



(1) If a plaintiff or applicant does not appear at the time appointed for the trial of an action or the hearing of an application, the action or application may be dismissed with costs.

(2) If a defendant or respondent does not so appear, a judgment (not exceeding the relief claimed) may be given against him or her with costs, after consideration of such evidence, either oral or by affidavit, as the court deems necessary.

(3) The withdrawal or dismissal of an action or a decree of absolution from the instance shall not be a defence to any subsequent action, but if a subsequent action is brought for the same or substantially the same cause of action before payment of the costs awarded on such withdrawal, dismissal or decree of absolution, the court may on application, if it deems fit and if the said costs have been taxed and payment thereof has been demanded, order a stay of such subsequent action until such costs **[shall be]** shall have been paid and that the plaintiff shall pay the costs of such application.

(4) If both parties do not appear at the time allocated for the trial of an action or the hearing of an application, the action or application shall be struck off the roll."

### Substitution of rule 38 of the Rules

13. The following rule is hereby substituted for rule 38 of the Rules:

#### "Security by **[judgment]** execution creditor

38. (1) **[Where the sheriff is in doubt as to the validity of any attachment or contemplated attachment, he or she may require that the party suing out the process in execution shall give security to indemnify him or her]** If there is a claim made by any person to any property seized, or about to be seized by the sheriff, then, if the execution creditor gives the sheriff security to his or her satisfaction, to indemnify the sheriff against any loss or damage by reason of the seizure thereof, the sheriff shall retain or seize, as the case may be, and keep the said property.

(2) Unless the summons commencing the action has been served upon the defendant personally or **[he or she]** the defendant has delivered notice of intention to defend or notice of attachment has been given to **[him or her personally]** the defendant personally—

(a) (i) if any property **[corporeal or incorporeal]** is attached in execution, the execution creditor shall, at least 10 days before the day appointed for the sale of such property give security to the satisfaction of the sheriff for the payment to the **[execution]** judgment debtor or any person if such attachment **[be]** is set aside, of any sum which the **[execution]** judgment debtor or such person may in

law be entitled to recover from the execution creditor for damages suffered by reason of such attachment or of any proceedings consequent thereon; and

(ii) if security **[be]** is not given, the attachment shall **[cease to have effect:]** be automatically suspended until security is given: Provided that—

(aa) the said attachment lapses after a period of four months from the date of the attachment; and

(bb) **[Provided that]** the execution debtor may, by endorsement to that effect on the warrant of execution, dispense with the giving of security under this rule; or

(b) if **[moneys are]** money is received by the sheriff under any form of execution **[otherwise]** other than [as] from the proceeds of the sale in execution of property **[in respect of the attachment of which]** and security has been given in terms of paragraph (a) in respect thereof, such **[moneys]** money shall not be paid to the execution creditor until he or she has given security for the restitution of the full amount received by the sheriff if the attachment **[be]** of the money is thereafter set aside: Provided that the **[execution]** judgment debtor may in writing over his or her signature dispense with the giving of such security.

(3) The prescribed fee for security given under this rule shall without taxation be recoverable as part of the costs of execution.

(4) Any surety bond or other document of security given in terms of this rule may be sued upon by the **[execution]** judgment debtor or any person entitled thereto, without formal transfer thereof to him or her.

(5) This rule shall not apply where the party suing out the process in execution or the execution creditor is **[a Minister, a Deputy Minister or a Provincial Premier, in his or her official capacity, the State or a provincial government]** represented by Legal Aid South Africa."

#### **Substitution of rule 39 of the Rules**

14. The following rule is hereby substituted for rule 39 of the Rules:

#### **"General provisions regarding execution**

39. (1) Unless otherwise ordered by the court, the costs and expenses of issuing a warrant and levying execution shall be a first charge on the

proceeds of the property sold in execution and may so far as such proceeds are insufficient be recovered from the **[execution] judgment** debtor as costs awarded by the court.

(2) (a) Subject to any hypothec existing prior to attachment, all warrants of execution lodged with any sheriff appointed for a particular area or any other sheriff on or before the day immediately preceding the date of the sale in execution shall rank *pro rata* in the distribution of the proceeds of the goods sold in execution, in the order of preference referred to in rule 43(14)(c).

(b) The sheriff conducting a 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 for the area in which **[he or she] the sheriff** has been instructed to conduct a sale in respect of the attached goods.

(c) The sheriff conducting a sale in execution shall accept from all other sheriffs appointed for that area 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.

(3) (a) Withdrawal of attachment shall be effected by note made and signed by the sheriff on the warrant of execution that the attachment is withdrawn, stating the time and date of the making of such note.

(b) The sheriff shall give notice in writing of a withdrawal of attachment and of the time and date thereof to the execution creditor, the **[execution] judgment** debtor, all other sheriffs appointed for that area or any other sheriff who has submitted a certificate referred to in sub-rule (2)(c) and to any other person by whom a claim to the property attached has been lodged with **[him or her] the sheriff**: Provided that the property shall not be released from attachment for a period of four months if a certificate referred to in sub-rule (2)(c) or an unsatisfied warrant of execution lodged under sub-rule (2) remains in the hands of the sheriff.

(4) If any property attached in execution is claimed by any third party as his or her property or any third party makes any claim to the proceeds of property so attached and sold in execution, the sheriff shall, subject to sub-rule (5), deal with such matter as provided in rule 44.

(5) Notwithstanding a claim to property referred to in sub-rule (4) by a third party, the sheriff shall attach such property if **[he or she] the sheriff** has not yet done so, and the property shall remain under attachment pending the outcome of interpleader proceedings unless sooner released from attachment upon order of the court or otherwise, and **[rule 41(7) shall mutatis mutandis apply]** sub-rules 41(14), (17) and (18) shall apply with appropriate changes to property so attached.

(6) (a) On completion of any sale in execution of property, whether movable or immovable, the sheriff shall attach to **[his or her] the sheriff's** return a vendue roll showing details of the property sold, the prices realised, and, where known, the names and addresses of the purchasers and an account of the distribution of the proceeds and shall send a copy of such vendue roll to all other sheriffs appointed for that area who have submitted certificates referred to in sub-rule (2)(c).

(b) Where a warrant of execution has been lodged with the sheriff conducting a sale in execution by any other sheriff referred to in sub-rule (2)(a), the sheriff conducting the sale shall make payment in terms of a distribution account to any sheriff who submitted a certificate referred to in sub-rule (2)(c) in respect of that sale.

(c) Payment in terms of a distribution account shall only be made after the distribution account has lain for inspection for a period of 15 days after the sheriff who has lodged a warrant of execution with the sheriff who conducted the sale, has received a copy of the distribution account.

(7) No sheriff or person on behalf of the sheriff shall at a sale in execution purchase any of the property offered for sale either for himself or herself or for any other person."

#### **Substitution of rule 41 of the Rules**

15. The following rule is hereby substituted for rule 41 of the Rules:

#### **"Execution against movable property**

41. (1) An execution creditor may, at his or her own risk, issue out of the office of the registrar or clerk of the court one or more warrants of execution in a form corresponding substantially with form 32 of Annexure 1.

(2) (a) No process of execution shall be issued for the recovery of any costs awarded by the court to any party, until such costs have been taxed by the taxing master or agreed to in writing by the party liable for the payment of such costs in a fixed sum.

(b) (i) A claim for specified costs already awarded to the execution creditor, which costs are still to be taxed, may be included in the warrant of execution.

(ii) If such costs are subsequently taxed, they shall be included in the sheriff's account and plan of distribution only if the original bill of costs has been duly allocated and lodged with the sheriff before the date of the sale in execution.

(3) When the sheriff is instructed, by any court process, to recover any sum of money by execution against the goods of any person, the sheriff shall proceed forthwith to the residence, place of employment or business of such person, unless the execution creditor or the instructing attorney gives different instructions regarding the location of the assets to be attached, and there —

(a) demand satisfaction of the warrant and, failing satisfaction,

(b) demand that so much movable and disposable property be pointed out as the sheriff may deem sufficient to satisfy the said warrant, and failing such pointing out;

(c) search for such property.

(4) If on demand the **[execution] judgment** debtor pays the judgment debt and costs, or part thereof, the sheriff shall endorse the amount paid and the date of payment on the original and copy of the warrant, which endorsement shall be signed by **[him or her] the sheriff** and counter-signed by the **[execution] judgment** debtor or his or her representative.

(5) If the property pointed out in terms of **[paragraph (a)] sub-rule (3)(b)** is insufficient to satisfy the warrant, the sheriff shall nevertheless proceed to make an inventory and valuation of so much movable property as may be pointed out in part execution of the warrant.

(6) If the **[execution] judgment** debtor does not point out any property as required in terms of sub-rule **(3)(b)**, the sheriff shall immediately make an inventory and valuation of so much of the movable property belonging to the **[execution] judgment** debtor as **[he or she] the sheriff** may deem sufficient to satisfy the warrant or of so much of the movable property as may be found in part execution of the warrant.

(7) **[So] In so far as may be necessary [to] for** the execution of any warrant **[referred to in sub-rule (1)]**, the sheriff may open any door on any premises, or of any piece of furniture, and if **[opening] access** is refused or if there is no person there who represents the person against whom such warrant is to be executed, the sheriff may, if necessary, use force or a locksmith to that end.

(8) The sheriff shall exhibit the original warrant of execution and **[shall] hand** to the **[execution] judgment** debtor or leave on the premises a copy thereof.

(9) The sheriff shall sign and hand a copy of an inventory made under this rule **[, signed by himself or herself]** to the **[execution] judgment** debtor or leave the same on the premises, which copy shall have **[subjoined] appended** thereto a notice of the attachment in a format that corresponds substantially with form 33 of Annexure 1.

(10) As soon as the requirements of this rule have been complied with by the sheriff, the goods inventoried by **[him or her]** the sheriff shall be deemed to be judicially attached.

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

(12) Where perishables are attached, they may, with the consent of the judgment 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 may be expedient.

(13) Where **[specie]** money and documents are found and attached, the amount of money or number and kinds **[thereof]** of documents shall be specified in the inventory, and any such **[specie]** money or documents shall thereupon be sealed and removed to the office of the sheriff **[where it shall be safely]** and securely stored.

(14)(a) **[The execution creditor or his or her attorney shall, where]** Where movable property, other than **[specie]** money or documents, has been attached, the execution creditor or his or her attorney shall after notification of such attachment, instruct the sheriff in writing, whether the property shall be removed to a place of security or left upon the premises in the charge and custody of the **[execution]** judgment debtor or in the charge and custody of some other person acting on behalf of the sheriff. **[: Provided that]**

(b) Upon the execution creditor or his or her attorney **[may, upon]** satisfying the registrar or clerk of the court **[, who shall endorse his or her approval on the document containing the instructions,]** in writing of the desirability **[of]** for the immediate removal of goods attached, either upon issue of the warrant of execution or at any time thereafter, the registrar or clerk of the court shall endorse his or her approval on the document containing the instructions, and **[instruct]** authorise the sheriff in writing, to remove immediately from the possession of the **[execution]** judgment debtor all or any of the movable property attached **[articles reasonably believed by the execution creditor to be in the possession of the execution debtor]**.

(c) In the absence of any instruction under paragraph (a) or authorization under paragraph (b), the sheriff shall leave the attached property, other than **[specie]** money or documents, on the premises and in the possession of the person in whose possession the said movable property is attached.

(15) (a) Any person whose movable property has been attached by the sheriff may, together with some person of sufficient means who binds himself or herself

as surety to the satisfaction of the sheriff, undertake in writing to produce such property on the date appointed for the sale thereof, whereupon the sheriff shall leave the said property attached and inventoried on the premises where it was found.

(b) The deed of suretyship shall be in the form that corresponds substantially with form 37A of Annexure 1.

(16) (a) If the judgment debtor does not, together with a surety, give an undertaking as contemplated in sub-rule (15)(a), then, unless the execution creditor directs otherwise, the sheriff shall remove the said goods to a convenient place of security or keep possession thereof on the premises where they were attached.

(b) The costs of such removal or storage shall be recoverable from the judgment debtor and defrayed out of the proceeds of the sale in execution.

(17)(a) Where a sheriff is instructed to remove the movable property, he or she shall do so without any avoidable delay, and he or she shall in the meantime leave the same in the charge or custody of some person who shall have the charge or custody in respect of the goods on [his or her] the sheriff's behalf.

(b) Any person in whose charge or custody attached movable property [which has been attached,] has been left, shall not use, let or lend such property, or permit it to be used, let or lent, nor [shall he or she] in any way do anything which will decrease its value and, if the attached property [attached shall have] has produced any profit or increase, the custodian shall be responsible for any such profit or increase in like manner as he or she is responsible for the property originally attached, and shall deliver such profit or increase to the sheriff.

(c) If a person, other than the judgment debtor, in whose charge or custody movable property has been left, [other than the execution debtor, makes a default] defaults [in] on his or her duty [he or she] such person shall not be entitled to recover any remuneration for [his or her] taking charge and custody of the attached property.

(18)(a) Unless an order of court is produced to the sheriff requiring him or her to detain any movable property under attachment for such further period as may be stipulated in such order, the sheriff shall [, if a sale in respect of such property is not pending,] release from attachment [any] such property which has been detained for a period exceeding four months unless a sale in execution of such property is pending.

(b) If such order was [made on] granted in terms of an ex parte application [made ex parte], such order shall not [be subject to] require confirmation.

(c) In the event of a claimant lodging an interpleader claim with the sheriff in accordance with rule 44, the period of four months referred to in paragraph [i](a) shall be suspended from the date on which the claimant delivers his or her affidavit



to the sheriff until the final adjudication of the interpleader claim, including any review or appeal in respect of such interpleader claim.

(19)(a)(i) Any movable property to be sold in execution of process of the court shall be sold publicly **[and]** for cash to the highest bidder by the sheriff who removed the goods in terms of sub-rule **[(7)(b)](17)(a)** or, with the approval of the magistrate, by an auctioneer or other person appointed by the sheriff, **[to the highest bidder]** at or as near to the place where **[the]** same was attached or to which **[the]** same had been so removed as aforesaid **[as may be advantageous for the sale thereof]**.

(ii) The provisions of rule 43(10) shall apply with appropriate changes to the sale in execution of movable property under this rule.

(b) The execution creditor shall, after consultation with the sheriff, prepare a notice of sale and furnish two copies thereof to the sheriff in sufficient time to enable one copy to be affixed not later than 10 days before the day appointed for the sale on the notice board or door of the court-house or other public building in which the said court is held and the other at or as near as may be to the place where the said sale is **[actually]** to take place.

(c) **[If]** In addition to the requirements of paragraph (b), if in the opinion of the sheriff the value of the goods attached exceeds **[R5 000 he or she shall]** an amount equivalent to the monetary jurisdiction of the Small Claims Court, the sheriff shall indicate **[some local or other newspaper circulating in the district and require]** and direct the execution creditor to publish the notice of sale in **[that newspaper]** a local or other newspaper circulating in the region or district not later than 10 days before the date appointed for the sale **[in addition to complying with paragraph (b)]** and to furnish **[him or her]** the sheriff with a copy of the edition of the paper in which the publication appeared not later than the day preceding the date of sale.

(d) In lieu of paragraph (c), the sheriff may post the notice of sale on the sheriff's office's website, upon being so instructed in writing by the execution creditor: Provided that the sheriff shall not later than 10 days before the appointed date of sale, affix on the notice board, the door of the court-house or other public building in which the said court is held, and the other, at or as near as the case may be, to the place where the said sale is to take place, a notice stating the date of the sale in execution and the website on which the full details of the sale may be inspected.

(20) The day appointed for a sale in execution shall not be less than 15 days after attachment: Provided that where the goods attached are of a perishable nature, or with the consent of the **[execution]** judgment debtor, the court may, upon application, reduce any period referred to in this sub-rule or sub-rule **[(8)](19)** to such extent and on such conditions as it may deem fit.

(21) Where property subject to a real right of any third person, is to be sold in execution, such sale must be subject to the rights of such third person unless he or she otherwise waives such rights.

(22) A sale in execution shall be stopped as soon as sufficient money has been raised to satisfy the said warrant and any warrant referred to in rule 39(2) and the costs of the sale.

(23)(a) Should the sheriff have a balance in hand after satisfaction of the claim of the execution creditor and of all warrants of execution lodged with [him or her] the sheriff on or before the day immediately preceding the date of the sale and of all costs, [he or she] the sheriff shall pay [the same] such balance to the [execution] judgment debtor if he or she can be found, [otherwise he or she] failing which the sheriff shall pay such balance into court.

(b) The balance paid into court in terms of paragraph (a), if not disposed of before the expiration of three years, shall be paid into the [State] National Revenue Fund after three months' notice of such intention has been given to the persons concerned, whereafter any application for the refund of such balance shall be directed to the [State] National Revenue Fund by a person concerned."

#### **Substitution of rule 42 of the Rules**

16. The following rule is hereby substituted for rule 42 of the Rules:

#### **"Execution against movable property (continued)**

42. (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 [mutatis mutandis] be the same as that of attachment in execution, with appropriate changes.".

#### Substitution of rule 54 of the Rules

17. The following rule is hereby substituted for rule 54 of the Rules:

#### "Proceedings against non-juristic persons as a matter of procedural convenience

54. (1) In this Rule—

"association" means any unincorporated body of persons that is not a partnership;

"entity" means an association, partnership, firm or sole proprietorship;

"firm" means an unincorporated business;

"partnership" means an arrangement whereby two or more persons undertake to contribute towards an enterprise to be carried on jointly by them with the object of making a profit and sharing it between them;

"plaintiff" and "defendant" include an applicant and respondent;

"relevant date" means the date when the cause of action arose;

"sole proprietorship" means a business that is carried on by the sole proprietor under a name and style other than his or her own; and

"sue" and "sued" are used in relation to actions and applications.

(2) An entity may sue or be sued in its name.

(3) (a) Where an entity is sued, the plaintiff must serve a notice calling upon the defendant to deliver a statement within 10 days containing the full names, residential, business or employment addresses of all its partners, proprietors or, in the case of an association members and office-bearers, as at the relevant date.

(b) If the defendant fails to deliver a statement contemplated in paragraph (a) the plaintiff may on notice make application to court to compel the defendant to deliver such a statement within five days and should the defendant fail to comply, the plaintiff may apply to court to—

(i) strike out the defendant's defence, where such a defence has been filed, and to grant judgment, which shall be executable against the entity's assets as is permitted by law; or