CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 01/06

THE CAMPUS LAW CLINIC
(UNIVERSITY OF KWAZULU-NATAL
DURBAN) Applicant

versus

STANDARD BANK OF SOUTH AFRICA LTD First Respondent

MINISTER FOR JUSTICE AND CONSTITUTIONAL
DEVELOPMENT Second Respondent

Decided on : 31 March 2006

JUDGMENT

THE COURT:

[1] This is an application for leave to appeal against a judgment of the Supreme Court of Appeal (the SCA) in the matter *Standard Bank of South Africa Ltd v Saunderson and Others.*[1] The applicant applies in the alternative for direct access to this Court.

[2] The applicant, the Campus Law Clinic at the University of KwaZulu-Natal, is a voluntary association having legal personality and the right to sue and be sued. Its

[1] Case no 358/05, as yet unreported judgment handed down on 15 December 2005.

objects include the promotion of legal aid to indigent persons in South Africa and the encouragement of practical legal education. The Campus Law Clinic was not a party to the proceedings in the SCA which led to the judgment against which it seeks leave to appeal nor was it involved as an amicus.

[3] The first respondent is the Standard Bank of South Africa Ltd (Standard Bank). It was a party to the proceedings in the SCA against which the applicant seeks leave to appeal. The second respondent is the Minister for Justice and Constitutional Development (the Minister) who was also not a party to the proceedings in the SCA. The Standard Bank has indicated its intention to oppose both the application for leave to appeal and the application for direct access and lodged an answering affidavit.

[4] The proceedings in the SCA were unusual. The litigation was commenced in the Cape High Court by the Standard Bank when it issued summons separately against nine defendants in circumstances where the defendants were in default in respect of the repayment of home loans. It intended, upon obtaining judgment against the defendants in the High Court, to proceed to execute against the mortgaged property in each case. In eight of the nine cases, the defendants had not filed a notice of intention to defend in the High Court and judgments would ordinarily have been given by the registrar by default.

[5] Section 27A of the Supreme Court Act, 59 of 1959 provides that:

"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."

Rule 31(5) of the Uniform Rules of Court provides as follows:

"(a) Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, if he or she wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the registrar a written application for judgment against such defendant: Provided that when a defendant is in default of delivery of a plea, the plaintiff shall give such defendant not less than 5 days' notice of his or her intention to apply for default judgment.

(b) The registrar may –

(i) grant judgment as requested;

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

(iii) refuse judgment wholly or in part;

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

(v) request or receive oral or written submissions;

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

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

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

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

Rule 45(1) provides as follows:

"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."

[6] These provisions make it plain that where a summons involves a claim for a liquidated amount, the Registrar may, in the absence of an entry of appearance to defend, enter judgment by default. Despite these provisions, the Deputy Judge President of the Cape High Court instructed on 31 May 2005 that the registrar may not grant orders declaring immovable property to be specially executable. This instruction was given in the light of this Court's decision in *Jaftha v Schoeman*.[2]

[7] In that case, this Court was concerned with execution against immovable property in the magistrates' courts and the question whether the procedures for issuing a warrant of execution against such property in the magistrates' courts were inconsistent with the Constitution, and, in particular section 26 of the Constitution.[3] It was argued that the procedure provided for by section 66 of the Magistrates' Courts

[2] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC).

[3] Section 26 provides that:

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

Act 32, of 1944[4] for the issue of a warrant of execution against immovable property was unconstitutional. It empowered the clerk of a magistrate's court to issue a warrant of execution against immovable property without any consideration of whether the effect of that warrant would be to deprive a person unjustifiably of their right of access to housing as protected by section 26(1) of the Constitution.

[8] This Court upheld the argument and declared the provisions of section 66 of the Magistrates' Courts Act, 1944 to be inconsistent with the Constitution. It ordered that this inconsistency be remedied by reading words into the relevant statutory provision so that warrants of execution against immovable property may not be issued by a clerk of the court, but may only be issued by a court after consideration of all relevant circumstances.[5] Relevant circumstances would include the circumstances in which

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[4] Section 66 of the Magistrates Courts Act, 32 of 1944 provides as follows:

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

[5] The order made by the Court in *Jaftha* was the following:

> "1.1 The failure to provide judicial oversight over sales in execution against immovable property of judgment debtors in section 66(1)(a) of the Magistrates' Courts Act 32 of 1944 is declared to be unconstitutional and invalid.
> 1.2 To remedy the defect section 66(1)(a) of the Magistrates' Courts Act 32 of 1944 is to be read as though the words 'a court, after consideration of all relevant circumstances, may order execution' appear before the words 'against the immovable property of the party'.
> 2. The Registrar of this Court shall forward a copy of this judgment to the Law Society of the Cape of Good Hope.
> 3. The ninth respondent is ordered to pay the appellants' costs in the main application from 13 February 2002, as well as the costs of the application for joinder. Such costs shall include the costs of two counsel."

the debt was incurred; attempts by the debtor to pay the debt; the financial situation of the parties; the amount of the debt; and/or whether the debtor is employed.[6]

[9] As a result of the instruction issued to the Registrar in the Cape High Court referred to above, eight of the nine matters in which Standard Bank was seeking to execute against mortgaged property were enrolled as unopposed applications for default judgment before Blignault J in the Cape High Court. The ninth matter, the defendant having filed a notice of intention to defend, was set down for hearing on a summary judgment application simultaneously with the applications for default judgment. Counsel were appointed to act as amici curiae on behalf of the defendants.

[10] The Court held that it did have the power to deal with the applications for default judgment, despite the language of Rule 31.[7] It also held that in the light of the reasoning in *Jaftha*, a registrar of the court would not have the power to issue an order declaring immovable property to be executable.[8] Thirdly, it found that the summons was defective in each case as it should have contained a suitable allegation to the effect that the facts alleged by the plaintiff were sufficient to justify an order of execution despite the provisions of section 26 of the Constitution.[9] The Court accordingly granted judgment in each case but declined to order the mortgaged

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[6] At para 60 of the judgment.

[7] The judgment is now reported as *Standard Bank of South Africa Ltd v Snyders and eight similar cases* 2005 (5) SA 610 (C) at para 15.

[8] Id at para 7.

[9] Id at paras 24 - 25.

properties executable. It also granted leave to the plaintiff to apply to the court again in each matter, after notice to the relevant defendant on amplified papers, for permission to execute against the mortgaged property.[10]

[11] It should be noted that some time after this judgment had been handed down by the Cape High Court, similar proceedings arose in the Johannesburg High Court.[11] In that matter, the Registrar, also concerned about the implications of *Jaftha,* referred an application for default judgment in a mortgage bond matter for hearing before the court. The Deputy Judge President of that division appointed a full bench to hear the matter and consider the following questions:

> "1. Whether the Constitutional Court judgment in *Jaftha v Schoeman and Others* is applicable to applications for default judgments in terms of Rule 31(5)(a) of the Uniform Rules of the High Court in circumstances where the defendant has specially hypothecated immovable property as security for the debt and the plaintiff seeks default judgment against the defendant, as well as an order to have the immovable property declared executable?
> 2. If the judgment is applicable, can such application for default judgment be heard by a Judge in Chambers or must it be heard in open Court?
> 3. If such application can be heard in Chambers, what is the effect, if any, of the Transvaal Rule 3(2)?[12]
> 4. Does the judgment in *Jaftha v Schoeman and Others* apply to Rule 45(1) of the Rules of this Court, [13] and, if it does, how is that Rule to be applied?" [14]
> [Footnotes added]

[10] Id at para 30.

[11] See *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W).

[12] Rule 3(2) of the Transvaal Rules provides as follows:

> "In the Witwatersrand Local Division all motion court matters shall be set down for hearing on Tuesdays and, if a Tuesday is a public holiday, on the following court day."

[13] Rule 45(1) is cited above at para 5.

As in the Cape High Court, counsel were appointed as amici curiae to assist the court.

[12] The Court held in relation to the first question that where a creditor seeks an order declaring mortgaged property to be specially executable, it must lodge with its application for default judgment an affidavit setting out the following:

> "[33.1.1] The amount of the arrears outstanding as at the date of the application for default judgment.
> [33.1.2] Whether the immovable property which it is sought to have declared executable was acquired by means of or with the assistance of a State subsidy.
> [33.1.3] Whether, to the knowledge of the creditor, the immovable property is occupied or not.
> [33.1.4] Whether the immovable property is utilised for residential purposes or commercial purposes.
> [33.1.5] Whether the debt which is sought to be enforced was incurred in order to acquire the immovable property sought to be declared executable or not.
> [33.2] All applications for default judgment where the creditor seeks an order declaring specially hypothecated immovable property executable, where the amount claimed falls within the jurisdiction of the magistrate's court, shall be referred by the Registrar for consideration by the Court in terms of Rule 31(5)(b)(vi)."[15]

[13] It held that such applications should be heard in open court, and the third question accordingly fell away.[16] The Court also held that writs of execution shall contain a note drawing the judgment debtor's attention to the provisions of Rule 31(5)(d) which permits a dissatisfied judgment debtor to set the matter down for

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[14] *Nedbank v Mortinson*, above n 11 at para 4.

[15] Id at para 33.

[16] Id at para 36.

reconsideration by the court within twenty days of obtaining knowledge of the default judgment.[17] In relation to the question of the applicability of the *Jaftha* reasoning to Rule 45(1) it held that Rule 45(1) was indeed defective. In order to remedy that defect it ordered that the Rule be read to include the words "and a court, after consideration of all relevant circumstances, has authorised execution against the immovable property".[18]

[14] Three of the differences between the judgment in the Cape High Court and that in the Johannesburg High Court were that the latter Court (a) did not hold that the summons needed to contain allegations in relation to section 26 of the Constitution; (b) did hold that it would be appropriate for the Registrar to grant an order of execution against immovable property in certain circumstances; and (c) held Rule 45(1) to be unconstitutional and remedied that by reading certain words into Rule 45(1).

[15] To return to the current case. Once the Cape High Court had given its order refusing to declare the mortgaged property specially executable, Standard Bank appealed to the SCA in respect of three of the cases where the issues remained alive between the parties. Once again none of the original defendants appeared in the SCA, but five counsel appeared as amici curiae at the request of the SCA.

[17] Id at para 34.

[18] Id at paras 38 - 39.

[16] The SCA upheld the appeals. It disagreed with the Cape High Court that a registrar could not be authorised to grant orders declaring the properties to be executable. Neither the constitutionality of section 27A nor that of Rule 31 or Rule 45(1) was before the SCA, as they had not been before the Cape High Court. It also held that the Cape High Court had erred in holding that the summons did not contain sufficient allegations to establish the right of the plaintiff to an order granting leave to execute against the mortgaged properties. It reasoned that such allegations, in effect justifying any limitation of the right of access to adequate housing conferred by section 26(1), are not necessary until after a defendant has asserted that an order for execution against the mortgaged properties will infringe his or her section 26(1) right. It accordingly set aside the Cape High Court orders and made an order declaring that the plaintiff may execute against the mortgaged property.

[17] However, it made one further order, reasoning as follows:

> "Bearing in mind that in most cases where an order for execution is sought the defendant has no defence to the claim for payment, and is thus unlikely to seek or obtain legal advice, it seems to us desirable that the defaulting debtor should be informed, in the process of initiating action, that s 26(1) may affect the bond-holder's claim to execution. Should it be held that the negative obligation of s 26(1) binds even the bond-holder, the debtor would have the right to invoke circumstances that may persuade a court to grant extenuation in the execution of the order (albeit that the bond-holder's summons need not attempt to justify in advance a possible constitutional infringement)."[19]

The SCA accordingly issued the following practice direction:

[19] Above n 1 at para 25.

> "The summons initiating action in which a plaintiff claims relief that embraces an order declaring immovable property executable shall, from the date of this judgment, inform the defendant as follows:
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> > 'The defendant's attention is drawn to section 26(1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing. Should the defendant claim that the order for execution will infringe that right it is incumbent on the defendant to place information supporting that claim before the court.'"[20]

[18] The Campus Law Clinic now seeks leave to appeal against that judgment and order, to which it was not a party, on the grounds that it is in the public interest to do so. We accept that there is a public interest in the question of the circumstances in which a creditor might execute against mortgaged property and the procedure which must be followed before such execution is permitted. We also accept that that question raises an important constitutional issue as reflected in *Jaftha.* The Campus Law Clinic avers that it provides legal aid to indigent clients in matters of this sort quite regularly and accordingly has public interest standing in relation to that constitutional issue.

[19] Two issues arise for consideration: (a) whether the Campus Law Clinic has standing in terms of section 38 of the Constitution[21] to apply for leave to appeal to this

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[20] Id at para 27(2).

[21] Section 38 reads as follows:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:
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> (a) anyone acting in their own interest;
> (b) anyone acting on behalf of another person who cannot act in their own name;
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;

Court; and (b) whether it is in the interests of justice that the application for leave to appeal be granted. It is convenient to deal with the first issue now.

[20] Given the broad provisions of section 38 of the Constitution, the fact that the Campus Law Clinic was not a party to the proceedings in any of the three courts mentioned above is not an absolute bar to it being accorded standing to bring an application for leave to appeal. As Yacoob J pointed out in *Lawyers for Human Rights*, section 38 of the Constitution has introduced a radical departure from the common law in relation to standing.[22] In that matter this Court had to decide whether the applicant organisation, a non-profit non-governmental organisation, had standing to challenge provisions of the Immigration Act, 13 of 2002, dealing with the deportation of illegal foreigners. After observing that although it is not ordinarily in the public interest for proceedings to be brought in the abstract, Yacoob J emphasised that this was not an invariable principle, and that there might be circumstances in which it would be in the public interest to bring proceedings even if there was no live case.

[21] The factors that would be relevant would be: whether there is another reasonable and effective manner in which the challenge may be brought; the nature of the relief sought and the extent to which it is of general and prospective application; the range of persons or groups who may be directly or indirectly affected by any order

(d) anyone acting in the public interest; and
(e) an association acting in the interests of its members."

[22] See *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) at paras 14 - 18.

made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the court;[23] the degree of vulnerability of the people affected; the nature of the rights said to be infringed;[24] as well as the consequences of the infringement. The list of factors is not closed. In the circumstances of that case the possibility that the people affected by the provisions concerned would challenge their constitutionality was remote. They may well have left the country before the constitutional challenge could or would materialise even if it was assumed that they would have the resources, knowledge or will to institute appropriate proceedings. Accordingly, objectively speaking, Yacoob J held that it was in the public interest for the proceedings to be brought.

[22] In the present matter the Campus Law Clinic points to what it calls the exceptional circumstances of the case. The proceedings from the start were essentially driven by judicial concern to ensure that in enforcing warrants for sales in execution of properties where mortgage debtors were in default, constitutional rights concerning access to adequate housing be considered. The individual debtors did not actively pursue the matter themselves nor did they instruct counsel to appear. Counsel acting as amici curiae appeared at the request of the respective courts. Once the

[23] These considerations where adopted from a judgment by O'Regan J in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 234.

[24] In a minority judgment of *Lawyers for Human Rights*, Madala J adds that a further important factor is the egregiousness of the conduct at issue. He observes that section 38 introduces far-reaching changes to our approach to standing which takes account of, among other things, the vulnerability of the people previously disadvantaged by apartheid, their socio-economic plight and a concomitant desire to correct the wrongs perpetrated against them over a long period of time. He points out that Canadian courts will as a general rule grant standing as a matter of discretion to a plaintiff who establishes that: (a) the actions raise a serious legal question; (b) The plaintiff had a genuine interest in the resolution of the question; and (c) there is no other reasonable and effective manner in which the question may be brought to court. Above n 22 at paras 73 - 76.

appeal by Standard Bank succeeded in the SCA there was no litigant willing and able to take the matter further. The applicant contends that since the SCA decision will be binding on the High Court, and would be followed by the SCA itself, fresh proceedings would serve no useful purpose, and only involve unnecessary delay and expense. In the light of these considerations, we accept that the applicant has standing to bring an application for leave to appeal in this case.

[23] The second issue that needs to be considered is whether it is in the interests of justice that the application for leave to appeal be granted. In considering the interests of justice in a case such as the present, the desirability of avoiding a piecemeal determination of issues is important. Many of the arguments which the Campus Law Clinic wishes to make go to the question of the constitutionality of section 27A of the Supreme Court Act and Rule 31 of the Uniform Rules of Court − matters that were not before either the High Court or the SCA in this case − and which cannot therefore be considered in an appeal against the SCA judgment. In our view, these issues (as well as the constitutionality of Rule 45(1)) are inextricably entwined with the constitutional issue which the applicant seeks to have resolved on appeal − the question of the circumstances in which a creditor might execute against mortgaged property and the procedure which must be followed before such execution is permitted. Although the applicant simultaneously seeks direct access to the Court on those issues, as will be seen below, we do not think that this is a proper matter for direct access.

[24] In our view, therefore, it is not in the interests of justice that the application for leave to appeal be granted. The substantive issue which the applicant wishes to have adjudicated has not been properly aired on the record in the matter in which it seeks leave to appeal. It would not be appropriate to consider whether the order and practice direction made by the SCA is correct without a consideration of the broader issues.

[25] In reaching this conclusion, we should note that the existence of the SCA judgment is no bar to the Campus Law Clinic or other interested body or person pursuing this matter in other proceedings. The Campus Law Clinic was not a party to the proceedings in the SCA. Moreover, it is clear from the application for direct access that the issues that the Campus Law Clinic wishes to be adjudicated are broader than the issues adjudicated upon by the SCA.

[26] The next question that arises is whether the application for direct access should succeed. That application squarely raises the constitutionality of section 27A of the Supreme Court Act, which provides for a registrar to grant and enter judgments in circumstances contemplated by the Rules, as well as the constitutionality of Rule 31. Clearly these are constitutional matters not directly in issue in the SCA proceedings. 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.[25] Moreover, we think that this is a

[25] See, for example, *Phillips and Others v National Director of Public Prosecutions* 2006 (1) 505 (CC); 2006 (2) BCLR 274 (CC); *National Gambling Board v Premier Kwazulu-Natal and Others* 2002 (2) SA 715 (CC); 2002

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.[26]

[27] In our view the issues raised in the application for leave to appeal and the application for direct access should not be decided in a fragmented fashion. The interests of justice require that they be dealt with in a comprehensive manner on the basis of a fully prepared record to which all interested parties have had the opportunity to contribute.

[28] We accordingly conclude that the application for direct access should be dismissed. We make no order as to costs, as the Campus Law Clinic has sought to raise important constitutional issues in this Court, albeit unsuccessfully.

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(2) BCLR 156 (CC); *Lane and Fey NNO v Dabelstein and Others* 2001 (2) SA 1187 (CC); 2001 (4) BCLR 312 (CC); *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC).

[26] See, for example, *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) at paras 17 – 22.

[29] One last comment should be added. The manner in which this litigation has been approached by the Registrars, Deputy Judge President's and Judges of the various courts and on appeal is to be commended. The willingness of members of the Bar to assist the various courts as amici curiae has undoubtedly been of great value.

The Order

[30] The following order is made:

1. The application for leave to appeal is dismissed.

2. The application for direct access is dismissed.