

# Judicial oversight required for sales in execution of residential property

Gladys Mirugi-Mukundi

*Gundwana v Steko Development CC and Others CCT 44/10 (2011) ZACC 14 [Gundwana case]*

*The Gundwana case was a challenge to the constitutionality of the High Court Rules and practice, which allowed a High Court registrar to grant default judgment, without judicial oversight, declaring immovable property executable. A sale*

*in execution is the act of getting an officer of the court to take possession of the property of a losing party in a lawsuit (judgment debtor) on behalf of the winner (judgment creditor), sell it and use the proceeds to pay the judgment debt.*

Central to the case, therefore, was rule 31(5)(a) of the Uniform Rules of Court (High Court Rules), which sets out the manner and circumstances in which a registrar may grant and enter a default judgment.

The judgment gives effect to the constitutional right to have access to adequate housing and not to be arbitrarily evicted without a court order considering all the relevant circumstances, as guaranteed in section 26 of the Constitution of South Africa. It also reinforces the right not to be arbitrarily deprived of property guaranteed in section 25(1) of the Constitution.

### Facts and decisions of lower courts

In 1995, Ms Elsie Gundwana bought her property in Thembaletu, near George, Western Cape, using a mortgage bond loan from Nedcor Bank. Ms Gundwana used this property as her home, from which she ran the only black-owned bed and breakfast in the area. In 2003, she fell in arrears with her monthly repayments. In November 2003, at the bank's formal application, the High Court registrar granted a default judgment against her and declared the property executable for the debt (para 5).

Ms Gundwana continued to make payments on the bond over the next four years, without the bank letting her know that they were unacceptable because they had obtained a default judgment against her' (para 61). In August 2007, the bank carried out the execution, four years after the default judgment had been granted. The property was sold to Steko Development CC. However, Ms Gundwana did not vacate the property.

The case began in April 2008, in the George Magistrates' Court, where Steko Development CC sought to evict Ms Gundwana. The Court granted the eviction order, despite Ms Gundwana not fully responding to the allegations in the affidavit seeking the eviction (para 10). She appealed the eviction order in the High Court, which dismissed her appeal. The Supreme Court of Appeal also refused further leave to appeal. Ms Gundwana then approached the Western Cape High Court to seek rescission of the 2003 default judgment. Ms Gundwana also approached the Constitutional Court in August 2010, at which time the rescission application was still pending the Constitutional Court's consideration of the case.

### Issues and decision of the Constitutional Court

Ms Gundwana, represented by the Socio-Economic Rights Institute of South Africa (SERI), approached the Constitutional Court to seek permission to appeal against the eviction order as well as direct access to the Constitutional Court to overturn the ruling (para 12). The Constitutional Court found rule 31(5)(a) of the High Court Rules to be constitutionally invalid in as far as it allows the sale in execution of a person's home without judicial oversight.

The Court struck a delicate balance between the property rights of individuals and commercial interests of banks by stating that '[t]o agree to a mortgage bond does

● ● The Court recognised that Ms Gundwana's socio-economic right to have access to adequate housing was threatened. ● ●

not ... entail agreeing to forfeit one's protection [from arbitrary eviction]' (para 46). The Court stated that due regard should be taken of the impact that the sale in execution might have on judgment debtors who were poor and at risk of losing their home (para 53). As such, judicial oversight by a court of law of the execution process is necessary.

The Court further referred to its previous decision in the case of *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (1) BCLR 78 (CC), where it had declared section 66(1)(a) of the Magistrates' Courts Act 32 of 1944 invalid. This was on the basis that the section breached section 26(1) of the Constitution to the extent that it allowed execution against the homes of indigent debtors, resulting in them losing their security of tenure (para 40). In that case, the Constitutional Court noted that judicial oversight had the effect of preventing the unjustifiable sale in execution of the homes of people who, because of their lack of knowledge of the legal process, were ill-equipped to make use of the remedies available to them.

The Court further held that case-by-case analysis was necessary in order to determine whether a declaration might be made that residential property was executable. This kind of evaluation, the Court held, had to be done by a court and not a registrar; allowing the registrar to do so was unconstitutional (para 49).

The Court thus set aside the eviction order and referred the case back to the Western Cape High Court for the determination of the rescission application in the light of the Constitutional Court's decision (para 65).

### Conclusion

The effect of the judgment, as noted by the Constitutional Court, is that it overturns the Supreme Court of Appeal's decision in *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA) and *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W). It was decided in these cases that the High Court registrar was constitutionally competent to make execution orders when granting default judgment in terms of rule 31(5)(b) (para 52).

By allowing Ms Gundwana's application and setting aside the eviction order, the Court recognised that her socio-economic right to have access to adequate housing was threatened. While appreciating the importance of banks enabling citizens to access housing through mortgage loans, the Court ruled that in doing so, the constitutional rights of citizens had to be respected and given due

consideration. As such, the Constitutional Court's judgment cautions courts to give due regard to the impact that the execution of immovable property would have on judgment debtors who are indigent and who may, in addition, risk losing their livelihood (para 53).

Following the *Gundwana* decision, the High Court Rules were amended with effect from 24 December 2010. Debtors seeking to set aside past default judgments and execution orders issued against them by the registrar must first apply for the original default judgment to be set aside before applying for the execution orders to be set aside.

Debtors are also required to give sufficient reason for the delay in bringing the rescission application and why the judgment against them should be set aside. That requirement will undoubtedly limit the number of cases that can be legitimately challenged in courts.

The office of the Deputy Judge President, North Gauteng High Court, issued a practice note in April 2011 to inform legal representatives how the North Gauteng High Court was going to deal with applications for default judgments.

**Gladys Mirugi-Mukundi is a researcher with the Socio-Economic Rights Project**

The full judgment can be accessed at <http://www.saflii.org/za/cases/ZACC/2011/14.pdf>