

The constitutionality or otherwise of section 66(1) of the Magistrates' Courts Act, 1944 (No. 32 of 1944)

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Introduction

Namibian law is generally a prisoner to its own history. Almost 20 years after the country's independence, there are still some old statutes that require revision but have either received too little or none at all. The ongoing domestication of these old laws in Namibia perpetuates past injustices. One such injustice is found in the procedure of property execution, as encapsulated in section 66(1) of the Magistrates' Courts Act.¹ Of late, judgment orders made under the authority and in terms of this section have been effected in a manner that brings into question the constitutionality of the whole process of execution as this impacts on the individual's right to dignity and the constitutional responsibility of the Namibian State to both provide accommodation to and protect the right of individuals to retain their rights of ownership and benefits thereof, and thereby maintain their security of tenure. The histories of the legislative scheme under apartheid and the grave injustices perpetrated in the context of land have been dealt with in many judgements and scholarly works.²

Some unfortunate members of the community have recently been evicted from their own homes pursuant to sales in execution of judgment orders against immovable property. In

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¹ No. 32 of 1944.

² See O'Regan, K. 1989. "No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act". *South African Journal of Human Rights*, 5:361; Van der Walt, AJ. 2001. "Dancing with codes: Protecting, developing and deconstructing property rights in a constitutional State". *South African Law Journal*, 118:258; Van der Walt, AJ. 2002. "Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land-reform legislation". *Tydskrif vir Suid-Afrikaanse Reg*, 18:254–372. See also *Port Elizabeth Municipality v Various Occupiers* CCT 2005 (1) SA 217 (CC) and 2004 (12) BCLR 1268 (CC), where Sachs J discusses the various pieces of apartheid legislation which have dealt with the occupation of land, at paragraphs 8–10.

most cases, the outstanding instalments involve paltry and trifling sums of money, which renders the whole process of the sale in execution unjustifiable and unconstitutional.

As a result, on 16 April 2009, the National Council adopted a motion which mandated the Standing Committee on Constitutional and Legal Affairs to investigate the constitutionality of the above impugned provision, and thereafter report back to the house. Heated debates erupted in the hearings – which prompted the writing of this article. The debates were also aired in the media, which reported that the injustices of the said section had led to some homeowners losing their property – in one case because a paltry N\$168 was owed to a butchery.³ Without concentrating on these media reports and other unreported out-of-court cases, we tackle section 66(1) of the Act head on by analysing the procedure it lays down. We argue that this provision is unconstitutional for it violates both constitutional and international law imperatives.

Legal analysis on the constitutionality or otherwise of section 66(1)(a)

Section 66(1)(a) of the Magistrates' Courts Act raises momentous legal and public interest issues which are centred on the attachment and sale of immovable property in execution. Section 66(1)(a) provides as follows:

Whereas a court gives judgement 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 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 judgement or order of the court, on good cause shown, so orders, then against the immovable property of the party against whom such judgement has been given or such order has been made.

It would be convenient at this point to discuss briefly the procedure by which a debt is recovered in the magistrates' courts. If the defendant fails to enter an appearance to defend, the plaintiff is entitled to lodge with the clerk of the court a request for default judgment.⁴

³ See Maletsky, C. 2004. "House sold to recover N\$168 debt", *The Namibian*, 14 July 2007; available at http://www.namibian.com.na/index.php?id=28&tx_ttnews%5Btt_news%5D=7433&no_cache=1; last accessed 2 September 2009.

⁴ See Rule 12(1)(a) of the Magistrates' Courts Rules, which reads as follows:

After this request has been lodged, and where the claim is for a liquidated debt, the clerk of the court, as opposed to a magistrate, enters judgment in favour of the plaintiff.⁵ Rule 36 deals with the process in execution, which occurs when the judgment in the plaintiff's favour has not been satisfied.⁶ The process of execution starts with a warrant prepared by the judgment creditor's attorney, which is issued and signed by the clerk of the court and addressed to the sheriff.⁷ The process does not need to involve the courts at all in circumstances where the original judgment was entered by consent or default; however, if this is not the case, the process in execution may only be issued with leave of the court, which is sought at the same time as the granting of the judgment.⁸ Therefore, if the judgment is entered by default because of, for example, the non-appearance of the defendant, and where the debt is for a liquidated amount, the entire process occurs without any oversight by the courts. If judgment is not entered by default and is granted after a hearing, court oversight occurs only at that initial hearing because Rule 36(7) provides for the application that initiates the process of execution to occur simultaneously with the granting of judgment and not at a later date.

Section 66(1)(a) of the Act prescribes the process from the time a court gives judgment in favour of a creditor until the ultimate sale in execution of the debtor's immovable property. The messenger of court calls at the home of the debtor and attaches movable property sufficient to settle the debt. If insufficient movables exist, the sheriff issues a nulla bona return, which reflects that there is insufficient movable property to settle the debt. On the strength of the fact that no movables were found, the clerk of the court is obliged to issue a warrant of execution against the immovable property if the debtor possesses any.⁹ It is for the clerk of the court to decide whether, in the light of the sheriff's nulla bona return,

"If a defendant has failed to enter appearance to defend within the time limited therefor by the summons or before the lodgement of the request hereinafter mentioned, and has not consented to judgment, the plaintiff may lodge with the clerk of the court a written request, in duplicate, together with the original summons and the return of service, for judgment against such defendant for –

- (i) any sum not exceeding the sum claimed in the summons or for other relief so claimed;
- (ii) the costs of the action; and
- (iii) interest at the rate specified in the summons to the date of payment or, if no rate is specified, at the rate prescribed under section 1(2) of the Prescribed Rate of Interest Act, 1975 (Act 55 of 1975)."

⁵ See Rule 12(1)(c). See Rule 12(4) for the position where the claim is not for a liquidated amount.

⁶ See Rule 36(2)

⁷ See Rule 36(1)

⁸ See Rule 36(7).

⁹ Rule 43 deals with execution against immovable property.

insufficient movables exist to satisfy the judgment.¹⁰ Once the clerk of the court is satisfied of this fact, it follows that the debtor's immovable property will be sold in execution.

It should be noted from the above procedure that, in each of these circumstances, the relevant person being the owner at the time in question is a fact necessary for the right to proceed in rem under the Act to be legitimately invoked. Such a fact is called a *jurisdictional fact*, though care needs to be taken in using the phrase. Under the provisions of the Act and common law, the following are the condition precedent for the issuance of writ of attachment against immovable property:

- The movable property has to have been insufficient to satisfy the judgement debt
- Reasonable diligence has to have been exercised to trace the movable properties with no success
- There has to have been an application to court for writ of execution against immovable property, and
- The judgment creditor has to establish that the judgement debtor is the owner of the property.

These are the requirements that create the current procedure followed by the messenger of court. It is this procedure that appears to be in conflict with the Constitution – hence the necessity to analyse section 66(1). An analysis of the constitutionality or otherwise of the above provision will need to focus on whether –

- in the circumstances of the section, the manner of execution of debtors' immovable property is against the fundamental tenets of fair procedure, and
- in the light of the answer to the above issue, section 66(1) violates the fundamental rights enshrined in the Constitution and, if so, which specific rights are thus violated.

Is section 66(1) a violation of homeowners' procedural rights?

The language of section 66 is in itself not unconstitutional, but the procedure that is created by the section may be. There have been cases in Namibia where debtors' immovable property was attached and sold in execution. This is a normal, legal action, practiced universally. Unique in Namibia's jurisdiction, however, is that upon the issuance of nulla bona return on movables, the clerk of the court can, based on the report of the messenger of

¹⁰ Erasmus, HJ & J van Loggerenberg. 1997. *The civil practice of the magistrates' courts in South Africa*, Volume 1 (Ninth Edition). Lansdowne: Juta, p 287; relying on *Lambton Service Station v Van Aswegen* 1993 (2) SA 637 (T) at 641G–I.

the court alone – i.e. without going through the court or any judiciary officer – issue a writ for the messenger of the court to attach the debtor’s immovable property.

Striking in this procedure is that the debtor’s immovable property is attached and sold without his/her knowledge. What has already happened in Namibia is that, without the debtor even knowing about it, his/her property is auctioned to an unknown third party. The first the debtor learns of the transaction is when the new owner of the property comes with an eviction notice. This procedure has raised much debate on section 66(1) in legal circles and in the media, both here and in South Africa.

Clearly, when the messenger of the court follows the procedure under section 66 of the Act, there is no miscarriage of justice as such, since the Act provides for such a procedure and section 66 does not provide that the respondent/debtor should be put on notice; in fact, it provides for the opposite. It should be mentioned at this juncture that section 66(1) was amended by section 16 of Act 40 of 1952,¹¹ and substituted by section 3(1) of Act 63 of 1976.¹² All this was done before Namibia’s independence in 1990, i.e. before the Constitution came into force. Now that there is a Constitution with both substantive and procedural rights entrenched in it, can one say that section 66 creates a fair procedure, hence passes constitutional muster? This issue brings to the fore Article 18 of the Constitution and its jurisprudential foundation, which are constituted by the two basic tenets of the concept of fair hearing, to wit: *audi alteram partem*¹³ and *nemo iudex in causa sua*.¹⁴ Article 18 provides as follows:

Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.

This provision encapsulates the two basic rules of natural justice set out earlier. Arguably, therefore, where an order is made against a party who was not informed or given notice of the suit or proceeding, and was therefore not given an opportunity to be heard, the party has been denied fair hearing and the denial amounts to a violation of Article 18 of the Constitution. The audi rule enshrined in Article 18 is a universal principle and is part of the

¹¹ Magistrates’ Courts Amendment Act, 1952 (No. 40 of 1952).

¹² Magistrates’ Courts Amendment Act, 1976 (No. 63 of 1976).

¹³ “Hear both sides [in a dispute]”.

¹⁴ “No man shall be a judge in his own case”.

rules of natural justice that are deeply entrenched in Namibia's statutory and common law. In essence, the audi rule calls for the hearing of the other party's side of the story before a decision can be taken which may prejudicially affect such party's rights or interests or property. Historically, the audi rule is part of Namibia's administrative law and, as a general rule, has no application to private contracts.¹⁵ It applies to attachments in so far as the messenger of the court is an administrative official subject to the imperatives of Article 18.

In *Administrator, Transvaal & Others v Traub & Others*,¹⁶ Corbett CJ cautioned against the danger of freely applying the doctrine in determining whether or not procedural fairness required a pre-decision hearing. The Chief Justice added the following:¹⁷

There are many cases where one can visualise in this sphere – and for reasons which I shall later elaborate I think that the present is one of them – where an adherence to the formula of “liberty, property and existing rights” would fail to provide a legal remedy, when the facts cry out for one; and would result in a decision which appeared to have been arrived at by a procedure which was clearly unfair being immune from review. The law should in such cases be made to reach out and come to the aid of persons prejudicially affected ... A reasonable balance must be maintained between the need to protect the individual from decisions unfairly arrived at by public authority ...

Therefore, even if one may argue that that the principles in Article 18 do not apply to attachment and sale in execution processes, the common law dictates that they ought to.¹⁸ In this light, a hearing can only be *fair* when all parties to the dispute are given a hearing or the opportunity of one. If one of the parties is refused a hearing or not given an opportunity to be heard, the hearing cannot qualify as *fair*.¹⁹ Without a fair hearing, the principles of

¹⁵ See *Embling v The Head Master, St Andrew's College (Grahamstown) & Another* (1991) 12 ILJ 277 (E); *Damsell v Southern Life Association Ltd* (1992) 13 ILJ 848 (C) at 859E–H; *Sibanyoni & Others v University of Fort Hare* 1985 (1) SA 19 (CK); *Mkhize v Rector, University of Zululand & Another* 1986 (1) SA 901 (D) at 904F. However, there is one exception to the general rule that the audi rule does not apply to private contracts, namely where a private contract contains a provision which either expressly or by necessary implication incorporates the right to be heard; see *Lace v Diack & Others* (1992) 13 ILJ 860 (W); *Lamprecht & Another v McNellie* 1994 (3) SA 665 (A) at 668B–J; *Moyo & Others v Administrator of the Transvaal & Another* (1988) 9 ILJ 372 (W) at 384E–J.

¹⁶ 1989 (4) SA 731.

¹⁷ (*ibid.*:761E–G).

¹⁸ See *Ndulue v Ibezim; OTAPO v Sunmonu* (1987) 2 NWLR (pt 58) 587.

¹⁹ (*ibid.*).

natural justice are abandoned; and without the guiding principles of natural justice, the concept of the rule of law cannot be established and grow in the society. Hence, in this light, section 66 propagates the rule of man, uncertainty and whimsicality.

The attachment and sale of property on an ex-parte basis, i.e. without putting the other party on notice or giving that party the opportunity of being heard, is intrinsically unconstitutional, therefore. However, circumstances do arise in which courts can legitimately make ex-parte orders, namely when –²⁰

- from the nature of the application, the interest of the adverse party will not be affected, and
- time is of the essence in the application.

The attachment and sale of immovable property does not seem to fall into any of these exceptions.

In the circumstances of the above analysis, therefore, the entire proceedings under section 66(1) add up to a breach of the audi alteram partem rule, which in turn constitutes a breach of Article 18. Under Article 18, the procedural aspects of civil rights – including the right to property – are protected; thus, the Article sends the message that no court ought to deprive any party of property without putting the party on notice. This has not been said by any court in Namibia to date.

Nigeria offers an example to follow in this regard. In the case of *Prince Fred Obinabo v Lady Olayinka Obayele & Others*,²¹ Nigeria's Court of Appeal declared a sale in execution unconstitutional and in violation of the audi alteram partem rule because its attachment and sale had been done without the knowledge of the judgement debtor.

In more detail and for more clarity, the appellants in *Prince Fred Obinabo* case were judgment debtors against the second respondent. The second respondent had levied execution against the appellants and had, in the process, caused the property to be sold by public auction to the first respondent. With the sale, title to the property became vested in the first respondent, but possession remained with the second appellant. To recover possession, therefore, the first respondent approached the Lagos State High Court pursuant to S.51 of the Sheriff and Civil Process Act, and her application was granted. Thus, it was the

²⁰ See *Bayero v FMBN* (1998) 2 NWLR (pt 538) 509.

²¹ Unreported Appeal case number CA/L/450/03.

procedure for the grant of this application that was being challenged. Similar facts are found in the case of *Leed O Presidential Motel v BON Ltd.*²²

As stated earlier, ex-parte applications are intrinsically unconstitutional – let alone the clerk of the court’s decision based solely on the messenger of the court’s report or the nulla bona return. Indeed, the clerk of the court’s decision, effected without putting the appellants on notice, violates the principles of fair hearing and is in breach of the audi alteram partem rule and Article 18 of the Constitution.

Section 66(1)(a) v substantive rights under the Namibian Constitution

It may be stupendous argument that the provisions of section 66(1) violate the right to housing under Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) or the right to property in general, as blanketed under Article 16 of the Namibian Constitution. Namibia is a state party to the ICESCR; and although the right to adequate housing is not explicitly protected under the Constitution, the right to property is. Also, the Namibian Constitution was recently described as “an international law friendly constitution”²³ since, in terms of its Article 144, international law that meets the conditions in the Article is part of Namibian law – including the ICESCR. Article 11(1) of the ICESCR, which is binding on Namibia, states the following:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

The fact that the Constitution is silent on the specifics of the right to housing should not detract us from this argument. Since Namibia’s Supreme Law is “friendly” to international law, combined with the superior courts’ already “extensive jurisdiction”²⁴ in common law, how the interpretation or formulation of the right to housing in Namibian law is determined should

²² (1998) 10 NWLR (pt.570) 353.

²³ See *S v Mwinga* 1995 NR 166 (SC).

²⁴ See the description of the jurisdiction of Namibian superior courts in the *Mwinga* case.

not be based on “definitional obsessions and technical formulations,”²⁵ but should, according to the *Mwinga* case, keep in step with the other common law Commonwealth countries such as Canada, England and South Africa. In terms of the right to housing, both the State and private parties have a duty not to interfere unjustifiably with any person’s existing access to adequate housing. Therefore, it is legally supportable that section 66(1) of the Magistrates’ Courts Act is unconstitutional to the extent of its overbreadth in that it allows a person’s right to have access to adequate housing to be removed – even in circumstances where it is unjustifiable. This is particularly so in the circumstances of the analysis at hand.

In addition, and reinforcing the above argument, the practice under section 66 of the Act – a practice that involves State organs – is in gross violation of Article 95(b) and (e) of the Constitution, which imposes an obligation on the State to –

... actively promote and maintain the welfare of the people of Namibia by adopting, *inter alia*, policies aimed at the following:

- (b) enactment of legislation to ensure that the health and strength of the workers, men and women, and the tender age of children are not abused and that citizens are not forced tby economic necessity to enter vocations unsuited to their age and strength; [and]
- (e) ensurance that every citizen has a right to fair and reasonable access to public facilities and services in accordance with the law; ...

True, Government efforts to implement and realise the State policies contained in Chapter 11 of the Constitution, as well as any other programmes put in place to do so, are rendered null and void, and hampered by the application of the impugned provision in the Magistrates’ Courts Act. Notwithstanding that the right to housing is not justiciable in Namibian courts, it is worth noting that Namibia is expected to honour its obligations as contained in the ICESCR. One of the main obligations imposed by the ICESCR on member states is –²⁶

... to take steps ... to the maximum of their available resources, with a view to achieving progressively the full realization of the rights by all appropriate means, including particularly the adoption of legislative measures.

The above provision, Article 2(1) of the ICESCR, has been interpreted as imposing an obligation on member states to move as expeditiously and effectively as possible towards realising the rights contained in it, one of which is the right to housing. Namibia’s obligations

²⁵ *Mwinga* case.

²⁶ Article 2(1) of the ICESCR.

under the ICESCR do not end with the duty to refrain from interference with the enjoyment of the right to housing. In addition, as a state party to the ICESCR, Namibia is expected to take positive steps directed towards fulfilling the right to housing. The positive component of this right requires two forms of actions from Namibia. Firstly, in accordance with Article 2(1) cited above, Namibia is obliged to adopt “legislative measures”, that is, to create a legal framework that grants Namibian citizens and residents the legal status, rights and privileges that would enable them to pursue their right to housing. Secondly, Namibia is required to implement various other measures and programmes designed to assist individuals in realising the right in question.²⁷

Violation of constitutional rights: decoding international laws

Violation of the right to housing or property in general

With the freedom to go in search of authority from outside Namibia, as recommended by the Supreme Court in the *Mwinga* case, it is notable that a comparative study of the constitutional law of other countries is always helpful. Indeed, in matters concerning the interpretation of fundamental rights and freedoms, this has more or less become the norm, bearing in mind the almost universal application of those rights with more or less the same content. Also notably, however, there are clear differences between the various constitutional instruments and backgrounds to the force of international instruments in various countries; and for such a comparative study as the one presented below to be of any real value, due cognisance will need be given to these differences when analysing the applicability of these principles to Namibia.

In South Africa, the Constitutional Court decided this matter from a constitutional and international law standpoint under section 26 of the South African Constitution, which is inspired by Article 11 of the ICESCR.²⁸ In consequence of the Constitutional Court judgment in *Maggie Jaftha v Stephanus Schoeman & Others, Christina van Rooyen v Jacobus Stoltz & Others*,²⁹ the court held that that the sale in execution had been invalid as the warrant of execution pursuant to which the sale had taken place had been issued by the clerk of the

²⁷ See United Nations Committee on Economic, Social and Cultural Rights. 1994. *General Comment 3. The nature of States Parties' obligations*. UN Doc. HRI/Gen 1/Rev 1 at 45 (1994), paragraph 4.

²⁸ The same inspiration is not found in the Namibian Constitution.

²⁹ 2005 (2) SA 140 (CC).

magistrate's court, without judicial supervision.³⁰ The issue which was considered in this case was whether section 66, being a piece of legislation which permitted the sale in execution of people's homes because they had not paid their debts, thereby removing their security of tenure, violated the right to have access to adequate housing, as protected in section 26 of the South African Constitution.

In its consideration of this issue, the Constitutional Court declared section 66(1)(a) of the Act³¹ to be "unconstitutional and invalid" in that it failed to provide for judicial oversight over sales in execution of the immovable property of judgment debtors. In her judgment, Mokgoro J, writing for a unanimous court, held that the section constituted an unreasonable and unjustifiable limitation of the fundamental right of access to adequate housing protected by section 26(1) of the South African Constitution.³²

I have held that s 66(1)(a) of the Act is over-broad and constitutes a violation of s 26(1) of the Constitution to the extent that it allows execution against the homes³³ of indigent debtors, where they lose their security of tenure. I have held further that s 66(1)(a) is not justifiable and cannot be saved to the extent that it allows for such executions where no countervailing considerations in favour of the creditor justify the sales in execution.

In order to remedy this constitutional defect, the court ordered that section 66(1)(a) be amended by a 'reading in' of the words underlined below:³⁴

Whenever a court gives judgment for the payment of money or makes an order for the payment of money in instalments, such judgment, in case of failure to pay such money forthwith, or such order in case of failure to pay any instalment at the time and in the manner ordered by the court, shall be enforceable by execution against the movable property and, if there is not found sufficient movable property to satisfy the judgment or order, or the court, on good cause shown, so orders, then *a court, after consideration of all relevant circumstances,*

³⁰ As amended by a 'reading in' of certain words by the Constitutional Court.

³¹ As it currently still reads in the Namibian Act.

³² *Jaftha* case, paragraph 52; see also paragraphs 39–44.

³³ In this regard, see *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W) paragraph 22; *Nedbank Ltd v Mashiyi & Another* 2006 (4) SA 422 (T) paragraphs 10–11; *Standard Bank of South Africa Ltd v Saunderson & Others* 2006 (2) SA 264 (SCA) paragraphs 15–17.

³⁴ *Jaftha* case, paragraph 67.

may order execution against the immovable property of the party against whom such judgment has been given or such order has been made. [Emphasis added]

Zondi AJ³⁵ held that the declaration of invalidity of s 66(1)(a) by the Constitutional Court applied retrospectively and that, accordingly, a warrant of execution obtained prior to *Jaftha* without judicial oversight and, thus, in violation of the law laid down in that case – without the court making any order limiting the retrospective effect of its declaration of invalidity³⁶ – was invalid. The learned Acting Judge held further that it was clear the warrant of execution pursuant to which the property was sold in execution had been issued by the clerk of the court without judicial supervision and was, therefore, invalid.

As regards the question of the implications of these findings for a bona fide purchaser of property pursuant to such an invalid sale in execution, the Cape High Court in *Schloss*³⁷ emphasised that any exercise of public power had to be carried out in terms of a valid rule of law. The court approved of McCall AJ's finding in the *Joosub* case³⁸ to the effect that, where there was no sale in execution or where the sale in execution which was purported to have taken place was a nullity, then it could not have served to pass any title to the property concerned to the purchaser or to any successor in title into whose name the property was subsequently transferred:³⁹

[T]he plaintiff [the judgment debtor], as owner of the property, would be entitled to recover the [property] by way of a *rei vindicatio*.

³⁵ Following the judgment of Davis J in *Reshat Schloss v Gordon Taramathi & Others*, Case No. 2657/2005, unreported judgment of the Cape High Court dated 10 October 2005.

³⁶ *Ex Parte Women's Legal Centre: In Re Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 1288 (CC) paragraphs 11–13.

³⁷ *Reshat Schloss v Gordon Taramathi & Others*, Case No. 2657/2005, unreported judgment of the Cape High Court dated 10 October 2005.

³⁸ *Molelengoabe v Joosub* (Unreported case number CIV\T\252\92) Lesotho Court of Appeal, decided on 3 February 1995.

³⁹ *Joosub* has been followed in the High Court context in a number of cases; see e.g. *Sowden v Absa Bank Ltd & Others* 1996 (3) SA 814 (W) at 821H–I; *Kaleni v Transkei Development Corporation & Others* 1997 (4) SA 789 (TkS) at 792D–H; *Rasi v Madaza & Another* [2001] 1 All SA 498 (Tk) at 510G–J. See also *Van der Walt v Kolektor (Edms) Bpk & Andere* 1989 (4) SA 690 (T) at 696H–697D, and the criticism of this case by Davis J in *Standard Bank of South Africa Ltd v Prinsloo & Another (Prinsloo & Another Intervening)* 2000 (3) SA 576 (C) at 586F–H.

This means that all properties which have been sold in execution in Namibia under the section can be vindicated if challenged in court because no genuine title ever passed to those who 'bought' the properties.

Furthermore, in the case of *Menqa & Another v Markom & Others*,⁴⁰ the Supreme Court of Appeal in South Africa declared the warrant of execution issued under section 66 of the Act as it currently reads in Namibia as invalid, as it was issued without the judicial oversight required by the Constitutional Court in the *Jaftha* case, and the absence of this procedural safeguard imperilled the debtors' rights to housing. The sale in execution to the purchaser was declared invalid for the same reason. On appeal, the purchaser wanted to use the provisions of section 70 of the Act to justify why he should proceed with acquiring the house he had bought. The Supreme Court of Appeal agreed with the High Court that, if one were to hold that the provisions of section 70 of the Act rendered such a sale in execution unimpeachable, this would indeed "defeat the whole purpose of the Constitutional Court ruling in the *Jaftha* case".⁴¹

It was held in the *Menqa* case that the absence of judicial supervision in the execution of property under section 66(1) imperilled the respondent's constitutional rights under section 26(1) of the South African Constitution, and rendered the sale to Menqa, the first applicant, invalid. The court quoted from the case of *Sookdeyi & Others v Sahadeo & Others*,⁴² where Van Heerden JA said that to hold that the provisions of section 70 of the Magistrates' Courts Act rendered such a sale unimpeachable would defeat the purpose of the constitutional ruling in *Jaftha*. In a minority judgment in the *Jaftha* case, Cloete JA, with whom Scott JA concurred, agreed with these findings of the majority, but considered it desirable to analyse the meaning of s 70 and provide a rational basis for its interpretation. Having referred to Roman–Dutch law authors, Cloete JA disagreed with the passage in the *Sookdeyi* case where Van Den Heever JA, in respect of section 70, stated that –

... had the section not contained the words "in good faith and without notice of any defect", a sale in execution by the messenger would after delivery or transfer have been absolutely unassailable.

⁴⁰ 2008 (2) SA 120 (SCA); [2008] 2 All SA 235 (SCA).

⁴¹ *Jaftha* case.

⁴² 1952 (4) SA 568 (A) at 572D–E.

This being so, it followed that the sale could not in these circumstances be ‘saved’ by an application of section 70 of the Magistrates’ Courts Act.⁴³

Against the above backdrop, it must be emphasised that the sale of property under a defective procedure in section 66(1) of the Act contravenes Article 8 of the Constitution. In this light, Article 8 needs to be seen as making that decisive break from ill-treatment in the past. As held in the *Jaftha* case, where section 66 was declared unconstitutional, the indignity suffered as a result of eviction from homes, forced removal and the relocation to land often wholly inadequate for housing needs has to be replaced with a system in which the State strives to provide access to adequate housing for all and, where it exists, refrain from permitting people to be removed without justification.

Violation of the right to dignity

The Namibian Constitution provides for the right to dignity in Article 8, which addresses respect for human dignity. However, it is inconceivable to some how this right could be breached by section 66 of the Magistrates’ Courts Act. South African judgements can guide us here in seeing the link or interface between first-generation rights, which include the right to dignity and second-generation rights, which include the right to housing. In fact, the interconnectedness and interdependence between socio-economic rights, on the one hand, and civil and political rights, on the other, were recognised by the drafters of the ICESCR.⁴⁴ In addition, some judicial pronouncements have taken cognisance of these close

⁴³ The grounds on which the warrant and the subsequent sale in execution were invalid in this case render it unnecessary to consider the correctness of the analysis by Van den Heever JA in two earlier Constitutional Court decisions, namely on the Roman–Dutch authorities in respect of the qualified inviolability (in Namibia’s common law) of sales in execution, and the relationship between the common law position and section 70 of the Magistrates’ Courts Act; see *Messenger of the Magistrate’s Court, Durban v Pillay* 1952 (3) SA 678 (A) at 683F–684H, and *Sookdeyi & Others v Sahadeo & Others* 1952 (4) SA 568 (A) at 571G–572G. See also *Gibson NO v Iscor Housing Utility Co. Ltd & Others* 1963 (3) SA 783 (T) at 786G–787A; *Van der Walt*, at 696B–F; *Joosub*, especially at 672C–F, 674G–677H and 679D–681H; *Jones & Others v Trust Bank of Africa Ltd & Others* 1993 (4) SA 415 (C) at 419G–420D.

⁴⁴ In this regard, the Preamble to the ICESCR reads as follows: “... the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights”.

relationships between the two types of rights.⁴⁵ In *Government of the Republic of South Africa & Others v Grootboom & Others*,⁴⁶ the court put it as follows:

The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom. It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings. This is the backdrop against which the conduct of the respondents towards the appellants must be seen.

Therefore, it should be noted that an analysis of the issues, including second-generation rights, brings one to the controversy of intersecting rights – socio-economic rights and the founding values of human dignity, equality and freedom – which reinforce one another at the point of intersection.⁴⁷ The South African Constitutional Court has made it clear that any claim based on socio-economic rights must necessarily engage the right to dignity. Many in Namibia suffer a lack of adequate food, housing and health care, which is a blight on their dignity. Therefore, the right to dignity can easily be read into Article 8(2)(b) of the Constitution, which states the following:

No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

There is no doubt that homeowners whose houses are sold in execution by virtue of section 66(1)(a) of the Magistrates' Courts Act in order to settle debts owed by them to municipalities or town councils are exposed to unbearable and inhuman living conditions as homeless

⁴⁵ See e.g. *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) paragraph 23: "All the rights [both civil and political as well as socio- economic and cultural] as encapsulated in our Bill of Rights are inter-related and mutually supporting ...".

⁴⁶ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at paragraph 83.

⁴⁷ Mapaure, C. 2009. "Child labour: A universal problem from a Namibian perspective". In Ruppel, OC (Ed.). 2009. *Children's rights in Namibia*. Windhoek: Macmillan Education Namibia.

persons. Each time an applicant approaches the courts claiming that his/her socio-economic rights have been infringed, the right to dignity is invariably implicated.⁴⁸ Therefore, guidance may be sought from international instruments that have considered the meaning of adequate housing.

In its General Comment 4, the Committee, giving content to Article 11(1) of the ICESCR, emphasised the need not to give the right to housing a restrictive interpretation, but rather to see it as “the right to live somewhere in security, peace and dignity”.⁴⁹ The Committee’s position reflects the view adopted by the Constitutional Court in *Grootboom*, namely that the right to dignity is inherently linked with socio-economic rights.⁵⁰ The court put it as follows:⁵¹

The right of access to adequate housing cannot be seen in isolation. There is a close relationship between it and the other socio-economic rights. Socio-economic rights must all be read together in the setting of the Constitution as a whole. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them.

For the purposes of this case, it is important to point to the Committee’s recognition that the concept of adequacy was particularly significant in relation to the right to housing.⁵² While acknowledging that adequacy “is determined in part by social, economic, cultural, climatic, ecological and other factors”, the Committee identified “certain aspects of the right that must be taken into account for this purpose in any particular context”.⁵³ Of relevance is the focus on security of tenure. The Committee points out that security of tenure takes many forms and does not only involve ownership, but that –⁵⁴

⁴⁸ (ibid.).

⁴⁹ The Right to Adequate Housing (Article 11(1)), UNCESCR General Comment 4 (1991) 13 December 1991 E/1992/23 at paragraph 7.

⁵⁰ *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at paragraph 83.

⁵¹ (ibid.:paragraph 24).

⁵² The Right to Adequate Housing (Article 11(1)), UNCESCR General Comment 4 (1991) 13 December 1991 E/1992/23 at paragraphs 7–8.

⁵³ (ibid.).

⁵⁴ (ibid.).

... all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.

This is a broad interpretation of Article 11(1) of the ICESCR, which definitely includes the right not to be deprived of housing through the arbitrary and unconstitutional procedure provided for under section 66(1) of the Magistrates' Courts Act.

In the *Jaftha* case,⁵⁵ it was said that the situation under apartheid demonstrated the extent to which access to adequate housing was linked to dignity and self-worth – and Namibia was not excepted. Not only did section 66 of the Act permit the summary eviction of people from their land and homes which, in many cases, they had occupied for an extremely long time, but it also branded as criminal anyone who was deemed to be occupying land in contravention of that section.⁵⁶ In this sense, as the Constitutional Court reasoned in the *Jaftha* case, a person is made to suffer a double indignity: the loss of one's home, and the stigma that attaches to criminal sanction. In this light, section 66(1), as it continues to exist in the Namibian statute books, still carries this stigma and has to be jettisoned. In the *Jaftha* case, the appellants appealed against the judgment of the Cape High Court for the sale in execution of houses to settle outstanding debts. The issue was whether a law which permitted the sale in execution of people's homes because they had not paid their debts, thereby removing their security of tenure, violated the access to adequate housing protected by and provided for in section 26 of the South African Constitution.

The Constitutional Court of South Africa, in a unanimous decision, stated the following:⁵⁷

Any claim based on socio-economic rights must necessarily engage the right to dignity. The lack of adequate food, housing and health care is the unfortunate lot of too many people in this country and is a blight on their dignity ...

The Court further held that –⁵⁸

... [s]ection 66(1)(a) is so broad that it permits sales in execution to occur without judicial intervention and even where they are unjustifiable. The fact that a permissive measure which must be invoked by the debtor exists does not change the potentially unjustified executions

⁵⁵ 2005 (2) SA 140 (CC).

⁵⁶ See O'Regan *supra*.

⁵⁷ Paragraph 21.

⁵⁸ Paragraph 48.

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

Consequently, the Honourable Court held that section 66(1)(a) was unconstitutional to the extent that it allowed for sales in execution in unjustifiable circumstances and without judicial intervention, and that the most appropriate way to remedy this overbreadth was to provide for judicial oversight at the point of sale in execution against immovable property.

The Court held that the appropriate way to remedy the lack of judicial oversight over the process was to amend the impugned section by the addition of the phrase "a court, after consideration of all relevant circumstances, may order execution", so that it applied to sales in execution over immovable property where insufficient movables had been found to satisfy the judgment or order. Subsequent judicial decisions in South Africa have upheld the ruling in the *Jaftha* case.

Clearly, the judgments of the Constitutional Court of South Africa are not binding in Namibia, but they have persuasive authority in our jurisdiction. It is also important to note that the objectives of the Bill of Rights in the Constitution of the Republic of Namibia and that of the Republic of South Africa are principally aimed at protecting the fundamental human rights of indigenous peoples who suffered humiliation and oppression under the apartheid system.

The way forward: An amendment to section 66(1)?

The constitutional position is clear: section 66(1)(a) was enacted by the South African apartheid regime, but, in terms of Article 140(1) of the Namibian Constitution, the offending section remains in force until repealed or declared unconstitutional. To date, the section has not been repealed, nor has it been declared unconstitutional – hence this enquiry. After the establishment of the new constitutional order in Namibia, the higher courts, which are no longer hamstrung by the distorted version of parliamentary sovereignty that colonial and apartheid regimes pursued till the demise of those systems, introduced a system of constitutional supremacy, where all laws – whether made before or after the Constitution itself – are inferior to it if found to be inconsistent with it. Thus, Article 25 of the Constitution permits the courts to strike down any law as unconstitutional, or Parliament can amend such law.

Therefore, it is recommended that section 66(1) be repealed by an amendment to the Magistrates' Courts Act. The amendment should include the due process provisions which respect the fundamental principles of fairness in the attachment and sale of property, as well as the right to property and adequate housing.

The above holds in so far as we consider that the classic formulation of the audi encompasses not only existing rights, but also the property of an individual when it is prejudicially affected by a public official's decision. The word *property* would ordinarily tend to connote something which is the subject of ownership. It can also be said, however, that the concept of *property* to which the audi rule relates is wide enough to comprehend economic loss consequent upon the attachment and sale of property in execution. The immediate financial consequences of the loss of property owing to debts are very distressing; hence, there is a need to reform the law.

Thus, it is recommended, as was done in the *Jaftha* case, that the Magistrates' Courts Act be amended to include a provision which allows for judiciary oversight on sales in execution of property. Judicial oversight in this regard, if provided for in the Act, will permit a magistrate to consider all the relevant circumstances of a case to determine whether there is good cause to order an execution. The crucial difference between the provision of judicial oversight as a remedy and the possibility of reliance on sections 62 and 73 of the Act is that the former takes place invariably without being prompted 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 sales 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.

The Constitutional Court in the *Jaftha* case commented that it would be unwise to set out all the facts that would be relevant to the exercise of judicial oversight. However, the court provided some guidelines to follow in similar cases, and stated that if the procedure prescribed by the rules was not complied with, a sale in execution could not be authorised.

When it comes to what can be recommended, the *Jaftha* case is very informative to Namibian legislators, courts and law reformers. In this case it was stated that if there are other reasonable ways in which the debt can be paid, an order permitting a sale in execution will ordinarily be undesirable.⁵⁹ This is an acceptable position, since some homeowners have

⁵⁹ See *Jaftha* case, paragraph 56.

lost their property due to debts amounting to a paltry N\$168. It might be quite unjustifiable for a person to lose his or her access to housing where the debt involved is a trifling amount and insignificant to the judgment creditor – in our cases, municipalities and/or town councils.⁶⁰

Therefore, if the requirements of the rules have been complied with and if there is no other reasonable way by which a debt may be satisfied, an order authorising the sale in execution may ordinarily be appropriate unless the ordering of such sale in the circumstances of the case would be grossly disproportionate. This would be so if the interests of the judgment creditor in obtaining payment are significantly less than the interests of the judgment debtor in security of tenure in his or her home, particularly if the sale of the home is likely to render the judgment debtor and his or her family homeless. As was held in the *Jaftha* case, this is why the size of the debt is relevant for the court to consider; but, at the same time, it may be difficult to conclude that a debt is insignificant. In this regard, it is also important to bear in mind that there is a widely recognised legal and social value that needs to be acknowledged as regards debtors meeting the debts that they incur. As per the South African Constitutional Court precedent, this procedure would be fair, and would allow the realisation of the right to housing and property in general, for which the Namibian populace have yearned for so long.

⁶⁰ See Maletsky (2004); in some cases the houses were sold to rich individuals for meagre amounts.