



CONSTITUTIONAL COURT OF SOUTH AFRICA

Elsie Gundwana v Steko Development CC and Others

Case No: CCT 44/10

Date of Hearing: 10 February 2011

Date Decided: 11 April 2011

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Monday, 11 April 2011, the Constitutional Court delivered judgment in the application lodged by Ms Elsie Gundwana. Default judgment declaring her mortgaged property specially executable was granted in 2003, when she failed to enter an appearance to defend her case in the Magistrates' Court. Pursuant to that judgment, her property was sold in execution to the first respondent, Steko Development CC in 2007. Subsequently, Steko sought and obtained an eviction order against the applicant.

Ms Gundwana unsuccessfully appealed against the eviction order in both the Western Cape High Court as well as the Supreme Court of Appeal. She also lodged an application in the Western Cape High Court for the rescission of the default judgment. This application was postponed to enable her to pursue her application in the Constitutional Court. She approached the Constitutional Court for leave to appeal the eviction order as well as direct access to argue that the execution order was not constitutionally valid.

The key question which arose out of the application for direct access is whether section 27A of the Supreme Court Act and rule 31(5) of the Uniform Rules of Court are unconstitutional in so far as they allow the Registrar of the High Court to grant an order declaring immovable property executable.

The Court found that the willingness of mortgagors to put their homes forward as security for the loans they acquire is not by itself sufficient to permit the Registrar to grant an order declaring immovable property executable. The Court also found that an evaluation

of the facts of each case is necessary in order to determine whether a declaration that hypothecated property constituting a persons home is specially executable, may be made. This determination has to be made by a judicial officer and not a Registrar.

The Court accordingly granted direct access and declared rule 31(5) of the Uniform Rules of Court unconstitutional to the extent that it permits the sale in execution of the home of a person. The Court thus granted leave to appeal in the eviction application in order to remit the rescission application back to the High Court for determination in light of the declaration of unconstitutionality in this judgment.