

PROPOSED NEW RULE 56A

APPLICATION TO DECLARE IMMOVABLE PROPERTY EXECUTABLE IN TERMS OF SECTION 66(1)(A) OF THE MAGISTRATES' COURTS ACT

In the case of *Jaftha v Schoeman and Others; Van Rooyen, Scholtz and Others* 2005 (2) SA 140 (CC), the court decided that section 66(1)(a) of the Magistrate's Court Act is unconstitutional because of the "failure to provide judicial oversight over sales in execution against immovable property of judgment debtors".

In view of the decision, it is necessary for a party who wants to execute against immovable property to apply to court for leave to do so. The Magistrates' Courts Committee proposes that the following rule and a prescribed form should be enacted in respect of this type of application.

56A Application to declare immovable property executable

(1) Every application to court for an order under section 66(1)(a) shall be brought on notice to the judgment debtor, all persons who occupy the property and any other party having an interest in the property.

(2) Notice of the application must be served on the parties referred to in subsection (1) not less than 15 days before the date on which the application is set down for hearing.

(3) The notice of application shall be substantially in accordance with Form xxx of Annexure 1 and must advise that –

(i) Any party who wishes to oppose the application or place relevant facts before the court may either appear before the court on the date of the hearing to give evidence or serve on the other parties and file with the clerk of the court, not later than 10 days before the date of the hearing, an affidavit or affidavits setting out the relevant facts.

(ii) Where the respondent or any other party serves and files affidavits as provided for in sub-rule (2)(i), the applicant may file a replying affidavit not later than 12 noon on the day but one preceding the hearing.

(4) At the hearing of the proceedings the court may receive evidence either *viva voce* or by affidavit and may at any time during the hearing postpone the proceedings and direct any party to produce further evidence.

FORM xxx

NOTICE OF APPLICATION TO DECLARE IMMOVABLE PROPERTY EXECUTABLE

In the Magistrate's Court for the District of

held at.....

Case number..... of 19

In the matter between

..... Applicant

and

..... Respondent

Take notice that application in terms of Section 66(1)(a) of the Magistrates Courts Act 32 of 1944 will be made to the above-mentioned Court on theday of, 20..... at for an order in the following terms:

(a) an order declaring the property owned by the respondent, described as.....situated at..... to be executable;

(b) costs;

(c) other or alternative relief.

Further take notice that at the hearing of this application the court will enquire into all the relevant circumstances, which may include the following factors:

- (i) the amount and nature of the debt;
- (ii) the circumstances in which the debt arose;
- (iii) the financial situation of the debtor and his or her family;
- (iv) any attempts made by the debtor to pay off the debt;
- (v) the availability of alternatives which might allow recovery of the debt without the sale in execution of the debtor's property;
- (vi) the hardship which will be caused to the debtor and his or her family, or other occupiers if the sale is permitted;
- (vii) whether the creditor's interest will be adequately protected; and
- (viii) any other relevant factor(s).

The respondent and all interested parties are hereby called upon to appear at the hearing to give evidence with regard to the relevant circumstances and must bring to the hearing all documentation relating to such circumstances.

The respondent and other interested parties may file affidavits containing such evidence not later than 12 noon on the day but one preceding the hearing.

Failure on the part of the respondent or other interested parties to respond to this notice and appear at the hearing may result in the property being

declared executable in the absence of the respondent or such parties and being sold by the sheriff at a sale in execution.

Dated at this day of
....., 20.....

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Applicant/Attorney for the Applicant

To:
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And:
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