42 Execution against movable property (*continued*)

(1) If incorporeal property 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, 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,

(ii) the sheriff shall have taken possession of the document, if any, evidencing the lease, the bill of exchange, promissory note, bond or other security, as the case may be, or has certified that he or she has been unable, despite diligent search, to obtain possession of the document, and

(iii) in the case of a registered lease or any registered right, notice has been given to the registrar of deeds.

(b) (i) Where the incorporeal right in movable property sought to be attached is the interest of the judgment 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 notice of the attachment and a copy of the warrant of execution on the judgment debtor and on the owner of the movable property or any other party who has an interest therein.

(ii) The sheriff may, upon exhibiting the original of such warrant of execution to the owner of the movable property or any other party who has an interest therein, 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 rights in property—

(i) the attachment shall only be complete when—

(aa) notice of the attachment has been given in writing by the sheriff to all interested parties and, where the asset consists of 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

(bb) the sheriff shall have taken possession of the document evidencing the ownership of such property or right, or shall have certified that he or she has been unable to obtain possession of the document, despite diligent search;

(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.

(2) Attachment of property subject to a lien must be effected in accordance with the provisions of sub-rule (1)*(b)*, with necessary changes.

(3) The method of attachment of property under section 32 of the Act shall be the same as that of attachment in execution, with appropriate changes.

[Rule 42 substituted by GN R1604 of 17 December 2021 with effect from 1 February 2022.]

Uniform Rule of Court: 45(8) and (9).

Subrule (1): '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 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.[1]

Examples of incorporeal property that may be attached are the right, title and interest in an action;[2] the right to money in a banking account;[3] a vested right in an inheritance;[4] intellectual property rights;[5] debts which have been ceded;[6] a member's interest in a close corporation.[7]

Certain rights are so personal that they can never be transferred to anyone else and are accordingly not capable of attachment in execution.[8] 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.[9]

Attachment of a debtor's interest in a pension fund, the rules of which prohibit attachment, is not competent.[10]

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;[11] s 2(1) of the Statutory 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.

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[1] See *Ormerod v Deputy Sheriff, Durban* 1965 (4) SA 670 (D) at 672H–673A.

[2] *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)).

[3] *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.

[4] *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).

[5] *Bieber v Columbia Pictures Industries Inc* 1981 (2) SA 405 (W).

[6] *Ex parte Deputy Sheriff for the District of Kempton Park: In re J I Case South Africa Ltd v Volkskas Ltd* 1989 (2) SA 646 (T).

[7] 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).

[8] *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.

[9] 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.

[10] *Vorster v Vorster* 1958 (3) SA 755 (T).

[11] 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.

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.[1] 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.[2]

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.[3] This subrule now makes it possible to attach any type of incorporeal property without a prior application to court.[4]

Subrule (1)*(b)*(i): 'The interest of the judgment debtor in property pledged'. This subrule must be read with s 68(3) of the Act, which provides that the sheriff may attach and sell in execution 'the interest of the execution debtor in any movable property belonging to him and pledged ... to a third person'. It is submitted that the Act provides for the attachment only of the debtor's interest in the pledged property, and that those decisions are correct in which it was held that the property pledged by an execution debtor to a creditor in security for some debt cannot be attached by another creditor who has obtained judgment against him.[5]

'Leased or sold under a suspensive condition to or by a third person'. This subrule must be read with s 68(3) of the Act, for whereas the rule refers only to a sale under a suspensive condition, the Act refers to a sale 'under any hire purchase contract or under a suspensive condition'. It would appear that it makes a difference whether the seller or the buyer is the judgment debtor, since in the former case the Act makes no express mention of a hire-purchase agreement.[6] It is submitted that the words 'under any hire-purchase contract' in s 68(3) are wide enough to include a credit agreement under the National Credit Act 34 of 2005. Legislative intervention to clarify the position beyond doubt is, however, desirable.

If the judgment debtor is the buyer under a hire-purchase agreement or under a sale with a term suspending ownership, his interest may be attached and sold in execution. The purchaser in execution does not acquire ownership in the goods; what he acquires is the judgment debtor's interest in the goods: the right to possess and use the goods and to become the owner when he has paid the instalments due.[7] Such rights are prima facie rights *in personam*,[8] and attachment of a personal right does not have the effect of converting it into a real right

[1] Section 131(1).
[2] Section 131(2).
[3] See, for example, *Suliman v Volkskas Bpk* 1956 (2) SA 474 (T); *Lutuli v Hirsch* 1956 (2) SA 586 (W).
[4] *Ormerod v Deputy Sheriff, Durban* 1965 (4) SA 670 (D).
[5] *Haupt v Hancock* (1841) 2 Menz 347; *Brown v The Messenger of the RM Court, Queenstown* 1876 Buch 79; *Van de Venter v Moss & Webb* (1884) 4 EDC 222; *Payn v Yates* (1892) 9 SC 494; *Andrews v Knight Bros & Gibson* 1906 EDC 251. In *Schoeman NO v Aberdeen Trading Co (Pty) Ltd* 1955 (1) SA 100 (C) at 104 the correctness of these decisions was doubted, but it was not a decision given under a statutory provision similar to this section of the Act. For the same reason the decision in *De Wet NO v Die Bank van die Oranje Vrystaat Bpk* 1968 (2) SA 73 (O) is not applicable to magistrates' courts proceedings under this section. See further the notes to s 68 sv 'Interest ... in any movable property ... pledged' in vol I.
[6] See the notes to s 68(3) in vol I.
[7] *Trust Bank of Africa Ltd v Imperial Garage and Filling Station* 1963 (1) SA 123 (A).
[8] *Perumal v Messenger of the Court* 1953 (2) SA 734 (N).

in the property.[1] The goods themselves cannot be attached and sold while the ownership remains in the seller[2] except at the instance of the seller.

The interest of the judgment debtor in goods sold to him under a hire-purchase agreement may be attached and sold in execution at the instance of the seller[3] or a cessionary of the seller.[4]

Since the right of the purchaser in a hire-purchase agreement is a right *in personam* and is to be classed as a movable, such right is attachable under this subrule even where the hire-purchase agreement relates to the sale of immovable property.[5]

Under 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.[6]

Subrule (1)*(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 (1)*(c)*(i)*(aa)* the sheriff has to give notice of the attachment in writing to, amongst others, *all* interested parties.[7] Failure by the sheriff to comply with this requirement will render a subsequent sale null and void.[8]

Subrule (1)*(c)*(i)*(bb)*: 'Of the document evidencing the ownership of such property'. 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.[9]

Subrule (1)*(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 and valuation of the right attached; it merely empowers him to do so if he thinks it necessary and advisable.[10]

Subrule (3): 'The method of attachment of property under section 32'. Section 32 of the Act provides for the attachment of property in security of rent.[11] This subrule provides for the method of the attachment, not the effect thereof.[12] A magistrate's court hearing an *ex parte* application in terms of s 32 is not entitled to order that the goods be removed. In terms of this subrule the removal of the goods is something that can take place only after the provisions of rule 41 relating to execution have been complied with.[13]

'Shall be the same as that of attachment in execution'. This subrule renders the provisions of rule 41(7)*(a)* applicable to the attachment of property in security for rent in terms of s 32 of the Act.[14] The registrar or clerk of the court must accordingly follow the instructions of the landlord, if properly given, as to the immediate removal of the property attached and convey such instructions to the sheriff.[15]

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[1] *Menzies Motor Co (Pty) Ltd v Turkstra* 1955 (3) SA 408 (T).
[2] *Gool v Rahim* 1938 CPD 397 at 399.
[3] *Perumal v Messenger of the Court* 1953 (2) SA 734 (N).
[4] *Trust Bank of Africa Ltd v Imperial Garage and Filling Station* 1963 (1) SA 123 (A).
[5] *Nathan & Co v Sheonandan* 1963 (1) SA 179 (N) at 182.
[6] *Absa Bank Ltd v Van Eeden* 2011 (4) SA 430 (GSJ) at 439F.
[7] *Stratgro Capital (SA) Ltd v Lombard NO* 2010 (2) SA 530 (SCA) at 536D–I.
[8] *Stratgro Capital (SA) Ltd v Lombard NO* 2010 (2) SA 530 (SCA) at 536H–I.
[9] *Badenhorst v Balju, Pretoria Sentraal* 1998 (4) SA 132 (T).
[10] *Marais v Aldridge* 1976 (1) SA 746 (T) at 751B. On the application of the similar rule in High Court practice, see *Simpson v Standard Bank of SA Ltd* 1966 (1) SA 590 (W).
[11] See further the notes to s 32 in vol I.
[12] See *Eight Kaya Sands v Valley Irrigation Equipment* 2003 (2) SA 495 (T) at 504F.
[13] See *Timmerman v Le Roux* 2000 (4) SA 59 (W) at 65H–66A.
[14] See *Letsoho Developers (Pty) Ltd v Messenger of the Magistrate's Court, Alberton* 1993 (2) SA 634 (W) at 636D.
[15] See *Letsoho Developers (Pty) Ltd v Messenger of the Magistrate's Court, Alberton* 1993 (2) SA 634 (W) at 636E.