

# Execution against immovable property : negotiating the tightrope of Section 26

Following a number of court decisions on the impact of section 26 of the Constitution on the procedure relating to applications for default judgment and the issuing of warrants for attachment of immovable property in pursuance thereof, as well as a subsequent practice directive issued in the South Gauteng High Court, some procedural aspects may still seem confusing. A brief account of the case law that led to the prevailing situation is a good starting point in understanding the law as it now stands.

The Constitutional Court held in ***Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*** 2005 (2) SA 140 (CC) that section 66(1)(a) of the Magistrate's Court Act was unconstitutional and ordered that words be read into the section to the effect that a warrant for attachment of immovable property on receipt of a *nulla bona* return in respect of movable property, could only be issued by a "court after consideration of all relevant circumstances". The Court further held that where a debt is a relatively small amount (Mrs Jaftha owed approximately R190 on an account in respect of which her house, bought with assistance of a State subsidy, would be sold in execution) execution of immovable property is not justified.

Following the decision in *Jaftha*, the Registrar of the South Gauteng High Court felt uncomfortable in granting an application for default judgment in a matter involving specially hypothecated property, and referred the application to open court with a number of questions. The Court held in ***Nedbank Ltd v Mortinson*** 2005 (6) SA 462 (W) that default judgment in cases involving specially hypothecated property is a limitation of an owner's property rights which is reasonable and justifiable in terms of section 36(1) of the Constitution. The Court held that the Registrar could deal with such judgments, although he retained the right in terms of the rules to refer such judgments to open court if he considered there to be an abuse of the court procedure or other justifiable reason.

The Court however held that in all other matters, if the *quantum* of the claim fell within the jurisdiction of the Magistrate's Court, the Registrar should refer applications for default judgment to the open court in accordance with the decision in *Jaftha*.

Thereafter, in ***Standard Bank of South Africa Ltd v Saunderson*** 2006 (2) SA 264 (SCA) the Supreme Court of Appeal held that unless a mortgagor can show that his or her rights are infringed in terms of section 26(1) of the Constitution, a bank is not required to justify the granting of an order declaring hypothecated immovable property specially executable. Lastly, in ***Absa Bank Ltd v Ntsane*** 2007 (3) SA 554 (T) the court held that if an outstanding amount on a bond could be settled by the sale of movable assets, the bondholder should place facts before the court to establish that no other reasonable alternative exists than execution of the immovable property.

Following the above decisions, a Practice Directive was issued in the South Gauteng High Court which incorporates much of the principles outlined in the decisions as well as a number of additional matters. The procedure in the Magistrate's Court has also been indirectly affected. What follows is an attempt to explain and simplify these procedures.

### In the High Court

- All applications for default judgment in cases involving hypothecated property should be accompanied by an affidavit stating the amount of the arrears at the date of application for default judgment ; whether the property sought to be declared executable was acquired by means of a state subsidy ; whether the property is occupied or not ; whether it is utilised for residential or commercial purposes and whether the debt which is sought to be enforced was incurred to acquire the said immovable property.
- Applications for default judgment where the creditor seeks an order to declare hypothecated property specially executable where the amount claimed falls within the jurisdiction of the Magistrate's Court, shall be referred by the Registrar to open court in terms of Rule 31(5)(b)(vi). The Registrar may deal with all other applications for default judgment but retains the right to refer any such application to open court.
- A warrant for attachment of immovable property should contain a note drawing the debtor's attention to his or her rights to have the application for judgment heard *de novo* in terms of Rule 31(5)(d).
- The Registrar issues all warrants in respect of attachment of movable and immovable property.

### In the Magistrate's Court

- On receipt of a *nulla bona* return after issuing of a writ in respect of movable property, the judgment creditor is required to bring a substantive application in terms of Section 66 of the Magistrate's Court Act for an order authorising attachment of immovable property and is required to deal with the facts in a supporting affidavit along the same lines as referred to above relating to applications for default judgment in cases of hypothecated immovable property in the High Court.
- In applications for default judgment, based on summonses seeking an order to declare immovable hypothecate property specially executable, the Magistrate considers the granting of the judgment and as such the judgment and the order to execute is dealt with by a court in accordance with the decision in *Jaftha*. Therefore, once default judgment is granted, no further application in terms of section 66 of the Magistrate's Court Act to authorise the warrant should be necessary in such cases. Note that the application for

default judgment in such cases should be accompanied by the same affidavit as that referred to above in section 66 applications.

- In claims to declare hypothecated immovable property executable or when applying to execute against immovable property, if it appears that the outstanding amount on the bond is relatively small or the debt, where a bond is not involved, is small, reasons why the sale of movable property to settle the bond or the claim is not more just and equitable, should be dealt with in the affidavit.

Lastly note that following the order in *Saunderson*, all summonses that require immovable hypothecated property to be declared specially executable, should contain a note drawing the defendant's attention to his rights of access to adequate housing in terms of section 26(1) of the Constitution. It is however not necessary that the plaintiff justifies the order to execute against immovable property. In proceedings relating to eviction, a similar note is advisable.

The following note was prescribed by the Court in *Saunderson's* case :

"The Defendant's attention is drawn to section 26(1) of the Constitution of the RSA which accords 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."

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