his rights, the question arises whether any further judicial oversight over the execution process is required.

(h) Ultimately, the question whether the imposition of a general duty upon our courts to exercise judicial oversight over the execution against immovable property had been at all necessary, will be investigated. The findings in *Jaftha*, particularly the reading-in of the words "a court, after consideration of all the relevant circumstanc-

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19 The High Court recently in *True Motives 84 (Pty) Ltd v Mahdi and Another* 2009 (4) SA 153 (SCA) at [100] said the following about the precedent system: "The doctrine of precedent, which requires courts to follow the decisions of coordinate and higher courts in the judicial hierarchy, is an intrinsic feature of the rule of law, which is in turn foundational to our Constitution. Without precedent there would be no certainty, no predictability and no coherence. The courts would operate in a tangle of unknowable considerations, which all too soon would become vulnerable to whim and fancy. Law would not rule. The operation of precedent, and its proper implementation, are therefore vital constitutional questions." In *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at [21] it was said that in maintaining the system of judicial precedent it has often been warned that judges should not be led by their own sense of justice. What is called for is not an intuitive reaction to a collection of arbitrary factors but rather a balancing against one another of identifiable norms.

20 This requirement was first stated in *Standard Bank of South Africa v Saunderson and Others* 2006 (2) SA 64 (SCA) ("*Saunderson*").

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es, may order execution" into section 66(1)(a) of the Magistrates' Courts Act will be subjected to criticism.

(i) If the indications are that a uniform approach is required, attention must be given to the manner in which this goal is to be attained. A uniform approach could be allowed to develop through jurisprudence, but also through legislative intervention. The final challenge would be to determine which approach would be preferable and what the contents of any such future developments would be.[21]

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21 The Rules Board for Courts of Law ("*the Rules Board*") is a statutory body established by the Rules Board for Courts of Law Act 107 of 1985 to review the rules of court and to make, amend or repeal rules, subject to the approval of the Minister of Justice. See more at www.justice.gov.za/rules_board. On 9 September 2013 the Rules Board invited submissions in respect of the amendment of the High and Magistrates' Courts rules. This invitation ,*inter alia,* requested submissions about Magistrates' Courts rule 43 which concerns execution against immovable property and posed the question whether the Uniform Rules of Court or the Magistrates' Courts rules are preferable. The request included a statement of intention which endeavoured to achieve *through the process of harmonisation of the rules, for practitioners uniformity between the rules of the High Court and the Magistrates' Courts*. It is suggested that the approach of the Rules Board shows that there is a need for uniformity between the processes of the two courts.

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CHAPTER 2: JUDICIAL OVERSIGHT BEFORE *JAFTHA*

Although the findings in *Jaftha* related to section 66(1)(a) of the Magistrates' Courts Act and amended the procedure of the Magistrates' Court, the *Jaftha* decision also influenced the practice in the High Court.[22] In order to understand to what extent *Jaftha* changed the execution practices of our courts, it is necessary to reflect upon the position which existed before the decision of the Constitutional Court. It will be shown that in the past our courts assumed control over their own processes. Evidence exists that our courts accepted that they had a general discretion to assert control over the process of execution.

Attention has also been given to the impact of the Bill of Rights as contained in the Constitution. Since 1994, with the passing of the previous regime, courts were required to adapt their procedure in accordance with the Constitution.[23] Whenever a judgment debtor challenged an attempt by a judgment creditor to execute against his immovable property, then it was expected of the court which considered the dispute to take into account the Bill of Rights and the values which are implicit to the Constitution. In this regard the *Jaftha* decision of the Cape High Court, which preceded the decision of the Constitutional Court, is significant because the findings of the court *a quo* did take into account the Constitution.[24] The court *a quo* found that the provisions of section 66(1)(a) of the Magistrates' Court Act did not violate the right to access to adequate housing as contained in section 26(1) of the Constitution. Herein below the findings in *Jaftha* are critically analysed.[25] In this analysis it is argued that the approach of the court *a quo* is to be preferred above that of the Constitutional Court.[26] In the premises the decision of court *a quo* requires consideration.

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22 AJ Van der Walt & R Brits "Judicial Oversight Over the Sale in Execution of Mortgaged Property Gundwana v Steko Development 2011 3 SA 608 (CC); Nedbank Ltd v Fraser and Four Other Cases 2011 4 SA 363 (GSJ)" 2012 (75) THRHR, at 323; and as can be gathered from *, inter alia,* the amendments to Uniform Rules of Court 46(1) and 31(5).

23 First the 1993 version and the later 1996 version.

24 *Jaftha v Schoeman and Others; Van Rooyen v Scholtz and Others* 2003 (1) BCLR 1149 (C), hereafter referred to as "the court *a quo*" or "*Jaftha a quo*".

25 See Chapter 6.

26 See 6.1 below.

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2.1 Jurisdiction of High Court

The function of a court is mainly focused on offering a forum to a person who requires a dispute to be decided by the application of the law.[27] Upon conclusion of the adjudication of a dispute, a court is required to give a judgment or order. A judgment or judicial order has at least two functional components: first, it is a command by a competent court directed at the party at whom it is aimed, coupled in an appropriate case with a warrant to the sheriff to enforce such command; secondly, it regulates the legal relationship between the parties and settles their mutual rights and obligations to the required extent.[28] The process which precedes the handing down of a judgment, namely, the hearing, falls completely within the jurisdiction of a court. Traditionally, our courts control or oversee[29] the entire hearing which eventually culminates in a judgment or order. To give effect to a court's order, a process of execution is then followed.[30] The question arises whether this judicial control or oversight usually also extended to the process of execution.

Section 19 of the Supreme Court Act[31] had earlier identified the persons over whom and the matters in relation to which the High Court enjoyed jurisdiction.[32] Section 21 of

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27 Section 34 of the Constitution gives "[e]veryone the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".

28 Erasmus (*supra*) at B1-296. In *Administrator, Cape v Ntshwaqela* 1990 1 SA 705 (A) at 715A-F, *judgment* was said to imply, when used in general sense, both the reasons for judgment and judgment or order. When the word *judgment* is used in the technical sense, the meaning is equivalent to *order*.

29 In this dissertation, the words *judicial control* are used synonymously with the words *judicial oversight.*

30 In *Le Roux v Yskor Landgoed (Edms) Bpk* 1984 (4) SA 252 (T) at 257F it was said that: *Die algemene reël is dat 'n eksekusielasbrief tersyde gestel sal word as die lasbrief nie ondersteun of nie verder ondersteun word deur sy causa nie. Die causa is die skuld en die vonnis wat daarop verleen is.* In *Road Accident Fund v Nnosa* 2005 (4) SA 575 (T) at 578B-578G various authorities are referred to which confirm the principle that without a valid judgment or order there may not be execution. Uniform Rule of Court 45(1) relates to execution against movable property. In terms of this rule a *judgment creditor* may require the registrar to issue him with a writ of execution. Uniform Rule of Court 46(2) describes the procedure which must be followed if execution is aimed at immovable property of *the judgment debtor*. Both these concepts imply the existence of a judgment liability in which the debt or other obligation of the debtor and the matter which is to be enforced by the sheriff are specifically described before there may be execution.

31 59 of 1959.

32 Section 19(1) of the Supreme Court Act reads as follows: "19(1) (a) A provincial or local division shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognizance, and shall, subject to the provisions of subsection (2), in addition to any powers or jurisdiction which may be vested in it by law, have power - (i) to hear and determine appeals from all inferior courts within its area of jurisdiction; (ii) to review the proceedings of all such courts; (iii) in its discretion, and at the instance of any interested person, to enquire into and de-

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the Superior Courts Act[33] replaced the previous provision. It should be noted that both sections give the High Court jurisdiction over "all other matters of which it may according to law take cognizance". In this regard it has often been said that the High Court is vested with inherent jurisdiction. Such a conclusion would be correct insofar as it relates to the jurisdiction of the High Court to regulate its own procedure. The inherent power of the High Court to control its own procedure can be demonstrated with what was said in *Ex parte Millsite Investment Co (Pty) Ltd*:[34]

> The inherent power claimed is not merely one derived from the need to make the Court's order effective, and to control its own procedure, but also to hold the scales of justice where no specific law provides directly for a given situation.

In *Williams v Carrick*[35] similar sentiments were expressed. This case offers a particular response to the question as to whether the inherent jurisdiction of the High Court includes the authority to exercise judicial control over its execution process. Millin J said:[36]

> I can see no reason why the Court should not at the instance of the debtor undertake the same enquiry, when a writ of execution has been issued, as it would have to undertake if the wife applied for a committal order or for leave to take out a writ . . . *The Court's discretion in any control over the enforcement of arrears operates to relieve the defaulter in a proper case by giving him the right to move the Court to stay the execution, to set aside the writ, or to declare for what amount the writ shall be carried into effect*.[37]

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termine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."

33 10 of 2013. Section 21 of the Superior Court Act reads as follows: "Persons over whom and matters in relation to which Divisions have jurisdiction. (1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power (a) to hear and determine appeals from all Magistrates' Courts within its area of jurisdiction; (b) to review the proceedings of all such courts; (c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination. (2) A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third party notice becomes a party to such a cause, if the said person resides or is within the area of jurisdiction of any other Division. (3) Subject to section 28 and the powers granted under section 4 of the Admiralty Jurisdiction Regulation Act, 1983 (Act 105 of 1983), any Division may issue an order for attachment of property to confirm jurisdiction."

34 1965 (2) SA 582 (T) at 585F-H.

35 1938 TPD 147.

36 At 162. The reference has been quoted with approval in *Mlauzi v Attorney-General, Zimbabwe* 1993 (1) SA 207 (ZS) at 211A; *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd and Another* 1984 (4) SA 149 (T) at 171B-E.

37 Emphasis added.

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A court which had the power to regulate its own procedure promoted the proper administration of justice.[38] This power included the right and the duty to exercise judicial control over the process of execution against immovable property. By the time that *Jaftha* was decided the High Court had already claimed the inherent jurisdiction to control its own process, including the execution process. This assertion is probably best demonstrated by the right which the High Court assumed to set aside any of its own writs of execution.[39] In addition, Uniform Rule of Court 45A has since 1991 given the High Court the jurisdiction to suspend the execution of any order for such period as it deems fit.[40]

In the post-constitutional dispensation a High Court now primarily derives its power from the Constitution itself, which in section 173 provides that: [41]

> The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

More recent jurisprudence, pre-dating *Jaftha*, recognised the control our courts had exercised over the enforcement of their own judgments or orders. For instance, the Constitutional Court found in *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others*[42] that the High Court had the right to regulate and protect its own process.[43] Moreover, it emphasised that if a court could or did not exercise judicial oversight over the execution process, the rights enshrined in section 34 of the Constitution could be violated.[44]

The facts of *Chief Lesapo v North West Agricultural Bank and Another*[45] offer an example of where the Constitutional Court found a statutory provision, which allowed

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38 *Universal City Studios Inc and Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 754G.
39 It has become trite that the High Court may set aside any writ which was issued by it. See *Le Roux v Yskor Landgoed (Edms) Bpk* 1984 (4) SA 252 (T) at 257B-H for a summary of the grounds on which a writ may be set aside.
40 Rule 45A inserted by GN R1262 of 1991.
41 Section 173 was amended by section 8 of the Constitution Seventeenth Amendment Act, 2012 (Act 72 of 2013).
42 2006 (1) SA 505 (CC) at [47].
43 Also see *Monong and Associates (Pty) Ltd v Minister of Public Works and Another* 2010 (2) SA 167 (SCA) at [11].
44 Section 34 reads as follows: “Access to courts: Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”
45 2000 (1) SA 409 CC.

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seizure of a person's property without judicial supervision, as being unconstitutional. The case concerned the provisions of section 38(2) of the North West Agricultural Bank Act.[46] The section allowed the seizure of the property of a defaulting debtor without recourse to a court. When the Constitutional Court considered the constitutionality of this provision it said that:[47]

> If the debt itself is disputed, the seizure of property in execution of the debt must equally be disputed. To permit a creditor to seize property of a debtor without an order of court and to cause it to be sold by the creditor's agent on the conditions stipulated by the creditor to secure payment of a debt *denies to the debtor the protection of the judicial process and the supervision exercised by the court through its Rules over the process of execution*.[48]

More relevant to the execution process, the Constitutional Court made the following insightful observation in *Lesapo*:[49]

> The judicial process, guaranteed by s34,[50] also protects the attachment and sale of a debtor's property, even where there is no dispute concerning the underlying obligation of the debtor on the strength of which the attachment and execution takes place. That protection extends to the circumstances in which property may be seized and sold in execution and includes the control that is exercised over sales in execution.

The Constitutional Court pointed out in *Lesapo* that an important purpose of section 34 of the Constitution is to guarantee the protection of the judicial process to persons who have disputes that can be resolved by law. Execution is a means of enforcing a judgment or order of court and is incidental to the judicial process which is regulated by statute and the Rules of Court; and is subject to the supervision of the court which has an inherent jurisdiction to stay the execution if the interests of justice so require.[51] In other words, before *Jaftha* it had been established that a High Court had a general discretion to supervise its execution process. The post-constitutional dispensation confirmed this inherent power of our High Court.

46 14 of 1981.
47 *Chief Lesapo* at [14]. The provisions of section 38(2) of this Act were held to be unconstitutional.
48 Emphasis added.
49 *Chief Lesapo* at [13].
50 Of the Constitution.
51 *Chief Lesapo* at [13]. The Constitutional Court repeated itself in *Nyathi v MEC for the Department of Health, Gauteng and Another* 2008 (5) SA 94 CC at [134].

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2.2 Jurisdiction of Magistrates' Courts

Traditionally it has been accepted that Magistrates' Courts do not enjoy the same inherent jurisdiction as the High Court. A Magistrate's Court is said to be a creature of statute. It derives its authority to act from the Magistrates' Courts Act and is limited in its functions and authority to act within the four corners of the constituent Act.[52] However, where the authorising Act was silent about a particular procedural matter, Magistrates' Courts were allowed to apply the doctrine of implied jurisdiction.[53] The circumstances in which Magistrates' Courts assumed such implied jurisdiction mostly dealt with procedural inadequacies in the authorising Act. Although these inadequacies may have been corrected over time, the principle still applies that when the constituent Act is silent on a particular issue, the Magistrates' Courts may have implied jurisdiction.[54]

Presently section 62 of the Magistrates' Courts Act[55] provides that a Magistrate's Court may, on good cause shown, set aside or stay a writ of execution issued by the that court. This section leaves no doubt that before *Jaftha* was decided the Magistrates' Courts had been endowed with the jurisdiction to exercise judicial control over their own process of execution, at least insofar as it concerned the staying or setting aside of a writ of execution.

2.3 General Discretion to Regulate Execution Process

Execution against immovable property in the High Court is presently governed by Uniform Rule of Court 46(1).[56] Section 66(1)(a) of the Magistrates' Courts Act prescribes the requirements for execution against immovable property in the

52 See the authorities listed in Jones and Buckle *The Civil Practice of the Magistrates' Courts in South Africa*, 10 ed, Volume **I**, at 77 footnotes 2 and 3.

53 The doctrine of *expressum facit cessare tacitum* has been found to apply in a number of instances. For example in the absence of an express provision in the Magistrates' Courts Act, as it then was, a magistrate could suspend (*Leeuwen v Spalding* 1912 TPD 202) or discharge its own writ of civil imprisonment (*Barnes v White* (1884) 3 SC 181) or set aside its own writ of execution (*Mohamed v Ebraheim* 1911 CPD 29; *Ahmed v Van der Merwe* 1911 CPD 846; *Shandling v Southern Union Manufacturing Co Ltd* 1933 CPD 607).

54 Jones and Buckle (*supra*) 78.

55 Which reads as follows: "62 Power to grant or set aside a warrant. (1) Any court which has jurisdiction to try an action shall have jurisdiction to issue against any party thereto any form of process in execution of its judgment in such action. (2) A court (in this subsection called a second court), other than the court which gave judgment in an action, shall have jurisdiction on good cause shown to stay any warrant of execution or arrest issued by another court against a party who is subject to the jurisdiction of the second court. (3) Any court may, on good cause shown, stay or set aside any warrant of execution or arrest issued by itself, including an order under section seventy-two."

56 See chapter 1 for the wording of rule 46(1).

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Magistrates' Courts. Section 66(1)(a) has remained unchanged since 1976.[57] The previous Uniform Rule of Court 45(1), which dealt with execution against immovable property, contained similar provisions to those contained in section 66(1)(a) of the Magistrates' Courts Act.[58]

From the history preceding the present state of Uniform Rule of Court 46(1), it may be concluded that the traditional order of execution had first taken place against movable and then against immovable property. This general rule was in accordance with the common law. Today the general rule is still found in Uniform Rule of Court 46(1) and section 66(1)(a) of the Magistrates' Courts Act. However, in the past our courts were willing to allow execution outside the ambit of the general rule. The question arises whether the willingness to deviate from the ordinary order of execution also entails a general discretion of a court to exercise judicial control over the execution process, including execution against immovable property.

Gerber v Stolze[59] offers a useful summary of the historical events which led to the origin and development of Uniform Rule of Court 45(1) and the practice of execution against immovable property. In *Gerber* the court held that after the annexation of the Transvaal the practice always was that writs were normally issued by the registrar to the successful party who had obtained a judgment. It was not necessary to seek a court's authority to carry a judgment into execution. It was held that execution was an executive matter dealt with by the registrar. Previous rules and case law indicated that this practice had been clearly established in the Transvaal High Court and that there was no justification for considering that a special order from the court was required if, after an unsuccessful attempt to levy execution on movables had been

57 Magistrates' Courts Amendment Act 63 of 1976, section 3.

58 The previous wording of Uniform Rule of Court 45(1) was: "The party in whose favour any judgment of the Court has been pronounced may, at his own risk, sue out of the office of the Registrar one or more writs for execution thereof as near as may be in accordance with Form 18 of the First Schedule: Provided that except where by judgment of the Court immovable property has been specially declared executable, no such process shall issue against the immovable property of any person until a return shall have been made of any process which may have been issued against his immovable property, and the Registrar perceives therefrom that the said person has not sufficient movable property." See Nathan Barnett Brink *Uniform Rules of Court*, Third Edition at 274. This sub-rule was substituted by GN R181 of 28 January 1994 and by GN R982 of 19 November 2010, so that it now reads as follows: "A judgment creditor may, at his or her own risk, sue out of the office of the registrar one or more writs for execution thereof corresponding substantially with Form 18 of the First Schedule." The wording of the new rule 45(1) appears in *Erasmus* (*supra*) at B1-319.

59 1951 (2) SA 166 (T) at 171B-172C. Also see *Mortinson* at 468C-470B, 468C-470B; *Saunderson* at 269F-I.

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made, it was desirable to have recourse to the defendant's immovable property. These findings were motivated on the strength of past practice.

The position in 1902, when the Supreme Court was established in the Transvaal and the first set of rules was promulgated, the original rule 67(a) provided that[60] the party in whose favour any final judgment of the court has been pronounced may, at his own risk, issue out of the office of the registrar one or more writs for execution thereof, provided that, except where by judgment of the court immovable property has been specially declared executable, no such process shall issue against immovable property of any person until any process which may have been issued against his movable property shall be first returned, and the court shall perceive thereby that the said person had not sufficient means to satisfy the exigency thereof.[61]

While this rule was in force *Re WJ Jooste*[62] came before the Transvaal Supreme Court. In that case it was recognised that the practice prevailing under the Republican regime was that when there was a *nulla bona* return in an attempt to execute against movables the courts usually declared the immovable property of the debtor executable.

Shortly after *Re WJ Jooste*, the Transvaal Supreme Court in *Harrison & Co v Reyneke*[63] declared that when a writ was issued against the movables of the defendant and a return of *nulla bona* was made, the registrar would have the authority and discretion, upon being satisfied of these facts himself, to issue a writ against the immovable property, without an order of court declaring such property executable. In other words, it was not required that only the court could make the order.

On 27 November 1903,[64] rule 67(a) was amended to provide for the registrar to sanction the issuance of the writ, provided always that it would be competent for the registrar, whenever he thought that the circumstances of the case rendered such a course desirable, to refer any party to the court for permission to issue a writ against immovable property which had not been specially declared executable.

60 *Gerber* at 171G-H.
61 Emphasis added.
62 1902 TS 245.
63 1903 TH 316.
64 Pursuant to the promulgation of GN 1376 of 1903.

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Thus two recognised methods of attachment of immovable property by writ existed, namely, after a writ against movables had been issued and the registrar determined that the judgment had not been satisfied thereby and where the court declared the immovable property executable. The latter would normally occur when the property had been specifically hypothecated. The reason for this was set out in *Gerber*[65] as follows:

> The only reason for applying to Court at all is to have a short-cut in the one case where a money judgment has been obtained and the money judgment is secured to the plaintiff by specially hypothecated immovable property; then, in the normal course, the Court is asked, in advance, to dispense with the circumlocution of having to take execution against the movable property first and only on that property failing to realise the money sum, then to have recourse against the immovable property. When an order is granted declaring executable the property specially hypothecated, that order permits the grantee, the creditor, to take his execution straightaway against the immovable property.

By the fifties it had become well-established practice that a court could declare immovable property executable if it was satisfied that the debtor did not have sufficient movable property to satisfy the writ.[66] In the absence of an order which declared immovable property specifically executable the creditor was required to first obtain a so-called *nulla bona* return and thereafter could apply for a writ of execution against the immovable property of the debtor.[67] The inclination of our courts at that time was that the issuance of a writ against immovable property was an executive formality which would be performed if it was shown that either a *nulla bona* return had been issued or if the property had been offered as security for the monetary debt.

The next development occurred in 1991 when section 27A was inserted in the Supreme Court Act.[68] It provided that the registrar of the court could, in the manner and the circumstances prescribed in the Uniform Rules of Court, grant a default judgment and such a default judgment would be deemed to be a judgment of the court. Uni-

65 *Gerber* at 172F-H.
66 *Cape Town Town Council v Estate Faliel* 1911 CPD 11; *Lansdowne Concrete, Etc, Co v Davids* 1927 CPD 132; *Dorasamy v Messenger of the Court, Pinetown and Others* 1956 (4) SA 286 (N).
67 *Dorasamy* at 290A-C.
68 By section 5 of Act 4 of 1991 and substituted by section 29 of the General Law Amendment Act 139 of 1992.

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form Rule of Court 31(5) was then introduced,[69] which conferred the power on the registrar to declare specifically hypothecated immovable property executable.

Except in cases where immovable property had been specifically declared executable, execution would not follow against immovable property until the debtor's movable property had been excussed.[70] From this long-standing practice in the Magistrates' and High Courts it was clear that hypothecation of immovable property as security entitled a creditor to have the debtor's immovable property declared executable. In such a case a creditor immediately commenced to satisfy his judgment from the proceeds of the property which had been hypothecated to him for that purpose. The approach was to declare such property executable unless some sound reason for refusal had been advanced.[71]

Earlier our courts exhibited caution when it came to the issuance of writs of execution against immovable property which had not been hypothecated. In *Ledlie v Erf 2235 Somerset West (Pty) Ltd*[72] the plaintiff, *inter alia,* sued for an order that certain immovable property which had not been hypothecated should be declared executable. The court took a strict view and found that because no facts had been disclosed which would indicate that the defendant had no movable assets, it could not grant the order. Section 66(1)(a) of the Magistrates' Courts Act provided for an alternative procedure. It

69 By GN R2365 of 10 January 1994 and amended by GN 417 of 14 March 1997. The rule then read as follows: "31(5)(a) Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, if he or she wishes to obtain judgment by default, shall, where each of the claims is for a debt or liquidated demand, file with the Registrar a written application for judgment against such defendant: Provided that when a defendant is in default of delivery of a plea, the plaintiff shall give such defendant not less than five days' notice of his or her intention to apply for default judgment. (b) The Registrar may (i) grant judgment as requested; (ii) grant judgment for part of the claim only or on amended terms; (iii) refuse judgment wholly or in part; (iv) postpone the application for judgment on such terms as he may consider just; (v) request or receive oral or written submissions; (vi) require that the matter be set down for hearing in open court. (c) The Registrar shall record any judgment granted or direction given by him. (d) Any party dissatisfied with a judgment granted or direction given by the Registrar may, within 20 days after he has acquired knowledge of such judgment or direction, set the matter down for reconsideration by the Court. (e) The Registrar shall grant judgment for costs in an amount of R200 plus the Sheriff's fees if the value of the claim as stated in the summons, apart from any consent to jurisdiction, is within the jurisdiction of the magistrate's court and, in other cases, unless the application for default judgment requires costs to be taxed or the Registrar requires a decision on costs from the Court, R650 plus the Sheriff's fees." As was pointed out above in chapter 1, this rule had been amended further on the 16th August 2013 to provide that if an application for default judgment before the registrar is for an order declaring *residential property* specially executable, the registrar must refer such application to the court.

70 *Barclays Nasionale Bank Bpk v Badenhorst* 1973 (1) SA 333 (N) at 338F.

71 *Colonial Mutual Life Assurance Society Ltd v Tilsim Investments (Pty) Ltd* 1952 (4) SA 134 (C) at 135C.

72 1992 (4) SA 600 (C).

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was possible that on *good cause* shown the court could grant a writ against the immovable property which had been hypothecated to the creditor.[73] There is no clarity as to what circumstances may have constituted *good cause* in the Magistrates' Courts or may have persuaded a High Court to exercise its discretion to declare immovable property executable.[74] Nonetheless, inherent to the pre-*Jaftha* wording of the section, the Magistrates' Courts were endowed with a discretionary power in terms of which a writ of execution against immovable property could be granted or refused.

The jurisprudential history stated thus far suggests that our courts traditionally took a rather distant and even mechanical approach when it came to a court's control over the execution process. However, it would be incorrect to assume that there were no exceptions to this seemingly distant approach of our courts. There is case law which demonstrates that our courts accepted that they had a general discretion to issue a warrant of execution against immovable property.[75] From these authorities it appears that a court had to be satisfied on reasonable grounds that there should be a departure from the general rule.

In *Silva v Transcape Transportation Consultants and Another*[76] the court accepted that the issuance of a writ against immovable property not necessarily depended upon the lack of movable property. In that case a creditor made a counter application declaring four immovable properties executable in circumstances where the creditor had twice attempted to attach the movable property of the debtor, but was frustrated by the debtor who refused or failed to point out any attachable movable assets. Uniform Rule of Court 45(1)[77] then provided that no such process would issue against the debtor's immovable property until a return was made of any process issued against the movable property of the debtor. The registrar concluded therefrom that the debtor did not have sufficient movable property to satisfy the writ. Counsel for the first respondent, who made the counter application, conceded that the registrar could not make the aforesaid inference, but argued that the court had a general discretion at common law[78] to

73 *Dorasamy* (*supra*) at 290C-F.
74 *Ledlie* at 601I-J.
75 *Roux & Another v The Registrar, Cape Provincial Division* 1916 CPD 490; *Hart v Lennox* 1926 WLD 219; *Trustees, Gardner & Scott v Maskill* 29 NLR 541; *Pope-Ellis v Bennee* 29 NLR 137 and *Guy v Colley* 1934 NPD 268.
76 1999 (4) SA 556 (W).
77 In its earlier condition.
78 In accepting the argument the court relied on *Voet* 42.1.42.

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declare immovable property executable where the debtor frustrated the creditor's attempt to execute against the debtor's movable property by refusing or failing to point out movable property in "a tricky manner".[79] The court accepted that Uniform Rule of Court 45(1) did not remove or impact upon the court's discretion, because to do so would be to provide that the discretion was either removed or limited, expressly or by necessary implication.[80]

The commentary of *Voet*, on which the Court in *Silva* relied, provided that execution against immovable property had to be preceded by execution against the movable property of the debtor.[81] The general rule was not rigidly applied. This much appears from what follows after *Voet* stated the general rule, namely:

> Order and method under modern law. - But the writer next mentioned below[82] advises that this order of first seizing movables and then immovables is not exactly followed nowadays. At any rate, the execution is not void when such an order has been changed and reversed unless the defendant makes his objection. Generally the judgment debtor himself is asked to point out to the person making the execution the property which he wishes to be taken and sold off with a view to the securing of a judgment debt. If he refuses to do so, or does so in a tricky manner or points out what is not enough, the court servant himself seizes at his discretion those things from which the money can most readily be made up. He does so up to the limit of the debt. Hence if a debtor should pay a good deal while the execution is pending fewer things would have to be sold off than those which had been originally seized.

Further examples of such a deviation are found in *Hart v Lennox*[83] and *Guy v Colley*.[84] In *Hart*, the applicant obtained leave to attach a certain stand in Brixton to found jurisdiction and sue by edictal citation. The respondent was a *peregrinus* and owned the stand which was his only property. The applicant obtained judgment and sought to enforce it. The applicant argued that in the circumstances it would have been a waste of expenses if he was first required to execute against movable property. The court held that the application "seems very reasonable". In *Guy*, the applicant wanted to

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79 *Silva* at 562B-E, where reliance was placed on *Ledlie* at 601F-H, and *Hart v Lennox* 1926 WLD 219.
80 The court in *Silva* relied on the *dictum* in *Fey NO and Whiteford NO v Serfontein and Another* 1993 (2) SA 605 (A) at 614C. That case concerned the removal of a trustee. It was found that the Insolvency Act 24 of 1936 did not remove the common law power of the High Court to remove a trustee.
81 Voet 42.1.42, according to Gane's translation *The Selective Voet* (1957).
82 Gane referred to Groenewegen, *Abrogated Laws* on *Dig* 42.1.15.2.
83 See footnote 71 above.
84 See footnote 71 above.

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execute first against movable instead of immovable property. The immovable property which had been bonded was worth less than the judgment debt. The Natal High Court considered "whether any prejudice is caused to the judgment debtor or the other creditors" if the order was granted.[85] The court first restated the general rule, then pointed out that "special cases" existed in which the general rule was not adhered to. This case is suggestive of the conclusion that the Natal High Court required more than reasonable grounds before it was willing to depart from the general rule.

Our courts also assumed a general discretion to intervene in cases where the strict application of procedural rules would lead to undue difficulty to conduct or settle the claim or brought about an undue exposure to High Court costs.[86] In these cases the court exercised its discretion to prevent an abuse of its process.

2.4 The Impact of the Constitution

2.4.1 Introduction

The Constitution, which contains a Bill of Rights, brought about dramatic changes to our jurisprudence and legal system pertaining to *inter alia* the rights to adequate housing, not to be evicted without a court order, dignity, property and children's rights.[87]

Jaftha made it clear that the fundamental right to adequate housing could be unjustifiably infringed by the execution against the home of a debtor. Before the *Jafhta* decision, in both the Magistrates' and High Courts, the applicable rules and procedures did not require judicial oversight at the time of execution. In certain circumstances the clerk of the Magistrates' Court and the Registrar of the High Court

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85 *Guy* at 272.

86 See *Standard Bank of South Africa Ltd v Shiba; Standard Bank of South Africa Ltd v Van den Berg* 1984 (1) SA 153 (W) at 158D-159B where the High Court disapproved the practice of using the motion court to apply for default judgments in cases where the Magistrates' Courts had jurisdiction. The practice implied increased costs of litigation and was tantamount to an abuse of process. In *Whitfield v Van Aarde* 1993 (1) SA 332 (E) the court decided to stay execution of a delictual claim which the applicant had instated against the respondent, and who purportedly wanted to obtain payment of a costs order which the respondent obtained against the applicant earlier in the litigation. The court held that the sale of the claim would leave the applicant without any control over his own claim and therefore found it necessary to exercise its discretion in favour of a stay in execution.

87 L Steyn *Statutory regulation of forced sale of the home in South Africa* (UP LLD Thesis, 2012), chapter 3 where these rights are dealt within the context of execution. Woolman *et al Constitutional Law of South Africa*, Juta, Second Edition, Volume 3, offer a in-depth discussion of these rights in chapter 36, dignity; chapter 46, property; chapter 47, children's rights and chapter 48, land.

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was permitted to issue a writ of execution against immovable property, without the supervision of the court. The right of a mortgagee to an order declaring specifically executable mortgaged property, regardless of whether it was the home of the mortgager, was viewed incontrovertible.[88] Subsequent cases concerning execution against mortgaged property raised further complicated issues, which included the balancing of the right to property, or real security and housing rights in the contractual context. Principles such as *pacta sunt servanda* and the broader economic and other societal interests came under consideration.

The research question in this thesis challenges the existence of a clear framework of substantive and procedural criteria within which the weighing of the rights of a judgment creditor against that of the judgment debtor should be made at the time of execution. Since 1994, when the apartheid regime came to an end, and before *Jaftha* was decided, there existed various fundamental rights that impacted on the position of both the creditor and debtor. It followed that a court should have considered these rights whenever there was a challenge to an intended or pending execution process. [89] An understanding of the contents of these rights will also shed light on the findings in *Jaftha* and the later cases which dealt with the requirement of judicial oversight.

2.4.2 The Application, Interpretation and Limitation of the Bill of Rights

Section 7(1) of the Constitution provides that the Bill of Rights "is a cornerstone of democracy in South Africa [which] enshrines the rights of all people in our country and affirms the values of human dignity, equality and freedom".[90] Section 7(2) of the Constitution provides that the state "is obliged to respect, protect, promote and fulfil the rights in the Bill of Rights". Section 8(1) provides that "the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state". In terms of section 8(2) a natural person or a juristic person is also bound to the Bill of Rights to the extent provides that it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right. Section 8(3) prescribes a mechanism for application of the Bill of Rights to private persons in terms of which a

88 Steyn (*supra*) at 4.3.1 and 4.3.3.
89 For instance an application in terms of the applicable court rules to stay or set aside a writ of execution.
90 For a general discussion of this right see Cheadle, Davis and Haysom *South African Constitutional Law The Bill of Rights*, Butterworths, Second Edition at 2.1 and 3.1.

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court must first consider whether there is legislation which gives adequate effect to the right in question and if not, then the court must consider whether an existing common-law rule gives effect to the right. In the event that the common law is inadequate then the court would be obliged to develop it in order to give effect to the right and may develop rules to limit the right but subject to the limitation clause contained in section 36(1) of the Constitution.

In terms of section 39(2) of the Constitution, when interpreting legislation and when developing the common law, a court "must promote the spirit, purport and objects of the Bill of Rights". Thus, provision is made for the indirect application of the Bill of Right to the law or also expressed as a "value based interpretational approach".[91] Woolman *et al* state that there are at least five fundamental values which animate the entire constitutional enterprise, namely openness, democracy, human dignity, freedom and equality.[92] The values animate the specific rights which are contained in the Bill of Rights and thus the range of the protected activity of each is determined.

Section 39(1)(a) of the Constitution requires a court when interpreting the Bill of Rights "to promote the values that underlie an open and democratic society based on human dignity, equality and freedom". The duty to promote emphasises that "transformative constitutionalism and a socially interconnected and embodied concept of humanity" are envisaged. In this context the concept of *ubuntu* recognises the values which section 39(1) requires to be promoted. In *S v Makwanyane*,[93] Mokgoro J associated *ubuntu* with concepts such as "humaneness" and "human dignity".[94] In the same judgment Langa J described *ubuntu* as:[95]

> ...a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.

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91 See the authorities cited by Steyn (*supra*), Chapter 3, footnote 21.
92 Woolman *et al* (*supra*), volume 2 at 34-17.
93 1995 (3) SA 391 CC. Also reported at 1995 (2) SACR 1 (CC) ("*Makwanyane*"). For present purposes the SA Law Perort version was used.
94 *Makwanyane* at [308].
95 *Makwanyane* at [224].

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Steyn submits that at least on the level of the emphasis on communality and human interdependence, parallels are discernible between *ubuntu* and elements of the concepts of *amicitia* and patronage in Roman society. Similarities have also been suggested between *ubuntu* and the role played by institutions of Roman-Dutch law such as unjustified enrichment, public policy, good faith, the *exceptio doli generalis* and the concept of *arbitrium boni viri*. [96]

Constitutional rights are not absolute and therefore section 36 of the Constitution provides that:

> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

For the limitation of a right to be valid, it must be limited by a law of general application.[97] The court adopts a two-stage process to determine the constitutional validity of a law. This includes legislation, sub-ordinate legislation, the common law (private and public law rules) and customary law.[98] The two-stage approach first determines whether the law infringes a fundamental right,[99] and if so, then whether the infringement can be justified as a reasonable limitation of the right according to the criteria as set out in section 36(1) of the Constitution. Before Jaftha was decided the judgment in *Government of the Republic of South Africa and Others v Grootboom and Others*[100] offer a good example of the two-staged approach. This decision is discussed further herein below.

It is submitted that even before the *Jaftha* decision a court was obliged to apply and interpret, or give effect to the right to adequate housing, as contained in section

96 Steyn (*supra*) at 67.
97 Woolman *et al* (*supra*) at 34-47 to 34-67.
98 Woolman *et al* (*supra*) at 34-51 - 34-53.
99 Cheadle, Davis and Haysom (*supra*) at 30.4.1.
100 2001 (1) SA 46 (CC) ("*Grootboom*").

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26(1), by taking into account the aforesaid values and the limitations imposed on such right by the applicable procedural law.

2.4.3 The Rights which are Potentially Affected by the Sale in Execution of a Judgment Debtor's Immovable Property

What follows is summary of those rights which are contained in the Bill of Rights and which may have an impact upon execution against immovable property. These rights will be given context by reference to cases which were decided before *Jaftha*, including the findings in *Jaftha a quo*.

2.4.3.1 The right to have access to adequate housing

The right to adequate housing is contained subsections 26(1) and (2) of the Constitution, which reads as follows:

> (1) Everyone has the right to have access to adequate housing.
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

The right to adequate housing is a so-called socio-economic right.[101] Traditionally, civil and political rights, also referred to as "first generation rights" such as equality, freedom, property, freedom of speech and freedom of assembly and association, have been regarded as imposing on the state duties of restraint and non-interference with such human liberties. These are often referred to as "negative obligations". Other than first generation rights, socio-economic rights, also referred to as "second generation rights", impose "positive obligations" on the state to do as much as reasonably possible to secure for all members of society a basic set of social goods such as education, health care, food, water, shelter, access to land and housing. These are qualified rights because the state is required to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of these rights.[102] It is submitted that thus far socio-economic rights have had minimal impact on the law of contract. [103]

The Constitutional Court interpreted and applied section 26 for the first time in

101 Steyn (*supra*) at 75.
102 Liebenberg *Socio-economic Rights: Adjudication under a transformative constitution* (2010) at 54 and Steyn (*supra*) at 75 – 76.
103 The cases of *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) and *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2011 (5) SA 19 (SCA) underline this point.

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Grootboom. In the *Grootboom* case a group of people lived in appalling conditions. They decided to move out and illegally occupied another person's land. They were evicted and left homeless. The root cause of their problems was the intolerable conditions under which they were living while waiting in the queue for their turn to be allocated low-cost housing.[104] They were the people whose constitutional rights had to be determined in the case. The case considered the duties which section 26(1) imposed upon the state to ensure the protection of the right to adequate housing. The central thrust of the housing development policy evidenced by the legislation and other measures in place was to provide citizens and permanent residents with access to permanent residential structures with secure tenure ensuring internal and external privacy and to provide adequate protection against the elements. The Constitutional Court held that interpreting a right in its context required the consideration of two types of context. On the one hand, rights had to be understood in their textual setting, which required a consideration of chapter 2 and the Constitution as a whole. On the other hand, rights also had to be understood in their social and historical context. The right to access to adequate housing could therefore not be seen in isolation but in the light of its close relationship with the other socio-economic rights, all read together in the setting of the Constitution as a whole.[105]

It was found that the state was obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. The interconnectedness of the rights and the Constitution as a whole had to be taken into account in interpreting the socio-economic rights and, in particular, in determining whether the state had met its obligations in terms of them.[106] Based on the facts of the case it was found that the manner in which the eviction of the appellant had been carried out resulted in a breach of this obligation.[107]

The Constitutional Court stated that sub-sections 26(1) and (2) are related and must be read together.[108] This has the effect that section 26(2) imposes a qualified, positive obligation on the state to devise a comprehensive and workable program to

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104 *Grootboom* at [3].
105 *Grootboom* at [22] and [24] at 61H - 62A/B and 62D.
106 *Grootboom* at [24] at 62D - E.
107 *Grootboom* at [34] and [88] at 66G/H and 84I - 85A.
108 *Grootboom* at [34].

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meet the responsibility to provide adequate housing. The court also emphasised the negative aspect of the obligation which is contained in section 26(3), namely the prevention of arbitrary evictions.[109]

In relation to execution against mortgaged property, where the issue is usually whether a contractual term such as a clause providing for the sale in execution or an acceleration clause may be enforced, the decision in *Barkhuizen v Napier*[110] is relevant. In that case it was argued that a section of the Constitution could not be directly applied to a contractual term, using section 8(2) and (3), and neither could a contractual term be tested by applying the limitation clause in section 36 as it was not "a law of general application". Ngcobo J stated that a constitutional challenge to a contractual term would ordinarily entail determination of whether the term was contrary to public policy which is now deeply rooted in our Constitution and the values which underlie it.[111] He also stated, with reference to the judgment of the court *a quo*, that the doctrine *pacta sunt servanda* is "not a sacred cow that should trump all other considerations" but that its application is subject to constitutional control.[112] In other words, a contractual clause, in terms of which a debtor agreed to an order declaring his property immediately executable upon breach of a loan agreement, may be challenged on constitutional grounds.

2.4.3.2 Human dignity

In terms of section 10 of the Constitution every person has inherent dignity and the right to dignity is seriously respected and protected. In order to give effect to this right an infringement upon this right will only be justifiable if the limitation constitutes the best method to protect the dignity of others or another interest which is constitutionally accorded similar singular status.[113] It is therefore expected that whenever a person was to be evicted from his home then the right to dignity would be a factor to consider.

2.4.3.3 The right not to be evicted without a court order

Section 26(3) of the Constitution protects a person against being evicted from his

109 *Grootboom* at [34].
110 2007 (5) SA 323 (CC).
111 *Barkhuizen* at [28] – [30].
112 *Barkhuizen* at [15].
113 *Makwanyana* at [58], [328] - [329].

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home without a court order. The sub-section provides that “[n]o 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.”

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[114] gives effect to this right. In terms of section 4 of the PIE Act a court is required to find that it is just and equitable to evict the person, after considering all the relevant circumstances, including the rights and needs of elderly, children, disabled persons and households headed by women.

Closely related to those factors which a court must consider in terms of the PIE Act are the fundamental rights which children enjoy in terms of section 28 of the Constitution which specifically provides for the rights of children. These rights include that every child has the right to parental care[115] and that every child has the right to shelter.[116] The rights of children who occupy a residence which is under threat of execution would necessarily have to be considered if the execution process was challenged.

In the judgment of the Cape High court which preceded *Jaftha*[117] the court took the position that a sale in execution does not invoke 26(3) of the Constitution and that section 66(1)(a) of the Magistrates’ Court Act was therefore not unconstitutional. The court *a quo* found that section 26(3) prevents unfair evictions, namely if evictions occur without due process or if the court failed to consider all relevant circumstances.[118] The PIE Act is aimed at addressing this mischief. The court *a quo* further motivated this position on the basis that a sale in execution consists of two distinct legal acts, namely the sale of the property and the transfer of ownership of the property.[119] Until the property is transferred to the purchaser, the judgment debtor retains ownership of the property. The court *a quo* further found that the judgment debtor’s legal right to use the property ends when ownership is transferred to the new owner. The new owner in his capacity as owner then has the right to use the property. Once the judgment debtor’s

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114 19 of 1998, hereinafter referred to as “the PIE Act” .
115 Section 28(1)(b).
116 Section 28(1)(c).
117 *Jaftha v Schoeman and Others; Van Rooyen v Scholtz and Others* 2003 (1) BCLR 1149 (C), referred to as “the court *a quo*” or “*Jaftha a quo*”.
118 *Jaftha a quo* at [40].
119 *Jaftha a quo* at [45].

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legal basis for occupation has been removed he should vacate the property voluntarily.[120]

If the judgement debtor remains in occupation, then the judgment creditor, the new owner, must commence eviction proceedings and in such a case the substantive and procedural requirements of the PIE Act must be complied with. The court in *Jaftha a quo* further held that the eviction which so follows is not the result of the execution process, but the result of a separate legal proceeding in terms of the PIE Act. Thus the eviction would take place only after a court has considered all the relevant circumstances according to the PIE Act.[121] The Constitutional Court in *Jaftha* had not expressly rejected this conclusion.

2.4.3.4 Property

Section 25 of the Constitution provides that "[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property".

The reported judgments have not specifically addressed the impact of sale in execution of the immovable property of a debtor upon the rights of parties involved but reference has been made in a number of cases to a possible infringement of section 25 in this context.[122] Herein below the argument is developed that section 25 should have received more attention during the constitutional challenge of section 66(1)(a) of the Magistrates' Court Act.

2.5 Conclusion

Jaftha not only confirmed the right of a court to control its execution procedure, but also imposed an obligation on a court to oversee the issuance of a writ of execution against

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120 *Jaftha a quo* at [46].
121 *Jaftha a quo* at [46].
122 For example, in *Jaftha*, argument based on section 25 was presented to the Constitutional Court but Mokgoro J found it unnecessary to address it; see 6.1 below. In *Saunderson infra*, the *amici curiae* referred, in their arguments, to, *inter alia*, section 25. Although section 25 was not canvassed in the judgment, Cameron JA did state, at [2], that a "mortgage bond … curtails the right of property at its root, and penetrates the rights of ownership, for the bond-holder's rights are fused into the title itself". In *Gundwana infra* at [51], the Constitutional Court found it unnecessary, in view of its instance in relation to the effect of section 26 of the Constitution, to deal with the argument, advanced by counsel for the applicant, that the right to property is also implicated when immovable property is declared specially executable.

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immovable property of a debtor.[123] Having control over its execution process usually meant that the issuance, validity and operation of writs of execution could be subjected to the scrutiny of the High Court. Before *Jaftha*, although a challenge to the validity of a writ of execution usually arose after the writ had been issued, there was nothing in our law that prevented a debtor from approaching a court after judgment, but before the issuance of a writ, to oppose the issuance of a writ.

In the past our courts readily accepted that they had a general discretion to depart from the accepted order of execution, for instance where the application was "reasonable" or if it was a "special case" or if the debtor went about in "a tricky manner" to escape execution. All of the abovementioned examples confirm that our courts assumed a general discretion to prevent an abuse of process. It is submitted that when the two cases in *Jaftha* had first come before the Cape High Court, the applicants could have approached the matter on the basis that due to the abuse of the execution process the High Court would have been entitled to prevent the sale in execution of their homes through the exercise of its general discretion.

The presence of this general discretion raises the question as to whether it was really necessary to impose judicial oversight as a general requirement before a writ of execution is issued against the home of a debtor. In the critical analysis of *Jaftha,* which follows here in below,[124] it is submitted that the imposition of a general duty to exercise judicial oversight over the execution against the immovable property of a debtor was unnecessary, because the existing procedural law offered sufficient remedies to a judgment debtor who alleged an abuse of execution process by the judgement creditor.

It has been said that the right to adequate housing is one of the socio-economical rights which are contained in the Bill of Rights. It is submitted that *Grootboom* offered guidance about the scope and application of this right as contained in sub-sections 26(1) and (2) of the Constitution, namely that it primarily concerned the positive duty which the state owed its citizens to provide adequate housing. When the facts of *Jaftha* served before the Constitutional Court it was reasonably expected that the findings in *Grootboom* should have guided the court away from the notion that section 66(1)(a) of the Magistrates' Court Act violated the socio-economical right

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123 *Jaftha* at 161D-E.
124 See chapter 6.

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envisaged in section 26(1) of the Constitution, because section 26(1) was intended to burden the state with the positive obligation to put into place measures to provide adequate housing and this obligation had nothing to do with execution against immovable property.[125]

The Constitution enshrined the fundamental rights to adequate housing, property, not to be arbitrarily deprived of property, not to be evicted without due process, human dignity and children's rights. At all relevant times, after 1994 and before *Jaftha* was decided, our courts possessed the authority to entertain any challenge to an intended or pending execution process. Whenever a court entertained such a challenge it was obliged to consider the impact which the execution would have on the mentioned rights. It is submitted that after the *Jaftha* decision all courts are now required to consider these rights every time it is required to authorise the issuance of a writ of execution and not only when there is a challenge to an intended or pending execution process.

When it was first argued before the Cape High Court that the section 66(1)(a) had violated 26(1) of the Constitutional Court, the court in *Jaftha a quo* made out a persuasive case against the argument. The findings of the Cape High Court were rejected by the Constitutional Court. Herein below it is argued that this rejection is subject to criticism.

125 Herein below, in Chapter 6, this argument is developed more fully.

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CHAPTER 3: OVERVIEW OF FACTS OF AND FINDINGS IN *JAFTHA*

In *Jaftha* the Constitutional Court held that section 66(1)(a) of the Magistrates' Courts Act violated section 26(1) of the Constitution. [126] Section 26(1) of the Constitution provides that every person has the right to have access to adequate housing. In response to the violation the Constitutional Court imposed a general duty on our courts to oversee the process of execution against the home of a debtor.[127] The rationale behind the imposition of this blanket oversight duty was heavily influenced by the facts of the case. What follows is an overview of the facts, legal arguments and findings in *Jaftha*.

3.1 Facts of *Jaftha*

The facts which led to the aforesaid conclusion included the following:[128]

(a) There were two separate cases under consideration, of which the facts were similar. Firstly, Ms Jaftha was unemployed, of ill health and indigent. She had a standard 2 education only. She suffered from heart problems and high blood pressure which prevented her from working. In 1997 she applied for and was granted a state housing subsidy with which she bought a home where she lived with her two children. In 1998, Ms Jaftha borrowed R250 from the second respondent (Ms Skaarnek), which was to be repaid in instalments. Although Ms Jaftha had paid some of the instalments, Ms Skaarnek referred the matter to the third respondent, Markotter Attorneys, on the grounds that Ms Jaftha had not repaid her debt. Judgment was taken against Ms Jaftha in the Prince Albert Magistrate's Court in an amount which had by then escalated to R632,45 (including interest and costs). Thereafter, and during the course of 2000, Ms Jaftha made a further few payments through Markotter Attorneys. Ms Jaftha was then hospitalised and when she returned home she discovered that her house was to be sold in a sale of execution to pay her outstanding debt to Ms Skaarnek. In March

126 The precursor to *Jaftha* was the decision by the Cape High Court, reported as *Jaftha v Schoeman; Van Rooyen v Stoltz* [2003] 3 All SA 690 (C) which concerned the question whether section 66(1)(a) of the Magistrates' Courts Act violated section 26(1) of the Constitution. The Cape High Court found that the section did not violate section 26(1) of the Constitution.

127 Van Heerden & Boraine 2006 *De Jure* at 330 par 2 4 also concluded that the *Jaftha* requirement to exercise judicial oversight is limited to instances where the home of a debtor is at stake.

128 *Jaftha* at [3]-[5].

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2001 she was informed by Markotter Attorneys that she would need to pay R5 500, including accrued interest, to prevent the sale of her home. Having made two further payments to Markotter Attorneys of R300 and R200 respectively, she went to their offices in July 2001 only to discover that she would have to pay R7 000 to prevent the sale of her home. This amount was way beyond her means and Markotter Attorneys were not willing to give her another opportunity to pay. Ms Jaftha was forced to vacate her meagre property following its sale in execution for R5 000 on 17 August 2001 to the first respondent, Mr Schoeman.

(b) In the second case, the applicant was Ms Van Rooyen, an unemployed woman who had three children. She too was indigent and had never been to school. In 1997 her husband had acquired their home with a state subsidy of approximately R15 000. After her husband passed away in 1997, she inherited the home. In 1995 she purchased vegetables on credit to the value of approximately R190 from the second respondent, Ms Goliath. In this case too, Ms Van Rooyen was unable to repay the debt and Ms Goliath instituted proceedings which were also initiated by Markotter Attorneys against Ms Van Rooyen in the Prince Albert Magistrate's Court. The amount claimed was R198,30 plus interest and costs. Ms Van Rooyen's home was sold in execution for R1 000 on the same day as that of Ms Jaftha. It is common cause that both appellants had unsatisfied judgments against them obtained by other creditors; in the case of Ms Jaftha four others and in the case of Ms Van Rooyen two others.

(c) Assisted by a lawyer from Cape Town who heard of their plight, Ms Jaftha and Ms Van Rooyen launched proceedings in the Cape High Court. The essence of the relief sought was the setting aside of the sales in execution and interdicts restraining certain of the respondents from taking transfer of the appellants' homes pursuant to the sales in execution.[129]

(d) Although Markotter Attorneys initially opposed the granting of relief, it subsequently withdrew its opposition and consented to an order setting aside the sale in execution of Ms Jaftha's home; an interdict restraining Markotter Attorneys from attempting to evict Ms Jaftha from her home pursuant to the sale in execution; and similar orders in respect of the home of Ms Van Rooyen. Markotter At-

129 *Jaftha* at [6].

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torneys also reached agreement with Ms Jaftha and Ms Van Rooyen as to their liability for costs. Only the constitutional challenges were determined by the High Court.[130] The Minister for Justice and Constitutional Development opposed the applications in the High Court.

An important factual feature of the case was that if a recipient of a state housing subsidy loses ownership of the home in a sale in execution, he would be disqualified from obtaining other state-aided housing. It was common cause that if the appellants were evicted because of sales in execution, they would have no suitable alternative accommodation.[131]

In summary it may be said that the facts in *Jaftha* concerned the plight of two indigent home owners who faced the loss of, and the eviction from, their modest homes because of a relatively small debt which their creditors were attempting to recover.

3.2 Legal Questions in *Jaftha*

The following legal questions were raised in *Jaftha*:

(a) Counsel for the Minister contended that once the parties had settled the non-constitutional issues in the case, there was no need for the court to decide the constitutional questions. The High Court rejected this contention and was of the view that both of the appellants had further unpaid debts and, based on the previous conduct of Markotter Attorneys, it was fair to infer that the appellants' properties might be attached in the future.

(b) The appellants argued that in terms of section 66(1)(a) of the Magistrates' Courts Act the state and private parties had a duty not to interfere unjustifiably with any person's existing access to adequate housing and that section 66(1)(a) of the Magistrates' Courts Act was unconstitutional to the extent that it was over-broad as it allowed a persons' right to adequate housing to be infringed in unjustifiable circumstances.[132]

It was held that if the offending provisions in the Magistrates' Courts Act remained on the statute books, the appellants would always be in jeopardy of having their homes

130 *Jaftha* at [8].
131 *Jaftha* at [12].
132 *Jaftha* at [17].

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sold in a sale in execution. The question of the constitutionality of the impugned provisions was therefore deemed an independent and necessary aspect of the application.[133]

3.3 Findings in *Jaftha*

The findings of Constitutional Court can be summarised as follows:

(a) Section 26(1) of the Constitution emphasised the importance of adequate housing and in particular security of tenure in a new constitutional dispensation. The indignity suffered as a result of evictions from homes, forced removals and the relocation to land often wholly inadequate for housing needs must be replaced by a system in which the state must strive to provide access to adequate housing for all and when that exists, must refrain from allowing people to be removed unless it can be justified.[134]

(b) The Constitutional Court concluded that section 66(1)(a) of the Magistrates' Courts Act allowed execution against the homes of indigent debtors in which they lost their security of tenure. The section was found to violate section 26(1) as it was couched in overly broad terms and was thus not justifiable. In recognition of the rights of a creditor who was entitled to execute against the property of a debtor, the Constitutional Court found that if judicial oversight was introduced over the execution process the offensive nature of section 66(1)(a) would be removed.[135]

(c) The failure to provide for judicial oversight over sales in execution against immovable property in section 66(1)(a) of the Magistrates' Courts Act was declared unconstitutional and invalid.[136]

(d) To remedy the defect an order was made to read in the words "a court, after consideration of all relevant circumstances, may order execution", before the words "against the immovable property of the party".[137]

It should be noted that the Constitutional Court did not find that section 26(3) of the Constitution had been violated. However, the words which the Constitutional Court

133 *Jaftha* at [9].
134 *Jaftha* at [29].
135 *Jaftha* at [52]-[54].
136 *Jaftha* at 165E-F.
137 *Jaftha* at [67].

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ordered to be read into section 66(1)(a) would appear to have been inspired by section 26(3) which reads as follows:

> 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.[138]

With the advent of *Jaftha*, judicial oversight over the execution against immovable property became a Constitutional requirement in all instances where the right to adequate housing would be affected.

3.4 Rationale Behind Introduction of Judicial Oversight as Blanket Procedural Requirement

It was shown above that before *Jaftha* our courts had not approached the issue of execution against immovable property without oversight. In the past our courts had shown a willingness to guard against the abuse of its processes. However, in cases where the clerk of the court (or the registrar) granted judgment by default or consent the involvement of the court was not compulsory when a writ of execution against the immovable property of a debtor was issued.[139]

The appellants in *Jaftha* argued that in terms of section 26(1) of the Constitution the state and private parties have a duty not to interfere unjustifiably with a person's existing access to adequate housing and that section 66(1)(a) of the Magistrates' Courts Act was overly broad to the extent that it allowed interference with a person's right to adequate housing in circumstances that were unjustifiable.[140]

Mokgoro J pointed out that section 26 of the Constitution must be seen as making a decisive break from the past. The case emphasised the importance of adequate housing and in particular security of tenure in our new constitutional democracy. The indignity suffered as a result of evictions from homes, forced removals and the relocation to land often wholly inadequate for housing needed to be replaced by a system in which the state must strive to provide access to adequate housing for all and, where that exists, refrain from allowing people to be removed unless it could be justi-

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138 Emphasis added to demonstrate the conclusion that section 26(3) probably inspired the inclusion of the words *after consideration of all relevant circumstances* in section 66(1)(a) of the Magistrates' Courts Act.
139 As was pointed out in *Jaftha* at 149G-151A.
140 *Jaftha* at [17].

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fied.[141]

The Constitutional Court emphasised that the underlying problem raised by the facts of *Jaftha* was "not greed, wickedness or carelessness", but "poverty". What was really a welfare problem was converted into a property one. People at the lower end of the market were especially vulnerable as they lacked income and savings to pay for the necessities of life and they had poor prospects of raising loans, probably because their only asset is a state-subsidised house. The consequences of inability to pay could be drastic because they lived on the brink of being thrown back among the homeless in informal settlements, from where they would have little chance of escape. Such indigent persons may easily find themselves at the mercy of conscienceless persons ready to abuse the law for purely selfish gain.[142]

Mindful of not only the severe impact that the execution process can have against indigent debtors the Constitutional Court recognised that there would be many instances when execution would be unjustifiable since the advantage it offers to a creditor who seeks execution will be far outweighed by the immense prejudice and hardship caused to the debtor. The facts of *Jaftha* demonstrated an abuse by unscrupulous people of the execution process who took advantage of uninformed persons.[143]

Seemingly *Jaftha* also applies to those cases where a debtor hypothecated his home as security. Van der Walt[144] states that also in such instances the abuse of process motivates the requirement for judicial oversight. He is of the view that despite the potentially negative economic impact that stricter judicial control over sales in execution could have on a "normal" mortgage situation, it is important to note that *Jaftha* established the significant constitutional principle that court procedures which are intended to facilitate "normal" commercial processes may not be abused to exploit or exacerbate the economic and social weakness and marginality of the indigent, especially

141 *Jaftha* at [29].
142 *Jaftha* at [30]. This view raises the question as to whether the requirement of judicial oversight only applies to indigent persons. It is submitted that although the facts of *Jaftha* dealt with two indigent applicants this did not mean that the requirement of judicial oversight was limited to indigent debtors.
143 *Gundwana* at [43].
144 *Constitutional Property Law* (2011) at 305-306.

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when doing so would have a negative impact on the state's efforts to alleviate homelessness.

In some of the judgments handed down after *Jaftha* it was acknowledged that an abuse of the execution process may arise if a debtor's home was about to be sold for a relatively small amount of arrears or for a small debt. Giving effect to intentions of the Constitutional Court, the court in *Mortinson* required that when a creditor applied for an order declaring specifically hypothecated immovable property executable, the creditor had to disclose what the amount of the outstanding arrears was.[145] In *Bekker* it was required that where the property might be the debtor's home and the secured debt was repayable by instalments, it could be advantageous for the bondholder to assist the court by stating the amount of arrears and if this was relatively low, by stating why the creditor was resorting to direct realisation of the security.[146]

3.5 Conclusion

From the above it follows that the rationale behind the findings in *Jaftha* was primarily aimed at preventing an abuse of process. The facts of *Jaftha* leave one with the impression that the execution process was open to abuse insofar as the circumspection of the courts was not normally required. It took the extreme factual examples of *Jaftha* to demonstrate how easily a home owner could be divested of his principal asset, while alternative means may have existed for the recovery of small debts.

In summary it follows that the rationale behind the imposition of judicial oversight over the process of execution against immovable property includes the following:

(a) Section 26(1) of the Constitution provides that every person has the right to adequate housing.
(b) Adequate housing will be threatened if there is an abuse of the execution process against the home of a debtor.
(c) When a relatively small amount is being recovered by a judgment creditor, execution against immovable property should not be authorised without circumspection.

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145 *Mortinson* at [33.1.1].
146 *Bekker* at [29].

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(d) In order to ensure that there is no abuse of process and in order to balance the rights between creditor and debtor the courts are required to oversee the process of execution against immovable property.

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CHAPTER 4: JURISPRUDENTIAL AND LEGISLATIVE DEVELOPMENTS AFTER *JAFTHA*

Decisions handed down after *Jaftha* did not all demonstrate a uniform approach to the application of the requirement of judicial oversight over execution against immovable property.[147] These differences lead to legal uncertainty. In response to *Jaftha* some of the High Court divisions implemented practice directives. The recent amendment to Uniform Rules of Court 46(1) and 31(5) has not dealt definitively with the differing applications of the requirement of judicial oversight. This chapter contains an overview of most of the decisions handed down after *Jaftha* and a discussion of the practice directives and recent amendments to the Uniform Rules of Court.

4.1 *Standard Bank of South Africa Ltd v Snyders and 8 Similar Cases*[148]

In *Jaftha* the Constitutional Court directed that its registrar had to forward a copy of the judgment to the Law Society of the Cape of Good Hope.[149] As a result of this instruction nine cases in which Standard Bank sought to execute against mortgaged property were enrolled as unopposed applications for default judgment in the Cape High Court. *Snyders* concerned the effect of the findings in *Jaftha* on applications in which orders are sought declaring immovable property executable and which formed part of default and summary judgments. Blignault J found that an order in terms of which the home of a debtor was declared executable is subject to the provisions of section 26(3) of the Constitution. Only a court, and not the registrar, would therefore have the power to grant such an order.[150] Blignault J directed that in all such cases the plaintiff had to include suitable assertions that would justify the granting of an order declaring the immovable property executable.[151]

4.2 *Nedbank Ltd v Mortinson*[152]

Shortly after *Snyders* served before the Cape High Court, the findings in *Jaftha* were

147 See in this regard the useful summary of the effect of *Jaftha* and the cases which followed it by Du Plessis "Judicial oversight for sales in execution of residential property and the National Credit Act" 2012 *De Jure* 532.
148 2005 (5) SA 610 (C) ("*Snyders*").
149 *Jaftha* at [67].
150 *Snyders* at [7].
151 *Snyders* at [22] and [24].
152 2006 (6) SA 462 (W) ("*Mortinson*").

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considered by the full court of the Witwatersrand Local Division.[153] In *Mortinson* the plaintiff requested the registrar to grant default judgment against the defendant under Uniform Rule of Court 31(5). The plaintiff extended a loan to the defendant, secured by a first mortgage bond registered over the immovable property of the defendant, and the plaintiff sought an order declaring the property executable. The registrar, acting in terms of Uniform Rule of Court 31(5)(b)(vi), requested that the application be set down for hearing in open court. The court formulated a number of questions for determination which included whether *Jaftha* was applicable to the circumstances of the case and whether *Jaftha* applied to Uniform Rule of Court 45(1).[154] In answer to the first question it was found that Uniform Rule of Court 31(5) did not violate section 26 of the Constitution. In order to alert the registrar and assist him in determining abuses of procedure and referring those matters for consideration by the court, a number of practice rules had to be put into place.[155]

Mortinson differed from *Snyders* in respect of the finding that it was only the court and not the registrar who could grant an order declaring immovable property executable. In *Snyders* the Cape High Court found that only the court had the power to declare immovable property executable in terms of the provisions of Uniform Rule of Court 31(5). Joffe J, who gave the judgment in *Mortinson*, pointed out that no reasons were given for this conclusion and accordingly there was no reason to agree with this particular conclusion.[156]

The two decisions also differed on the issue about what a plaintiff was required to assert in his summons when execution against immovable property was sought. In *Mortinson* it was held that the facts which *Snyders* required to be included in the summons were no different from the allegations contained in a non-excipiable summons.[157]

Snyders and *Mortinson*, which were the first cases handed down after *Jaftha*, immediately resulted in two different interpretations of the findings in *Jaftha*. More disparity between High Court judgments was soon to follow.

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153 Presently referred to as the Gauteng Division of the High Court, Johannesburg.
154 *Mortinson* at [4].
155 *Mortinson* at [33].
156 *Mortinson* at [31].
157 *Mortinson* at [32].

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4.3 *Standard Bank of South Africa v Saunderson And Others*[158]

Next, the Supreme Court of Appeal considered the *Jaftha* principles in *Saunderson*. This was an appeal against the findings of Blignault J in three of the matters referred to in *Snyders*. The first issue pointed out in *Saunderson* was that the Cape High Court interpreted *Jaftha* incorrectly.[159] The issue in *Jaftha* was not section 26(3) of the Constitution but rather section 26(1). The latter enshrined a right of access to adequate housing and the *Jaftha* case investigated how that right was impacted upon by execution against residential property. Section 26(3) became relevant in the event of eviction consequent upon a sale in execution. Section 26(3) was neither in issue in *Jaftha* nor did the Constitutional Court decide that section 26(1) was compromised in every case where execution was levied against residential property. It was decided that a writ of execution which would deprive a person of adequate housing would compromise his section 26(1) rights and would therefore need to be justified within the meaning of section 36(1) of the Constitution. The premise on which the Cape High Court proceeded was thus incorrect. This conclusion was drawn on the basis that it must be borne in mind that section 26(1) does not confer a right of access to housing *per se* but only a right of access to adequate housing and this concept is relative.[160] In *Jaftha* it was accepted that the forfeiture in question entailed a deprivation of adequate housing.

In *Snyders* it was contentious whether a threat to ownership, as opposed to the right to occupation, was in itself invasive of section 26(1). The Constitutional Court found that it was. However, *Jaftha* did not decide that ownership of all residential property was protected by section 26(1). It is submitted that the Constitutional Court could not have done so, bearing in mind that what constituted adequate housing was necessarily a fact-bound enquiry. One need only postulate executing against a holiday home to see that this must be so, for in that instance it cannot be asserted that the process of execution would implicate the right of access to adequate housing.

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158 2006 (2) SA 64 (SCA) ("*Saunderson*").
159 *Saunderson* at [15].
160 In support of this position reference was made to *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at [34] and [37].

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Saunderson thus differed from *Snyders* in that it was found that the requirement of judicial oversight over execution against immovable property had as it focus the contents of section 26(1) and not section 26(3) of the Constitution. In *Saunderson* the Supreme Court of Appeal was required to decide whether the registrar was authorised to grant orders declaring immovable property executable. It held that Uniform Rule of Court 31(5) permitted the registrar to make such an order and that a plaintiff would only have to justify the granting of such a writ where the defendant contested its validity because of an infringement of section 26(1) of the Constitution.[161]

4.4 *Nedbank Ltd v Mashiya and Another*[162]

Masiya was reported at the same time that *Mortinson* was decided. In this case Bertelsmann J found that in terms of the Transvaal rules of practice, a creditor who sought to have his debtor's specially hypothecated immovable property declared executable had to make certain essential averments in the founding affidavit to his application for default judgment before such an order would be granted.[163] The case gave practical guidance to plaintiffs who required execution against the home of a debtor and who wanted to satisfy the requirement of judicial oversight over the execution process.

4.5 *Standard Bank of South Africa Ltd v Adams*[164]

In the meantime, the Cape High Court in *Adams* relied on *Snyders* to come to the conclusion that the wording which the plaintiff used in his summons did not meet the intention of the directive in *Snyders*, namely, to inform the defendant of the rights which he had in terms of section 26(3) of the Constitution.[165] The wording was found

161 *Saunderson* at [23]. The Law Clinic of the University of KwaZulu Natal appealed against the *Saunderson* decision. C*ampus Law Clinic, University of Kwazulu-Natal v Standard Bank Ltd & Another* 2006 (6) SA 103 (CC) was the application for leave to appeal against the *Saunderson* case.

162 2006 (4) SA 422 (T) ("*Masiya*").

163 *Mashiya* at [23] where the averments were listed as (1) the amount of the arrears as at the date of the application for default judgment; (2) whether the property had been acquired by means of, or with the assistance of a state subsidy; (3) whether or not, to the creditor's knowledge, the property was occupied; (4) whether the property was used for residential or commercial purposes; and (5) whether the debt had been incurred in order to acquire the property.

164 2007 (1) SA 598 (C) ("*Adams*").

165 In *Adams* the plaintiff alleged in its summons that: "An order declaring the property executable for the said sums as contemplated by the provisions of s 26(3) of the Constitution of the Republic of South Africa Act 108 of 1996, the facts relied upon by the plaintiff, which facts appear from prayer 1 above entitling the plaintiff to the order sought."

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to be wanting because it was misleading and it failed to achieve the purpose of alerting the defendant to his rights in respect of execution against his home.

4.6 *Mkhize v Umvoti Municipality and Others*[166]

In *Mkize* the KwaZulu-Natal Provincial Division of the Court found that the findings in *Jaftha* were applicable to only those cases which concerned execution against a debtor's home.

4.7 Amendment of Uniform Rule of Court 46(1)

On 30 September 2010 Uniform Rule of Court 46(1) was amended to provide that no writ shall issue unless the court, having considered all the relevant circumstances, ordered execution against the property.[167] This amendment introduced the words "primary residence of the judgment debtor" as the trigger for the application of the judicial oversight in the High Court.

The amendment of Uniform Rule of Court 46(1) was the work of the Rules Board.[168] The Rules Board is incapable of amending parliamentary statutes[169] such as the Magistrates' Courts Act and the Superior Courts Act. In the result the provision of section 66(1)(a) of the Magistrates' Courts Act, with the read-in words, and the amended Uniform Rule of Court 46(1) are not uniform in their description of the type of immovable property which requires judicial oversight before execution may take place.

4.8 *Gundwana v Steko Development CC & Others*[170]

In the meantime, the apparent difference of opinion remained as to whether the registrar should be allowed in terms of Uniform Rule of Court 31(5)(b) to issue writs of execution against immovable property. This issue was eventually laid to rest by the Constitutional Court in *Gundwana*. In this case *Mortinson* and *Saunderson* were both overruled to the extent that they held that a registrar was constitutionally competent to make execution orders when granting default judgment in terms of Uniform Rule of Court 31(5)(b). The Constitutional Court held that Uniform Rule of Court 31(5) was unconstitutional insofar as it authorised the registrar to order the sale in execution of

166 2010 (4) SA 509 (KZP) ("*Mkize*") at [8] and [41].
167 See chapter 1, footnote 21 for an explanation of the origin and function of the Rules Board.
168 Established by the Rules Board for Courts of Law Act 107 of 1985. See footnote 21 above.
169 Which mostly applies nationally.
170 2011 (3) SA 608 (CC) ("*Gundwana*").

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"the home of a person".[171] It should be noted that this judgment did not disagree with the practical suggestions made in the two judgments about how defendants should be informed about their rights in terms of section 26(1) of the Constitution.[172]

In *Gundwana* the question as to the retrospective application of *Jaftha* was decided definitively. The aspect of retrospectivity is dealt with in more detail hereinbelow. For present purposes it suffices to say that in *Gundwana* it was accepted that the findings in *Jaftha* had retrospective application. The practical effect of this finding is that a debtor whose home had been sold in execution and was transferred to another, may approach the High Court to have the sale and transfer set aside. In such an instance the debtor would, *inter alia*, have to show that a court, with full knowledge of all the relevant facts existing at the time of granting the default judgment and the execution order, would nevertheless have refused leave to execute against the specifically hypothecated property.[173]

Gundwana leaves some confusion as to whether the requirement of judicial oversight is applicable to cases of execution against the home of a debtor or whether the requirement only applies to indigent debtors. Referring to *Lesapo* and *Jaftha* the Constitutional Court said in *Gundwana*[174] that the combined effect of these two cases was that execution may follow upon judgment in a court of law, but where the execution targeted the homes of indigent debtors who ran the risk of losing their security of tenure, judicial oversight by a court of law was compulsory. This finding must be balanced with what Froneman J said further on in the same case when he made it clear that it cannot be concluded from the willingness of mortgagors to put their homes forward as security for the loans that they are put beyond the reach of the *Jaftha* principles. An evaluation of the facts of each case is necessary in order to determine whether a declaration may be made that hypothecated property constituting a person's home is specifically executable.[175]

It was further found in *Gundwana* that in the case where action is instituted to enforce a debt secured by a special hypothec over the debtor's primary residence, or

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171 *Gundwana* at [65].
172 *Gundwana* at 626A.
173 *Gundwana* at 628D-E.
174 *Gundwana* at [41].
175 *Gundwana* at [49].

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usual or ordinary residence, the debtor is entitled to be informed in the summons of his or her rights in terms of section 26 of the Constitution.[176] This of course means that the *Jaftha* principles apply to extraneous debts[177] as well as to debts secured by mortgage bonds and to the execution procedures of the courts. The constitutional rule cannot depend on the subjective position of a debtor. The rules are either objectively valid or not.[178]

4.9 Amendment of Uniform Rule of Court 31(5)

Uniform Rule of Court 31(5) was amended on 16 August 2013 with the introduction of the proviso that if the registrar is approached with an application to declare *residential property* executable, the registrar must refer the application to court.

The amended Uniform Rule of Court 46(1) requires judicial oversight in cases where the execution is aimed at the "primary residence" of a debtor. The words "residential property" and "primary residence" imply a potential conflict in situations where a debtor has more than one "residential property". If the property of the debtor is "residential property", but not his "primary residence", there should be no apparent reason why the registrar may not grant a writ against the immovable property of the debtor. Such an interpretation would be in conflict with the findings in *Gundwana* which found Uniform Rule of Court 31(5) to be unconstitutional to the extent that the registrar had previously been allowed to order the sale in execution of "the home of a person".

4.10 *Firstrand Bank Ltd v Folscher & Another and Similar Matters*[179]

The amended Uniform Rule of Court 46(1) came under the judicial scrutiny of the full court of the North Gauteng Provincial Court, Pretoria in *Folscher*.[180] A key issue before the court was the meaning of the words "primary residence" as used in rule 46(1). An investigation of "all relevant circumstances", as contemplated in the amended rule 46(1) was found to be necessary when the intended execution was aimed against "the home of a person".[181] The court based this conclusion on the

176 *Gundwana* at [52].
177 Meaning debts which are not secured by means of immovable property itself.
178 Van der Walt *Constitutional Property Law* (2011) at 306.
179 2011 (4) SA 314 (GNP) ("*Folscher*").
180 Now the Gauteng Division of the High Court, Pretoria.
181 *Folscher* at [25]-[27].

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findings in *Gundwana.*[182] If *Gundwana*, *Mkhize* and *Folscher* are considered together it should be accepted that judicial oversight must be exercised over the execution against the "home of a person". The meaning of "a person" is yet to be finally determined. The question is whether "a person" should be limited to a natural person or whether the words should include the rights of persons who registered their home in the name of some corporate entity.

In *Folscher* it was found that the term "judgment debtor" refers to an individual, thus a natural person. This therefore implies that it is the primary residence owned by a natural person that falls within the purview of the amended Uniform Rule of Court 46(1).[183] Immovable property owned by a company, a close corporation or a trust of which the member, shareholder or beneficiary is the beneficial occupier is not protected by the amended rule even if the immovable property is the only residence of the shareholder, member or beneficiary.[184]

After considering the relevant circumstances, the manner in which the relevant information should be placed before the court and the duty to inform the debtor of his rights, the court in *Folscher* issued practice directives which, *inter alia*, included that if the summons was preceded by a notice in terms of section 129 of the National Credit Act,[185] such notice must include a notification to the debtor that should action be instituted and judgment be obtained against him, execution against the debtor's primary residence would ordinarily follow and would usually lead to the debtor's eviction from such home.[186] If a debtor does not give notice of his intention to defend and the creditor applies for judgment by default either to the court or the registrar, the creditor must file an affidavit in which he must set out all the applicable circumstances.[187] A creditor applying to court for the granting of a writ of execution after obtain-

182 *Folscher* at [27] and [29]. See *Gundwana* at 629G.
183 *Folscher* at [31].
184 *Folscher* at [32]. In *Nedbank Ltd v Fraser and Another and four Other Cases* 2011 (4) SA 363 (GSJ) ("Fraser") at [12] Peter AJ came to a different conclusion. This aspect is addressed in more detail below.
185 34 of 2005 ("*the National Credit Act*").
186 *Folscher* at [33].
187 See *Folscher* at [19] where the circumstances are set as follows: "[M]ust simultaneously with the application file an affidavit setting out: (i) The amount of the arrears outstanding on the date of application for default judgment; (ii) whether the hypothecated property was acquired with a state subsidy or not; (iii) whether, as far as the debtor is aware, the property is occupied or not; (iv) whether the property is utilised for commercial or for residential purposes; (v) whether the debt sought to be enforced was incurred to acquire the property or not; (vi) in addition, any matter in which the amount claimed falls within the jurisdiction of

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ing judgment by default must file an affidavit setting out all the factors enumerated in the decision[188] and of which the creditor is aware or is able to reasonably establish from the information at his disposal. A creditor instituting action may include a prayer for a writ of execution in the summons, provided that the relevant circumstances which are required to motivate the required order are recorded in the particulars of claim. This information is to be verified by affidavit when application is made for judgment by default, which must be made to the court itself if the granting of a writ is sought at the same time.[189]

4.11 *Standard Bank of South Africa Ltd v Bekker & Another and Four Similar Cases*[190]

About the same time as when *Folscher* was reported, the full court of the Western Cape High Court, Cape Town, took a different approach. In *Bekker* it was immediately recognised that "due to conflicting judgments and an amendment to rule 46 of the Uniform Rules" it had become unclear what information a bondholder had to place before a court to enable it to decide whether to grant a writ of attachment and sale in execution of a judgment debtor's home. In order to address the situation, the Western Cape High Court required counsel representing the bondholders in five applications for default judgment against mortgagors to formulate specific questions for the court to address. The questions were:

(a) What were the "relevant circumstances" to which a court had to have regard before ordering execution against the mortgaged property specifically hypothecated to satisfy the debt secured by such mortgage?
(b) By whom did such circumstances have to be pleaded?
(c) Did the new rule 46(1) have the effect of setting up any substantive requirement on the part of the plaintiff in order to obtain the relief sought?[191]

In response to the aforesaid questions the full court held that:

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the Magistrates' Courts must be referred to the court if the hypothecated property is to be declared especially executable; (vii) the debtor's attention must be specifically drawn, in the warrant issued for the purposes of execution of the registrar's order, to the fact that he may apply for rescission of the judgment enforced against the hypothecated immovable property."

188 *Folscher* at [41].
189 *Folscher* at [56].
190 2011 (6) SA 111 (WCC) ("*Bekker*").
191 *Bekker* at [5].

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(a) Where a declaration of special executability was sought ancillary to the judgment in a money claim, the bondholder had to indicate in the summons whether or not execution was being sought against the judgment debtor's home. If the bond-holder was unable to do so because of lack of knowledge, that had to be stated in the summons.

(b) Where the bondholder was able to state that the property was not the debtor's home, the matter had, where possible, to be disposed of *via* the registrar. In such cases the bondholder had to submit to the registrar an affidavit confirming the fact that the property was not the debtor's home.

(c) Where the property might be the debtor's home, and the secured debt was paya-ble in periodic instalments, it would be to the advantage of the bondholder to as-sist the court by stating the amount of arrears and, where this was relatively low, by stating why it was resorting to direct realisation of the security.[192]

In *Bekker* an important distinction was drawn between cases which concerned the primary residence of a defendant and immovable property which fell outside that category. In the latter instance the registrar could still issue a writ of execution.[193]

4.12 *Nedbank Ltd v Fraser and Another and Four Other Cases*[194]

In *Fraser*[195] the South Gauteng High Court used the opportunity to investigate the context and purpose of the judicial oversight which was imposed by *Jaftha*.[196] Ac-cording to Peter AJ the requirement of judicial oversight implied a tension between two competing social values. On the one hand there was a need for people to be housed and the value of having a home. To advance this social value, protection must be afforded for security of tenure of persons in their homes. There must also be an appreciation that many persons in our society had either an insufficiency of means or are too ill-informed to vigorously defend their rights and were thus deserv-ing of a measure of judicial initiative in their protection.

It was pointed out that there is a compelling social value in enforcing contracts and

192 *Bekker* at [4] and [27]-[30].
193 *Bekker* at [28]. Since the amendment of Uniform Rule of Court 31(5) in 2013, the registrar may only grant a writ of execution if the property is not the "residential property" of the debtor.
194 2011 (4) SA 363 (GSJ) ("*Fraser*").
195 Reference given *upra*.
196 *Fraser* at [17]-[25].

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requiring the discharge of debts. In order to promote this social value, court structures exist and this social value finds its expression in section 34 of the Constitution. Judgments are given to enforce the payment of debts. The process of execution is essential to give content and effect to judgments of the courts. To promote this social value, the courts and their execution processes exist and are available to be utilised by judgment creditors.

In *Fraser* it was accepted that the right to execution is not absolute.[197] To motivate this conclusion Peter AJ gave examples of assets that are beyond the reach of execution.[198] It is of significance that a residential home is not placed beyond the process of execution. On an individual level, in the competition between the rights of the judgment creditor to obtain satisfaction of the judgment debt by execution against immovable property and the rights to housing of a judgment debtor, or person in the position of a beneficial owner occupying through the judgment debtor, the judgment creditor's rights will enjoy relative dominance. If this was not so, it would bring about a situation in which debtors could borrow money to purchase immovable property and defeat their creditors' legitimate claims to repayment by asserting a constitutional right to housing at the expense of the creditor.[199]

Should a residential immovable property, which is a person's home, be placed in the class of assets which are beyond the reach of execution, it would be rendered useless as a means of raising credit. Peter AJ suggested that if debtors are prevented from using their homes as security to raise credit a class of new homeless persons would be created. These would be people who are unable to afford the full purchase price of their homes in a cash sale, but who could afford to repay a loan. In addition,

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197 *Fraser* at [18].

198 These examples are contained in section 39 of the Supreme Court Act 1959; section 37 of the Magistrates' Courts Act; and section 86(2) of the Insolvency Act 24 of 1936. There are restrictions relating to certain insurance benefits as can be seen from section 63 of the Long-Term Insurance Act 52 of 1998; statutory protection has been given to certain pension benefits in terms of section 79 of the Railways and Harbours Service Act 28 of 1912, section 3 of the General Pensions Act 29 of 1979; section 14 of the Aged Persons' Act 81 of 1967; section 11 of the Blind Persons Act 26 of 1968. Also excluded is compensation for work-related injuries or illnesses as referred to section 131 of the Occupational Diseases in Mines and Works Act 78 of 1973, section 102 of the (now repealed) Workmen's Compensation Act 30 of 1941 and section 32 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993. Similarly, protection is given to unemployment insurance benefits in terms of section 33 of the Unemployment Insurance Act 63 of 2001.

199 *Fraser* at [20].

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such an interpretation would lock up capital and prevent the home-owning entrepreneur from using his or her home as security to finance a business initiative.[200]

In *Fraser* it was further said that section 26(3) of the Constitution offers a number of factors which contextualise judicial oversight. These are: the existence of the social need for housing; the constitutional right to access to adequate housing embodied in section 26(1); the need for people to honour their debts; the need for debts to be enforced by a court process; and the need for execution, all of which serve the housing need, as well as the drastic nature and far-reaching consequences of executing against a person's home and the scope for the abuse of the process of execution.[201] Seen in this context, the purpose of the judicial function required in section 26(3) is to act as a filter on any execution that does not serve the social interests. The function of the court is to safeguard against abuse of the execution process. It is within this context and purpose that a determination is made whether or not to declare a person's home executable.[202]

4.13 Practice Directives

The order handed down by the Supreme Court of Appeal in *Saunderson* included a practice directive which required that when a plaintiff claimed an order declaring immovable residential property executable in a summons, the summons shall inform the defendant as follows:[203]

> The defendant's attention is drawn to s26(1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing. Should the defendant claim that the order for execution will infringe that right it is incumbent on the defendant to place information supporting that claim before the Court.

As a consequence of the Supreme Court of Appeal's directive the Witwatersrand Local Division of the High Court,[204] in *Mortinson*,[205] laid down practice directives which require the following:

(a) In all applications for default judgment involving residential property where the

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200 *Fraser* at [21].
201 *Fraser* at [24].
202 *Fraser* at [24].
203 *Saunderson* at [27]. The part of the judgment which dealt with the practice directive was not overturned in *Gundwana*.
204 As it then was.
205 At [33]-[34].

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creditor seeks an order declaring the specially hypothecated immovable property executable the creditor shall aver in the application for default judgment:

(i) the amount of the arrears at date of the default judgment application;

(ii) whether the property was acquired with the assistance of a state loan;

(iii) whether to the knowledge of the creditor the property was occupied;

(iv) whether the property was used for residential or commercial purposes; and

(v) whether the debt was incurred in order to obtain the property.

(b) In cases where the creditor sought an order declaring specifically executable the residential property of a debtor for a debt amount falling within the jurisdictional limit of the Magistrates' Courts, the registrar shall refer the application to be heard by the court in terms of Uniform Rule of Court 31(5)(b)(vi).

(c) A warrant of execution that is presented to the registrar for issue, pursuant to an order made by the registrar declaring immovable residential property executable, shall contain a note advising the debtor of the provisions of Uniform Rule of Court 31(5)(d).[206]

The North West High Court, Mahikeng,[207] and the Eastern Cape High Court[208] issued practice directives similar to those stated in *Mortinson*.

The KwaZulu-Natal High Court adopted a practice directive similar to the directive in *Saunderson*.[209]

In reaction to *Jaftha* the Northern Cape High Court issued practice directives on 6 July 2006 that combined the practice directives given in *Mortinson* and *Saunderson*.[210]

The Western Cape High Court adopted a similar approach to the *Saunderson* directive.[211]

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206 This directive and the previous one has effectively been made obsolete by the advent of the amendment to Uniform Rule of Court 31(5) on 16 August 2013.

207 Practice Direction 30, Applications for Default Judgment.

208 Eastern Cape High Court Notice 1 of 2010 (30 July 2010), which inserted Rule 14A into the Joint Rules of Practice for the High Court of the Eastern Cape.

209 Practice Manual: KwaZulu-Natal, section 26.

210 Practice Directions.

211 As per *Standard Bank v Hunkydory Investments (No 2)* 2010 (1) SA 634 (WCC) at [29]. In *Bekker* the full court of the Western Cape High Court gave further guidelines which were in line with the *Saunderson* directive.

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In the Gauteng Division of the High Court, Pretoria, a practice directive was issued in *Folscher* which directs that if the issue of a summons is preceded by a notice in terms of section 129 of the National Credit Act,[212] such notice is to include a notification to the debtor informing him that if action is instituted and judgment is obtained against him, execution against the debtor's primary residence will ordinarily follow and will usually lead to the debtor's eviction from such home.[213] If the debtor does not enter an appearance to defend after the service of summons and the creditor applies for default judgment, the creditor must file an affidavit in which he sets out all the applicable circumstances similar to those which were contained in the *Mortinson* practice directive.[214] A creditor applying to court for the issuance of a writ of execution after obtaining default judgment must file an affidavit setting out all the circumstances enumerated in the *Folscher* decision.[215]

Hereinbelow more detailed attention is given to the subject of how the judgment debtor should be informed of his rights against deprivation of adequate housing be-

212 34 of 2005.
213 *Folscher* at [53].
214 *Folscher* at [54], read with [19].
215 *Folscher* at [55] read with [41] in which the follow circumstances were stated: "[41] Mindful of the impossibility to anticipate every potential circumstance, some of the following factors that may need to be taken into consideration by the court, when deciding whether a writ should issue or not, are:

- Whether the mortgaged property is the debtor's primary residence;
- the circumstances under which the debt was incurred;
- the arrears outstanding under the bond when the latter was called up;
- the arrears on the date default judgment is sought;
- the total amount owing in respect of which execution is sought;
- the debtor's payment history;
- the relative financial strengths of the creditor and the debtor;
- whether any possibilities exist, that the debtor's liabilities to the creditor may be liquidated within a reasonable period, without having to execute against the debtor's residence;
- the proportionality of prejudice the creditor might suffer if execution were to be refused, compared to the prejudice the debtor would suffer J if execution went ahead and he lost his home;
- whether any notice in terms of s 129 of the National Credit Act 34 of 2005 was sent to the debtor prior to the institution of action;
- the debtor's reaction to such notice, if any;
- the period of time that elapsed between delivery of such notice and the institution of action;
- whether the property sought to be declared executable was acquired by means of, or with the aid of, a State subsidy;
- whether the property is occupied or not;
- whether the property is in fact occupied by the debtor;
- whether the immovable property was acquired with moneys advanced by the creditor or not;
- whether the debtor will lose access to housing as a result of execution being levied against his home;
- whether there is any indication that the creditor has instituted action with an ulterior motive or not;
- the position of the debtor's dependants and other occupants of the house, although in each case these facts will have to be established as being legally relevant...."

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fore a writ of execution is issued against his home.[216] In that discussion reference is made to a decision by the Western Cape Division of the High Court, Cape Town in *Standard Bank of South Africa Ltd v Dawood*[217] in which it was held that it is not irregular to supply in a simple summons the particularity required in a combined summons.[218] The court gave a detailed practice directive about what should be included in such a notice.

From the above it can be seen that the various divisions of the High Court all adopted the *Saunderson* directive. In most of the divisions the *Mortinson* directives were incorporated into their respective practices. With the advent of the amendment to Uniform Rule of Court 31(5) the practice directives which gave specific instructions to the registrar became obsolete.

Different approaches were adopted to the practical manner in which the court must be approached with a default judgment and/or an application for the issuance of a writ of execution against residential property. The most noticeable differences are those between the requirements which apply in the Gauteng Division, Pretoria and the Western Cape Division, Cape Town.

4.14 Conclusion

The imposition of the requirement that a court must exercise judicial oversight over the process of execution against the home of a judgment debtor resulted in our High Courts sometimes giving conflicting decisions regarding the manner in which the oversight must be exercised. The different decisions caused different practices to develop in the different divisions of the High Court about the manner in which a creditor should persuade a court to authorise a writ of execution against the home of a debtor. The different High Court decisions also left practitioners in the lurch about questions such as whether the requirement of judicial supervision applies to residential property which is registered in the name of a corporate entity. On an overview, case law development failed to promote a uniform approach towards the manner in which judicial oversight must be exercised over the execution against immovable property. These disparate approaches lead to legal uncertainty and have potentially

[216] See par 5.4.
217 2012 (6) SA 151 (WCC) ("*Dawood*").
218 *Dawood* at [7].

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unfair results.

For instance, in the Gauteng Divisions of the High Court, in terms of the *Folscher* requirements, a judgment creditor must satisfy a court in a detailed affidavit that he is entitled to an order declaring the home of the judgment debtor executable, whilst in the Western Cape Division, Cape Town, in terms of the *Bekker* decision, less stringent requirements apply.[219]

Another example of a significant disparity is the difference of opinion between the *Folscher* and *Fraser* cases concerning the issue of whether judicial oversight is required over execution against a home of a judgment debtor which is registered in the name of a legal entity. In *Folscher* it was found that judicial oversight did not apply to property which was so registered, whilst in the case of *Fraser* it was decided otherwise. It is foreseeable that practically in Pretoria judicial oversight would not be required when the home of a debtor is registered in the name of a legal entity, whilst in Johannesburg judicial oversight would be required even if the immovable property was registered in the name of a legal entity.

The inevitable effect of these disparities is that differing requirements subject judgment creditors and debtors to differing standards when judicial oversight is exercised.

Practice directives also resulted from *Jaftha*. Practice directives are useful instruments with which to manage courts. They offer legal practitioners and litigants guidance and promote a uniform approach when it comes to the manner in which cases are presented to court. Practice directives do not have the force of legislation, but this feature offers a useful measure of flexibility with which judges may manage their courts.

The exercise of judicial supervision over the execution against immovable property was prompted by constitutional considerations which impacted on the procedural law. A judgment creditor has a right to satisfy his judgment through the execution process provided in the procedural law. This right stands opposed to the rights of the judgment debtor such as the right to adequate housing, the right to property and the

[219] See par 4.11 above.

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right of a person not to be evicted without due process. Judicial oversight is aimed at settling the conflict between these opposing positions. Although each division of the High Court may have different practical challenges, and therefore practice directives may differ, the manner in which judicial oversight is exercised should be standardised to the extent that judgment creditors and debtors are treated similarly in all courts. Such an approach promotes legal certainty.

The practice directives issued after *Saunderson* all have one important common feature, namely, that before a writ of execution is issued the judgment debtor must be informed that if his home was under threat of execution he has the right to place facts before the court which may be persuasive of a direction that execution will not follow against his home.

Insofar as the reaction of the legislative authorities is concerned it should be noted that thus far it was only the Rules Board which made legislative amendments to the Uniform Rules of Court in an effort to give effect to the *Jaftha* requirements. However, the amendments did not result in uniform provisions which would be applicable to both the High and the Magistrates' Courts.

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CHAPTER 5: CONSEQUENCES OF *JAFTHA*

Jaftha had a profound impact on the manner in which creditors would in future have to approach execution against the residence of a debtor. The practical consequence of *Jaftha* is that in future all such cases will be subjected to judicial oversight. From the above discussion of the cases, legislation and practice directives which followed after *Jaftha* it is clear that there is not uniformity in the manner in which judicial over-sight should be exercised. *Jaftha* also opened the door to debtors whose homes had been sold in execution before *Jaftha*, to approach a court with an application to re-scind the sale on the basis that the past execution had not been subjected to judicial oversight. Since the practice directive given in *Saunderson*, all of the divisions of the High Court have acknowledged that there must be some way in which the debtor is to be informed before a writ of execution is issued that he is at risk of losing his home and that he has the rights as enshrined in section 26(1) of the Constitution. Consequently, the manner in which practitioners and litigants should approach ser-vice of notices and process which have to inform a debtor of these rights must be considered. What follows is a summary of the consequences which *Jaftha* had on procedural practice in South Africa.

5.1 *Jaftha* and Procedural Practice

Although the case law did not promote a uniform approach to judicial oversight it can be said that over time many of the controversies were eradicated through the development of the case law. Issues which are no longer contentious include the following:

(a) The fundamental right enshrined in section 26(1) and not in section 26(3) of the Constitution underpins the requirement of judicial oversight over execution against the home of a debtor.
(b) "Adequate housing" in section 26(1) of the Constitution means "the home of a debtor".
(c) "All relevant circumstances", as found in the read-in version of section 66(1)(a) of the Magistrates' Courts Act and in Uniform Rule of Court 46(1), cannot be enumerated.

The case law and the amendment of Uniform Rules of Court 31(5) and 46(1) have

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left a number of fundamental issues which do not promote uniformity. From the above summary of the case law and legislation it is submitted that the following issues hamper uniformity amongst our courts regarding the manner in which the requirement of judicial oversight over the execution against immovable property must be exercised, namely:

(a) Section 26(1) of the Constitution offers protection against the violation of the right to "adequate housing". Uniform Rule of Court 46(1) contains the words "primary residence", whilst Uniform Rule of Court 31(5) refers to "residential property". Section 66(1)(a) of the Magistrates' Courts Act simply refers to "immovable property of a party". From the case law it is clear that our courts accept that the requirement of judicial oversight relates to "the home of a person".
(b) Uniform Rule of Court 46(1) refers to "a judgment debtor" and not "a person". Both terms, read with the different views expressed in *Folscher* and *Fraser*, leave uncertainty about whether judicial oversight should be exercised over those instances where the debtor is a legal entity.
(c) The various divisions of the High Court have issued practice directives in an attempt to direct the manner in which judicial oversight has to be exercised. The practice directives does not all have uniform requirements.
(d) It should be noted that since *Jaftha* no amendments have been made to the Magistrates' Courts Act or Rules. As in the case of many other contentious procedural aspects, Magistrates' Courts were left to rely on how the High Courts interpreted the requirement of judicial oversight. If the amendment of legislation relating to execution against immovable property is considered in future, alignment of the practices in the Magistrates' and High Courts should be placed high on the agenda.

Decisions handed down after *Jaftha* illustrated that our High Courts differed in their application of the findings in *Jaftha* on a number of issues. Over time the courts have managed to agree on uniform approaches to some of the issues. A number of issues that arose as a consequence of the findings in *Jaftha* remain controversial.

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5.2 Retrospectivity

Gundwana[220] considered the question whether the requirement of judicial oversight before allowing execution against immovable property has retrospective effect. It should be kept in mind that in *Jaftha* the Constitutional court placed no limit on the retrospectivity of its order. However, the declaration of invalidity of the legislative provisions in *Jaftha* did not entail that all transfers made subsequent to invalid sales in execution have automatically been invalidated. The possibility remained open that individual persons affected by the ruling could approach the courts to have the sales and transfers set aside if granted by default. This was made clear by the Supreme Court of Appeal in *Menqa and Another v Markom and Others.*[221] This conclusion is qualified to the extent that the retrospective application of the *Jaftha* principles would only come under consideration in those instances where a sale in execution of a debtor's home has already taken place. In *Menqa* the applicant applied for the setting aside of a sale in execution which took place before *Jaftha*. The Supreme Court of Appeal accepted the reasoning of Zondi AJ,[222] namely, that the writ of execution was invalid because it had not been issued under scrutiny of judicial supervision. The respondent assailed the appeal by, *inter alia*, relying on section 70 of the Magistrates' Courts Act.[223] In the majority judgment, Van Heerden JA held that if the section were allowed to withstand the claim of the appellant to set aside the writ, the whole purpose of *Jaftha* would be defeated.[224] Cloete JA, who handed down the minority decision, with Scott JA concurring, concluded that the sale in execution should be set aside, but motivated the finding on the basis that section 70 cannot be interpreted as rendering a sale in execution unimpeachable because this would defeat the whole purpose of the Constitutional Court ruling in *Jaftha*.

Campbell v Botha and Others[225] also dealt with an application to set aside a sale in execution. Although reference was made to the findings in *Menqa*, it was ultimately

220 *Gundwana* at [57] and [60].
221 2008 (2) SA 120 (SCA).
222 The appellant first appealed to the Cape High Court against a decision by a magistrate refusing the rescission of a default judgment which led to the execution against his home. The first appeal was heard by Zondi AJ.
223 Which determines that 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".
224 *Menqa* at [21].
225 2009 (1) SA 238 (SCA).

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held that because the property had not been attached in execution of a judgment, the sale that was conducted was not a sale in execution of the judgment and was therefore not protected by section 70 of the Magistrates' Courts Act.

The majority judgment in *Menqa* did not critically consider the question whether it was correct to assume that in all cases where a writ of execution was issued without judicial oversight the writ and consequent sale in execution would be susceptible to rescission merely because of the absence of judicial oversight. Justifiably this general assumption would create the fear that *Jaftha* would lead to large-scale legal uncertainty about its effects on past matters and that many debtors would seize the opportunity to set aside the sale in execution of their homes. In *Gundwana* this fear was assuaged.[226] Froneman J pointed out that *Jaftha* only affected cases in which the writ of execution was issued by the registrar.[227] In order to turn the clock back in such cases, aggrieved debtors would first have to apply for the original default judgment to be set aside. In other words, the mere constitutional invalidity of the rule under which the property had been declared executable, was not sufficient to undo everything that followed. In order to do so debtors would have to explain the reason for not bringing a rescission application earlier and they would have to set out a defence to the claim for judgment against them. It may be that in many cases aggrieved debtors may find it difficult to comply with these requirements.[228]

According to the Constitutional Court, aggrieved debtors who seek to set aside past default judgments and execution orders granted against them by the registrar, must, in addition to the normal requirements for rescission, show that a court, with full knowledge of all the relevant facts existing at the time of granting default judgment, would nevertheless have refused leave to execute against specially hypothecated property that is the debtor's home. Once these requirements were met, and it is determined that special execution should not have been allowed, the question of the effect of invalid sales in execution and subsequent transfers would have to be considered as a next step. It is not possible to lay down inflexible rules to deal with all the permutations that may arise in these cases. The Constitutional Court finally concluded that existing legal principles and rules would be sufficient to deal with most

226 *Gundwana* at [58].
227 In the Magistrates' Courts, implicitly by the clerk of the court.
228 *Gundwana* at [58].

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cases in a just and equitable manner.[229]

The courts which have thus far considered the retrospective application of the *Jaftha* principles were relatively conservative in their approach. From the clarification given in *Gundwana* it is settled that an aggrieved debtor who falls in the category under discussion must show that at the time when the writ was executed against his home, good cause had existed not to execute. There is no sound reason to burden the legislature with the task to further describe the grounds upon which an aggrieved debtor may place reliance on the retrospective effect of *Jaftha*. It is submitted that if the regulation of this aspect is considered it should be limited to the recognition of the retrospectivity principle.

5.3 To Which Cases Does Requirement of Judicial Oversight Apply?

From the findings in the *Gundwana*, *Mkhize* and *Folscher* it is clear that the requirement of judicial oversight applies to instances of execution against the home of a debtor. Notwithstanding the difference in wording presently found in Uniform Rules of Court 46(1) and 31(5), the requirement of judicial oversight should apply to instances where the execution is aimed at the primary residence of the debtor.[230] The facts of *Jaftha* inspired the imposition of the requirement of judicial oversight. The focus was on indigent persons. The findings of the Constitutional Court did not make it clear whether a court would have to exercise judicial oversight when the debtor is apparently affluent. The case is also silent on whether the requirement would also apply in cases where a corporate entity is the registered owner of a residence.

5.3.1 Indigent Versus More Affluent Debtors

The factual matrix within which *Jaftha* was decided creates the impression that only persons who are victims of poverty may rely on judicial oversight before a decision is made to execute against their homes. Such a conclusion would be wrong. *Jaftha* was motivated by the constitutional values found in section 26 of the Constitution. These values do not only apply to the poorest of the poor. The example of a home owner/debtor who resides in a luxurious home in one of South Africa's upmarket neighbourhoods and who offered his home as security for a home loan amounting to millions of rands comes to mind. This debtor may be forced into a position where he

229 *Gundwana* at [59].
230 See chapter 4.

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defaults on the payment of a few monthly instalments to the bondholder. This situation may have been caused by circumstances beyond the debtor's control, for example loss of employment or some other reasonable economical circumstance. Notwithstanding the fact that this debtor continues to pay the monthly instalments after the relapse he remains in arrears with some instalments. The fact that the debtor has fallen in arrears will entitle the bondholder to foreclose on the bond. Despite a relatively small amount of arrears the debtor's home may be at risk of sale in execution. The question arises whether this debtor would be entitled to protection against execution based on the principle that his right to adequate housing was threatened by an abuse of process. *Absa Bank Ltd v Ntsane and Another*[231] offers a response to this question.

In *Ntsane* the amount claimed fell within the jurisdiction of the Magistrates' Courts, but the case was referred to the High Court because of the practice directive which was made following the *Mortinson* case. In *Ntsane* the specific question was raised whether section 26 of the Constitution would be infringed if a bondholder called up the bond because the mortgagor had fallen in arrears while the unpaid amount was minute.[232] Bertelsmann J found that it would be in conflict with section 26 of the Constitution to enforce the right to execute against immovable property and thereby terminate a defendant's right to adequate housing in circumstances where the outstanding amount appeared to be less than R20.00.[233] A stern warning was given to plaintiffs in circumstances where there were easier ways to obtain payment of the arrears without any prejudice to their rights.[234] This case offers support for the conclusion that the findings in *Jaftha* would apply to both indigent and affluent debtors.

In *Jaftha* it was argued that the Constitutional Court should read into section 67 of the Magistrates' Courts Act a prohibition against the sale in execution of houses of a particular minimum value. The Constitutional Court declined to make such a finding.[235] From this unwillingness it may also be concluded that the Constitutional Court intended to make the *Jaftha* requirement of judicial oversight applicable to all home owners.

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231 2007 (3) SA 554 (T).
232 *Ntsane* at [81].
233 *Ntsane* at [18]-[21] and [82].
234 *Ntsane* at [85].
235 *Jaftha* at [51].

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In *Fraser*[236] the South Gauteng High Court found that section 26(3) of the Constitution offers a number of factors that contextualise judicial oversight. These factors are:

(a) the existence of the social need for housing;
(b) the constitutional right to access to adequate housing embodied in section 26(1);
(c) the need for people to honour their debts; and
(d) the need for debts to be enforced by a court process, and the need for execution.

All these factors serve the housing need, as well as the drastic nature and far-reaching consequences of executing against a person's home, bearing in mind the scope for the abuse of the process of execution.[237] The function of a court is to safeguard against abuse of the execution process. It is within this context that a determination is made whether or not to declare a person's home executable.[238] Based on the above stated values which underlie this judicial responsibility it is submitted that the right to rely on the findings in *Jaftha* cannot be reserved for only indigent debtors.

5.3.2 Natural Persons and Corporate Entities

In *Folscher* it was held that the requirement to have judicial oversight when immovable property was to be sold in execution applies specifically where the property was the *primary residence* of the judgment debtor.[239] It was further held that immovable property owned by a company, a close corporation or a trust, of which the member, shareholder or beneficiary is the beneficial occupier, was not protected by the amended Uniform Rule of Court 46(1) requiring judicial oversight, “even if the immovable property is the shareholder’s, member’s or beneficiary’s only residence”.[240]

In the past the Constitutional Court held that a corporate entity was capable of protection against the violation of its right to property as contemplated in section 25(1) of the Constitution.[241]

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236 2011 4 SA 363 (GSJ). See paragraph 4.12 above.
237 *Fraser* at [24].
238 *Fraser* at [24].
239 *Folscher* at [25].
240 *Folscher* at [32].
241 See *First National Bank of South Africa t/a Wesbank v Commissioner, South African Revenue Service SARS; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC). The summary of facts was taken from the headnote at 773-774. The case concerned a bank, who was the appellant in the case and who had leased two vehicles and

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In two of the matters which served before Peter AJ in *Fraser*, the judgment debtors were juristic persons, one a company and the other a close corporation. The properties in question were both residential. Peter AJ concluded that where the home was held through the vehicle of a company, close corporation or trust, the constitutional protection afforded by the provisions of section 26(3) extended equally to members of such companies and close corporations and beneficiaries of the trusts who were living in the immovable properties concerned and might be considered as what might loosely be called "beneficial owners", as it did to persons who owned the immovable properties in their personal capacities.[242]

In modern society it is not uncommon that a person would elect to register his property in the name of a corporate entity or trust. The reasons for such a decision may vary between personal preferences and economical considerations or it may be based on an estate planning objective. No matter what the motivation for such a decision is, the fact remains that if that house becomes the primary residence of the person who is the beneficial occupier of the house, judicial oversight should probably also precede execution against such a house.

The National Credit Act is aimed at protecting consumer rights. Scholtz *et al* remark that in the context of enforcement in respect of mortgage bonds, a consumer-debtor's rights of access to adequate housing may significantly curtail a credit provider's right to attach and sell immovable property in execution and thus limits the

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sold another under an instalment sale agreement to two companies. In these instances the appellant remained the owner of the vehicles. The Commissioner of the South African Revenue Services detained and thereby established a lien over one of the leased vehicles to obtain security for a customs-related debt owed to him by the first company. The Commissioner also detained and established a lien over the other leased vehicle as well as the one sold under the instalment sale agreement to obtain security for customs debts and penalties owed by the second company. Section 114 of the Customs and Excise Act 91 of 1964 allowed the Commissioner, in order to collect a debt owed, to sell goods without the need for a prior judgment or other authorisation by a court. The section further allowed the Commissioner to sell goods not belonging to the customs debtor but to a third party. The appellant attacked the constitutionality of section 114 on the basis that it violates the provisions of section 25(1) of the Constitution. The Constitutional Court found that the appellant was a public company, which was a legal entity altogether separate and distinct from its members. Its continued existence was independent of the continued existence of its members and its assets were its exclusive property. No matter how complex the holding structure of a company might be, ultimately, in the vast majority of cases, the holders of shares were natural persons.

242 *Fraser* at [12]. However, the South Gauteng High Court did not consider this applicable to the position of an ordinary lessee since the interest of the latter is not akin to a homeowner, and in any event there seems to be sufficient protection of such more limited interest in the application of the common-law rule of *huur gaat voor koop* and the statutory provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998.

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extent to which a credit provider is able to enforce a mortgage agreement.[243] Scholtz *et al* point out that whilst the National Credit Act applies only to mortgagees who are natural persons, section 26(1) of the Constitution is not so limited and that judicial oversight is now required in in all instances where such right of access to adequate housing may be infringed.[244] This approach is in agreement with the abovementioned submission, namely that even when a residence is registered in the name of a legal entity, judicial oversight must precede execution against such property.

A number of interesting questions arise if the aforementioned postulation is correct, namely:

(a) Who bears the onus to bring the fact that behind the corporate entity there is a beneficial occupier who is a natural person?
(b) Should the court order a joinder if such fact arises?
(c) Should the creditor be obliged to investigate the possibility that the corporate entity is but the *alter ego* of a natural person, and to report to the court before application is made for default judgment?

As a direct result of *Jaftha* it has become practice to inform defendants of the rights envisaged in section 26(1) of the Constitution. It has also become practice in some divisions of the High Court to require that when a plaintiff applies for default judgment, which application included a claim to have immovable property declared executable, the plaintiff has to inform the court whether the immovable property was used for residential purposes. This requirement immediately recognises the fact that a home is occupied by natural persons and not by some abstract corporate entity. In other words, notice to the entity should suffice as notice to the natural person behind the corporate entity. It is submitted that the law on joinder is sufficiently clear to afford the natural person behind the corporate entity an opportunity to be heard. Apart from the duty to inform the corporate home owner about the possibility of execution against its immovable property and that the home owner has the rights as contemplated in section 26(1) of the Constitution, there should be no further duty to investigate and report on any other issues pertaining to ownership of the immovable

243 Scholtz *et al Guide to the National Credit Act*, LexisNexis, Issue 6, at 12-107 – 12-108. Also see the authorities referred to in footnote 614 of this publication.
244 Scholtz *et al*, at 12-108; and see sections 4(1)(a) and (b) of the National Credit Act.

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property which the plaintiff intends to target during execution.

5.4 Service of Process and Creditor's Duty to Inform Debtor About His Rights

What is apparent from *Jaftha* and many of the decisions which followed thereafter is the requirement to inform the debtor about the right to adequate housing and how the litigation which the creditor had instituted could impact on those rights.[245] At present the ordinary rules of service apply to the service of process.[246] Most contracts provide that service of notices and process may be affected at the chosen *domicilium citandi et executandi* of the debtor. The process with which litigation commences is often served at the chosen *domicilium* address. It is not uncommon that at the time of service the debtor no longer resides at that address, or worse, has never resided there at all. Despite the absence of the debtor, the creditor would be entitled to rely on service by attachment. Based on the service at the *domicilium* address, the creditor may apply for default judgment which would eventually lead to the issuance of a writ of execution against the home of the debtor. It is often only when the writ of execution is served or at the time when notice of the sale in execution is given that the debtor becomes aware of the existence of the default judgment and the debtor only then applies for the rescission of the default judgment and the writ of execution. The probable reason for this is that the debtor at some time resided in the home which had become the target of execution. The debtor's home may not have been the same place where the initial court process was served.

Following the *Jaftha* decision it has become established practice to inform a debtor about the right to adequate housing and that if the creditor's claim for execution against the immovable property of the debtor will infringe that right it is incumbent upon the debtor to place information supporting that claim before the court.[247] It serves little purpose if this notice is served at an address where the debtor will probably not receive it, for example at an unoccupied domicile address. It is therefore submitted that if the notice is served at an address where the debtor actually receives it, then the probabilities increase decidedly that the debtor will avail himself of

245 See *Saunderson* at [25] where this was made a requirement.

246 Rule 4 of the Uniform Rules of Court and rule 9 of the Magistrates' Courts Rules.

247 In *Mortinson* at [27] it was directed by the full court of the Witwatersrand Local Division (as it then was) that a writ of execution against immovable property had to include a note that 31(5)(d) of the Uniform Rules of Court was available to a debtor who was dissatisfied with a judgment granted by the registrar. See also *Folscher* at 335A-B.

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the opportunity to place facts before the court to prevent execution against his immovable property. On the other hand, it may be inferred from the fact that a debtor who has actually received notice of his rights and who did not not make use of those rights, was unable to resists the execution against his immovable property.

In *Folscher*, Bertelsmann J[248] remarked that in cases where the National Credit Act[249] applies the so-called section 129 notice should include a warning that execution may follow upon the successful prosecution of the claim for the repayment of the debt. In this regard it should be noted that at present there must be evidence that the section 129 notice had come to the attention of the consumer before a credit provider may prosecute his claim. After some disparity about how the notice must be brought to the attention of the debtor it is now settled that there must be proof that the notice was delivered to the debtor.[250] This requirement is clearly aimed at promoting the aims of the National Credit Act insofar as the act seeks to strike a balance between the respective rights of the credit provider and the consumer.

More recently Meyer J in the South Gauteng High Court[251] in *Firstrand Bank Ltd v Powell*[252] required personal service of the Uniform Rule of Court 46(1) application for execution and was not satisfied with service thereof at the defendant's chosen *domicilum et executandi* where the application for execution was made subsequent to the plaintiff having obtained default judgment against the defendant.

248 *Folscher* at [47].
249 34 of 2005.
250 In terms of section 130(1)(a) of the National Credit Act the credit provider is not allowed to enforce the credit agreement unless 10 days have passed since a notice as contemplated in section 129(1) has been delivered. The debate about the meaning of the word *deliver* commenced in *Rossouw v Firstrand Bank* 2010 (6) SA 439 (SCA) at [32] in which it was found that it was sufficient to establish compliance if the credit provider sent the notice by ordinary mail, by fax, by e-mail or by printable web-page. This case was overruled by the Constitutional Court in *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) at [87] where it held that the word *deliver* means that there must be proof of delivery. Where the credit provider posted the notice, proof of registered dispatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivery will in the absence of contrary indication constitute sufficient proof of delivery. In two case decided thereafter, *Absa Bank Ltd v Mkhize and two similar cases* 2012 (5) SA 574 (KZD) and *Standard Bank of South Africa Ltd and several other matters and Van Vuuren, JG and several other matters*, Case no 32847/2012, 26/02/2013, SAFLII (32847/2012) [2013] ZAGPJHC (26 February 2013), it was held that if the postal dispatch record showed that the notice was not collected it cannot follow that there was delivery of the notice.
251 Now known as the "Gauteng Local Division, Johannesburg".
252 [2012] ZAGPJHC 20 (6 March 2012).

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Another development occurred in *Nedbank v Jessa*[253] where it was held that the summons must, in addition to the *Saunderson* notice, include an appropriate notification to the defendant that he is entitled to place information regarding relevant circumstances within the meaning of section 26(3) of the Constitution and Uniform Rule of Court 46(1) before the court hearing the matter.

Subsequent to *Jessa* the Western Cape High Court in *Standard Bank of South Africa Ltd v Dawood*[254] held that it is not irregular to supply in a simple summons the particularity required in a combined summons.[255] The court further directed that the summons should contain a notice having the following effect:[256]

> Take notice that:
> (a) your attention is drawn to section 26(1) of the Constitution of the Republic of South Africa, 1996, which accords to everyone the right to have access to adequate housing. Should you claim that the order for execution will infringe that rights it is incumbent on you to place information supporting that claim before the court;
> (b) in terms of section 26(3) of the Constitution you may not be evicted from your home or your home may not be declared executable and sold in execution without an order of court made after considering all the relevant circumstances;
> (c) in terms of rule 46(1)(a)(ii) the Rules of the High Courts of South Africa, no writ of execution shall issue against your primary residence (ie your home), unless the court, having considered all the relevant circumstances, orders execution against such property;
> (d) if you object to your home being declared executable, you are hereby called upon to place facts and submission before the court to enable the court to consider them in terms of rule 46(1)(a)(ii) of the Rules of Court. Your failure to do so may result in an order declaring your home specially executable being granted, consequent upon which your house may be sold in execution.

When the Constitutional Court made judicial oversight compulsory in cases where the creditor requires execution against the home of a debtor, the balancing of the rights of the creditor to enforce a debt and the right to adequate housing became necessary. The requirement of judicial oversight over the execution against the home of a debtor is aimed at the prevention of an abuse of process. Underlying the requirement for judicial oversight are two conflicting rights, namely, the right of the creditor to satisfy his debt through execution and the debtor's right not to be exposed

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253 2012 (6) SA 166 (WCC) ("*Jessa*").
254 2012 (6) SA 151 (WCC).
255 *Dawood* at [7].
256 *Dawood* at [37].

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to an abuse of process. The National Credit Act attempts to strike a balance between similarly conflicting rights. Once a court is satisfied that the section 129 notice had come to the attention of the debtor, and the debtor failed to avail himself of the remedies contemplated in section 129, there remains no further impediment against the creditor to enforce his debt through the court process. Delivery of the section 129 notice is a requirement in all cases where the National Credit Act applies. This simple requirement guides all creditors in a simple practical manner about the prerequisites that have to precede litigation. Compliance with the provisions of sections 129 and 130 of the National Credit Act also offers the court the assurance that the creditor has not embarked on an abusive process.

In respect of the requirement of judicial oversight similar results could be achieved if future legislation requires a creditor who intends to enforce a debt through execution against the home of a debtor, to give written notice to the debtor of the imminent litigation and the risks of execution against the home of the debtor. The notice should inform the debtor of the right to adequate housing and if the debtor wanted to prevent execution against his home he or she must take the necessary preventative steps. Once the court has been satisfied that the notice came to the attention of the debtor, the duty has shifted to the latter to show that an abuse of process had occurred. If the debtor does not react to the notice a court may assume, until the contrary is shown, that there has not been an abuse of process. It is submitted that such legislation would promote a simplified and uniform approach towards execution against the home of a debtor.

5.5 Conclusion

In summary it can be said that there is certainty about the following consequences of *Jaftha*, namely:

(a) Judicial oversight was imposed as a prerequisite before execution may take place against the home of a judgment debtor.

(b) The fundamental right which founded the Constitutional Court’s requirement was the protection of the right to adequate housing as meant in section 26(1) of the Constitution.

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(c) The findings in *Jaftha* meant that a judgment debtor could also apply retrospectively to a court that previously approved execution against his immovable property should be subjected to judicial oversight.
(d) The right to be protected by judicial oversight applies to both indigent and affluent debtors.
(e) A debtor whose immovable property could be the subject of execution must be informed of the right to approach a court with facts which could prevent execution against his immovable property.

The *Jaftha* decision also had a number of uncertain consequences, which include:

(a) The manner in which judicial oversight must be exercised;
(b) The lengths to which a court must go before it could be said that there has been proper judicial oversight;
(c) Whether corporate owners of residential property could also rely on the court's duty to exercise judicial oversight over execution against residential property; and
(d) Whether any further inquiry should be made by a court once it is established that a debtor has been informed about the right to approach the court with facts which may prevent the execution, but failed to make use of that right.

The uncertainties which resulted from *Jaftha*, *inter alia*, gave rise to criticism against the imposition of judicial oversight, which is discussed in the following chapter. This sentiment is shared by Scholtz *et al* when they remark that the plethora of cases, which followed after *Jaftha* case, had the unfortunate consequence of clearing up some of the problematic issues but at the same time created fragmented approaches in respect of others and consequently requires further judicial scrutiny in order to achieve legal certainty in respect of those matters where divergent opinions still exist.[257]

257 Scholtz *et al*, at 12-125.

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CHAPTER 6: CRITICAL ANALYSIS OF FINDINGS IN *JAFTHA*

In the above discussion of the rationale behind *Jaftha* it was pointed out that the Constitutional Court emphasised that the underlying problem raised by the facts of *Jaftha* was "not greed, wickedness or carelessness" but "poverty". What is really a welfare problem is converted into a "property" one.[258] In *Jaftha* it was held that the fundamental right to adequate housing, as enshrined in section 26(1) of the Constitution, was violated by the overbroad terms of section 66(1)(a) of the Magistrates' Courts Act. The question arises whether the Constitutional Court was correct in finding that the fundamental right to adequate housing was threatened by section 66(1)(a) of the Magistrates' Courts Act. In this chapter the findings and legal conclusions in *Jaftha* are critically considered.

6.1 Identifying the Threatened Fundamental Right

The mischief which was sought to be addressed by the requirement to exercise judicial oversight over each execution against the home of a debtor is founded on the need to prevent the abuse of a court's process. The exercise of judicial supervision over the execution process is aimed at the prevention of abuse of the process. The appellants in *Jaftha* argued in both the Cape High Court[259] and the Constitutional Court that their right to adequate housing as contemplated in section 26(1) had been violated by the provisions of section 66(1)(a) of the Magistrates' Courts Act. Ultimately it was found that the process of execution had been abused. That finding does not in itself mean that section 66(1)(a) was unconstitutional.

The right to adequate housing which is protected by section 26 of the Constitution is a socio-economic right which includes the right not be unlawfully evicted from a person's home. Section 26(1) contains the right to adequate housing. Section 26(2) imposes a positive obligation on the state to take reasonable measures to realise the aforesaid right to adequate housing, while section 26(3) prohibits arbitrary and unjustifiable evictions. According to *Jaftha*, section 26 must be read as a whole.[260] Once section 26 is considered in its entirety it becomes apparent that the section contains positive as

258 *Jaftha* at [30].
259 *Jaftha v Schoeman and Others; Van Rooyen v Scholtz and Others* 2003 (1) BCLR 1149 (C), herein referred to as "*Jaftha a quo*".
260 *Jaftha* at 154C-D.

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well as negative obligations.[261] Although *Jaftha* was largely concerned with the negative duty imposed by section 26(3), the Constitutional Court found that section 66(1)(a) of the Magistrates' Courts Act violated section 26(1), which contained a negative right.

In *Jaftha a quo*, Van Reenen J found that section 26(1) of the Constitution did not contain a negative obligation, namely, the obligation not to be deprived of adequate housing.[262] The negative obligation is found in section 26(3) which prohibits the eviction from or demolition of the home of a person in an unfair manner and without due process. Van Reenen J pointed out that this negative obligation was addressed by the substantive and procedural requirements of the PIE Act.[263]

Van Reenen J approached the question whether section 66(1)(a) of the Magistrates' Courts Act violated section 26(1) of the Constitution on a wider basis, namely, whether the consequences of the entire process of execution authorised by section 66(1)(a) and not merely the signing and issuing of the warrant of execution were constitutionally objectionable.[264] Van Reenen J reasoned that the debtor's ownership and use of property, which has been sold in execution, remains undisturbed until the immovable property is transferred into the name of the purchaser.[265] The transfer of the immovable property brings about the end of ownership. As the ownership of the immovable property is not encapsulated in the right of access to adequate housing as entrenched in section 26(1) of the Constitution the loss thereof as a consequence of the execution process does not violate the right to adequate housing.

The Constitutional Court rejected the conclusions of Van Reenen J and found that if a person is deprived of existing access to adequate housing, section 26(1) is violated.[266] It is submitted that this conclusion should not have been made as section 26(1), read with section 26(2), imposes a positive obligation upon the state to provide adequate housing. In terms of section 25(1) of the Constitution no one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property. Upon a critical consideration of the facts in *Jaftha* it is

261 See the authorities referred to in 2.4.3.1 above in footnote 101 – 102 and Brand & Heyns *Socio-Economic Rights in South Africa* (2005) PULP, Pretoria, at 10-11 and 98.
262 *Jaftha court a quo* at [39].
263 19 of 1998. See *Jaftha court a quo* at [39].
264 *Jaftha court a quo* at [42].
265 *Jaftha court a quo* at [44]-[46].
266 *Jaftha* at [34].

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submitted that the rights enshrined in section 25(1) of the Constitution were in fact violated in *Jaftha*.

The Constitutional Court indicated in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*[267] that it was impossible to define property comprehensively for purposes of section 25 and restricted itself to the statement that ownership of corporeal movables and of land is at the heart of the constitutional property concept. That does not mean that "property" is limited to these categories.

Van der Walt argues that the approach adopted by the Constitutional Court in *FNB* might mean that our courts will in future place very little emphasis on the threshold property question and prefer to postpone the essential balancing of interests to a later stage of the proceedings by focussing on the question whether there was proof of an arbitrary deprivation of property.[268] He concludes that the tendency to focus on arbitrariness as the element could mean that the question whether the affected interest is in fact "property" will receive less attention than it deserves as a threshold consideration, or even that it will receive no attention at all.[269] He contends that this observation finds support in foreign jurisdictions where it is also said that proof of recognised property interest is a threshold issue, which is in fact often brushed over in the process of focussing on the legitimacy and proportionality of the limitation in question.[270]

After considering the approaches in foreign jurisdictions the Constitutional Court in *FNB* concluded that a deprivation of property was "arbitrary" as meant by section 25 when the "law" referred to in section 25(1) did not provide sufficient reason for the particular deprivation in question or was procedurally unfair.[271] According to Van der Walt the methodology followed by the court in *FNB* means that practically all attention in a constitutional property challenge is focused on the arbitrariness test in the sense that the balancing at the heart of all such challenges takes place with regard to arbitrariness rather than any other issue, including the threshold property

267 2002 (4) SA 768 (CC) at [51], hereafter referred to as *the FNB case*.
268 Van der Walt (*supra*) at 93 para 3.3.
269 Van der Walt (*supra*) at 3.1, 3.6 and 3.10.
270 Van der Walt (*supra*) at 109.
271 *FNB* at [100].

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issue.[272]

In practice, when a clerk of the court or a registrar was previously requested to issue a writ of execution he was never required to investigate the merits of the request for the writ. If a judgment in favour of the creditor existed, a *nulla bona* return was issued or if the debtor had hypothecated his immovable property the clerk or the registrar would have been entitled to issue the writ. The authority to issue a writ without hearing the version of the debtor or not having investigated the merits of the request for a writ may eventually result in the arbitrary deprivation of property. Section 25(1) imposes a negative obligation upon the state in terms of which a person may not be deprived of his property in an arbitrary manner. In terms of section 66(1)(a) of the Magistrates' Courts Act the clerk of the court was not required to exercise judicial scrutiny over the execution process against the home of a debtor. It is submitted that the issuance of a writ by the clerk of the court may therefore constitute arbitrary deprivation of property, within the meaning of section 25(1) of the Constitution.

Section 26(1) of the Constitution does not in itself create a negative obligation. In *Jaftha* the Constitutional Court was at pains to read into section 26(1) a negative obligation, while section 25(1) leaves no doubt about such an obligation.

When the Constitutional Court found that section 26(1) was violated it seemingly limited its findings to cases where the homes of debtors were threatened by execution. It is imaginable that a debtor who is the owner of a valuable commercial property may become the victim of an abuse of the execution process. The example of a debtor company which owes a small debt and which is the owner of a valuable factory comes to mind. It is possible that the company's creditor may obtain default judgment and when it seeks to execute against movable property finds the factory temporarily closed and thus obtains a *nulla bona* return. If the factory was then sold in execution it is possible that the debtor could challenge the constitutionality of section 66(1)(a) of the Magistrates' Courts Act on the basis that the issuance of a writ of execution by the clerk of the court has led to arbitrary deprivation of property.

The amendments to Uniform Rules of Court 46(1) and 31(5) introduced two different descriptions of property, namely, "primary residence" and "residential property". These

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272 Van der Walt (*supra*) at 109.

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descriptions are intended to relate to the protection of the fundamental right to adequate housing as contemplated in section 26(1). Generally speaking, the execution process against immovable property is subject to possible abuse, for instance, a judgment creditor may obtain judgment for a relatively small debt, obtain a *nulla bona* return at a *domicilium* address and then go after a valuable commercial property. The example demonstrates that the debtor and owner of the commercial property can make an argument that the absence of judicial oversight in section 66(1)(a) of the Magistrates' Courts Act violated his right to property because it was possible that if the creditor was allowed to go through with the execution it would amount to arbitrary deprivation of property.

It was shown above[273] that at least in the two divisions of the Gauteng High Court there is a difference of opinion as to whether the requirement of judicial oversight is only applicable to residential property. Had the Constitutional Court approached the *Jaftha* matter on the basis that section 66(1)(a) of the Magistrates' Courts Act violated section 25(1) of the Constitution, this debate would not have followed because then the execution against all immovable property would have been subjected to a process of judicial oversight.

It is submitted that in *Jaftha* section 66(1)(a) of the Magistrates Court Act should have been challenged on the basis of section 25(1) of the Constitution. Section 25(1) protects everyone against the violation of property rights. Property rights are mostly free from the social problems of poverty which so prominently featured in *Jaftha*.[274]

6.2 Default cases and judicial oversight

Through the requirement of judicial oversight a court is now required to investigate the relevant circumstances which are specific to the application by a plaintiff for a warrant of execution. From the directives of cases such as *Folscher* the judgment creditor is required, *inter alia*, to offer evidence about the personal circumstances of the debtor, the nature of the property, whether the property is occupied, whether the property has been obtained by a state subsidy etcetera.[275] In those instances where default judgment is sought it is unlikely that the creditor would be fully aware of these

273 See the discussion of *Folscher* and *Fraser* on the topic of whether *Jaftha*'s requirement for judicial oversight was applicable to residential property only.
274 *Jaftha* at [30].
275 *Folscher* at [41].

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facts.

When applying for an order declaring the home of a judgment debtor specially executable it is required in *Folscher* to deal with a comprehensive list of circumstances in a supporting affidavit in order to persuade the court to grant such an order.[276] However, it was conceded that "[i]t is obvious that not each and every one of the above considerations will of necessity have to be taken into account in every matter. The enquiry must always be fact-bound to identify the criteria that are relevant for the particular case."[277] Notwithstanding this reasonable approach it is foreseeable that in default cases it would be left up to the judgment creditor to decide which of the circumstances he deals with in the affidavit. Without the input of the judgement debtor the affidavit may produce an imbalanced and even incorrect version of what the court should consider before issuing the order.

The issuance of a writ of execution is a procedural undertaking which follows after a judgment was granted. There cannot be execution without a judgment or order. By the time that the judgment creditor applies for a writ of execution against the immovable property of a debtor and it has been established that by then the debtor had been informed about the possible threat of execution against his immovable property, there should be no further requirement to meet before the warrant of execution against the immovable property of the judgment debtor is authorised. However, the requirements in *Folscher* create a complicated procedure which must first be complied with before a writ of execution is issued against the home of the debtor. The *Bekker* case, which was decided in the Cape High Court, also requires that the court must be persuaded on affidavit that writ of execution against the home of the judgment debtor was justifiable.[278]

Even if all these requirements are met the judgment debtor may still, after the writ has been issued, turn to the court with an application to rescind the judgment and/or set aside or suspend the writ of execution.

The *Jaftha* decision gave rise to court decisions and practice directives which all attempted to clarify the practical manner in which judicial oversight over the execution

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[276] See footnote 215 above.
[277] *Folscher* at 334D-E.
278 *Bekker* at [29].

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of the home of a judgment debtor should take place. The cases and the practice directives have at least one commonality, namely that before a writ of execution is issued against the home of a judgment debtor he must be informed about the possibility that his home may be sold in execution and that he may object to the intended execution and that in default cases the court must be persuaded in an application that the issuance of the writ was justifiable.

In light of the criticism that in default cases not all of the relevant circumstances may be within the knowledge of the judgment creditor, or that some relevant circumstances may even be deliberately withheld from the court, the question arises whether the requirement of judicial oversight over the execution against the home of a debtor should in default cases require anything more than satisfying the court that the debtor has been informed, before judgment is applied for, that his home may be under threat of execution and that if he is aware of circumstances which may persuade the court not to authorise the execution, he may approach the court for such relief.

In the final chapter of this dissertation the last mentioned question is responded to with the suggestion that in default cases a court should only be satisfied that a judgment debtor has been informed about the right to object against the intended execution against his immovable property and that such notice had been properly served on the judgment debtor and that compliance with these requirements would satisfy the requirement of judicial oversight in default cases.

6.3 Inadequacy of Read-In Words[279]

Before *Jaftha* the practice in the Magistrates' Courts was that a writ of execution against immovable property could be issued by the clerk of the court. The latter's authority is derived from the wording of section 66(1)(a) of the Magistrates' Courts Act and Magistrates' Courts Rule 36.[280] The Constitutional Court intended to prevent

279 In *Jaftha* it was held that the provisions of section 66(1)(a) of the Magistrates' Courts Act violated section 26(1) of the Constitution since section 66(1)(a) is overly broad to the extent that it allows execution against the homes of indigent debtors wherein they lose their security of tenure. The Constitutional Court attempted to cure the violation by imposing judicial oversight over the execution process through the reading-in of the words *a court, after consideration of all the relevant circumstances*.

280 The relevant portions of rule 36 read as follows: "Process in execution: (1) The process for the execution of any judgment for the payment of money, for the delivery of property whether movable or immovable, or for ejectment shall be by warrant issued and signed by the registrar or clerk of the court and addressed to the sheriff . . . (4) Any alteration in a process issued under subrule (1) shall be initialled by the registrar or clerk of the court before it

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the clerk of the court from issuing a writ of execution against the home of a debtor without judicial oversight.

It should be noted that apart from those instances where insufficient movable property was found (when the clerk of the court could issue a writ against the immovable property of the debtor), section 66(1)(a) of the Magistrates' Courts Act also made it possible to execute against immovable property if "the court, so orders on good cause shown". The purpose of the read-in words of the Constitutional Court was to provide that in all instances where execution was aimed at the home of a debtor the court had to oversee the process. Although the intention of the Constitutional Court may be gleaned from its judgment, the read-in words do not clearly convey the message that it is only a court that can issue a writ against immovable property.

Without knowledge of what was said in the *Jaftha* judgment the read-in words amount to nothing but a repetition of what was already contained in the section, namely, that the court on good cause shown could grant a writ against immovable property.

The requirement of judicial oversight applies to matters where the creditor intends to execute against the primary residence of the debtor. In terms of the amended Uniform Rule of Court 31(5) the registrar is not allowed to issue a writ of execution against "residential property". The registrar is authorised to issue writs of execution against the non-residential immovable property of the debtor without judicial supervision. The words read into section 66(1)(a) are not sufficiently clear that the clerk of the court is authorised to issue writs of execution when it does not comprise the home of a debtor.

It is submitted that the read-in words do not convey the true intention of the findings in *Jaftha*, namely, that judicial oversight is required in all instances where a creditor intends to execute against the home of a debtor.

6.4 Dichotomy between Execution and Eviction

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is issued by him or her. (5) The registrar or clerk of the court shall at the request of a party entitled thereto reissue process issued under subrule (1) without the court having sanctioned the reissue . . . (7) Except where judgment has been entered by consent or default, process in execution of a judgment shall not be issued without leave of the court applied for at the time of granting the judgment, before the day following that on which the judgment is given."

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Various authors argue that as a consequence of *Jaftha* sub-sections 26(1) and (3) of the Constitution are applicable to the sale in execution of mortgaged residential properties and that it would be artificial to draw a distinction between the sale in execution and eviction.[281] Brits contends that it would not make sense to ignore the possibility of eventual eviction when having to decide whether to grant the execution order.[282]

Brits further argues that a sale in execution which transforms a lawful occupier into an unlawful occupier must be subject to section 26(3), since the occupier's tenure becomes less secure. He states that:

> Before allowing a sale in execution, the court must judge whether it is justifiable to change the debtor's status (from lawful to unlawful occupiers) and so weaken his or her security of tenure. This obligation on judges is particularly important in light of the fact that both section 25 and 26 of the Constitution are as a whole aimed at stronger tenure security and preventing what occurred under apartheid law, namely the arbitrary and forced removal of people from their properties.[283]

It is submitted that this conclusion is incorrect. Section 26(3) prohibits eviction without a court order. The PIE Act gives effect to this right. The PIE Act contains substantive and procedural requirements which must first be satisfied before a person is evicted from his home. The eviction inquiry stands separate from the inquiry whether a writ of execution against the home of a debtor may be issued or not. It is improbable that at the time when application is made for the issuance of a writ of execution that all of the facts which would be required for the eviction application would be at hand to satisfy the court that the eviction of the judgment debtor is justifiable.

However, if the argument of Brits is correct it would mean that the court would be obliged to hold two separate inquiries in to the same issue, namely whether the eviction of the judgment debtor would be justifiable; once at the time when the writ of execution is applied for, and if the writ of execution is granted, a second time when application is made for the eviction of the judgment debtor. It is reasonably foreseeable that if a court is, during the execution process, required to initially

281 R Brits "Statutory regulation of forced sale of the home in South Africa" (UP LLD Thesis, 2012); and Van Heerden CM & Boraine A "Reading procedure and substance into the basic right to security of tenure" 2006 *De Jure* 318, at 323.
282 Brits (*supra*), at 3.3.2.
283 Brits (*supra*), at 3.3.2.

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consider the eviction of the debtor, such an inquiry cannot in itself lead to an order for eviction. In other words, the PIE process must first be complied with before eviction can follow. It is submitted that such an approach would create an unnecessary duplication of court procedures and costs.

It is submitted that if judicial oversight continues to be a prerequisite before a writ of execution against immovable property is issued, the fact that a person may be evicted as a result of the execution is only one of the issues which a court must consider when judging "all the relevant circumstances".

6.5 Conclusion

The writs of execution in *Jaftha* were granted without judicial oversight. The facts of *Jaftha* speak of unscrupulous behaviour by creditors and their attorneys who clearly abused the court process. In *Jaftha* the initial debts started out at respectively R250.00 and R198.30. These trifling amounts led to the issuance of writs of execution against the homes of the debtors.

When Van Reenen J had to consider these facts in the Cape High Court, he observed that the issuance of a writ of execution did not in itself negatively impact upon the right of ownership or occupation of the debtor. Furthermore, the debtor could always apply in terms of section 62 of the Magistrates' Courts Act to set aside the writ.[284] In other words, section 66(1)(a), read with section 62 of the Magistrates' Courts Act, did not violate section 26(1) of the Constitution. Through the application of section 62 the mechanism existed to expose and treat an abuse of process.

The practical effect of the order of the Constitutional Court was to prevent the abuse of process *before* a writ of execution is issued against immovable property. The non-abuse of process is not necessarily guaranteed if the court is to exercise judicial oversight over the process of issuing the writ. It is perfectly imaginable that an unscrupulous creditor or legal practitioner may take all the right steps to acquire the writ and still mislead the court on some critical issue. For example, the debtor and creditor may have agreed that the creditor would not execute against the home of the debtor. If the magistrate, in an application for the issuance of a writ of execution, was intentionally misled about this fact the writ would be issued. If the debtor later applied

284 *Jaftha v Schoeman; Van Rooyen v Stoltz* [2003] 3 All SA 690 (C) at [42].

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for the setting aside of the writ on the aforesaid ground, only then would the abuse of process become known and dealt with. In other words, the imposition of judicial oversight over the execution process is no guarantee against the abuse of process.

Requiring a court to exercise judicial supervision over the process of execution against the home of debtor places the proverbial cart before the horse. Presently many of our courts require the creditor to make a substantive application with which to motivate the issuance of the writ against the home of a debtor. In these applications the creditor is often required to deal with facts which are not within his knowledge, for instance how many persons are dependent upon the residence and whether they are frail or otherwise dependent. It may be that the particular residence is occupied by a number of frail persons and that fact could have persuaded the court not to authorise the writ of execution against the residence. Bearing in mind that in this example the relevant fact was not discovered during the initial judicial oversight, the question arises whether judicial oversight can consistently pre-empt and prevent injustices.

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CHAPTER 7: ROAD TO UNIFORMITY

Jaftha imposed a general duty upon our courts to exercise judicial oversight over the process of execution against the home of a judgment debtor. The jurisprudential and legislative responses to *Jaftha* raised the question whether a need exists for a uniform approach to judicial oversight over the execution against the immovable property of a judgment debtor.

In response to the research question, the procedural law regarding execution and judicial oversight which had preceded *Jaftha* disclosed that the general rule was that there should first be execution against movables before execution against immovable property could take place. It has been shown that our courts assumed a general discretion to regulate their own procedure regarding judicial oversight over execution against immovable property.[285] Both the High and Magistrates' Courts legislation provided that writs of execution could be suspended or rescinded.[286] The relevant case law did not unveil any serious discrepant approaches towards execution against immovable property.

The factual issues, the legal questions and the findings in *Jaftha* were important to consider, because without such a subjective insight it would be difficult to contextualise the resultant legislative and jurisprudential reactions which followed after the decision.[287] *Jaftha* dealt with the plight of two indigent persons who became the victims of abuse of the execution process. The facts in *Jaftha* revealed that the rationale behind the imposition of the general duty to exercise judicial oversight as a general requirement was inspired by the fact that the execution process can have a severe impact upon indigent debtors. The impact that the Constitutional Court foresaw could include many instances where execution would be unjustifiable as the advantages of a creditor who seeks execution will be far outweighed by the immense prejudice and hardship caused to the debtor.[288] Although the rationale behind the decision is understandable, the resultant judicial reactions showed inconsistent interpretations of what was expected of our courts when exercising this general oversight duty.

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285 See chapter 2, in particular 2.3, above.
286 Uniform Rules of Court 31(5)(2)(b) and 45A and section 62 of the Magistrates' Courts Act.
287 See chapter 3.
288 *Gundwana* at [43].

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Jaftha inspired a host of High Court decisions, not all of which were consistent in their interpretation and application of the requirement to exercise judicial oversight over execution against immovable property. The precedent system allows the development of the law in South Africa and it remains a cornerstone of the legal system in South Africa. Unfortunately the study of most of the relevant decisions which followed after the *Jaftha* decision made it clear that there are discrepant views amongst the different divisions of the High Court about the manner in, and the depth to which, the judicial oversight must be exercised.[289]

As a consequence of the imposition of the general duty to judicially oversee execution against immovable property, certain elements of what were required from our courts when fulfilling this duty were clarified through some of the later court decisions. The issue of whether the requirement was retrospectively applicable was responded to positively and little doubt remains about the circumstances under which a debtor could make use of the opportunity to approach a court for the rescission of a completed execution process.[290]

The Constitutional Court in *Jaftha* did not direct what should qualify as the “relevant circumstances” referred to in the read-in words of section 66(1)(a) of the Magistrates’ Courts Act. Although various High Courts attempted to offer guidance about the contents of the “relevant circumstances” there remains uncertainty about certain important considerations. Although it is implied by section 26(1) of the Constitution that everyone is entitled to adequate housing, it remains to be seen whether the owner of a residence, which is worth millions, would be treated the same as the person with a government-subsidised home.[291] Another aspect about which there is uncertainty is whether a court must exercise judicial oversight over the execution of a residence which is held in the name of a juristic person.[292]

In *Saunderson* the Supreme Court of Appeal realised that in order to give effect to the *Jaftha dicta*, creditors had to inform debtors about the risk of losing their homes

289 See chapter 4.
290 See chapter 5 paragraph 5.2.
291 See chapter 5 paragraph 5.3.1.
292 See chapter 5 paragraph 5.3.2.

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during the execution process. In reaction to this finding the different divisions of the High Court made diverging practice directives. These directives have one uniform requirement, namely, that before execution takes place the creditor must inform the debtor about his right in terms of section 26 of the Constitution. It was shown that the resultant practice directives does not have uniform requirements.[293]

In this study the findings in *Jaftha* were criticised on the basis that the fundamental right which should have been identified to have been violated by section 66(1)(a) of the Magistrates' Courts Act was section 25 and not 26(1) of the Constitution. In at least two cases there had been discourse about whether section 26(3) founded the requirement for judicial oversight. [294] Authors such as Brits, Boraine and Van Heerden argue that *Jaftha* in fact mainly dealt with the negative obligation imposed by section 26(3).[295] It has been shown that if this argument is correct then it would mean that a court would have to consider the issue of eviction twice, once during execution, and if the writ of execution is granted, another time when the eviction application is heard. If the Constitutional Court found that the section 66(1)(a) caused a violation of section 25, namely the arbitrary deprivation of property, then it was unlikely that this tension between the requirements of judicial oversight over the execution process and the eviction process would have existed. If section 25 was found to be the focus of judicial oversight over the execution process the inquiry would simply focus on whether the deprivation of property was arbitrary or not.

The question remains whether the imposition of judicial oversight as a prerequisite before a writ of execution was issued against the home of a debtor had been necessary to prevent an abuse of process. In most, if not all the cases where the debtor is absent at the time when application is made for the issuance of a writ of execution against his home, the creditor would not be in a position to inform the court about all the "relevant circumstances" which should be considered by the court. It follows that if a debtor can later show that the writ was issued without the consideration of relevant information, which at the time of issuance may not have been to the knowledge of the creditor, the court would probably set aside or stay the warrant.[296]

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293 See chapter 5 paragraph 5.3.3.
294 *Snyders* and *Saunderson*. See paragraphs 4.1 and 4.3 above.
295 See paragraph 6.4 and footnote 276 above.
296 See chapter 6 paragraph 6.4.

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Save for the read-in words of the Constitutional Court, sections 66(1)(a) and 67 of the Magistrates' Courts Act remained the same. The wording of the read-in version of section 66(1)(a) continued to refer to "immovable property", notwithstanding the fact that the intention of the Constitutional Court was clearly aimed at addressing the rights of the home owner. In the High Court, Uniform Rules of Court 46(1) and 31(5) were amended in an attempt to formalise the duty of the High Court to exercise judicial oversight when there is an intention by a creditor to execute against the home of a debtor. Rule 46(1) refers to "primary residence of the judgment debtor" which now differs from the wording which is used in the amended Rule 31(5) that prohibits a registrar to grant default judgment in cases where the "residential property" of the debtor is at risk of being sold in execution. Each of these provisions may mean something different and therefore begs to be corrected with uniform wording.

It has been argued that under the post *Jaftha* dispensation, a legal entity who is the owner of a home which has been beneficially occupied by natural persons should receive the same treatment as a natural person who is the owner of a home.[297] The case law makes it uncertain whether a corporate entity would be entitled to the same protection as a natural person. This uncertainty invites further judicial scrutiny.

The point was also made that the execution against immovable property, other than the residence of a person, may be susceptible to abuse. It was argued that there is no reason why a debtor/owner of commercial immovable property should not also be entitled to be protected by judicial scrutiny before a writ of execution against his immovable property is issued.[298]

It is submitted that this study has shown that, despite the efforts of our High Courts and the Rules Board to give effect to the *Jaftha* requirements, there is a need for a uniform approach towards the manner and the extent to which judicial oversight must be exercised over execution against immovable property.

There are three options available to attempt the establishment of a uniform approach, namely, through case law development, practice directives or legislation.

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297 See chapter 5, paragraph 5.3.2.
298 See chapter 6 paragraph 6.1.

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Insofar as the manner in which judicial oversight must be exercised over execution against immovable property our courts were unable to offer unified guidelines. In the result this development method would not be the best suited to address the challenge.

Practice directives offer a useful mechanism with which procedural practice can be standardised. Unfortunately these directives would remain subject to the *dicta* of existing case law and legislation and would therefore not offer a definitive solution.

Amending the existing legislation would seem to be the most appropriate means by which to attain a uniform approach towards the exercise of judicial supervision over execution against immovable property. In this regard there are two options. The first is that Parliament may impose a general amendment of the Superior Courts Act, which would be made to apply *mutatis mutandis* to the Magistrates' Courts Act. This option would also entail an appropriate amendment of the rules in both courts. The other option is for the Rules Board to amend the existing rules which deal with execution. Probably the most effective intervention would be through Parliamentary legislation because it has the potential to address the position in both the High and Magistrates' Courts at once.

Other considerations which favour legislative intervention are that it could

(a) promote legal certainty;
(b) be in accordance with the values entrenched in the Constitution;
(c) accord with the intention of the Constitutional Court when the *Jaftha* decision was handed down;
(d) balance the interests of judgment creditor and debtor alike;
(e) recognise the *audi alteram partem* rule; and
(f) promote uniformity.

In this study it was shown that a number of key elements cause uncertainty.[299] In the premises the following essentials should be addressed when a legislative solution is formulated, namely:

(a) The amendment should apply to all immovable property;

299 See chapters 5 and 6.

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(b) The amendment should apply to all natural and corporate persons;

(c) The amendment should impose a duty on a creditor who intends to execute against the immovable property of the debtor to inform the debtor before execution against the immovable property takes place;

(d) direction must be given about the contents of the notice and how the notice should be brought to the attention of the debtor; and

(e) once it has been established that the debtor received the notice, whether it remains necessary for the court to agree to the execution against immovable property.

Having considered all of the above the following draft provision is proposed as an amendment to the Superior Court Act, which should apply *mutatis mutandis* to the Magistrates' Courts Act:

> "No writ of execution against any immovable property of any person or legal entity shall be issued unless:-
> (a) a written notice has been served informing such person or legal entity that-
> (i) the immovable property could be declared specifically executable and a writ of execution could issue against the immovable property pursuant to a judgment against such person or legal entity;
> (ii) the execution against the immovable property could be opposed by such person or legal entity on good cause shown; and
> (iii) in the event of such person or legal entity intending to oppose the execution against the immovable property, such opposition, setting out good cause, must be lodged with the registrar of the court and the party issuing the notice within 10 days from date of service of the notice;
> (b) the notice in paragraph (a) contains a full description of the nature and the situation (including the full address) of the immovable property;
> (c) the notice in paragraph (a) has been served on such person or legal entity in any manner provided for in the Uniform Rules of Court, otherwise than by attachment or service at an unoccupied address."

The above proposal intends to inform the debtor of his rights before the issuance of a writ of execution against his immovable property, but without the court actually supervising the process of issuance. On first glance this proposition would appear to be in conflict with the intention of the Constitutional Court when Mokgoro J held that:[300]

> Judicial oversight permits a magistrate to consider all the relevant circumstances of a case to determine whether there is good cause to order execution. The crucial difference between the provision of judicial oversight as a

300 *Jaftha* at [55].

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> remedy and the possibility of reliance on ss 62 and 73 of the Act is that the former takes place invariably without prompting by the debtor. Even if the process of execution results from a default judgment the court will need to oversee execution against immovables. *This has the effect of preventing the potentially unjustifiable sale in execution of the homes of people who, because of their lack of knowledge of the legal process, are ill-equipped to avail themselves of the remedies currently provided in the Act*.[301]

The findings in *Jaftha* went further than the legislative provisions which offer a debtor the opportunity to apply for the rescission of a default judgment and the stay of a writ in execution in the sense that the Constitutional Court also acknowledged that the fundamental right to adequate housing may prevent the sale in execution of a debtor's home. The Constitutional Court reasoned that judicial oversight could prevent a potentially unjustifiable sale in certain circumstances, because it was assumed that a debtor lacked the knowledge of the legal process, and therefore is ill-equipped to make use of the remedies which are available to him. In the event that the debtor is equipped with the knowledge of his rights and the means with which to approach the court to assert those rights, the apprehensions expressed in *Jaftha* fall away. The proposed amendment intends to achieve exactly this goal.

In criticising the findings in *Jaftha* above it was pointed out that even if judicial oversight is exercised *before* the issuance of a writ of execution against the immovable property of the debtor, there may still be an abuse of process if the creditor is not forthright with the presentation of all the "relevant circumstances". It was also argued that at the time when the creditor applies for default judgment he may not have knowledge of all the "relevant circumstances".[302] It is submitted that the potential futility of the initial judicial oversight should be avoided. The proposed amendment is designed to inform the debtor of his rights in a notice. Once it has been established that the notice had come to the knowledge of the debtor, the court, registrar or clerk of the court, should be entitled to assume that if the debtor failed to avail himself of the right to make representations to the court against the issuance of a writ of execution, the debtor abides by the intentions of the creditor.

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301 Emphasis added.
302 See chapter 6.

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It was submitted that if the execution process is abused it has the potential to violate a person's fundamental right not to be deprived of his property arbitrarily.[303] Execution is not only levelled against the home of debtor, but may potentially also affect his other immovable property. There is no good reason why all debtors, who may own all kinds of immovable property, should not also be protected against abuse of the execution process. The amendment proposes to address this concern as well.

The proposal ensures a procedure which would bring to the attention of the judgment debtor the fact that his immovable property would be subjected to execution if he does not present facts to the court which may prevent execution.[304] It should be kept in mind that even if the debtor misses the opportunity to oppose the intended execution there remains the legislative provisions in both the High and Magistrates' Courts with which a writ of execution may be stayed or even rescinded.[305]

Insofar as service of the notice to the debtor is concerned the proposed amendment clearly requires service which accords with the provisions of the Uniform Rules of Court, but excludes service by way of attachment or at an unoccupied address. This exclusion offers assurance that the notice would actually come to the attention of the debtor.

In line with the rationale behind the findings in *Jaftha*, the proposed provision envisages a process which requires the judgment creditor to act responsibly and which does not only offer information to the judgment debtor about his rights, but also creates a direct procedure with which to assert those rights.

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303 As enshrined in section 25 of the Constitution.

304 It is submitted that the content of these facts should not be defined because that could unnecessarily limit what would be a case-specific inquiry. Each debtor who wishes to ward off the execution against his immovable property should be free to offer any fact which may be dissuasive of the claim.

305 Uniform Rules of Court 31(5)(2)(b) and 45A and section 62 of the Magistrates' Courts Act.

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