



rural development
& land reform

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REPUBLIC OF SOUTH AFRICA

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REGISTRAR'S CIRCULAR 4/2011

**Sale in Execution by a Sheriff in accordance with a
Magistrates Court attachment**

Background

In the as yet unreported decision of *The Sheriff for the Magistrates' Court
Kuil's River and Absa Bank Limited vs. the Registrar of Deeds, Cape Town
and Pauline Davids* the interpretation by the deeds office that attachments
issued in terms of section 66 of the Magistrate's Courts Act, 32 of 1944
("the Act") by the Magistrate's Court, was only valid for a period of one
year was dealt with.

Judgment

The judge in the above case agreed with the interpretation in *September
and Another v Nedcor Bank Limited* and Another 2005 (1) SA 500 where
the court considered the wording of section 66 (4) to section 66(5) of the
Act. The court found that the provisions made in sections 4 and 5 for the
lapse and possible extension of warrants of execution clearly only
applied to sales in execution of immovable property, subject to any claim
preferent to that of the judgment creditor.

In that regard it found, albeit *obiter*, that immovable property which is
attached but not subject to some other preferent claim is thus excluded
and still subject to indefinite attachments.

The judge also had the following to say in paragraph (19) of his
judgment:

"To the extent that this office (the deeds office) may be uncertain in
specific instances as to whether or not it may lawfully pass transfer of

immovable property pursuant to a sale in execution, there is no doubt, good sense in its seeking clarification from the judgment creditor, the sheriff or the transferee as to possible existence of a creditor with a claim preferent to that of the execution creditor and/or the validity of the warrant of execution. The only observation I would make in this regard is that nowhere in the Rule 43 or s66 do I detect a duty resting upon the Registrar of Deeds, (obviously, apart from considering its own records) to pro-actively ascertain or determine the existence or ranking of preferent claims over immovable property."

Effect of judgment on examination

Examiners must note that a magistrate's court attachment issued in terms of ss 66(4) – (6) of the Magistrate's Court Act only lapses if immovable property is subject to a claim preferent to that of the judgment creditor, meaning immovable property which is attached, but not subject to a preferent claim is excluded and therefore does not lapse after a period of one year.

Note that Magistrate's Court Rule 43 (3) places a responsibility on the sheriff to ascertain and record whether the said property is subject to any preferent claim or not.

Examiners responsibility where a property is transferred by the Sheriff as a result of a sale as per the provisions of s 66 (2) – (5) of the Magistrate's Court Act, 32 of 1944.

In respect of sales in execution occurring after the lapse of a year from date of attachment, examiners must call for a certificate from the Sheriff which must be on an original letterhead and which clearly states that the property is not subject to any claim preferent to that of the judgment creditor referred to in the notice of attachment . Obviously the status quo remains where the sale in execution occurred within the period of one year from date of attachment.


K. Pillay
Registrar of Deeds
Deeds Office Cape Town.

Date: 9 September 2011