

## 45 Execution — general and movables

RS 22, 2023, D1 Rule 45-1

(1) A judgment creditor may, at his or her own risk, sue out of the office of the registrar one or more writs for execution thereof corresponding substantially with Form 18 of the First Schedule.

[Subrule (1) substituted by GN R181 of 28 January 1994 and by GN R981 of 19 November 2010.]

(2) No process of execution shall issue for the levying and raising of any costs awarded by the court to any party, until they have been taxed by the taxing master or agreed to in writing by the party concerned in a fixed sum: Provided that it shall be competent to include in a writ of execution a claim for specified costs already awarded to the judgment creditor but not then taxed, subject to due taxation thereafter, provided further that if such costs shall not have been taxed and the original bill of costs, duly allocated, not lodged with the sheriff before the day of the sale, such costs shall be excluded from his account and plan of distribution.

[Subrule (2) amended by GN R2410 of 30 September 1991.]

(3) Whenever by any process of the court the sheriff is commanded to levy and raise any sum of money upon the goods of any person, he shall forthwith himself or by his assistant proceed to the dwelling-house or place of employment or business of such person (unless the judgment creditor shall give different instructions regarding the situation of the assets to be attached), and there —

- (a) demand satisfaction of the writ and, failing satisfaction,
- (b) demand that so much movable and disposable property be pointed out as he may deem sufficient to satisfy the said writ, and failing such pointing out,
- (c) search for such property.

Any such property shall be immediately inventoried and, unless the execution creditor shall otherwise have directed, and subject to the provisions of subrule (5), shall be taken into the custody of the sheriff: Provided —

- (i) that if there is any claim made by any other person to any such property seized or about to be seized by the sheriff, then, if the plaintiff gives the sheriff an indemnity to his satisfaction to save him harmless from any loss or damage by reason of the seizure thereof, the sheriff shall retain or shall seize, as the case may be, make an inventory of and keep the said property; and
- (ii) that if satisfaction of the writ was not demanded from the judgment debtor personally, the sheriff shall give to the judgment debtor written notice of the attachment and a copy of the inventory made by him, unless his whereabouts are unknown.

[Subrule (3) amended by GN R2410 of 30 September 1991.]

(4) The sheriff shall file with the registrar any process with a return of what he has done thereon, and shall furnish a copy of such return and inventory to the party who caused such process to be issued.

[Subrule (4) amended by GN R2410 of 30 September 1991.]

(5) Where any movable property has been attached by the sheriff, the person whose property has been so attached may, together with some person of sufficient means as surety to the satisfaction of the sheriff, undertake in writing that such property

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shall be produced on the day appointed for the sale thereof, unless the said attachment shall sooner have been legally removed, whereupon the sheriff shall leave the said property attached and inventoried on the premises where it was found. The deed of suretyship shall be as near as may be in accordance with Form 19 of the First Schedule.

[Subrule (5) amended by GN R2410 of 30 September 1991.]

(6) If the judgment debtor does not, together with a surety, give an undertaking as aforesaid, then, unless the execution creditor otherwise directs, the sheriff shall remove the said goods to some convenient place of security or keep possession thereof on the premises where they were seized, the expense whereof shall be recoverable from the judgment debtor and defrayed out of the levy.

[Subrule (6) amended by GN R2410 of 30 September 1991.]

(7)(a) Where any movable property is attached as aforesaid the sheriff shall where practicable and subject to rule 58 sell it by public auction to the highest bidder after due advertisement by the execution creditor in a newspaper circulating in the district in which the property has been attached and after the <sup>1</sup> expiration of not less than 15 days from the time of seizure thereof.

(b) Where perishables are attached as aforesaid, they may with the consent of the execution debtor or upon the execution creditor indemnifying the sheriff against any claim for damages which may arise from such sale, be sold immediately by the sheriff concerned in such manner as seems expedient.

(c) The sheriff shall not later than 15 days before the date of sale either in terms of paragraph (a) or paragraph (b), forward a notice of sale to all other sheriffs appointed in that area.

[Subrule (7) substituted by GN R2004 of 15 December 1967 and amended by GN R608 of 31 March 1989, by GN R2410 of 30 September 1991 and by GN R1343 of 12 December 2008.]

(8) If incorporeal property, whether movable or immovable, is available for attachment, it may be attached without the necessity of a prior application to court in the manner hereinafter provided:

- (a) Where the property or right to be attached is a lease or a bill of exchange, promissory note, bond or other security for the payment of money, the attachment shall be complete only when —
  - (i) notice has been given by the sheriff to the lessor and lessee, mortgagor and mortgagee or person liable on the bill of exchange or promissory note or security as the case may be, and
  - (ii) the sheriff shall have taken possession of the writing (if any) evidencing the lease, or of the bill of exchange or promissory note, bond or other security as the case may be, and
  - (iii) in the case of a registered lease or any registered right, notice has been given to the registrar of deeds.

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- (b) Where movable property sought to be attached is the interest of the execution debtor in property pledged, leased or sold under a suspensive condition to or by a third person, the attachment shall be complete only when the sheriff has served on the execution debtor and on the third person notice of the attachment with a copy of the warrant of execution. The sheriff may upon exhibiting the original of such warrant of execution to the pledgee, lessor, lessee, purchaser or seller enter upon the premises where such property is and make an inventory and valuation of the said interest.

- (c) In the case of the attachment of all other incorporeal property or incorporeal rights in property as aforesaid,

- (i) the attachment shall only be complete when —
    - (a) notice of the attachment has been given in writing by the sheriff to all interested parties and where the asset consists of incorporeal immovable property or an incorporeal right in immovable property, notice shall also have been given to the registrar of deeds in whose deeds registry the property or right is registered, and
    - (b) the sheriff shall have taken possession of the writing or document evidencing the ownership of such property or right, or shall have certified that he has been unable, despite diligent search, to obtain possession of the writing or document;
  - (ii) the sheriff may upon exhibiting the original of the warrant of execution to the person having possession of property in which incorporeal rights exist, enter upon the premises where such property is and make an inventory and valuation of the right attached.

[Subrule (8) amended by GN R2410 of 30 September 1991.]

(9) Attachment of property subject to a lien shall be effected *mutatis mutandis* in accordance with the provisions of sub-paragraph (b) of subrule (8).

(10) Where property subject to a real right of any third person is sold in execution such sale shall be subject to the rights of such third person unless he otherwise agrees.

(11)(a)(i) Subject to any hypothec existing prior to the attachment, all writs of execution lodged with any sheriff appointed for a particular area or any other sheriff before or on the day of the sale in execution shall rank *pro rata* in the distribution of proceeds of the goods sold, in the order of preference referred to in paragraph (c) of rule 46.

(ii) The sheriff conducting the sale in execution shall not less than 10 days prior to the date of sale forward a copy of the notice of sale to all other sheriffs appointed in the district in which he or she has been instructed to conduct a sale in respect of the attached goods.

(iii) The sheriff conducting the sale shall accept from all other sheriffs appointed in that district or any other sheriff a certificate listing any attachment that has been made and showing the ranking of creditors in terms of warrants in the possession of those sheriffs.

(b) If there should remain any surplus, the sheriff shall pay it over to the judgment debtor; and the sheriff shall make out and deliver to him an exact account, in writing of his costs and charges of the execution and sale, which shall be liable to taxation upon application by the judgment debtor, and if upon taxation any sum shall be disallowed, the sheriff shall refund such sum to the judgment debtor.

[Subrule (11) amended by GN R2410 of 30 September 1991.]

(12)(a) Whenever it is brought to the knowledge of the sheriff that there are debts which are subject to attachment, and are owing or accruing from a third person to the judgment debtor, the sheriff may, if requested thereto by the judgment creditor, attach the same, and thereupon shall serve a notice on such third person, hereinafter called the garnishee, requiring payment by him to the sheriff of so much of the debt as may be sufficient to satisfy the writ, and the sheriff may, upon any such payment, give a receipt to the garnishee which shall be a discharge, *pro tanto*, of the debt attached.

(b) In the event of the garnishee refusing or neglecting to comply with any such notice, the sheriff shall forthwith notify the judgment creditor and the judgment creditor may call upon the garnishee to appear before the court to show cause why he should not pay to the sheriff the debt due, or so much thereof as may be sufficient to satisfy the writ, and if the garnishee does not dispute the debt due, or claimed to be due by him to the party against whom execution is issued, or he does not appear to answer to such notice, then the court may order execution to issue, and it may issue accordingly, without any previous writ or process, for the amount due from such garnishee, or so much thereof as may be sufficient to satisfy the writ.

(c) If the garnishee disputes his liability in part, the court may order execution to issue in respect of so much as may be admitted, but if none be admitted then the court may order that any issue or question necessary for determining the garnishee's liability be tried or determined in any manner *mutatis mutandis* in which any issue or question in any action may be tried or determined, or the court may make any such other order in the premises as may be just.

(d) Nothing in these rules as to the attachment of debts in the hands of a garnishee shall affect any cession, preference, or retention claimed by any third person in respect of such debts.

(e) The costs connected with any application for the attachment of debts, and the proceedings arising from or incidental thereto, shall be in the discretion of the court.

(f) Where the sheriff is of opinion that applications to the court or orders with respect to a garnishee will probably cost more than the amount to be recovered thereunder, he may sell such debts, after attachment, by auction, in the same way as any other movable property, or may cede the same at the nominal amount thereof to the judgment creditor with his consent.

(g) Payment of the amount due under and in respect of any writ, and all costs and the like, incidental thereto, shall entitle the person paying to a withdrawal thereof.

(h) to (k) inclusive...

[Subrule (12) inserted by GN R235 of 18 February 1966. Paragraphs (h) to (k) inclusive deleted by GN R608 of 31 March 1989.]

(13) Neither a sheriff nor any person on behalf of the sheriff shall at any sale in execution purchase any of the property offered for sale either for himself or for any other person.

[Subrule (13) inserted by GN R1843 of 1 October 1993.]

## Commentary

**Forms.** Writ of execution, 18; Form of security under rule 45(5), 19.

**General.** Rules 45, 46 and 46A deal with execution in High Court procedure. Whereas rule 45 makes provision for execution in general and against movable property, rule 46 deals with execution against immovable property and rule 46A with execution against residential immovable property. Rules 45, 46 and 46A should, where necessary, be read together with:

- (a) rule 45A, which provides for the suspension of execution;
- (b) the following sections of the Superior Courts [Act 10 of 2013](#) which are reproduced in Volume 1 third edition, Part D:
  - (i) s 42 — scope and execution of process;
  - (ii) s 43 — execution of process by sheriff;
  - (iii) s 44 — electronic transmission of summonses, writs and other process;
  - (iv) s 45 — property not liable to be seized in execution; <sup>2</sup>
  - (v) s 46 — offences relating to execution;
- (c) statutory provisions that place a bar on attachment in execution such as, for example, [s 58A\(4\)](#) of the South African Schools [Act 84 of 1996](#); <sup>3</sup>
- (d) multilateral treaties under which international organizations enjoy immunity from execution. <sup>4</sup>

Rule 45 requires several consecutive steps for the valid attachment in execution of the movable property of a judgment debtor, the most important being: <sup>5</sup>

- (a) the issue of a valid writ of execution;
- (b) a demand that the writ be satisfied;
- (c) if not satisfied, a demand that the judgment debtor point out sufficient movable and disposable property, failing which the sheriff is authorised to search for such property;
- (d) the making of an inventory of the goods;
- (e) subject to rule 45(3) and (5), the sheriff shall take the movables into custody;
- (f) the making of a return of the manner of execution;
- (g) if the judgment debtor does not give an undertaking, and unless the execution creditor directs otherwise, the sheriff shall remove the goods to a convenient place of security or keep possession thereof on the premises where they were seized;

- (h) notice of sale to be forwarded at least 15 days before the date of sale; and
- (i) the sale of the property attached at a sale in execution.

**Subrule (1): 'A judgment creditor.'** It is submitted that the provisions of this subrule, as in the case of its predecessor, contemplate a judgment liability in which the debt or other obligation of the judgment debtor and the matter which is to be enforced by the sheriff are specifically and with certainty described. <sup>6</sup>

A writ may be issued in respect of a judgment which is conditional in the sense of being dependent upon the performance of some act by the judgment creditor. <sup>7</sup> There must nevertheless be certainty as to what the creditor is entitled to under the judgment, and a writ may be set aside if the judgment in respect of which it had been issued is not definite and certain, <sup>8</sup> or if it is no longer supported by its *causa*. <sup>9</sup>

Rule 41(4) provides that judgment may be applied for if a written settlement has not been carried out. There is no provision

in rule 41 that an undertaking in a settlement to pay costs shall have the effect of an order of court. It is clear that in order to execute on an undertaking in a settlement to pay costs, a judgment will have to be obtained and the costs will have to be taxed.<sup>10</sup> A taxed bill of costs alone is not enough to levy execution on an undertaking to pay costs.<sup>11</sup> An *allocatur* does not amount to a judgment for purposes of execution.<sup>12</sup> In the absence of an order that compelled a party to pay the other party's costs, the taxing master has no authority to tax the bill. If the taxing master does so, he acts *ultra vires* and the writ of execution issued falls to be set aside for lack of a *causa*.<sup>13</sup> There is, however, no reason in principle or practice why a judgment for payment of a category of expenses which can be quantified without difficulty should not be able to sustain a writ, if the accrual and the amount of the expenses, on the basis of which liability therefor is established in a judgment, are proved, for example, by an affidavit of the judgment creditor.<sup>14</sup>

**Section 163** of the Labour Relations [Act 66 of 1995](#) provides that an award of the Labour Court is equated with an order of the High Court for purposes of execution.<sup>15</sup> It is submitted

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that its operation is *ex lege* and that once the Labour Court makes an order, it is deemed to have the attributes of an order of the High Court.<sup>16</sup>

**Section 31(1)** of the Arbitration [Act 42 of 1965](#) provides that an award (or interim award) may, on application, be made an order of court by a court of competent jurisdiction.<sup>17</sup> In terms of [s 31\(3\)](#) of the Arbitration [Act 42 of 1965](#) an award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect. In order for an award (or interim award) of costs to be enforceable under rule 45, it must therefore first be made an order of court as contemplated in the Arbitration [Act 42 of 1965](#).

**'At his own . . . risk.'** The effect of these words (which appeared in the former Transvaal rule 67(a)) is not clear. Subrules (3) and (7) make provision for the giving of an indemnity to the sheriff in certain cases. The position has always been that if a judgment creditor authorizes an attachment which causes damage to the judgment debtor or a third party the judgment creditor, and not the sheriff, is liable therefor;<sup>18</sup> but if the sheriff has acted outside the scope of his authority he, and not the creditor, is liable. These words appear merely to be declaratory of the common-law rule that the judgment creditor may be liable for damages if the writ is set aside.<sup>19</sup>

**'Sue out of the office of the registrar.'** In *Rand West City Local Municipality v Quill Associates (Pty) Ltd*<sup>20</sup> Botes AJ purportedly accepted that the decision of the registrar to issue a writ of execution was reviewable under PAJA.<sup>21</sup> On appeal to the Supreme Court of Appeal, reliance on PAJA as a basis for review and for the setting aside of the writ was abandoned. The Supreme Court of Appeal *sub nomine Rand West City Local Municipality v Quill Associates (Pty) Ltd*<sup>22</sup> stated:<sup>23</sup>

'Reliance on PAJA as a basis for review and for the setting aside of the writ was correctly abandoned before us. It is difficult to discern what precisely the high court determined in this regard. It appeared to keep the option of a PAJA-based review open, concluding that the Registrar could not be accused of not applying his mind, whilst at the same time accepting that the basic test is to determine whether a writ is in accordance with the

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court order on which it is premised. It is clear that a writ will be set aside where it does not accord with the order on which it was purportedly issued, or the facts show that the debt has been satisfied, or the order on which it was premised is itself set aside. [*Le Roux v Yskor Landgoed (EDMS) BPK en Andere* [1984 \(4\) SA 252 \(T\)](#) at 257 B-1.] The Registrar does not engage in administrative action when he/she issues a writ. It can and ought to be challenged on the principle of legality.'

**'One or more writs.'** The writ is the source of the sheriff's authority for all actions taken pursuant to the writ. The sheriff derives authority to act from the writ itself and enjoys no residual authority.<sup>24</sup>

**'Corresponding substantially with Form 18 of the First Schedule.'** The verbatim following of Form 18 is not required. The word 'substantially' requires, it is submitted, that the writ must by and large, or materially, comply with the prescribed requirements. It need not in all respects conform to the specimen. In other words, Form 18 may be used with such variation as circumstances require.<sup>25</sup> Form 18 directs the sheriff to 'attach and take into execution the movable goods of the judgment debtor' to be realized by public auction for the sum of the judgment debt. A writ which is overspecific in terms of the movable property to be attached, directing the sheriff to attach only the bank account of a government department, does not correspond substantially with Form 18 and contravenes rule 45(1).<sup>26</sup>

A description of the judgment in a writ of execution is, according to the wording of Form 18, unnecessary and can be omitted. The fact that an incorrect description of the judgment debt is included in a writ of execution does not affect the validity of the writ.<sup>27</sup> The aforesaid does not affect the principle that a writ of execution must be in accordance with the judgment which warrants its issue — a writ which is not warranted by the judgment is liable to be set aside.<sup>28</sup>

**Subrule (2): 'Of any costs awarded by the court . . . until they have been taxed by the taxing master or agreed to in writing . . . in a fixed sum.'** Subrule (1) and this subrule provide for two requirements before a writ of execution can validly be issued for the recovery of costs, viz:

- (a) a judgment or order of a court awarding costs to a party; and
- (b) an agreement on costs or taxation of the bill of costs by the taxing master as contemplated in this subrule.<sup>29</sup>

The subrule permits the inclusion in a writ of costs which have been awarded to the judgment creditor but have not yet been taxed. In order that they may rank in the distribution, however, they must be duly taxed and the original bill lodged with the sheriff before the day of the sale in execution. If the costs have already been taxed when the writ is issued, or the judgment debtor has agreed in writing to pay a fixed sum in respect thereof, such amount may be included in the writ without any further steps being necessary.

It is to be noted that interest on a costs order can only be levied on taxed costs, i.e. the interest is only payable from the date of the taxing master's *allocatur*.<sup>30</sup>

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**Subrule (3): 'He shall . . . forthwith proceed.'** The sheriff should adhere strictly to this subrule and the subrules following upon it,<sup>31</sup> for unless this is done there is no valid attachment.<sup>32</sup>

**'To the dwelling-house or place of employment or business.'** This subrule does not disallow personal service in circumstances where the debtor is not at his home or at his place of employment or business. The subrule allows service at such places in the absence of the debtor. It also allows service at some other location if the assets to be attached are there and presumably if the debtor is not.<sup>33</sup>

If the sheriff presents a writ to the debtor elsewhere than at the house or place of business of the latter, and the debtor takes no objection, the debtor will not be allowed later to rely upon this irregularity.<sup>34</sup> If the judgment debtor has chosen a

*domicilium citandi et executandi* at some other place, service of the writ at such *domicilium* is good. [35](#)

**Subrule (3)(a): 'Demand satisfaction of the writ.'** This subrule requires, for a valid attachment in execution, a demand to be made that the writ of execution be satisfied. [36](#)

**Subrule (3)(b): 'Demand that . . . property be pointed out.'** The words 'point out' imply that the movable property must be something that can be physically pointed out. [37](#) The return should show whether the debtor pointed out the goods; and, if he did not, in whose possession they were attached. If the debtor points out assets which the sheriff deems insufficient, he has no right to release them and make a *nulla bona* return; the sheriff's duty is to make an inventory and valuation of so much movable property as may be pointed out in part execution of the warrant.

A judgment debtor should not be deprived of the opportunity to point out movable property before the sheriff searches for property and proceeds to attach so much of the judgment debtor's movables as is sufficient to satisfy the writ. [38](#)

If the debtor fails to point out assets for attachment on request, the sheriff is authorized by the subrule to proceed to attach and inventory so much of the debtor's movables as he deems sufficient to satisfy the writ. The judgment creditor's right to satisfaction cannot be frustrated by the debtor's refusal or failure to point out assets for attachment. [39](#)

**'Movable.'** Rule 46(1)(a)(i) provides that, subject to the provisions of rule 46A, no writ of execution against the immovable property of any judgment debtor shall be issued unless a return has been made of any process issued against the movable property of the judgment debtor from which it appears that the said person has insufficient movable property to satisfy the writ. Rule 46A applies whenever an execution creditor seeks to execute against the

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residential immovable property of a judgment debtor. See further the notes to rule 46(1)(a)(i) s v 'A return . . . that the said person has insufficient movable property to satisfy the writ' below.

**'Disposable property.'** This phrase has been considered in a number of cases. [40](#) The phrase brings this subrule into line with [s 8\(b\)](#) of the Insolvency [Act 24 of 1936](#) in terms of which a debtor's failure to point out disposable property amounts to an act of insolvency.

See further the notes to subrule (4) s v 'A return of what he has done thereon' below.

**Subrule (3)(c): 'Search for such property.'** The debtor is the person best situated to know what property he has and the whereabouts thereof and if the sheriff fails to enquire from the debtor, when it is possible to do so, what property he has and where it can be found, then the sheriff could hardly be said to have taken all the appropriate steps to ascertain what property the debtor has. [41](#)

**'Shall be immediately inventoried and . . . taken into the custody of the sheriff.'** The attachment process provided for in this subrule contemplates (a) an inventory of the goods which the sheriff proposes to sell; and (b) retention of possession of those goods by the sheriff unless the judgment debtor has given a guarantee that the goods will be produced on the day of sale. A mere inventory coupled with a warning not to make away with the goods is of no effect in effecting a valid attachment. [42](#)

**Subrule (3)(c)(ii): 'Shall give to the judgment debtor written notice of the attachment.'** Failure to comply with the provisions of this subrule may render the attachment and subsequent sale in execution invalid. [43](#)

**Subrule (4): 'A return of what he has done thereon.'** The return of process must be made to the registrar and the party [44](#) at whose instance the process was issued.

See further the notes to [s 44\(1\)](#) of the Superior Courts [Act 10 of 2013](#) s v 'Make return of the manner of execution thereof' in Volume 1 third edition, Part D.

**Subrule (5): 'Where any movable property has been attached.'** Attachment in execution creates a *pignus judiciale*, the effect of which is that the control of the property attached passes from the judgment debtor to the officer entrusted with the execution of the writ. [45](#) However, the *dominium* remains in the debtor, who can up to the last moment before the sale redeem his attached property. [46](#) An attachment operates *in rem*. [47](#)

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The custody and control which the sheriff holds over the attached property in terms of a *pignus judiciale* terminate when insolvency ensues and passes to the Master, and after his appointment to the trustee of the insolvent estate. [48](#)

**Subrule (6): 'Keep possession thereof.'** It has been held that 'keep possession' means leaving an officer in possession and, accordingly, that if the sheriff leaves the goods with the debtor and merely sends an officer occasionally to inquire as to their safety, he does not keep possession and is not entitled to his fees. [49](#)

**Subrule (7)(a): 'The sheriff shall . . . sell it by public auction . . . after due advertisement.'** The sale in execution is an essential step in the process of levying execution; a mere attachment puts nothing in the execution creditor's pocket and does not make available to him the fruits of his judgment. [50](#)

The subrule requires the sheriff himself, and not an agent of the judgment creditor, to sell the property. [51](#) A sale conducted by such an agent is not a sale in terms of the subrule and the property may be recovered from the purchaser by a *rei vindicatio*. [52](#) It is, however, the duty of the judgment (i e execution) creditor to advertise the sale as contemplated in the (amended) [53](#) subrule.

**Section 45** of the Consumer Protection [Act 68 of 2008](#) read with regulations 20-33 sets out the requirements for an auction. In terms of [s 45\(1\)](#) of the Consumer Protection [Act 68 of 2008](#) the word 'auction' in s 45 includes a sale in execution of or pursuant to a court order, to the extent that the order contemplates that the sale is to be conducted by an auction. In *Sheriff, Piketberg v Lourens* [54](#) it was held [55](#) that, despite regulation 22(2) not explicitly mentioning the sheriff of the High Court, it did apply to a sale in execution pursuant to a court order declaring the property executable. Further, having regard to its unique role in the context of auctions, the sheriff must be regarded as a 'rightful holder (who has the right to sell)' as contemplated in the proviso to regulation 22, i e that a 'written agreement' was required '[u]nless the auctioneer is also the owner or the rightful holder (who has the right to sell) of the goods to be auctioned'.

The sale, once completed, can only be interfered with if there was a reviewable irregularity in the process which prejudiced the debtor. Ulterior motives, hidden agendas, etc do not constitute ground for interference. [56](#)

A sale of property of a deceased estate in contravention of [s 30](#) of the Administration of Estates [Act 66 of 1965](#) is null and void, irrespective of whether the attachment of the property took place before or after the death of the deceased. [57](#)

**Subrule (8): 'Incorporeal property.'** This subrule deals with three categories of incorporeal property. Paragraph (a) is

concerned with leases, bills of exchange, promissory notes, bonds and other securities for the payment of money; paragraph (b) is concerned with interests in

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property pledged, leased or sold under a suspensive condition, while paragraph (c) relates to the attachment of all other incorporeal property (that is, other than those types of incorporeal property which are the subject of paragraphs (a) and (b)) or incorporeal rights in property.<sup>58</sup>

Examples of incorporeal property that may be attached are the right, title and interest in an action; <sup>59</sup> the right to money in a banking account; <sup>60</sup> a vested right in an inheritance; <sup>61</sup> intellectual property rights; <sup>62</sup> debts which have been ceded; <sup>63</sup> a member's interest in a close corporation. <sup>64</sup>

Certain rights are so personal that they can never be transferred to anyone else and are accordingly not capable of attachment in execution. <sup>65</sup> These would include, for example, the 'right' to make a will; the 'right' not to be assaulted; the 'right' to freedom of speech and, in the law of cession, where a *delectus personae* is involved. <sup>66</sup>

Attachment of a debtor's interest in a pension fund, the rules of which prohibit attachment, is not competent. <sup>67</sup>

The General Pensions [Act 29 of 1979](#) provides in s 2(1) that no annuity or benefit or right in respect of an annuity or benefit payable under a pension law (as defined in the Act) shall be liable to be attached or subjected to any form of execution under a judgment or order of a court of law. Similar provisions are contained in a number of other Acts dealing with pensions, for example: [s 37A](#) of the Pension Funds [Act 24 of 1956](#); <sup>68</sup> s 2(1) of the Statutory

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Pensions Protection [Act 21 of 1962](#); s 14 of the Aged Persons Act 81 of 1967 (repealed by the Older Persons [Act 13 of 2006](#) which came into operation on 1 April 2010) and [s 20\(3\)](#) of the Social Assistance [Act 13 of 2004](#).

A right to a benefit or gratuity to which any person is entitled under the Occupational Diseases in Mines and Works [Act 78 of 1973](#) is not subject to execution of a judgment or order of a court of law, except at the instance of the Compensation Commissioner for Occupational Diseases in proceedings to recover an amount to which the payee was not entitled. <sup>69</sup> If a person to whom or on whose behalf such a gratuity or benefit (other than a monthly allowance or a pension) has been paid has purchased any movable or immovable property, and the purchase price or not less than one-quarter of the purchase price has been paid out of a gratuity or benefit, the property is not subject to attachment for a debt (or a novation thereof) which arose before the gratuity or benefit in question was paid to or on behalf of the judgment debtor. <sup>70</sup>

The levying of execution upon insurance policy benefits is dealt with in [s 63](#) of the Long-term Insurance [Act 52 of 1998](#).

**'Without the necessity of a prior application to court.'** Previously the leave of the court had to be obtained before incorporeals could be attached in execution. <sup>71</sup> This subrule now makes it possible to attach any type of incorporeal property without a prior application to court. <sup>72</sup> What it does not do is give the judgment creditor the right to choose which of the judgment debtor's movable property must be attached by the sheriff. The subrule, in other words, does not serve as authority for the judgment creditor to choose to only attach a particular incorporeal right belonging to the judgment debtor, and to authorize the registrar to issue a writ that limits the authority of the sheriff to the attachment of specific movable incorporeal property. Subrule (8) cannot derogate from the issuing of a writ as envisaged in subrule (1), in substantial compliance with Form 18. <sup>73</sup>

**Subrule (8)(b): 'The interest of the execution debtor in property pledged, leased or sold under a suspensive condition to or by a third person.'** This subrule clearly provides for the attachment only of the debtor's *interest* in the property concerned.

The purchaser in execution of such interest does not acquire ownership in the goods; what he acquires is the execution debtor's interest in the goods. <sup>74</sup>

In magistrates' courts practice it has been held that under rule 42(2) (which materially corresponds with this subrule), read with the National Road Traffic [Act 93 of 1996](#), a sheriff must give notice of the intention to sell a motor vehicle in execution to both the 'title holder' and 'owner' of the vehicle as defined in the National Road Traffic [Act 93 of 1996](#). <sup>75</sup>

The effect of [s 1\(1\)](#) of the Security by Means of Movable Property [Act 57 of 1993](#) is that the notarial bondholder acquires a real right over the property concerned as if it was pledged to him. <sup>76</sup> Such right constitutes an interest in the property concerned as contemplated in this subrule.

As to property 'leased', see the National Credit [Act 34 of 2005](#).

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**Subrule (8)(c)(i): 'The attachment shall only be complete.'** An attachment will only be complete once the sheriff has complied with all the provisions of this subrule. In terms of subrule (8)(c)(i)(a) the sheriff has to give notice of the attachment in writing to, amongst others, *all* interested parties. <sup>77</sup> Failure by the sheriff to comply with this requirement will render a subsequent sale null and void. <sup>78</sup>

**Subrule (8)(c)(i)(b): 'Of the writing or document evidencing the ownership of such property or right.'** It is essential for the validity of an attachment under this subrule that the sheriff shall take possession of the documents in question or attempt to do so. <sup>79</sup>

**Subrule (8)(c)(ii): 'May make an inventory and valuation of the right attached.'** This subrule does not make it obligatory for the sheriff to make an inventory or valuation of the right attached; it merely empowers him to do so if he thinks it necessary and advisable. <sup>80</sup>

**Subrule (11)(a)(i): 'Lodged with any sheriff . . . before or on the day of the sale.'** In magistrates' courts practice all warrants lodged 'on or before the day immediately preceding the date of the sale in execution' rank *pro rata* in the distribution of the proceeds of the sale in execution. <sup>81</sup> It would seem that the decision in *Humphreys v Pickles* <sup>82</sup> no longer applies. In that case it was held that, by reason of the different times within which a judgment creditor had (at that time) to lodge his writ of execution with the messenger or the sheriff in order to share in the proceeds of execution, where Supreme Court and magistrates' courts writs compete, the creditors thereunder rank, in accordance with the rules of the common law, *pro rata* in respect of the proceeds of the sale in execution.

**Subrule (12)(a): 'Debts . . . subject to attachment, and . . . owing or accruing.'** An accruing debt is a debt not yet actually payable but a debt which is represented by an existing obligation. <sup>83</sup> For example, during the subsistence of a contract of lease the rent payable for the unexpired period of the contract is a debt which is capable of attachment by a garnishee order. <sup>84</sup> The existence of a relationship of debtor and creditor between a third party and the judgment debtor is a

prerequisite for an attachment under this subrule. Thus, for example, the legal relationship between a banking institution and its customer whose account is in credit is that of debtor and creditor<sup>85</sup> and the credit balance of a customer's current account may be the subject of a garnishee order.<sup>86</sup> Similarly, money representing a debt due by a

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third party to the judgment debtor which has been lodged with the sheriff may be made the subject of a garnishee order.<sup>87</sup>

The question whether salary, earnings and emoluments are debts which are subject to attachment within the meaning of this subrule has given rise to diversity of opinion: in *Foley v Taylor*<sup>88</sup> it was held they are, while in *Gouws v Theologo*<sup>89</sup> this view was not approved and not followed. The common-law practice in accordance with the view of Voet is that wages can be arrested, but the portion of the wages that should be garnished is a matter that lies in the discretion of a prudent and circumspect judge.<sup>90</sup> In *Pienaar v Pienaar*<sup>91</sup> the court considered the aforesaid conflicting views and held that the *Foley* approach disregards the discretion of the court and could provide an irresponsible practitioner with a drastic remedy while little or no protection is being afforded to the judgment debtor and, should the whole salary of the judgment debtor be attached, he will not be able to support his dependants.<sup>92</sup> The court<sup>93</sup> accepted the approach followed in the *Gouws* case. It held,<sup>94</sup> however, that since subrules (j) and (k) had been repealed, no legal attachment of an employee's salary could be effected in terms of this subrule without the sanction of the court.

**'Shall be a discharge, pro tanto, of the debt attached.'** The legal relationship created by garnishee procedure and by the order made under it is not that of debtor and creditor, i.e. the judgment creditor does not become a creditor of the garnishee — there is no transfer or cession of the debt to the judgment creditor.<sup>95</sup> The garnishee is obliged to pay the amount stipulated to the garnishor, and any such payment operates as a discharge *pro tanto* of the garnishee's obligation to the judgment debtor.<sup>96</sup> Failure on the part of the garnishee to make payment to the judgment creditor is a breach of his obligation to his creditor, the judgment debtor who may sue him for breach of contract.<sup>97</sup>

**Subrule (12)(c): 'The garnishee disputes his liability.'** The garnishee is not entitled to question the correctness of the judgment against the judgment debtor,<sup>98</sup> but is entitled to raise against the judgment creditor any defence that he could validly raise against the judgment debtor.<sup>99</sup>

**'Be tried and determined in any manner.'** In *Marshall Timbers Ltd v Hauser and Battaglia (Pty) Ltd*<sup>100</sup> the judgment creditor and the garnishee agreed upon the terms of a special case for the adjudication of the court in terms of rule 33.

<sup>1</sup> Subrule (7) was amended by GN R1343 of 12 December 2008 (GG 31690) with effect from 12 January 2009. The word 'the', which is part of the subrule, was omitted from the amendment. This calls for a rectification of the subrule.

<sup>2</sup> The date of commencement of this section of the Act is still to be proclaimed.

<sup>3</sup> As to which, see *Moodley v Kenmont School* 2020 (1) SA 411 (CC).

<sup>4</sup> See Riaan de Jager 'Immunity from jurisdiction and execution by international organisations' 2021 (March) *De Rebus* 16 where, amongst other things, *African Development Bank v TN* 2019 (2) SA 437 (GP) is discussed.

<sup>5</sup> MEC, *Department of Public Works v Ikamva Architects* 2022 (6) SA 275 (ECB) (a decision of the full court) at paragraph [74] (footnotes omitted). On a plain reading of rule 45(3) to (6), it is the sheriff himself who must take the property into his 'custody' and who must 'retain' and 'keep the property that has been attached. Accordingly, it is the sheriff alone who must take into and maintain in his possession the property that has been attached (*Spartan SME Finance (Pty) Ltd In re: Insurance Underwriting Managers (Pty) Ltd v Zululand Bus Services CC* (unreported, GP case no 38929/2022 dated 7 December 2022) at paragraph 35).

<sup>6</sup> Cf *Muniamma v Ramalingam* 1932 NPD 29 at 37; *De Crespiigny v De Crespiigny* 1959 (1) SA 149 (N); *Le Roux v Yskor Landgoed (Edms) Bpk* 1984 (4) SA 252 (T) at 257F; *Road Accident Fund v Nnosa* 2005 (4) SA 575 (T) at 578B and 580D (and see the authorities referred to at 578C–579G). One of the functional components of a judgment is that it is a command to the party at whom it is aimed, coupled in an appropriate case with a warrant to the sheriff to enforce the command (*Lurlev (Pty) Ltd v Unifreight General Services (Pty) Ltd* 1978 (1) SA 74 (D) at 79A). See also *Nu-Shelf Investments CC v Bangaar* 2012 (3) SA 136 (KZD) in which it was held (at 137G–H) that under rule 45(1) and (2) an attachment should be made on a duly taxed bill of costs only if it arose from an order contained in a judgment, such an order or judgment being a prerequisite for the validity of the writ of execution on which the attachment is based.

<sup>7</sup> *McNutt v Mostert* 1949 (3) SA 253 (T) at 255; *Du Preez v Du Preez* 1977 (2) SA 400 (C) at 403.

<sup>8</sup> *De Crespiigny v De Crespiigny* 1959 (1) SA 149 (N); *Ras v Sand River Citrus Estates (Pty) Ltd* 1972 (4) SA 504 (T) at 510E; *Le Roux v Yskor Landgoed (Edms) Bpk* 1984 (4) SA 252 (T) at 257G; *Van Dyk v Du Toit* 1993 (2) SA 781 (O) at 783D.

<sup>9</sup> *Ras v Sand River Citrus Estates (Pty) Ltd* 1972 (4) SA 504 (T) at 510A–E; *Le Roux v Yskor Landgoed (Edms) Bpk* 1984 (4) SA 252 (T) at 257B–D; *Van Dyk v Du Toit* 1993 (2) SA 781 (O) at 783C; *Gois t/a Shakespeare's Pub v Van Zyl* 2011 (1) SA 148 (LC) at 155F–G.

<sup>10</sup> *Road Accident Fund v Nnosa* 2005 (4) SA 575 (T) at 580C–D.

<sup>11</sup> *Road Accident Fund v Nnosa* 2005 (4) SA 575 (T) at 580D.

<sup>12</sup> *Road Accident Fund v Nnosa* 2005 (4) SA 575 (T) at 580D.

<sup>13</sup> *Graphic Laminates CC v Albar Distributors CC* 2005 (5) SA 409 (C) at 412I–J.

<sup>14</sup> *Butchart v Butchart* 1996 (2) SA 581 (W); 1997 (4) SA 108 (W). In this case it was held that it is competent for a judgment creditor to issue a writ of execution to recover amounts for medical, dental, pharmaceutical, hospitalization, ophthalmic, orthodontic and related expenses payable in terms of a settlement agreement incorporated in a divorce order.

<sup>15</sup> Rule 26 of the Rules of the Labour Court provides as follows:

'In terms of section 163 of the Act, service and execution of the court's decisions, judgments or orders must take place in accordance with the procedure for service and execution of decisions, judgments or orders of the High Court of South Africa.'

<sup>16</sup> See *Lea v Maister Directories (1881) (Pty) Ltd* 1994 (1) SA 84 (T) at 87D. This does not, it is submitted, mean that a party who fails to comply with an order of the Labour Court can be committed to a correctional centre for contempt of court by a High Court (see *Food and Allied Workers Union v Sanrio Fruits CC* 1994 (2) SA 486 (T)).

<sup>17</sup> If a successful party approaches the court with such an application under circumstances where the parties have waived their right to have their dispute relitigated or reconsidered, the proper relief for the unsuccessful party who challenges the award on the ground of alleged irregularities or misconduct on the part of the arbitrator is to invoke the review provisions of s 33(1) of the Arbitration Act 42 of 1965 (*Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at 292A–C (in this case, at 292C–301C, the Supreme Court of Appeal analyzed in depth the meaning of the words 'gross irregularity' and 'exceeding powers' in s 33(1)(b) of the Arbitration Act 42 of 1965); *Bantry Construction Services (Pty) Ltd v Raydin Investments (Pty) Ltd* 2009 (3) SA 533 (SCA) at 5411–542B; and see *Termico (Pty) Ltd v SPX Technologies (Pty) Ltd* 2020 (2) SA 295 (SCA); *Insurance Underwriting Managers (Pty) Ltd v Blue Crest Holdings (Pty) Ltd; Blue Crest Holdings (Pty) Ltd v Insurance Underwriting Managers (Pty) Ltd* (unreported, GJ case nos 4327/2021; 38025/2021; 04842/2022 dated 26 January 2023) at paragraph [47]); *Vleissentraal Bethlehem (Pty) Ltd v Konsortium Operations (Pty) Ltd* (unreported, FB case nos 1611/2022; 1728/2022 dated 31 January 2023 — a decision of the full bench) at paragraphs [3]–[4]).

<sup>18</sup> This sentence, appearing in the first edition of this work, is cited with approval in *Butchart v Butchart* 1997 (4) SA 108 (W) at 116C.

<sup>19</sup> See *McNutt v Mostert* 1949 (3) SA 253 (T) at 255.

<sup>20</sup> 2020 (5) SA 626 (GP).

<sup>21</sup> At paragraphs [71]–[82].

<sup>22</sup> Unreported, SCA case no 497/20 dated 26 October 2021.

<sup>23</sup> At paragraph [6].

<sup>24</sup> *Weeks v Amalgamated Agencies Ltd* 1920 AD 218 at 225; MEC, *Department of Public Works v Ikamva Architects* 2022 (6) SA 275 (ECB) (a decision of the full court) at paragraph [75].

<sup>25</sup> This paragraph was referred to with approval in *Kennedy v Nedbank Limited* (unreported, GP case no 73083/2009 dated 11 March 2022) at paragraph 5.10.

- 26 MEC, Department of Public Works v Icamva Architects [2022 \(6\) SA 275 \(ECB\)](#) (a decision of the full court) at paragraph [72].
- 27 De Clerk v Balju van die Hoogereghof, Empangeni [1994 \(3\) SA 564 \(D\)](#) at 568B-C. See also Perelson v Druain 1910 EDL 458; Du Preez v Du Preez [1977 \(2\) SA 400 \(C\)](#).
- 28 See, for example, Cornforth v Dalton and Roux (1922) 43 NLR 116; Albow Bros v Wirth 1924 CPD 251; Sachs v Katz [1955 \(1\) SA 67 \(T\)](#); De Clerk v Balju van die Hoogereghof, Empangeni [1994 \(3\) SA 564 \(D\)](#) at 565I-566I.
- 29 Road Accident Fund v Nnosa [2005 \(4\) SA 575 \(T\)](#) at 578B.
- 30 Administrateur, Transvaal v J D van Niekerk en Genote Bpk [1995 \(2\) SA 241 \(A\)](#).
- 31 Reichenberg v Deputy Sheriff, Johannesburg: *In re Reichenberg v Joel Melamed & Hurwitz* [1992 \(2\) SA 381 \(W\)](#) at 382H; and see Dorasamy v Messenger of the Court, Pinetown [1956 \(4\) SA 286 \(D\)](#) at 289 and Messenger of the Magistrate's Court, Durban v Pillay [1952 \(3\) SA 678 \(A\)](#) at 683.
- 32 Calusa v Nyongwana 1930 NPD 157; Van der Walt v Kolektor (Edms) Bpk [1989 \(4\) SA 690 \(T\)](#); Reichenberg v Deputy Sheriff, Johannesburg: *In re Reichenberg v Joel Melamed & Hurwitz* [1992 \(2\) SA 381 \(W\)](#) at 383F; and see R v Molotsi 1931 EDL 211; R v Van der Westhuizen [1951 \(2\) SA 338 \(C\)](#).
- 33 Wilken and Others NNO v Reichenberg [1999 \(1\) SA 852 \(W\)](#) at 858I.
- 34 De Beer v Isaacson [1929 AD 345](#).
- 35 Gerber v Stolze [1951 \(2\) SA 166 \(T\)](#); Muller v Mulbarton Gardens (Pty) Ltd [1972 \(1\) SA 328 \(W\)](#) at 331.
- 36 Reichenberg v Deputy Sheriff, Johannesburg: *In re Reichenberg v Joel Melamed & Hurwitz* [1992 \(2\) SA 381 \(W\)](#) at 383F; and see Nedbank Ltd v Norton [1987 \(3\) SA 619 \(N\)](#) at 621G. See, however, Cochrane v Ngesman (1906) CTR 222 in which it was held that failure to demand payment if a demand would clearly have been nugatory, will not render an attachment invalid.
- 37 Connolly v Ferguson 1909 TS 195 at 198; Hogan v Messenger, Johannesburg 1915 WLD 101; Poffley v Goldblatt 1933 TPD 222; Samuel v Pagadia [1963 \(3\) SA 45 \(D\)](#).
- 38 MEC, Department of Public Works v Icamva Architects [2022 \(6\) SA 275 \(ECB\)](#) (a decision of the full court) at paragraph [75].
- 39 See Rosenberg v Madnitsky [1948 \(3\) SA 1123 \(T\)](#).
- 40 See, for example, Rose-Innes & Co v Theron 1928 CPD 181; Horace Sudar & Co (Pty) Ltd v Cassja & Co [1950 \(1\) SA 203 \(N\)](#); Natalse Landbou Koöperasie Bpk v Moolman [1961 \(3\) SA 10 \(N\)](#); Barclays Nasionale Bank Bpk v Badenhorst [1973 \(1\) SA 333 \(N\)](#); Nedbank Ltd v Norton [1987 \(3\) SA 619 \(N\)](#).
- 41 Nedbank Ltd v Norton [1987 \(3\) SA 619 \(N\)](#) at 621J-622A.
- 42 Reynolds Groots (SA) Ltd v Wessels [1977 \(1\) SA 583 \(C\)](#) at 585G-586E.
- 43 Van der Walt v Kolektor (Edms) Bpk [1989 \(4\) SA 690 \(T\)](#).
- 44 In terms of rule 1 'party' includes the attorney acting for any party.
- 45 Liquidators Union and Rhodesia Wholesale Ltd v Brown & Co [1922 AD 549](#) at 558-9; Syfrets Bank Ltd v Sheriff of the Supreme Court, Durban Central [1997 \(1\) SA 764 \(D\)](#) at 772; Hiralal v Naicker [2009 \(1\) SA 636 \(D\)](#) at 642F-G; South African Congo Oil Co (Pty) Ltd v Identiguard International (Pty) Ltd [2012 \(5\) SA 125 \(SCA\)](#) at 132E-F. See also Menzies Motor Co (Pty) Ltd v Turkstra [1955 \(3\) SA 408 \(T\)](#) at 412; Liquidator, Mr Spares (Pty) Ltd v Goldies Motor Supplies (Pty) Ltd [1982 \(4\) SA 607 \(W\)](#); Simpson v Klein NO [1987 \(1\) SA 405 \(W\)](#) at 411C-D; Syfrets Bank Ltd v Sheriff of the Supreme Court, Durban Central [1997 \(1\) SA 764 \(D\)](#) at 772E-773D.
- 46 Liquidators Union and Rhodesia Wholesale Ltd v Brown & Co [1922 AD 549](#) at 558-9; South African Congo Oil Co (Pty) Ltd v Identiguard International (Pty) Ltd [2012 \(5\) SA 125 \(SCA\)](#) at 132E-F. See also Menzies Motor Co (Pty) Ltd v Turkstra [1955 \(3\) SA 408 \(T\)](#) at 412; Morrison NO v Rand NO [1967 \(2\) SA 208 \(D\)](#) at 210; Liquidator, Mr Spares (Pty) Ltd v Goldies Motor Supplies (Pty) Ltd [1982 \(4\) SA 607 \(W\)](#); Simpson v Klein NO [1987 \(1\) SA 405 \(W\)](#) at 411C-D; Syfrets Bank Ltd v Sheriff of the Supreme Court, Durban Central [1997 \(1\) SA 764 \(D\)](#) at 772E-773D.
- 47 Symons v The Messenger 1909 TS 749; Barrow v Baker 1911 TPD 957; Grobbelaar v Wilken 1915 OPD 140; Maharaj Brothers v Pieterse Bros Construction (Pty) Ltd and Another [1961 \(2\) SA 232 \(N\)](#) at 238; Menzies Motor Co (Pty) Ltd v Turkstra [1955 \(3\) SA 408 \(T\)](#); Reyners v Rand Bank Bpk [1978 \(2\) SA 630 \(T\)](#).
- 48 Syfrets Bank Ltd v Sheriff of the Supreme Court, Durban Central [1997 \(1\) SA 764 \(D\)](#) at 776E and 778C-D.
- 49 Deputy-Sheriff v Curtis 1910 TS 18; Adjunk-Balju, Vanderbijlpark v Sentraal Westelike Ko-op Maatskappy Bpk [1970 \(2\) SA 124 \(T\)](#) at 127D.
- 50 Mattoida Construction (SA) (Pty) Ltd v E Carbonari Construction (Pty) Ltd [1973 \(3\) SA 327 \(D\)](#).
- 51 Van der Walt v Kolektor (Edms) Bpk [1989 \(4\) SA 690 \(T\)](#) at 696A.
- 52 Van der Walt v Kolektor (Edms) Bpk [1989 \(4\) SA 690 \(T\)](#) at 697B-C.
- 53 Paragraph (a) of subrule (7) was amended by GN R1343 of 12 December 2008 (GG 31690) with effect from 12 January 2009.
- 54 [2016 \(6\) SA 110 \(WCC\)](#).
- 55 At 118G, 119A-1, 120C and 120F.
- 56 Brummer v Gorfil Brothers Investments (Pty) Ltd [1997 \(2\) SA 411 \(T\)](#) at 413J-414A.
- 57 De Faria v Sheriff, High Court, Witbank [2005 \(3\) SA 372 \(T\)](#) at 380D-G; and see Standard Bank of South Africa v Nkahalele [2021 \(5\) SA 642 \(WCC\)](#) at paragraphs [8]-[9].
- 58 See Ormerod v Deputy Sheriff, Durban [1965 \(4\) SA 670 \(D\)](#) at 672H-673A. A clear distinction must be made between execution of a writ under rule 45(8)(c) and one under rule 45(12)(a). The former rule provides for the attachment of 'other' incorporeal rights, for example a judgment debtor's right to moneys standing to its credit in its banking account. Importantly, rule 45(8)(c) does not envisage the attachment of actual moneys but rather the right to the money in the bank account. Like any movable property that is attached, the right must be realised by its sale at a sale in execution. Rule 45(8)(c) does not place any obligation on the bank in question to pay actual moneys to either the sheriff or the judgment creditor. Rule 45(12)(a), instead, contemplates payment of actual moneys. The procedure created by it is not that of an attachment followed by the sale of the attached property at a sale in execution. It creates a garnishee procedure, dealing with execution against debts which are accruing to the judgment debtor (MEC, Department of Public Works v Icamva Architects [2022 \(6\) SA 275 \(ECB\)](#) (a decision of the full court) at paragraphs [77]-[80]).
- 59 Mahabeer v Rajpathi [1961 \(4\) SA 269 \(N\)](#); Madden v BP Southern Africa (Pty) Ltd [1967 \(2\) SA 326 \(D\)](#); Marais v Aldridge [1976 \(1\) SA 746 \(T\)](#) at 750B; Brummer v Gorfil Brothers Investments (Pty) Ltd [1999 \(3\) SA 389 \(SCA\)](#) at 409E-411F; Stratgro Capital (SA) Ltd v Lombard NO [2010 \(2\) SA 530 \(SCA\)](#) at 536D. However, a debtor's right, title and interest in a pending appeal cannot be attached (Soja (Pty) Ltd v Tuckers Land and Development Corporation (Pty) Ltd [1981 \(2\) SA 407 \(W\)](#)).
- 60 Simpson v Standard Bank of SA Ltd [1966 \(1\) SA 590 \(W\)](#); Ormerod v Deputy Sheriff, Durban [1965 \(4\) SA 670 \(D\)](#). In view of the wording of the rule it is not necessary to obtain an order of court for the attachment of the money of the debtor which is in the hands of a third party, for example, a bank.
- 61 Re Ebert v Edy (1893) 8 EDC 95; Humphreys v Engelbrecht 1924 EDL 140; Vrede Ko-op Landboumaatskappy Bpk v Lourens [1962 \(3\) SA 952 \(O\)](#).
- 62 Bieber v Columbia Pictures Industries Inc [1981 \(2\) SA 405 \(W\)](#).
- 63 Ex parte Deputy Sheriff for the District of Kempton Park: *In re JI Case South Africa Ltd v Volkskas Ltd* [1989 \(2\) SA 646 \(T\)](#).
- 64 A member's interest in a close corporation cannot be attached merely by the intention or decision of the sheriff. Some document or similar item representing the interest has to be attached (*Badenhorst v Balju, Pretoria Sentraal* [1998 \(4\) SA 132 \(T\)](#) at 138H-139I). In addition, it is submitted, there has to be actual notice of the attachment to the close corporation failing which the purported attachment will be invalid (see Schmidt v Weaving [2009 \(1\) SA 170 \(SCA\)](#) at 173F-175D).
- 65 Nkwana v Hirsch [1956 \(2\) SA 219 \(T\)](#); Nkwana v Hirsch [1956 \(4\) SA 450 \(A\)](#); Soja (Pty) Ltd v Tuckers Land and Development Corporation (Pty) Ltd [1981 \(2\) SA 407 \(W\)](#) at 410A; McPhee v McPhee [1989 \(2\) SA 765 \(N\)](#) at 768C.
- 66 See Nkwana v Hirsch [1956 \(2\) SA 219 \(T\)](#); Nkwana v Hirsch [1956 \(4\) SA 450 \(A\)](#); Soja (Pty) Ltd v Tuckers Land and Development Corporation (Pty) Ltd [1981 \(2\) SA 407 \(W\)](#) at 410A; McPhee v McPhee [1989 \(2\) SA 765 \(N\)](#) at 768C.
- 67 Vorster v Vorster [1958 \(3\) SA 755 \(T\)](#).
- 68 See ABSA Bank Ltd v Burmeister [2004 \(5\) SA 595 \(SCA\)](#) and Msunduzi Municipality v Natal Joint Municipal Pension/Provident Fund [2007 \(1\) SA 142 \(N\)](#) at 154B-156E.
- 69 Section 131(1).
- 70 Section 131(2).
- 71 See, for example, Suliman v Volkskas Bpk [1956 \(2\) SA 474 \(T\)](#); Lutuli v Hirsch [1956 \(2\) SA 586 \(W\)](#).
- 72 Ormerod v Deputy Sheriff, Durban [1965 \(4\) SA 670 \(D\)](#); MEC, Department of Public Works v Icamva Architects [2022 \(6\) SA 275 \(ECB\)](#) (a decision of the full court) at paragraph [73].
- 73 MEC, Department of Public Works v Icamva Architects [2022 \(6\) SA 275 \(ECB\)](#) (a decision of the full court) at paragraph [73].
- 74 See Trust Bank of Africa Ltd v Imperial Garage and Filling Station [1963 \(1\) SA 123 \(A\)](#).

- 75 *Absa Bank Ltd v Van Eeden* [2011 \(4\) SA 430 \(GSJ\)](#) at 439F.
- 76 *Bokomo v Standard Bank van SA Bpk* [1996 \(4\) SA 450 \(C\)](#) at 454E–F.
- 77 *Stratgro Capital (SA) Ltd v Lombard NO* [2010 \(2\) SA 530 \(SCA\)](#) at 536D–I.
- 78 *Stratgro Capital (SA) Ltd v Lombard NO* [2010 \(2\) SA 530 \(SCA\)](#) at 536H–I.
- 79 *Badenhorst v Balju, Pretoria Sentraal* [1998 \(4\) SA 132 \(T\)](#).
- 80 *Marais v Aldridge* [1976 \(1\) SA 746 \(T\)](#) at 751B. On the application of this subrule, see further *Simpson v Standard Bank of SA Ltd* [1966 \(1\) SA 590 \(W\)](#).
- 81 Magistrates' courts rule 39(2)(a).
- 82 [1925 AD 471](#).
- 83 *Honey and Blankenberg v Law* [1966 \(2\) SA 43 \(SR\)](#) at 48A; see further *Webb v Stanton* (1883) 11 QBD 518 (CA).
- 84 *Honey and Blankenberg v Law* [1966 \(2\) SA 43 \(SR\)](#) at 48B.
- 85 *Ormerod v Deputy Sheriff, Durban* [1965 \(4\) SA 670 \(D\)](#) at 673D.
- 86 Cowen *Negotiable Instruments* 418. A clear distinction must be made between execution of a writ under rule 45(8)(c) and one under rule 45(12)(a). The former rule provides for the attachment of 'other' incorporeal rights, for example a judgment debtor's right to moneys standing to its credit in its banking account. Importantly, rule 45(8)(c) does not envisage the attachment of actual moneys but rather the right to the money in the bank account. Like any movable property that is attached, the right must be realised by its sale at a sale in execution. Rule 45(8)(c) does not place any obligation on the bank in question to pay actual moneys to either the sheriff or the judgment creditor. Rule 45(12)(a), instead, contemplates payment of actual moneys. The procedure created by it is not that of an attachment followed by the sale of the attached property at a sale in execution. It creates a garnishee procedure, dealing with execution against debts which are accruing to the judgment debtor (MEC, *Department of Public Works v Ikamva Architects* [2022 \(6\) SA 275 \(ECB\)](#) (a decision of the full court) at paragraphs [77]–[80]).
- 87 *Henderson & Rowell and Shimwell Bros: In re Lee* (1910) 31 NLR 439; and see *Merber v Xesi* 1917 EDL 105.
- 88 [1971 \(4\) SA 515 \(D\)](#).
- 89 [1980 \(2\) SA 304 \(W\)](#).
- 90 *Shaw and Bosman v Tatham* 1912 WLD 75.
- 91 [2000 \(1\) SA 231 \(O\)](#).
- 92 *Pienaar v Pienaar* [2000 \(1\) SA 231 \(O\)](#) at 240C–E. The Foley approach is also inconsistent with the procedure provided for in [s 651](#) of the Magistrates' Courts [Act 32 of 1944](#) which provides that certain requirements be complied with prior to the issue of a warrant, including notice to the debtor.
- 93 At 240F.
- 94 At 240F.
- 95 *Paramount Furnishers v Lezar's Shoe Store and Outfitters* [1970 \(3\) SA 361 \(T\)](#) at 364; *African Distillers Ltd v Honiball* [1972 \(3\) SA 135 \(R\)](#) at 136H; *Reichenberg v Röntgen* [1983 \(3\) SA 745 \(W\)](#) at 748.
- 96 *Paramount Furnishers v Lezar's Shoe Store and Outfitters* [1970 \(3\) SA 361 \(T\)](#) at 364–5, cited with approval in *Reichenberg v Röntgen* [1983 \(3\) SA 745 \(W\)](#) at 748A–D.
- 97 *Reichenberg v Röntgen* [1983 \(3\) SA 745 \(W\)](#) at 748F.
- 98 *Higgins v Ellery & Noble* (1919) 40 NLR 49.
- 99 *Marshall Timbers Ltd v Hauser and Battaglia (Pty) Ltd* [1976 \(3\) SA 437 \(D\)](#).
- 100 [1976 \(3\) SA 437 \(D\)](#).