CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 44/10
[2011] ZACC 14

In the matter between:

ELSIE GUNDWANA	Applicant
and	
STEKO DEVELOPMENT CC	First Respondent
NEDCOR BANK LIMITED	Second Respondent
MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
and	
NATIONAL CONSUMER FORUM	Amicus Curiae

Heard on : 10 February 2011

Decided on : 11 April 2011

JUDGMENT

FRONEMAN J:

Introduction

[1] The ultimate constitutional issue in this matter is whether a High Court registrar (registrar),[1] in the course of ordering default judgment under rule 31(5)(b) of the Uniform Rules of Court[2] (High Court Rules), may grant an order declaring mortgaged property that is a person's home specially executable.[3]

[2] The applicant contends that the power of the registrar is constitutionally invalid. She seeks direct access to this Court for a declaratory order to that effect. In addition she claims consequential relief in the form of rescission of the default judgment which included the order declaring her property executable (rescission application), and for the setting aside on appeal of an order evicting her from her property (eviction order).

[3] The second respondent, Nedcor Bank Limited (Bank) contends that the order declaring the applicant's property executable is valid, but opposes the application for direct access to this Court to decide its constitutionality. Its grounds for doing so are that the rescission application is pending in the Western Cape High Court, Cape Town (High

[1] The registrar is not a judicial officer appointed in terms of the court structures under the Constitution. A registrar is appointed in terms of section 34 of the Supreme Court Act 59 of 1959 as being administratively responsible for the execution of the powers and authorities of a particular High Court.

[2] The rules regulating the conduct of the High Courts in South Africa, currently issued in terms of the Rules Board for Courts of Law Act 107 of 1985.

[3] This invokes section 26 of the Constitution, which provides in relevant part:

> "(1) Everyone has the right to have access to adequate housing.
>
> (2) . . . .
>
> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

Court) and that it will not be in the interests of justice to bypass those proceedings. In relation to the eviction order the Bank argues that there are no reasonable prospects of success on appeal and that leave to appeal should be refused for that reason.

[4] To appreciate these contentions it is necessary to turn to the history of the matter.

Factual background

[5] The applicant purchased Erf 457 and Erf 458 Tyolora, Thembalethu, George, Western Cape (the property) in 1995 for R52 000. She paid part of the price, R25 000, with money lent to her by the Bank under a mortgage bond (mortgage bond). In terms of the mortgage bond the property served as security for the loan. During 2003 the applicant fell in arrears with her monthly repayments. On 7 November 2003 the registrar granted default judgment against her in the High Court at the Bank's instance for payment of R33 543,06 together with a further order declaring the property executable for that sum. On the same day a writ of attachment was issued to give effect to the declaration of executability.

[6] The Bank did not take further action in relation to the execution for approximately four years. The applicant continued making payments on the bond, albeit irregularly. In August 2007 the applicant says she discovered, on her return from a visit to her sister in Cape Town, that the sale in execution of the property was to take place. She immediately contacted a Bank official who she says told her that she was in arrears in the amount of

R5 268,66 and that the total outstanding balance on the bond amounted to R23 779,13. She promised the Bank official that she would pay the arrears as soon as possible and on 13 August 2007 she paid R2 000 to the Bank. She thought she had averted the sale in execution, but that was not to be.

[7] On 15 August 2007, the property was sold in execution under the original writ to the first respondent, Steko Development CC (Steko).[4] Registration of transfer to Steko followed but the applicant did not vacate the property. On 23 April 2008, Steko launched an application for her eviction from the property in the George Magistrates' Court.

[8] When the eviction application first came before court, the applicant sought and obtained a postponement in order to obtain legal advice. She was less fortunate when the matter came before the court a second time, on 3 June 2008. She sought another postponement, on the basis that she needed to obtain her file from the Legal Aid Board in order to put a proper defence before the court. The magistrate refused this request and granted the eviction order. The applicant appealed against this order to the High Court, but the appeal was dismissed on 27 February 2009. Further leave to appeal was refused by the Supreme Court of Appeal.

[9] After the eviction order had been granted, the applicant sought rescission of the 2003 default judgment in the High Court. She launched the rescission application on 13

[4] Steko indicated that it abides by the decision of this Court.

October 2008. The rescission application is pending in the High Court; the parties having agreed to postpone it until determination of the proceedings in this Court.

[10] The eviction order was granted without the applicant fully answering the allegations in Steko's founding affidavit seeking eviction. In her founding affidavit in support of her application for a postponement, she alluded to Steko's acknowledgement that she may have a case against the Bank which attached the property and that she might also have grounds for setting the original default judgment aside, but she provided no further details.

Proceedings in this Court

[11] In the papers before this Court a much fuller picture appears.[5] The applicant admits that the summons which formed the basis of the default judgment was served on her on 14 October 2003. She states that before default judgment was granted she consulted with a Bank official and made arrangements to borrow money from friends and colleagues. Because of this, she assumed that default judgment would not be taken against her. She knew of no further action taken against her by the Bank for a period of approximately four years. During that time, she states that she was unaware that default judgment had been taken against her. The Bank's summons had claimed a balance of R33 543,06 and interest at the rate of 14,5% on the sum as at 1 September 2003. The

[5] These facts are also set out in detail in the applicant's papers in the rescission application. They are not materially disputed in the affidavit filed on behalf of the Bank, who attached a printout of her financial history as well as the formal returns of service in respect of the default judgment and sale in execution.

Bank's financial records reflect that three further amounts of R853,70 were credited to the account between 1 September 2003 and 7 November 2003, the date of the default judgment. The actual amount outstanding on the day of the judgment was R32 581,62. Subsequent to the default judgment monthly payments continued from 1 December 2003 fairly regularly until April 2004 when, in addition, two larger payments of R6 000 and R9 000 were made on 26 April and 28 April respectively. Regular monthly payments continued for the rest of 2004. In 2005 the payments became irregular and in 2006 none were made. This was apparently compensated for by a payment of R10 066 on 5 February 2007.

[12] The applicant approached this Court on two bases. She sought leave to appeal against the eviction order and also sought direct access on the substantive constitutional issue in order to dispose of the rescission application. I think it is fair to say that her approach to the exact relief she sought has not been entirely consistent, but in view of the fact that the Bank's counsel accepted that the matter should proceed on the basis of the relief sought in the applicant's written argument, this need not detain us further.

[13] On 30 August 2010 the Chief Justice directed that both the applications for leave to appeal and for direct access be set down for hearing.[6]

[6] They read in part:

"6. The written argument must deal only with the following issues:

a. Whether it is in the interests of justice to grant leave to appeal and direct access;

[14] On 23 September 2010, a similar application,[7] involving different parties, was brought in this Court against the Bank in respect of a matter emanating from the Eastern Cape High Court, Grahamstown (Eastern Cape High Court), for orders declaring rule 31(5)(b) and rule 45(1) of the High Court Rules unconstitutional, alternatively for leave to intervene in the present matter. That application was withdrawn when the Bank withdrew its opposition to rescission of the original default judgment.

[15] This Court then issued further directions inviting interested parties, including the Banking Association of South Africa, to apply to be admitted as amici curiae to these proceedings. No one did. At a later stage however, the National Consumer Forum (NCF) applied and was admitted as an amicus. We are indebted to the NCF for its valuable assistance.

Issues

[16] I intend to deal with the issues under the following categories:

(a) Preliminary procedural issues—

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b. Whether Rule 31(5)(a) of the Uniform Rules of Court, allowing the registrar of the High Court to grant an order declaring immovable property specially executable, is constitutionally valid;

c. Whether the enforcement of the sale in execution of the immovable property was constitutionally permissible in the particular circumstances of the case;

d. If the execution was not permitted, what effect does the subsequent transfer of the property to the first respondent have on the rights of the parties?"

[7] *Siphiwo Peter Kanana and Another v Nedbank Limited and Others* Case No CCT 91/10.

1. condonation and

2. admissibility of Ms Sarah Sephton's affidavit;

(b) Direct access and leave to appeal;

(c) Constitutional validity of the High Court Rules and practice; and

(d) Remedies and relief.

Preliminary procedural issues

[17] The first of these relate to a number of condonation applications.[8] It has become a disturbing feature of litigation in this Court that its rules of practice and procedure are not meticulously adhered to by litigants. This must stop. Except for one condonation application, the transgressions were slight and adequately explained and need not concern us further. They are granted. The exception is the condonation application of the third respondent (Minister) for the late filing of written submissions. The explanation for the delay is unsatisfactory, but the Minister abides the decision of the Court and offers no material objection that will affect the outcome of the matter. During the oral hearing counsel for the Minister undertook to convey critical comments from the Bench on this issue to the Minister. Given the outcome I reach, it is unnecessary to decide the condonation application.

[8] They are: (a) an application for condonation for the late filing of the applicant's notice of motion and application to this Court; (b) an application for condonation for the late filing of the applicant's heads of argument; (c) an application for condonation for the late filing of the record; and (d) an application for condonation by the third respondent for the late filing of heads of argument.

[18] The NCF sought the admission of an affidavit by Ms Sephton, Director of the Legal Resources Centre (LRC), Grahamstown, as evidence before us. The purpose of placing this affidavit before the Court was stated to be two-fold, namely: (a) to demonstrate that there is a recurring problem of people's homes being declared specially executable in the High Courts, even where these cases could be dealt with in the Magistrates' Courts; and (b) to contend that it is unlikely that the issue of the constitutionality of the High Court Rules will reach this Court given the tendency of banks to settle matters when the constitutionality of the Rules is raised in the High Courts.

[19] Ms Sephton's affidavit deals with: (i) the factual position in relation to a new rule 14A(a) in the Eastern Cape High Court that stipulates what particulars a creditor must set out in an affidavit, where an order declaring property specially executable is sought in a default judgment; (ii) details of the number of default judgments since February 2010 in that High Court that could have been obtained in the Magistrates' Courts over a certain period; and (iii) the facts of three cases concerning sales in execution in which the LRC has been involved in the Eastern Cape.

[20] Rule 31(1) of this Court's Rules allows an amicus to lodge documents—

> "to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts–
>
> (a) are common cause or otherwise incontrovertible; or

> (b) are of an official, scientific, technical or statistical nature capable of easy verification."

In my view the evidence of Ms Sephton complies with the requirements of the rule.[9] The situation relating to the operation of the Eastern Cape High Court rule and the number of default judgments that could have been obtained in the Magistrates' Courts are of a statistical nature, capable of easy verification. The fact that three applications relating to sales in execution took place or are ongoing in the Eastern Cape is likewise incontrovertible.

[21] The affidavit is thus admitted.

Direct access and leave to appeal

[22] The Bank's opposition to direct access in the rescission application and to the application for leave to appeal against the eviction order, is premised, firstly, on a strict compartmentalisation of the two applications, and, secondly, on an emphasis of the applicant's particular circumstances in relation to the consequential relief she seeks. Both these approaches are inappropriate, for the reasons that follow.

[9] See *S v Shaik and Others* [2007] ZACC 19; 2008 (2) SA 208 (CC); 2007 (12) BCLR 1360 (CC) at para 19; *Prophet v National Director of Public Prosecutions* [2006] ZACC 17; 2007 (6) SA 169 (CC); 2007 (2) BCLR 140 (CC) at para 38; *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at paras 37-8; *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* [2002] ZACC 31; 2003 (2) SA 363 (CC); 2003 (2) BCLR 111 (CC) at paras 3, 26 and 32; *Prince v President, Cape Law Society, and Others* [2002] ZACC 1; 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC) at para 10; and *S v Lawrence; S v Negal; S v Solberg* [1997] ZACC 11; 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) at para 23.

[23] It is true that there are nominally two separate applications before us. It is also correct that the applicant has at times been less than clear in exactly what relief she sought and in respect of which application the relief will operate. But there is little doubt that in reality the constitutional validity of allowing a registrar to declare a person's home specially executable when granting default judgment under rule 31(5)(b) is crucial to both the rescission application and the eviction order. If the rule's ambit is constitutionally bad, the default judgment may well have to be rescinded to that extent at least. And rescission of the order will have an impact on the legal validity of the execution sale in pursuance of an order that has been set aside. The validity or otherwise of the execution sale will, in turn, have possible consequences for the transfer of the property subsequent to the execution sale to Steko and may thus have a material bearing on the eviction order. The rescission application and the eviction order are thus inextricably linked.

[24] The applicant says that she became aware of the default judgment in the High Court only when the execution sale was imminent. Her efforts at stopping the process thus came at the end and not at the start of it. The start should have been an application for rescission of the default judgment, but she alleges that she was unaware that default judgment had been granted. The situation was then exacerbated by the fact that the underlying constitutional issue was not raised fully in court before the eviction order was granted. This quirk in the history of the matter thus provided the Bank with the opportunity in this Court to argue that the application for leave to appeal against the eviction order should be assessed in isolation and that, on that approach, there are no

prospects that the applicant's appeal could ever succeed on the appeal record as it stands. In my view this strict compartmentalisation of the two applications unjustifiably puts form above substance and should not be countenanced.

[25] In similar vein, the Bank argued that direct access in the rescission application should be refused because that application is still pending in the High Court and it is not in the interests of justice for this Court to hear the matter as a court of first and last instance. There are two aspects informing the interests of justice that militate against acceptance of this contention. The first narrower one is that to separate the rescission application from the eviction order in this manner would have the inevitable result that the applicant will lose her home. The eviction order would become final, without any further possibility of setting it aside even if the rescission application is eventually successful. The second aspect is of wider import and I turn to it now.

[26] Even if one accepts that the applicant may not eventually be successful in obtaining relief for herself, that is no absolute bar to granting her direct access. The constitutionality of the rule is an issue that potentially affects many others: if the rule is found to be unconstitutional this Court's acceptance of the doctrine of objective unconstitutionality means that its effects will extend far beyond the immediate confines of the applicant's own particular circumstances.[10] There are instances in this Court where

[10] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at paras 26-9. See *Mvumvu and Others v Minister of Transport and Another* [2011] ZACC 1; Case No CCT 67/10, 17 January 2011, as yet unreported at para 44; *Van der Merwe v Road*

leave to appeal was granted in cases where the decision did not directly translate into individual relief for the litigant before court.[11] The same has occurred in the Supreme Court of Appeal.[12]

[27] It is undoubtedly so that the general rule is that direct access will be granted only in exceptional circumstances.[13] And this is a case where exceptional circumstances exist.

[28] The reach of this Court's decision in *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*[14] has been interpreted in various courts,[15] including the Supreme Court of Appeal,[16] and the outcomes have not been consistent. There is a difference in the rules for declaring property specially executable in the Magistrates' Courts, where full effect

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Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae) [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC) at para 61; and *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 84.

[11] *MEC for Education, KwaZulu-Natal, and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) at para 32; and *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* [2006] ZACC 9; 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) at para 27. For an opposite holding, see *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa and Another* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 22.

[12] *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA); 2007 (9) BCLR 958 (SCA) at paras 4 and 21.

[13] *Christian Education South Africa v Minister of Education* [1998] ZACC 16; 1999 (2) SA 83 (CC); 1998 (12) BCLR 1449 (CC). See also *Transvaal Agricultural Union v Minister of Land Affairs and Another* [1996] ZACC 22; 1997 (2) SA 621 (CC); 1996 (12) BCLR 1573 (CC) at para 16; *Luitingh v Minister of Defence* [1996] ZACC 5; 1996 (2) SA 909 (CC); 1996 (4) BCLR 581 at para 15; *S v Mbatha; S v Prinsloo* [1996] ZACC 1; 1996 (2) SA 464 (CC); 1996 (3) BCLR 293 (CC) at para 29; *Ferreira* above n 10 at para 10; *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* [1995] ZACC 8; 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) at paras 15-7; and *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 11.

[14] [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC).

[15] *Mkhize v Umvoti Municipality and Others* 2010 (4) SA 509 (KZP); *ABSA Bank Ltd v Ntsane and Another* 2007 (3) SA 554 (T) (*Ntsane*); *Standard Bank of South Africa v Adams* 2007 (1) SA 598 (C); *Nedbank Ltd v Mashiya and Another* 2006 (4) SA 422 (T); *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W) (*Mortinson*); *Standard Bank of SA Ltd v Snyders and Eight Similar Cases* 2005 (5) SA 610 (C).

[16] *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA) (*Saunderson*).

has been given to *Jaftha*,[17] and the High Court Rules, where that has not been the case. It appears from the NCF's papers and submissions that this difference may have been exploited by banks seeking these orders in the High Court even in instances that fall within the jurisdiction of the Magistrates' Courts. The High Courts have divergent practice rules with regard to additional requirements that must be met before specially executable orders are made.[18] If the issue is not dealt with in this case, the evidence presented by the NCF indicates that there is, to put it at its weakest, a possibility that the constitutional issue will not easily reach this Court again.

[29] The Bank also submitted that the considerations referred to in *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd and Another*[19] for refusing direct access in that case are equally apposite here. In *Campus Law Clinic* direct access to this Court was sought to challenge the correctness of the decision in

[17] Section 66(1)(a) of the Magistrates' Courts Act 32 of 1944 reads:

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

[18] The North West High Court, Mafikeng has issued Practice Direction No 30 of the North West High Court Practice Directions. The Eastern Cape High Court issued Court Notice 1 of 2010 on 30 July 2010 inserting rule 14A into the Joint Rules of Practice for the High Courts of the Eastern Cape. In *Mortinson* above n 15 the court also laid down rules of practice at 473D-H. The Western Cape High Court has adopted the practice direction stated in *Saunderson* above n 16 at 277C-E. See *Standard Bank of South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd and Others (No 2)* 2010 (1) SA 634 (WCC) at para 29.

[19] [2006] ZACC 5; 2006 (6) SA 103 (CC); 2006 (6) BCLR 669 (CC).

Saunderson.[20] In *Saunderson* the Supreme Court of Appeal had stated, non-bindingly, that the registrar was entitled to dispose of orders of execution by default.[21] In rejecting the application for direct access from *Saunderson* this Court stated:

> "The question is whether it is in the interests of justice for us to grant direct access to the Campus Law Clinic on this issue. We think not. On many occasions this Court has indicated that it is undesirable to determine important constitutional questions of this sort as the Court of first and last instance. Moreover, we think that this is a matter which could properly commence in the High Court with the joinder of all interested parties, which could well include lending institutions other than Standard Bank, as well as bodies representing housing and home-owner interests. It is also important that the Minister be given a proper opportunity to lodge appropriate affidavits and argument. As this Court has frequently pointed out, if a statute is challenged on the basis that it limits a right, the government would ordinarily be expected to offer information and argument relevant to the possible justification of any such limitation."[22] (Footnotes omitted.)

[30] These are important considerations but on a substantive level I consider that most of the concerns expressed in the passage are adequately met in this matter. It is true that this Court's disposition on the constitutional issue will deprive the High Court of the opportunity to pronounce upon that issue. But we know by now that there are divergent approaches in the High Courts and that *Saunderson* dealt with a case emanating from the High Court. The rescission application in this matter is pending in the High Court. It is unlikely that the High Court would not consider itself bound by the approach suggested

[20] Id.

[21] Above n 16 at para 22. The question was not before the Supreme Court of Appeal since, as it recorded, the registrar had in each case referred the matters before it to open court. Therefore its opinion that the registrar was entitled to dispose of execution requests in dealing with default judgments was expressly obiter.

[22] *Campus Law Clinic* above n 19 at para 26.

in *Saunderson*. If the matter was taken further to the Supreme Court of Appeal, it seems reasonable to assume that it would not easily overturn a recent decision of its own. The end of that circuitous route would likely find the situation the same as it is before us now, with much time and costs wasted.

[31] As mentioned before, the Banking Association of South Africa was invited to join the proceedings in this Court but chose not to do so. As noted, the NCF did join. The Minister is a party to the proceedings and has indicated that he abides the decision of the Court.

[32] The result is that there has been a comprehensive airing of all the issues surrounding an important constitutional matter from a wide array of perspectives. Finality on the substantive constitutional issue will be to the benefit of all concerned.

[33] As will be seen from [56] below, the prospective effect of any order of constitutional invalidity may have been ameliorated by the coming into operation of the amendment of rule 46(1) of the High Court Rules on 24 December 2010 prior to the hearing of this matter. This amendment does not, however, operate retrospectively. The past can be dealt with by this Court only if the rule is declared to be inconsistent with the Constitution.

[34] I conclude that direct access should be granted in order to determine the constitutionality of the registrar's competence to declare a person's home specially executable, in default judgments granted under rule 31(5)(b). The outcome of that constitutionality enquiry will have a necessary impact on the rescission application and the eviction order. The consequential relief that should follow in respect of each of these applications will be dealt with later in this judgment when remedies and relief are discussed.

Constitutional validity of the High Court Rules and practice

[35] Section 27A of the Supreme Court Act[23] provides that default judgment may be granted in the High Courts by the registrar in accordance with the provisions of the High Court Rules.[24] Rule 31(5) sets out the manner and circumstances under which the registrar may grant and enter default judgment. It is as well to set out its relevant parts:

> "(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

[23] 59 of 1959. The Act must be read together with sections 165, 166(c), 169 and Schedule 6(16) of the Constitution, as well as with the Renaming of High Courts Act 30 of 2008.

[24] Section 27A states:

> "A judgment by default may be granted and entered by the registrar in the manner and in the circumstances prescribed in the Rules made in terms of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), and a judgment so entered shall be deemed to be a judgment of the court."

shall give such defendant not less than 5 days' notice of his or her intention to apply for default judgment.

(b) The registrar may—

(i) grant judgment as requested;

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

(iii) refuse judgment wholly or in part;

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

(v) request or receive oral or written submissions;

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

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

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

(e) . . . ."

[36] As can be seen from this, rule 31(5) makes no explicit reference to orders declaring mortgaged property specially executable. For that reference one needs to turn to rule 45(1), the rule dealing with execution following upon a judgment. It reads:

"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 immovable property has been specially declared executable* by the court or, *in the case of a judgment granted in terms of rule 31(5), by the registrar*, 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 movable property, and the registrar perceives therefrom that the said person has not sufficient movable property to satisfy the writ." (Emphasis added.)

[37] The origin and development of rule 45(1) and the practice of declaring immovable property specially executable at the time of judgment are helpfully set out in *Gerber v Stolze and Others*[25] and *Nedbank Ltd v Mortinson*.[26] For present purposes it is not necessary to re-examine that history in any detail. Suffice it to note that execution upon judgment on a money debt generally took place against movable property first and upon immovable property only if there was insufficient realisable movable property to satisfy the judgment. Initially the practice was that the court had to be approached for an order declaring immovable property executable when movables were insufficient to satisfy the debt, but this practice was soon discontinued.[27] The practice of ordering immovable property specially executable at the time of judgment arose on the basis of practical expediency, namely to circumvent the necessity of first executing against movables where immovable property had been specially hypothecated as security for the debt.[28] The underlying basis for the lack of judicial control over the whole process of execution was that it was an "executive matter which is dealt with by the Registrar."[29]

[25] 1951 (2) SA 166 (T).

[26] Above n 15.

[27] *Gerber* above n 25 at 171F-172C.

[28] Id at 172F-H.

[29] Id at 171E.

[38] The decisions of this Court in *Chief Lesapo v North West Agricultural Bank and Another*,[30] and in *Jaftha*[31] have challenged the notion that the execution process needs no judicial content.

[39] In *Lesapo* the constitutionality of a legislative provision,[32] providing for the seizure of property without recourse to a court of law upon default of payment of a debt, was successfully challenged. In the course of her judgment Mokgoro J stated:

> "The judicial process, guaranteed by s 34, 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."[33]

> "On this analysis, s 34 and the access to courts it guarantees for the adjudication of disputes are a manifestation of a deeper principle; one that underlies our democratic order. The effect of this underlying principle on the provisions of s 34 is that any constraint upon a person or property shall be exercised by another only after recourse to a court recognised in terms of the law of the land."[34]

[30] [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC). See also *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa and Others; Sheard v Land and Agricultural Bank of South Africa and Another* [2000] ZACC 9; 2000 (3) SA 626 (CC); 2000 (8) BCLR 876 (CC).

[31] Above n 14.

[32] Section 38(2) of the North-West Agricultural Bank Act 14 of 1981.

[33] *Lesapo* above n 30 at para 15.

[34] Id at para 16.

[40] In *Jaftha* section 66(1)(a) of the Magistrates' Courts Act[35] was found to violate section 26(1) of the Constitution to the extent that it allowed execution against the homes of indigent debtors, where they lose their security of tenure.[36] In the course of discussing a remedy for the violation, Mokgoro J commented on the suggestion made by the applicants that judicial oversight over the execution process was appropriate in the following terms:

> "It is my view that this is indeed an appropriate remedy in this case. Judicial oversight permits a magistrate to consider all the relevant circumstances of a case to determine whether there is good cause to order execution. The crucial difference between the provision of judicial oversight as a 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."[37]

[41] The combined effect of these two cases is that execution may only follow upon judgment in a court of law. And where execution against the homes of indigent debtors who run the risk of losing their security of tenure is sought after judgment on a money debt, further judicial oversight by a court of law of the execution process is a must.[38]

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[35] 32 of 1944.

[36] Above n 14 at para 52.

[37] Id at para 55.

[38] *Jaftha* above n 14 at para 55.

[42] The Bank did not challenge the necessity of judicial oversight of the execution process in *Jaftha*-like circumstances,[39] but sought to argue that the present case did not fall within the ambit of *Jaftha*. Two grounds were advanced in support of this argument, both said to be buttressed by the Supreme Court of Appeal decision in *Saunderson*. The first was that neither the person of the applicant, nor her property, fell within *Jaftha* protection (the fact-bound argument). The second was linked to the first, but it may also stand on its own feet, namely that mortgaged property is property that does not come within *Jaftha*'s reach, because mortgagors willingly accept the risk of losing their secured property in execution when entering into a mortgage loan agreement (the voluntary placing-at-risk argument). I will deal with each in turn. I prefer to do so without any detailed enquiry into whether the understanding of the import or effect of *Jaftha* by the Supreme Court of Appeal in *Saunderson* is correct. Both grounds advanced by the Bank can be shown to be based on incorrect premises, without reliance on precedent-based reasoning.

[43] There are two different reasons why the fact-bound argument, that neither the applicant nor her property falls within the *Jaftha* category, should not succeed. The first is that the constitutional validity of the rule cannot depend on the subjective position of a particular applicant. It is either objectively valid or it is not.[40] The second is that the fact-bound nature of each case supports the opposite conclusion to the one the Bank advances.

[39] It did not pursue a suggestion, first raised at the oral hearing, that *Jaftha* needed reconsideration.

[40] *Lesapo* above n 30 at para 7; see also cases in above n 10.

Some preceding enquiry is necessary to determine whether the facts of a particular matter are of the *Jaftha*–kind. An enquiry of that sort requires an evaluation that goes beyond merely checking the summons to determine whether it discloses a proper cause of action. On the face of the summons in this case there is nothing to indicate, either way, whether the applicant was indigent or whether the mortgaged property was her home.[41]

[44] The voluntary placing-at-risk argument also runs into difficulty. It is true that a mortgagor willingly provides her immovable property as security for the loan she obtains from the mortgagee and that she thereby accepts that the property may be executed upon in order to obtain satisfaction of the debt. But does that particular willingness imply that she accepts that—

(a) the mortgage debt may be enforced without court sanction;

(b) she has waived her right to have access to adequate housing or eviction only under court sanction under section 26(1) and (3); and

(c) the mortgagee is entitled to enforce performance, in the form of execution, even when that enforcement is done in bad faith?

I think not.

[41] Compare *Saunderson* above n 16 at para 25.

[45] If authority is needed that self-help is inimical to the rule of law, *Lesapo*[42] is that authority. It is also authority that execution upon property in respect of a mortgage debt without court sanction is not allowed.[43]

[46] Mortgage bonds do not ordinarily contain clauses describing the purpose for which the mortgaged property is held by the mortgagor. The applicant's mortgage bond contains no such provision. To agree to a mortgage bond does not without more entail agreeing to forfeit one's protection under section 26(1) and (3) of the Constitution.

[47] In *Jaftha* it is remarked that:[44]

> "Another factor of great importance will be the circumstances in which the debt arose. If the judgment debtor willingly put his or her house up in some manner as security for the debt, a sale in execution should ordinarily be permitted *where there has not been an abuse of court procedure*." (Emphasis added.)

[48] An agreement to put one's property at risk as security in a mortgage bond does not equate to a licence for the mortgagee to enforce execution in bad faith.

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[42] Above n 30 at para 11.

[43] Id at paras 14-6. The Supreme Court of Appeal has held, in a series of cases, that this does not apply to general notarial bonds hypothecating movables. See *SA Bank of Athens Ltd v Van Zyl* 2005 (5) SA 93 (SCA) at paras 13-5*; Juglal NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004 (5) SA 248 (SCA) at paras 25-6; and *Bock and Others v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA) at para 13. This Court has not been called upon to pronounce on this issue.

[44] Above n 14 at para 58. See also *Ntsane* above n 15 at para 85.

[49] I conclude that the willingness of mortgagors to put their homes forward as security for the loans they acquire is not by itself sufficient to put those cases beyond the reach of *Jaftha*. An evaluation of the facts of each case is necessary in order to determine whether a declaration that hypothecated property constituting a person's home is specially executable, may be made. It is the kind of evaluation that must be done by a court of law, not the registrar. To the extent that the High Court Rules and practice allow the registrar to do so, they are unconstitutional.

[50] The Bank suggested that any constitutional invalidity is cured by the provisions in the High Court Rules that allow a registrar to set the matter down for hearing in open court[45] and for dissatisfied parties to set a matter down for reconsideration once they acquired knowledge of the default judgment.[46] Perhaps these provisions might be sufficient for cases where the registrar does not need to make any evaluation. But execution orders relating to a person's home all require evaluation. And the registrar's power to refer the matter to open court, and a party's recourse on getting to know of a default judgment – once the horse has bolted – is a poor substitute for the initial judicial evaluation. In *Jaftha* a similar argument was rejected on the grounds that many debtors would be unaware of these provisions and, in any event, would often be too poor to make proper use of them.[47]

[45] Rule 31(5)(b)(vi).

[46] Rule 31(5)(d).

[47] Above n 14 at para 47.

[51] This finding makes it unnecessary to deal with the further ground advanced by the applicant in support of constitutional invalidity, namely that the right to property is also implicated when property is declared specially executable. I express no view on its merits. This case is confined to the potential invasion of a homeowner's right under section 26(1) and (3) of the Constitution.

[52] The effect of this judgment is to overturn the findings of the Supreme Court of Appeal in *Saunderson* and the Full Court in *Mortinson*, to the extent that they found that the registrar was constitutionally competent to make execution orders when granting default judgment in terms of rule 31(5)(b). This judgment does not, however, suggest that the practical suggestions made in both those cases,[48] to ensure that defendants are alerted to the possibility of the impact that judgment may have on their fundamental rights, should be discarded. To the contrary, those practical directions may also assist courts when evaluating whether to grant execution orders.

[53] Some further cautionary remarks are called for. It is rather ironic that the effect of this judgment is to restore to the courts a function that they exercised for close on a century before the introduction of rule 31(5) in 1994.[49] The change to the original

[48] *Saunderson* above n 16 at para 27 (para 2 of the order); *Mortinson* above n 15 at paras 33-4. See above n 18 for the practice directions adopted by the different High Courts.

[49] The rule was introduced by Government Gazette 15322 GN R2365, 10 December 1993, and amended by Government Gazette 17853 GN R417, 14 March 1997. It has subsequently undergone another amendment in terms

position has been necessitated by constitutional considerations not in existence earlier, but these considerations do not challenge the principle that a judgment creditor is entitled to execute upon the assets of a judgment debtor in satisfaction of a judgment debt sounding in money. What it does is to caution courts that in allowing execution against immovable property due regard should be taken of the impact that this may have on judgment debtors who are poor and at risk of losing their homes. If the judgment debt can be satisfied in a reasonable manner without involving those drastic consequences that alternative course should be judicially considered before granting execution orders.

[54] In *Jaftha*, Mokgoro J, before listing some relevant factors that needed to be considered in judicial oversight of the execution process, warned that "it would be unwise to set out all the facts that would be relevant to the exercise of judicial oversight."[50] Mindful of that warning, I would merely add the following. It must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided.

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of Government Gazette 18956 GN R785, 5 June 1998. See *Gerber* above n 25 at 170H-172H for a history of the procedure dating back to 1902.

[50] Above n 14 at para 56.

Remedies and relief

[55] In view of the conclusion that to the extent that the High Court Rules and practice allow a registrar to grant orders declaring immovable property that is a person's home executable, they are constitutionally invalid; a declaratory order to that effect must be made. What needs to be considered in its light is—

> (a) the just and equitable order in relation to the prospective and retrospective effect of the declaration;[51] and
>
> (b) the individual relief that should be granted in respect of the pending rescission application and the appeal against the eviction order.

[56] To an extent, the prospective effect of the order has been overtaken by events. Rule 46(1) of the High Court Rules was amended with effect from 24 December 2010. The relevant part now reads:

> "(a) No writ of execution against the immovable property of any judgment debtor shall issue until—
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> (i) a return shall have been made of any process which may have been issued against the movable property of the judgment debtor from which it

[51] Section 172 of the Constitution reads:

> "(1) When deciding a constitutional matter within its power, a court—
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> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

> 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 specially executable by the court or, in the case of a judgment granted in terms of rule 31(5), by the registrar: Provided that, where the property sought to be attached is the primary residence of the judgment debtor, no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property."

[57] But what about retrospectivity? In *Jaftha*, this Court placed no limit on the retrospectivity of its order. The declaration of invalidity of the legislative provisions in that matter did not entail, however, that all transfers made subsequent to invalid execution sales were automatically invalid. Individual persons affected by the ruling still needed to approach the courts to have the sales and transfers set aside if granted by default. This was made clear in *Menqa and Another v Markom and Others*.[52] A similar approach should be followed here.

[58] There may be a fear that the decision in this matter will lead to large-scale legal uncertainty about its effects on past matters where homes were declared specially executable by the registrar and sales in execution and transfers followed. The experience following *Jaftha* may be an indication that this fear is overstated. It must be remembered that these orders were issued only where default judgments were granted by the registrar. In order to turn the clock back in these cases aggrieved debtors will first have to apply for the original default judgment to be set aside. In other words, the mere constitutional

[52] 2008 (2) SA 120 (SCA). See also *Campbell v Botha and Others* 2009 (1) SA 238 (SCA).

invalidity of the rule under which the property was declared executable is not sufficient to undo everything that followed.[53] In order to do so the debtors will have to explain the reason for not bringing a rescission application earlier and they will have to set out a defence to the claim for judgment against them.[54] It may be that in many cases those aggrieved may find these requirements difficult to fulfil.

[59] From what has been stated above in relation to the legitimacy of resorting to execution in order to obtain satisfaction of judgment debts sounding in money, and that only deserving cases would justify other means to satisfy the judgment debt, it follows that a just and equitable remedy following upon the declaration of unconstitutionality should seek to ensure that only deserving past cases benefit from the declaration. I consider that this balance may best be achieved by requiring that aggrieved debtors who seek to set aside past default judgments and execution orders granted against them by the registrar must also show, in addition to the normal requirements for rescission, 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.

[53] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at paras 27-38 and *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* [2010] ZACC 26; Case No CCT 39/10, 13 November 2010, as yet unreported at paras 81-5.

[54] *Grant v Plumbers (Pty), Ltd* 1949 (2) SA 470 (O); *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764I-765D; and *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042.

[60] Once these hurdles have been cleared, and it is determined that special execution should not have been allowed, the question of the effect of invalid execution sales and subsequent transfers will 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. Existing legal principles and rules will be sufficient to deal with most cases in a just and equitable manner.

[61] The applicant alleges that she continued to make payments on the bond over a period of approximately four years and that the Bank accepted those payments without letting her know that they were inadequate or unacceptable or that they had obtained default judgment against her. She argued that the Bank could not, under those circumstances, simply proceed in 2007 with an execution order and writ obtained in 2003. It was argued that this amounted to a compromise that novated the judgment debt, or, if not, something less that at least precluded execution without giving her some form of a hearing before proceeding. Alleged abuse of the execution process after granting the order is of a different kind from that following upon a constitutionally invalid process. This is not an issue for us to decide, but it may become an issue in the rescission application and eviction proceedings.[55]

[55] Compare *Garlick Ltd v Phillips* 1949 (1) SA 121 (AD). The idea of good faith underlies the acceptance of many rules of our contract law – see Zimmermann "Good Faith and Equity", in Zimmermann and Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (Juta, Kenwyn 1996) 217-60. In the United States of America both the Uniform Commercial Code, clause 1-304; and the Restatement (2d) of Contracts, clause 205, impose an obligation of good faith in contractual performance *and enforcement*. In Europe good faith generally forms part of contract law, also in the enforcement of the contract. See Zimmermann and Whittaker (eds) *Good Faith in European Contract Law* (Cambridge University Press, Cambridge 2000).

[62] The pending rescission application before the High Court must be referred back to the High Court, with the parties being granted leave to supplement their papers in the light of this Court's judgment. The High Court should then determine the rescission application, in accordance with the guidelines set out in the order made by this Court.

[63] I now consider the application for leave to appeal against the eviction order. The application must be granted because there are prospects of success.

[64] The appeal itself must also succeed on the exceptional basis that the eviction order was granted by the Magistrates' Court, and confirmed by the High Court, on the assumption that there were no prospects of success in the rescission application.[56] Our finding on the constitutional validity of the High Court rule does not predetermine the rescission application. But it does make it clear that rescission is possible. The eviction order was thus granted on the mistaken premise that an execution order against the home of the applicant by the registrar was competent. The registrar's order is, however, inconsistent with the Constitution. The eviction application can be determined only once the rescission application has been finalised. The appeal therefore succeeds to the extent that the eviction order is set aside and the matter is referred back to the Magistrates' Court to be considered after the determination of the rescission application.

[56] In the Magistrates' Court, it was found that the rescission application should have been instituted much earlier. On appeal to the High Court, it was held that the matter was not one that "falls fairly and squarely within the factual situation . . . in *Jaftha*"

Order

[65] The following order is made:

a. The application for direct access is granted.

b. It is declared that it is unconstitutional for a Registrar of a High Court to declare immovable property specially executable when ordering default judgment under rule 31(5) of the Uniform Rules of Court to the extent that this permits the sale in execution of the home of a person.

c. The matter is remitted to the Western Cape High Court, Cape Town for the determination of the rescission application in the light of this judgment.

d. The application for leave to appeal against the eviction order granted by the Magistrates' Court, George, Case No 3291/2008, and confirmed by the Western Cape High Court, Cape Town, Case No A379/2008, is granted.

e. The appeal against the order granted by the Magistrates' Court, George, Case No 3291/2008 and confirmed by the Western Cape High Court, Cape Town, Case No A379/2008, evicting the applicant from Erf 457 and Erf 458 Tyolora, Thembalethu, George, Western Cape, is upheld.

f. The order for eviction is set aside and the costs of the application are reserved.

g. The application for eviction, including the costs issue, is referred back to the Magistrates' Court, George for determination after the finalisation of the rescission application.

h. The second respondent and the third respondent are ordered to pay the costs of the applicant, including the costs of two counsel, jointly and severally.

Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Mogoeng J, Mthiyane AJ, Nkabinde J, Van der Westhuizen J and Yacoob J concur in the judgment of Froneman J.

For the Applicant:	Advocate AM de Vos SC and Advocate S Wilson instructed by Francois van Zyl Attorneys.
For the Second Respondent:	Advocate AM Breitenbach SC and Advocate K Pillay instructed by Herold Gie Attorneys.
For the Third Respondent:	Advocate Nelly Cassim SC instructed by the State Attorney, Johannesburg.
For the Amicus Curiae:	Advocate G Budlender SC, Advocate S Budlender and Advocate A Bodasing instructed by the Legal Resources Centre, Grahamstown.