

Short notes on:

WARRANTS OF EXECUTION AGAINST IMMOVABLE PROPERTY

When and how are these warrants issued?

Even though immovable property can be acquired by cash sale, most people acquire it by means of applying for a mortgage bond (loan) from a bank (or financial institution).



For many people this is the most valuable asset they own, which as a result (whether mortgaged or not), is often the only or most feasible asset for creditors (or the bank) to attach in settling a debtor's (home owner) outstanding debts.

The constitutional right to housing

The Constitution of South Africa (hereafter referred to as the "Constitution"),¹ is the supreme law of our country thus, all laws must be in compliance therewith.² In terms of section 26 of the Bill of rights,³ everyone has the right to housing. Accordingly, the enactment hereof has resulted in many changes in the law relating to housing (in general) and has affected the process of evictions,⁴ and the issuing (and execution) of warrants of execution against immovable property.⁵

Limiting the Constitutional right: warrants of execution against immovable property

However, no constitutional right is absolute in terms of section 36 of the Constitution, which is often referred to as the limitation clause.⁶ This means that under certain circumstances a person's right to adequate housing in terms of section 26 thereof, can be limited and a court may make any order in accordance therewith.

In practice, a court can make an order limiting the provisions of section 26 by issuing a warrant of execution against immovable property.⁷

Thus, the process acquiring the above is as follows - the (judgement) creditor after obtaining the court's judgement will enforce the said judgement by applying (first) for a warrant of execution against movable property (that authorises the sheriff to attach assets such as cars, household contents, electronics, etc) to be issued. In cases where the attached movable goods do not satisfy the debt (in total), the creditor may apply that

¹ Act 108 of 1996.

² Act 108 of 1996: section 2.

³ "Everyone has the right to have access to adequate housing..."

⁴ Section 26 of chapter 2, Act 108 of 1996.

⁵ Execution against immovable property: Negotiating the tightrope of section 26 by Smith and van Niekerk - De Rebus January / February 2010: 32.

⁶ Act 108 of 1996.

⁷ A warrant of execution is usually issued once a court has reached / entered a judgement against a debtor and is essentially a document issued by the clerk (or registrar) of the court that authorises the sheriff to attach and remove certain assets to settle judgement debts.

a warrant of execution against immovable property be issued (which authorises the sheriff to execute judgement against the debtor's house).⁸

In *Jaftha v Schoeman* 2005 (2) SA 140 CC the constitutional court declared that:

“the provisions of section 66(1) of the Magistrates Court Act 33 of 1944 was unconstitutional and ordered that the words be read into the section to the effect that a warrant of 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 the circumstances.”⁹

It was further held, in this case, that a relatively small debt does not justify a warrant of execution against immovable property to be issued by court.¹⁰

In the case of enforcing the bank's rights to receive payment in terms of a mortgage bond, it was held in *Standard Bank of South Africa v Saunderson and others* 2006 (2) SA 264 SCA that unless, the mortgagor can show that his rights are infringed upon in terms of section 26 of the Constitution, the bank concerned does not have to justify the granting of an order to declare the property executable.¹¹ However, where the amount outstanding on a bond can be settled by the sale of movable property the bank must inform the court hereof.¹²

Thus besides considering the restrictions abovementioned, warrants of execution against immovable property will only be issued, when the following elements have been considered by court:¹³

1. the amount of the arrears,
2. whether or not the property was acquired by means of a state subsidy,
3. whether the property is occupied (or not) and whether it is used for residential or commercial purposes,
4. whether the debt in question was incurred as a result of acquiring the property.

Besides having to comply with the court rules, these applications must further contain a note regarding the debtor's rights in terms of section 26 of the Constitution.¹⁴

⁸ *Jaftha v Schoeman* 2005 (2) SA 140 CC and *Execution against immovable property: Negotiating the tightrope of section 26 by Smith and van Niekerk - De Rebus* January / February 2010: 32.

⁹ *Execution against immovable property: Negotiating the tightrope of section 26 by Smith and van Niekerk - De Rebus* January / February 2010: 32.

¹⁰ *Jaftha v Schoeman* 2005 (2) SA 140 CC.

¹¹ *Execution against immovable property: Negotiating the tightrope of section 26 by Smith and van Niekerk - De Rebus* January / February 2010: 32.

¹² *Execution against immovable property: Negotiating the tightrope of section 26 by Smith and van Niekerk - De Rebus* January / February 2010: 32 and *Absa Bank Ltd v Ntsane and another* 2007 (3) SA 554 T.

¹³ *Execution against immovable property: Negotiating the tightrope of section 26 by Smith and van Niekerk - De Rebus* January / February 2010: 32.

¹⁴ *Execution against immovable property: Negotiating the tightrope of section 26 by Smith and van Niekerk - De Rebus* January / February 2010: 32 and 33.