

INVITATION FOR PUBLIC COMMENTS
ON
THE SUPERIOR COURTS AMENDMENT BILL

1. INVITATION

1.1 The Department of Justice and Constitutional Development invites interested parties to submit written comments on the proposed draft Superior Courts Amendment Bill (the Bill), which is attached.

1.2 The comments on the Bill must be submitted not later than **5 May 2014**, marked for the attention of Ms E Steyn, and —

(a) if they are forwarded by post, be addressed to —

The Director-General: Justice and Constitutional Development

Private Bag X 81

Pretoria

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(b) if they are delivered by hand, be delivered at —

Salu Building, Room 2302

315 Thabo Sehume Street

Pretoria

(c) if they are submitted by email, be emailed to ensteyn@justice.gov.za

(d) if they are faxed, be faxed to 0866485369 or 012 - 4064632

1.3 For further information, please do not hesitate to contact Ms E Steyn at 012 – 4064768.

2. BACKGROUND NOTE

The following background information is hereby furnished in order to assist interested parties to comment on the proposed amendment of the Superior Courts Act, 2013 (Act No. 10 of 2013) (the Act).

2.1 The Department of Trade and Industry (the DTI), has approached the Department as part of its credit amnesty project to consider, among others, the inclusion of provisions in the Act to deal with the rescission of judgments with the consent of a judgment creditor, to assist certain categories of consumers in accessing credit by removing adverse credit information from credit bureaux. The suggestion was made that the Act be amended to require that judgment creditors must abandon judgments following the settlement thereof, alternatively, that they are deemed to have abandoned a judgment following *prima facie* evidence of the settlement of the debt.

2.2 The rescission and variation of judgments in the High Court under rules 31(2) and 42 of the Uniform Rules of the High Court (the Uniform Rules), are based on the common law and to succeed in such applications, an applicant must show good cause, including the existence of a *bona fide* defence.

2.3 The lack of substantive provisions in the Act, to allow for the rescission of judgments with the consent of the judgment creditor, similar to those in section 36 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944) (the Magistrates' Courts Act), was also brought to the attention of the Department by other interested parties.

2.4 The Department was alerted to an application in the North Gauteng High Court in which the applicant sought to have rule 42 of the Uniform Rules declared unconstitutional on the basis of unequal application of the law since the Magistrates' Courts Act and Rules provide for default judgments to be rescinded where the judgment creditor consents, while there are no corresponding provisions in the case of the High Court. The applicant abandoned the challenge to the rule, but it seems advisable to consider an amendment to substantive legislation as there is no substantive rule of law either at common law or in statute that permits the rescission of default judgments by consent in the High Court.

2.4 It is also relevant to reflect briefly on the history of Magistrates' Court Rule 49: In 1997 the Rules Board inserted subrule (5) into Magistrates' Courts Rule 49. The subrule was held to be *ultra vires* because it changed the common law. Section 36 of the Magistrates' Courts Act was therefore amended in 2002 to cure this defect. It could be argued that the intention of the Legislature to develop the common law to the extent that persons who have settled their judgment debts, and where the judgment creditors consent to the rescission of judgments, would not be unduly prejudiced and could therefore have recourse to Magistrates' Courts Rule 49(5), has been manifested.

2.5 In *Vilvanathan v Louw* NO 2010 (5) SA 17 (WCC), the question arose whether a final judgment of the High Court can be set aside simply because it has been satisfied in full by the judgment debtor and the judgment creditor consents to its rescission. The Court dismissed the application for rescission and, among others, held that there are, or may be, far-reaching consequences and ramifications to the rescission of judgments and does not appear to support the intervention of the Legislature in amending the common law to allow for the rescission of judgments by consent, to the extent that it emphasises the need for finality of judgments.

2.6 The *Vilvanathan* judgment seems to endorse the approach that if a defendant did not desire

judgment to be granted, such defendant should pay the debt and avoid the issue of summons. However, there could be multiple reasons why a defendant could not satisfy the debt at the time summons was issued but nevertheless subsequently satisfied the judgment debt.

2.7 If the common law position in so far as the rescission of judgments is concerned is not altered by statute, this will impact negatively on the realisation of the objectives of the 2030 National Development Plan, which envisages economic transformation by, among others, raising employment, reducing poverty and inequality, raising standards of living and education and broadening access to services such as banking services and mortgage loans.

2.8 The Department was also referred to the unreported judgment in the matter of Kalikhan, Anoj t/a Tri-Star Logistics v First Rand Bank Ltd in the South Gauteng High Court in which the applicant applied for a rescission of a money judgment granted in favour of the respondent. The respondent had consented to the rescission in writing. Counsel for the applicant urged the court to develop the common law meaning of the words “on good cause shown” in rule 31(2)(b) to include the situation when the judgment debt is discharged and the judgment creditor consents to the rescission of the judgment concerned. The court dismissed the application but identified the need for intervention by the legislature by stating that the iniquity constituted amongst litigants in different courts is not a matter to be addressed and corrected by the High Court. The judgment in the Kalikhan matter confirms the need for the intervention of the Legislature to amend the common law if the rescission of judgments where the execution creditor has consented, is to be allowed in the High Court.

2.9 The DTI’s proposed provisions forcing a judgment creditor to consent to a rescission of judgment or to abandon a judgment in his or her favour or to be deemed to have abandoned the judgment, will face some challenges and there are different views, some to the effect that the integrity of court decisions should not be tampered with lightly. However, a provision, in order to make it easier generally for a judgment creditor to consent to the rescission of a judgment in the High Court and so accommodating, to some extent, the DTI’s credit information amnesty, is proposed in the Bill.

3.6 **Clause 1** inserts section 23A into the Act and provides that if a plaintiff has agreed in writing that a judgment by default be rescinded or varied, a court may rescind or vary such a judgment on application by any person affected by it. It provides further that the rescission of a judgment does not affect the rights of third parties or the parties to the case and that nothing precludes a court from proceeding with the rescission of a judgment if there is proof that the debt has been settled by the debtor, where an agreement

cannot be obtained from the judgment creditor. The courts will have to consider the application thoroughly and will still have a discretion whether to rescind or not.

REPUBLIC OF SOUTH AFRICA

SUPERIOR COURTS AMENDMENT BILL

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(.....)

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.
 Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Superior Courts Act, 2013 to provide for the rescission of judgments by consent; and to provide for matters connected therewith.

Parliament of the Republic of South Africa enacts as follows:—

Insertion of section 23A in Act 10 of 2013

1. The Superior Courts Act, 2013, is hereby amended by the insertion of the following section after section 23:

“Rescission of judgment

23A. (1) If a plaintiff in whose favour a default judgment has been granted has agreed in writing that the judgment be rescinded or varied, a court may rescind or vary such judgment on application by any person affected by it.

(2) Except where a judgment was obtained erroneously or fraudulently, the rescission of a judgment referred to in subsection (1) does not affect the rights of third parties or the parties to the case.

(3) Nothing precludes a court from proceeding with the rescission or variation of a judgment if there is proof that the judgment debt has been settled by the judgment debtor, where an agreement in writing that the judgment be rescinded or varied cannot be obtained from the judgment creditor.”.

Short title and commencement

2. This Act is called the Superior Courts Amendment Act, 2014 and comes into operation on a date fixed by the President by proclamation in the *Gazette*.