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COURTS OF LAW AMENDMENT BILL [B8-2016]: SUMMARY AND ANALYSIS

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1. INTRODUCTION

The Courts of Law Amendment Bill seeks to amend sections of the, **Magistrates' Courts Act 32 of 1944**, in order to:

- (i) Curb abuses of *emolument attachment orders*; and
- (ii) Provide for the Department of Trade and Industry (DTI) '*removal of adverse credit information project*' - by amending sections of the Act dealing with the rescission of judgments.

The Bill also proposes amendments to the **Superior Courts Act 10 of 2013** to provide for the rescission of judgments by consent and where a debt has been settled.

2. EXPLORING THE ISSUES

Credit unlocks a diverse range of opportunities. These may be economic or educational or simply to improve 'standards of living'. However, credit is a double-edged sword: it can also lead to high levels of debt and indebtedness.¹ This problem is compounded because many South Africans are victims of "*predatory lending practices*".² The negative effects of these practices are compounded when creditors make use of short-cut processes to try to enforce repayment of loans.

¹ Haupt F, (2013). Garnishee" orders (Accessed at <http://www.rebels.co.za/resources/Documents/CR---EAO-report---Frans-Haupt-UP.pdf>)

² University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others 2015 (5) SA 221 (WCC).



Debt recovery is a big business, and a necessary step in any economy.³ Effective debt recovery procedures assist credit providers by reducing bad debt write-offs, and assist consumers by ensuring that high bad debts of a minority of consumers do not feed through into higher interest rates for the rest.⁴ Problems arise when debt collection processes are abused.⁵ One particular area of exploitation has been in respect of **emolument attachment orders**.

2.1 What is an Emoluments Attachment Order?

Section 61 of the Magistrates' Courts Act (MCA) describes "emoluments" as: *"(i) salary, wages or any other form of remuneration; and (ii) any allowances, whether expressed in money or not."*

When a judgment is granted in favour of a creditor and a debtor fails to comply with the judgment, credit providers utilise various mechanisms to recover the debts owed to them. One of these methods is an **emoluments attachment order (EAO)**.

An emoluments attachment order is a court order made in terms of section 65J of the Magistrates' Court Act which provides for a creditor to attach part of the salary or wages of a debtor. Once an emoluments attachment order has been granted, the employer of the judgment debtor is obliged (on a continuing basis, and until such time as the judgment debt has been paid in full) to pay a certain portion of the debtor's salary or wages to the judgment creditor (or his/her representative, e.g. an attorney or debt collector) through weekly or monthly instalments.⁶

An EAO may only be issued in three circumstances:

- (i) Where the debtor has consented to an EAO in writing;⁷
- (ii) Where the court has so authorised;
- (iii) Where the judgement creditor has complied with the requirements of section 65J(2)(b)(i) and (ii) of the MCA.⁸

³ Patel A and Fletcher T, (2015). Emoluments Attachment Orders: No more 'rubber stamping' by Clerks Employment Alert (Accessed at <https://www.cliffedekkerhofmeyr.com/en/news/publications/2015/employment/employment-alert-10-july-emoluments-attachment-orders-no-more-rubber-stamping-by-clerks.html>)

⁴ Ibid

⁵ University of Pretoria, (2013). The incidence of and undesirable practices relating to "garnishee orders" – a follow up report (Accessed at <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf>)

⁶ Ibid

⁷ Emoluments attachment orders can be implemented almost immediately if either a section 57 (a conditional consent to judgment) or section 58 (consent to judgment) agreement, containing a clause in terms of which the debtor consents to an emoluments attachment order, was obtained from the debtor.

⁸ Magistrates Court Act - Section 65 J (2) An emoluments attachment order shall not be issued -

(a) unless the judgment debtor has consented thereto in writing or the court has so authorised, whether on application to the court or otherwise, and such authorisation has not been suspended; or

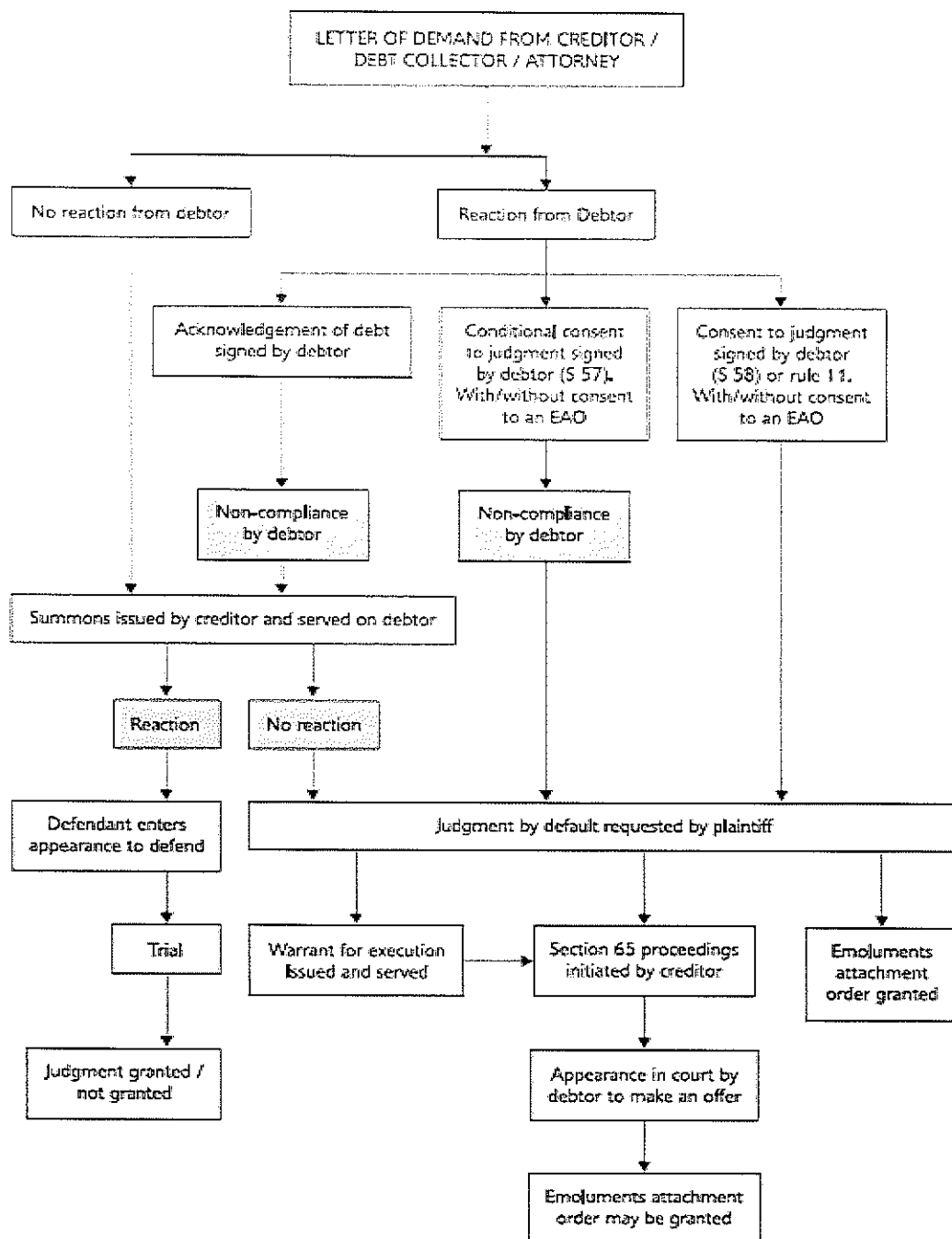
(b) unless the judgment creditor or his or her attorney has first -

(i) sent a registered letter to the judgment debtor at his or her last known address advising him or her of the amount of the judgment debt and costs as yet unpaid and warning him or her that an emoluments attachment order will be issued if the said amount is not paid within ten days of the date on which that registered letter was posted; and

(ii) filed with the clerk of the court an affidavit or an affirmation by the judgment creditor or a certificate by his or her attorney setting forth the amount of the judgment debt at the date of the order laying down the specific instalments, the costs, if any, which have accumulated since that date, the payments received since that date and



STEPS IN THE DEBT COLLECTION PROCESS



The debt collection procedure set out in section 65 of the Magistrates Court Act provides for a emolument attachment orders, administration orders and recovery of debt in terms of section 57 (an admission of liability and agreement to pay in instalments) and section 58 (an

the balance owing and declaring that the provisions of subparagraph (i) have been complied with on the date specified therein.



unconditional consent to a judgement and payment of instalments.) In practice most EAO's are obtained through a debtor signing a section 57⁹ or 58¹⁰ consent to judgement, which incorporates consent to an EAO and gives the clerk of the court power to grant the judgement against the debtor.

Debt collectors and collection attorneys favour the emoluments attachment order process, especially where the consumer does not have any other attachable assets, as it is both time and cost effective.¹¹

3. HIGHLIGHTING THE PROBLEMS WITH EAO'S

The process of obtaining EAO's has been open to significant abuse.¹² This is discussed in more detail as follows:

⁹ Section 57 Admission of liability and undertaking to pay debt in instalments or otherwise

(1) If any person (in this section called the defendant) has received a letter of demand or has been served with a summons demanding payment of any debt, the defendant may in writing- (a) admit liability to the plaintiff for the amount of the debt and costs claimed in the letter of demand or summons or for any other amount; (b) offer to pay the amount of the debt and costs for which he admits liability, in instalments or otherwise; (c) undertake on payment of any instalment in terms of his offer to pay the collection fees for which the plaintiff is liable in respect of the recovery of such instalment; and (d) agree that in the event of his failure to carry out the terms of his offer the plaintiff shall, without notice to the defendant, be entitled to apply for judgment for the amount of the outstanding balance of the debt for which he admits liability, with costs, and for an order of court for payment of the judgment debt and costs in instalments or otherwise in accordance with his offer, and if the plaintiff or his attorney accepts the said offer, he shall advise the defendant of such acceptance in writing by registered letter.

(2) If, after having been advised by the plaintiff or his attorney in writing that his offer has been accepted, the defendant fails to carry out the terms of his offer, the clerk of the court shall, upon the written request of the plaintiff or his attorney accompanied by- (a) if no summons has been issued, a copy of the letter of demand; (b) the defendant's written acknowledgment of debt and offer and a copy of the plaintiff's or his attorney's written acceptance of the offer; (c) an affidavit or affirmation by the plaintiff or a certificate by his attorney stating in which respects the defendant has failed to carry out the terms of his offer and, if the defendant has made any payments since the date of the letter of demand or summons, showing how the balance claimed is arrived at- (i) enter judgment in favour of the plaintiff for the amount or the outstanding balance of the amount of the debt for which the defendant has admitted liability, with costs; and (ii) order the defendant to pay the judgment debt and costs in specified instalments or otherwise in accordance with his offer, and such order shall be deemed to be an order of the court mentioned in section 65A (1).

(3) When the judgment referred to in subsection (2) has been entered and an order made, and if the judgment debtor was not present or represented when the judgment was entered by the clerk of the court and the order made, the judgment creditor or his or her attorney shall forthwith advise the judgment debtor by registered letter of the terms of the judgment and order.

(4) Any judgment entered in favour of the plaintiff under subsection (2) shall have the effect of a judgment by default.

¹⁰ Section 58 Consent to judgment or to judgment and an order for payment of judgment debt in instalments

(1) If any person (in this section called the defendant), upon receipt of a letter of demand or service upon him of a summons demanding payment of any debt, consents in writing to judgment in favour of the creditor (in this section called the plaintiff) for the amount of the debt and the costs claimed in the letter of demand or summons, or for any other amount, the clerk of the court shall, on the written request of the plaintiff or his attorney accompanied by- (a) if no summons has been issued, a copy of the letter of demand; and (b) the defendant's written consent to judgment- (i) enter judgment in favour of the plaintiff for the amount of the debt and the costs for which the defendant has consented to judgment; and (ii) if it appears from the defendant's written consent to judgment that he has also consented to an order of court for payment in specified instalments or otherwise of the amount of the debt and costs in respect of which he has consented to judgment, order the defendant to pay the judgment debt and costs in specified instalments or otherwise in accordance with this consent, and such order shall be deemed to be an order of the court mentioned in section 65A (1). (2) The provisions of section 57 (3) and (4) shall apply in respect of the judgment and court order referred to in subsection (1) of this section.

¹² Rees M and Volker D, (2013). Garnishees 'exploit all South Africans' Major legal firm calls for new laws (Accessed at <http://www.moneyweb.co.za/archive/garnishees-exploit-all-south-africans-webber-went/>) Webber Wentzel labelled the system an exploitation of South Africans and called for a revision of the law



2008: FIRST UNIVERSITY OF PRETORIA LAW CLINIC RESEARCH REPORT

The University of Pretoria Law Clinic published a research report in 2008 which identified a range of shortcomings and irregularities in the EAO processes.¹³ The Report identified key vulnerabilities such as:¹⁴

- **Abuse of Jurisdiction:** Although section 65J(1)(a) of the Magistrate's Court Act clearly states that an EAO must be issued from the jurisdiction in which the employer of the judgement debtor resides, carries on business or is employed this requirement is often circumvented by debt collection practitioners who make use of section 45 of the Magistrates' Court Act. Section 45 provides that 'in certain circumstances parties may consent to the jurisdiction of a court, to determine any action that is otherwise beyond its jurisdiction.' This means EAO's are often issued from courts situated far away from the employer/employee which makes it extremely difficult for the debtor or employer to query or challenge the order. There is no uniformity amongst courts as some magistrates' courts will grant an EAO based on a consent to jurisdiction in terms of section 45 while others refuse applications where there is no jurisdictional link. This has led to *forum shopping* amongst debt collectors. Indications are that the willingness and/or competency of a specific court (staff) to grant emoluments orders in a timely fashion plays a role when a jurisdiction is decided upon by the debt collector.
- **Abuse of requirements for obtaining EAO's.** As noted above an EAO can be obtained in three circumstances. Two of these have specific challenges:
 - (i) *Where the judgment debtor has consented in writing.* In the case of a written consent, however, the clerk of court has no way of verifying the authenticity of the signature of the debtor or the reasonableness of the instalments consented to or even the circumstances under which the consent was obtained; or
 - (ii) *In terms of section 65J(2)(b) of the MCA.* According to this section the judgement creditor or his/her attorneys are required to send a registered letter to the judgement debtor, informing him or her that an EAO will be issued if the debt is not paid within ten days. The judgment creditor must also file an affidavit or a certificate setting forth the debt, costs and proposed instalments. These are not served on the employer or the employee with the result that the employee only becomes aware of the amount to be deducted after service of the EAO on his employer or after the deduction has been affected. There is no enquiry into the financial affairs of the debtor and the creditor often decides

¹³ University of Pretoria, (2008). The incidence of and the undesirable practices relating to garnishee orders in South Africa (Accessed at <http://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>) the Commission in its research has found that, despite the fact that many debtors have consented to an EAO that effectively translated into a judgment debt, the implications of such an order were never fully explained to them by the micro lenders. This has dire implications to the public who are at the mercy of the micro lending industry, as one of the consequences of a judgment debt, via an EAO, impacts on a range of socio-economic human rights. <http://www.sahrc.org.za/index.php/sahrc-media/news-2/item/309-sahrc-challenges-the-powers-and-human-rights-violations-in-micro-lending>

¹⁴ Ibid



unilaterally on the amount of the instalment.¹⁵ Moreover, neither the creditor nor the clerk of court granting the emoluments attachment order is aware of the existence or not of other EAOs.

- **Lack of knowledge amongst clerks of the court.** In many instances, clerks of the court lacked the necessary knowledge and skill to effectively and efficiently administer these orders. This resulted in a lack of uniformity in the handling of EAOs in magistrate's courts. The research team also came across allegations of clerks accepting bribes from credit providers to ensure that emoluments attachment orders are issued.
- **Lack of Judicial oversight and control.** The exclusion of the discretion and supervision of judicial officers in the EAO process opened up the legal processes to various forms of abuse.
- **Lack of statutory cap on amount to be attached.** While regulation 23.3.6 in terms of the Public Finance Management Act 1 of 1999 caps the emoluments attachment to 40% of the state employee's salary, no such cap exists for debtors employed in the private sector. In many other jurisdictions, caps are applicable. For example in Rwanda, section 44 of the Civil Procedure Act provides that only one third of the salary of the debtor shall be subject to attachment. This problem is compounded by the fact that in South Africa multiple emoluments attachment orders are common.
- **Lack of Consent.** In many cases the debtors averred that they never signed consent to judgment even though judgment was granted on such basis. In some instances the debtors alleged duress or misrepresentation. Cases of blank consents, incomplete documentation and forgery of signatures were reported on.
- **Evidence of overcharging.** The research team found unlawful and burdensome charges to be added to the capital amount of the original debt in numerous cases. In some instances, credit providers and or their agents inflated the principal debt with unlawful charges. Some attorneys or collectors added contingency fees arranged amongst themselves and their clients to the principal debt. Judgement is often granted on these inflated amounts. The worst incidence of exploitation and over-charging were contingency fees of 25% added by the collectors to the capital amounts, instead of this amount being deducted from the money collected. Added to this 25% fee was a further fee for collection. There were examples of fees not being capped, costs not correlating with the debt, interest being charged on interest and interest being charged on fees.¹⁶
- **No statement of account.** Section 65J only provides for the furnishing of a statement at the request of the employer and does not compel creditors and/or their attorneys to render statements on a regular basis.

¹⁵ Section 65J of MCA "... must not cause the employee not to have sufficient means for his own and his dependants' maintenance."

¹⁶Van den Bout A, (2015). Perspective on EAOs – A problem or an abuse? (Accessed at <http://www.derebus.org.za/perspective-eaos-problem-abuse/>)



- **Lack of basic financial and legal literacy skills.** Often consumers did not understand the full financial risks, costs and obligations of the agreements they entered into. Furthermore consumers were not aware (often because they were not fully informed) of the maximum interest rates and fees that may be charged.¹⁷

The Report also proposed a number of **recommendations** for legislative and industry reforms.¹⁸ These included:

- Improving the basic financial and legal literacy of consumers/employees.
- **Proper training and education of clerks of the Magistrate's Court.**
- **Improved application of and adherence to existing legislative measures**
- Engagement with credit providers, the attorney's profession and debt collector's organisations.
- **Lobbying for legislative reform, specifically the relevant sections in the Magistrate's Court Act and Rules of Court.**

2012: CONCERNS GROW ABOUT SYSTEMIC ABUSE OF EAO'S

By 2012 growing media coverage of fraudulent practices and abuse of EAO's led to renewed attention being given to their use.¹⁹ Of particular concern was the exposure of the systemic abuse of EAO's processes by money lenders and collection attorneys in the case of miners along the platinum belt.²⁰ Directly following the events at Marikana, the National Credit Regulator (NCR) investigated Marikana micro-lenders.²¹ The NCR uncovered gross lending irregularities.²² In response National Treasury established a task team to investigate abuse of

¹⁷In numerous instances, emoluments attachment orders are re-implemented due to poor administration and communication between creditors and employers.

¹⁸*ibid*

¹⁹ Rees M, (2012). Garnishee fraud uncovered (Accessed at <http://www.moneyweb.co.za/archive/garnishee-fraud-uncovered/>); and Garnishee fraud debacle widens (Accessed at <http://www.moneyweb.co.za/archive/garnishee-fraud-debacle-widens/>)

²⁰ Bateman M, (2012). The rise and fall of microcredit in post-apartheid South Africa (Accessed at <http://mondediplo.com/blogs/the-rise-and-fall-of-microcredit-in-post>). Bateman expresses the view that, "the microcredit industry operating in Rustenburg had begun to replicate some of the worst cases of microcredit profiteering and manifest abuse of the poor found elsewhere around the world." Rees M, (2012). Financially illiterate miners debt shocker (Accessed at <http://www.moneyweb.co.za/archive/financially-illiterate-miners-debt-shocker-fraud-a/?sn=2009%20Detail>)

²¹Davis R, (2012). Marikana: The debt-hole that fuelled the fire (Accessed at <http://www.dailymaverick.co.za/article/2012-10-12-marikana-the-debt-hole-that-fuelled-the-fire/>.) The NCR's investigation of Marikana micro-lenders found that a number of them were using illegal EAO's to claim money from workers. Several of the Marikana micro-lenders were found to be forcing customers to sign blank forms that allowed lenders to get a garnishee order without going through the court process. Illegal garnishee orders were only one of the "undesirable practices" being employed; loan sharks were also charging excessive interest (in one case, more than 2,000% per year); keeping debtors' ID documents, bank cards and PIN codes; not carrying out affordability assessments; not disclosing the cost of credit upfront; and charging illegal fees (such as the legal costs mentioned above).

²²Rees M (2012). Platinum miner repays R11690 on R1000 loan (Accessed at <http://www.moneyweb.co.za/archive/platinum-miner-repays-r11690-on-r1000-loan/>.) In September 2012 Moneyweb published the findings of its investigation into the charges attorneys were imposing on platinum miners in connection with the collection of outstanding debt. Instances where collection attorneys were charging miners between two and 12 times the amount of their initial loan in fees were revealed. In one of the most striking examples of excess, law firm Steyn Attorneys charged a miner R9 934 in legal fees, excluding VAT, in addition to a collection commission of R1 140



EAO's and by the end of 2012 warned that it was consulting with the Department of Justice with a view to amending the laws governing EAO's.²³

In the same year a forensic investigation conducted by law firm Edward Nathan Sonnenberg (ENS) uncovered widespread abuse, exploitation and maladministration across a spectrum of service providers involved in EAO's.²⁴ Key areas of abuse that were identified concerned EAO's that were:²⁵

- Never ending because the current outstanding balance was unknown;
- Reinstated on employees after they had been informed that the debt was settled;
- Not validated and were later found to be fraudulent;
- Subject to excessive costs (i.e. excessive charges that exceed prescribed fees excessive interest rates that were levied for several months before being lowered (the incorrect interest was never deducted) and also payments which were made to attorneys acting on behalf of judgement creditors who charged further interest and costs);
- Subject to double deductions of instalment amounts through the implementation of secondary debit orders on employee bank accounts.

2013: GOVERNMENTS RESPONSE; SECOND UNIVERSITY OF PRETORIA RESEARCH REPORT RELEASED; AND DEBT COLLECTION BUSINESSES COMMISSION OWN RESEARCH

In his 2013 Budget Speech Finance Minister Pravin Gordhan stated that government was: *"concerned by the abuse of emolument attachment orders that has left many workers without money to live on after they have serviced their debts every month."*²⁶ The Department of Justice and Constitutional Development at the end of February 2013, released a working document with suggested amendments to the Magistrates' Court Act, and more specifically emoluments attachment orders, for public comment.²⁷ An oversight Committee was formed (consisting of National Treasury, DTI, Justice Department and the South African Reserve Bank) to address unscrupulous debt-collection practices.²⁸ An Emoluments Attachment Order

for the recovery of a R1 000 loan. The miner had paid R11 690 on his R1 000 loan but still sat with an outstanding balance of R3 084. In another example an accounts statement issued by attorney firm Grobler Vorster, for a miner who had incurred debt for outstanding school fees had an opening capital balance of R3 500 in August 2011. Within a year, he had paid R4 000 but was left with an outstanding balance of R3 247.

²³Rees M, (2013). Opinion: Marikana burst the unsecured lending bubble (Accessed at <http://www.moneyweb.co.za/archive/opinion-marikana-burst-the-unsecured-lending-bubble/>)

²⁴Allwright P, (2012). Garnishee Orders: Continued Abuse And Exploitation (Accessed at <http://www.saipa.co.za/articles/255014/garnishee-orders-continued-abuse-and-exploitation>); Benjamin C, Ghastly garnishee abuse exposed, (Accessed at <http://mg.co.za/article/2012-11-30-00-ghastly-garnishee-abuse-exposed>)

²⁵Allwright P, Garnishee orders: facts and answers, (Accessed at <http://www.moneyweb.co.za/archive/garnishee-orders/>)

²⁶ Minister of Finance Pravin Gordhan 2013 Budget Speech (Accessed at <http://www.gov.za/minister-finance-pravin-gordhan-presents-2013-budget-speech>)

²⁷UP (2013). The incidence of and undesirable practices relating to "garnishee orders" – a follow up report (Accessed at <http://www.up.ac.za/media/shared/Legacy/sitefiles/file/47/327/2013garnisheordersfollowupreport.pdf>)

²⁸ The Minister of Finance and the Banking Association of South Africa (BASA) issued a joint statement in October 2012, which included the following undertaking, "...BASA members commit not to use garnishee orders against credit defaulters, as they believe the use of such orders for credit is inappropriate." (p5, UP Report 2013). The announced ban on the use of emolument attachment orders has not been implemented by the banks.



Task Team, chaired by the Credit Ombud, was established to investigate practices around EAOs.²⁹

• **Second University of Pretoria Law Clinic Report Released**

Five years after its 2008 report the University of Pretoria Law Clinic published a follow-up Report - *'The Incidence of and the Undesirable Practices relating to "Garnishee Orders"'*.³⁰ The irregularities with the EAO system, which were identified in 2008 study, were reconfirmed and expanded upon in the updated report which noted the following.³¹

- **Continued uncertainty regarding the interpretation of jurisdiction.** There was still no uniformity amongst courts as regards jurisdiction. Some magistrates' courts granted an EAO based on a consent to jurisdiction in terms of section 45 and some courts refused applications where there was no jurisdictional link as required by section 65 J (1)(a) of the MCA. This continued to lead to forum shopping amongst debt collectors.
- **Uncertainty over the common law in duplum rule and/or Section 103(5) of the National Credit Act.**³² One interpretation of the statutory in duplum rule in the National Credit Act is that it caps the fees lawyers may charge in connection with the collection of a loan. The other interpretation, (unsurprisingly the one collection attorneys favour), is that the in duplum rule does not include the costs of securing and imposing a legal judgment such as an EAO.
- **Lack of uniformity in respect of the court processes.** Apart from the different interpretations of the jurisdiction and in duplum issues by courts, credit providers and attorneys, the study also found there was often no uniformity amongst the courts with regard to the documentation supporting an application for an emoluments attachment order. This also encouraged forum shopping as attorneys prefer to use the courts where it is easier to obtain EAO's.

²⁹ A meeting of role players in the credit and debt collecting industry, made a set of comprehensive proposals on 13 February 2013. This meeting resolved that a task team, chaired by the Credit Ombud, Manie van Schalkwyk, would investigate the reported abuses and draft a code of conduct in an effort to stamp out abuses. According to the Credit Ombud Annual Report 2013, the Task Team had finalised its work, submitted a comprehensive report, and at the time of publishing its Annual Report, was awaiting feedback from National Treasury. The EAO Task Team provided a list of principles to Treasury.

³⁰Secombe A, 2015 Amplats takes debt collectors to court <http://www.bdlive.co.za/business/mining/2015/01/09/amplats-takes-debt-collectors-to-court> The Law Clinic estimated at the time that more than 435,000 employees in the private sector had emoluments attachment orders against their salaries, and 240,000 in the public sector

³¹Legal Aid Clinic Brings Application In Respect Of Emoluments Attachment Orders Yet the consistent highlighting of irregularities, numerous statements of intent and undertakings have come to nought (Accessed at <http://blogs.sun.ac.za/law/legal-aid-clinic-brings-application-in-respect-of-emoluments-attachment-orders/>)

³² The common-law in duplum rule, as it is generally known in South African law, provides that interest stops running when unpaid interest equals the outstanding capital amount. Section 103(5) of the National Credit Act introduced a statutory rule. It provides as follows: "Despite any provision of the common law or a credit agreement to the contrary, the amounts contemplated in section 101(1)(b) to (g) that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the defaults occurs." The difference between the common-law and the statutory in duplum rules lies in the fact that under the common-law rule it is only the interest (contractual and default) that ceases to run if it equals the outstanding capital amount. Under the statutory rule, however, all the amounts set out in section 101 (1) (b) – (g), i.e. initiation fees, service fees, interest (contractual and default), costs of any credit insurance, default administration charges, and collection costs, stop running if they combine to exceed the outstanding principal debt. Currently there is a difference of opinion as to whether section 103(5) of the National Credit Act includes the collection costs due to a debt collector or attorney.



- **Shortcomings in the statutory process.** Often no affordability tests are done (to determine if the debtor can still maintain him or herself and any dependents) and the creditor often decides unilaterally on the amount of the instalment. It is also not possible for the creditor or the clerk of court granting the EAO to determine whether or not other orders have already been granted against the debtor.
 - **Debtors paying instalments with no prospect of settlement.** This results in debtors being caught in a debt spiral with no likelihood of rehabilitation.
 - **Lack of cap on amount that can be deducted.** This means that employees are left without sufficient means for his or her own and any dependant's maintenance and can result in employees going home with a zero or near zero take-home salary.³³
 - **Charging of excessive fees.** Due to incorrect calculation of interest and outstanding balances and non-admissible charges being levied.³⁴
 - **Granting of reckless credit** and multiple deductions from employees' salaries.
 - **Fraud by clerks of court.** The report noted that court officials at two magistrate's courts were under investigation for the issuing of fraudulent orders. (In 2013 investigations exposed the issuing of fraudulent garnishee orders at the Palm Ridge Magistrates court.)³⁵
 - **Non-compliance** with various sections of the National Credit Act.
- **Response of the debt collection industry**

In response to growing concerns in the debt collection industry that EAO's could be banned:

- One-Law Debt Recovery Systems commissioned the University of Pretoria to investigate the irregularities in debt-collection mechanisms.³⁶ A Report was produced - '*Considering debt collection mechanisms in South Africa: An evaluation of selected contentious issues*' which recommended the following:³⁷
 - The institutional capacity constraints in courts should be addressed as a matter of great urgency. Training or alternatively practice directives were needed for all levels of personnel dealing with debt collection.
 - Jurisdiction rules should be clarified.
 - Introduction of a maximum allowable cost recovery on collection costs.
 - The format of the EAO should be amended to include more information about the financial status of the debtor.
 - Intervention by law societies to provide clearer guidelines on allowable fees.³⁸

³³If this happens, the employee can apply for the rescission or amendment of the order in terms of Section 65 J (6) which states that if the judgment debtor will not have sufficient means for his own and his dependants' maintenance, the court can rescind or amend the order.

³⁴ The research team received various complaints from debtors about excessive fees being charged by attorneys

³⁵ Rees M and Volker D. (2013). Garnishees 'exploit all South Africans' (Accessed at <http://www.moneyweb.co.za/archive/garnishees-exploit-all-south-africans-webber-went/>)

³⁶ This was funded by One-Law Debt Recovery Systems

³⁷ University of Pretoria Business Enterprises, (2013). Considering Debt Collection mechanisms in South Africa An evaluation of selected contentious issues' (Accessed at https://issuu.com/onelaw/docs/onelaw_-_1)

³⁸Econometrix, (2013). Economic Impact and Implications of Abolishing or limiting the use of Emolument Attachment Orders as a Form of legal Collection by Credit Providers in South Africa. (Accessed at https://issuu.com/onelaw/docs/onelaw_-_1)



- An overall regulatory body for debt collection be instituted.
- MicroFinance South Africa (MFSA) commissioned Econometrix to research the *Economic impact and implications of abolishing or limiting the use of emolument attachment orders as a form of legal collection by credit providers in South Africa*.³⁹ The Report concluded that:⁴⁰
- If the EAO system were to be completely removed or varied then this could in turn lead to less credit being advanced. The lack of availability of credit in an economy has a surprisingly large effect on consumers and the economy and should not be underestimated.
 - A comprehensive ban/limiting the use of EAOs was not an effective way of addressing the real or alleged problems associated with EAOs, reckless or unscrupulous lending and/or excessive, unscrupulous, ignorant or misinformed borrowing;
 - There is a substantial economic imperative to foster an environment where responsible lending and borrowing is the order of the day and that borrowers are incentivised to honour their debt obligations. EAOs play an important role in this process.

4. UNIVERSITY OF STELLENBOSCH LEGAL AID CLINIC COURT CASE

The need for legislative amendments to address the gaps/weaknesses identified in the EAO process were given added impetus with the case of **University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others 2015 (5) SA 221 (WCC)**.

The court, which noted that *'the debt collection procedure employed by the micro-lending industry gave rise to significant disquiet, if not alarm'*, took particular issue with three key aspects of EAO's:

- (i) Abuse of matters of jurisdiction and the infringement on the constitutional right of access to justice
- (ii) Lack of judicial oversight
- (iii) Lack of statutory control (over issues for instance such as the number of EAOs a low income earner can have granted or on the amount of the instalments)

The University of Stellenbosch's Legal Aid Clinic (LAC) brought a court action against 13 credit providers and the law firm, Flemix & Associates in the Western Cape High Court. The LAC

³⁹ Professor N Natrass of the Centre for Social Science Research at UCT observes that 'requiring more comprehensive documentation to facilitate judicial oversight will generate incentives from microlenders to collect this information from their clients before offering a loan and this is likely to reduce reckless lending. It may even reduce the burden on the courts with fewer bad debtors and fewer applications.'

⁴⁰Moneyweb, (2014) Emolument orders should not be banned – study (Accessed at <http://www.moneyweb.co.za/uncategorized/emolument-orders-should-not-be-banned-study/>)



sought to have certain sections of the Magistrate Court's Act, relating to Emolument Attachment Orders (EAOs), declared unconstitutional.

This matter involved 15 individual applicants who were all granted loans, often at interest rates of 60% per annum from a 'loan originator' who operated in the Stellenbosch area.⁴¹ The credit providers granted the loans - without taking reasonable steps to assess the applicants' existing financial means and obligations prior to concluding the credit agreements.⁴² This meant the loans with the repayments at times exceeded 50% of their monthly income.⁴³ The loans were granted in breach of the National Credit Act which seeks to prevent the granting of reckless credit through an affordability assessment.⁴⁴ Three examples of these loans are set out below:

APPLICANT	NET INCOME	LOAN AND INSTALMENTS
Ms Arrison	R2260	A loan of R6280 to be repaid in monthly instalments of R1574. (In the matter of this applicant three EAO's were issued on the same day effectively attaching almost her entire salary.)
Mr De Klerk	R1221.53	A loan of R1842 to be repaid in six monthly instalments of R513
Mr Siwayi	R3759.82	A loan of R7982 – repayable at monthly instalments of R1986

The individual applicants were unable to repay the loans as required. Having defaulted the debt collectors then moved in to collect payment of the loans. The applicants stated that the contents of the documents were not explained to them, and that they signed the documents presented to them under pressure from the Flemix debt collectors. These documents included, a written consent to: judgment; the payment of the debt by way of instalments; and the issuing of an EAO. Judgements were subsequently granted against the individual applicants and EAOs issued against their earnings by clerks of court without any evaluation of their ability to afford the deductions.⁴⁵

The applicants resided and were employed in Stellenbosch. Yet contrary to the provisions of section 65J(1)(a) of the MCA, **none of the judgments and EAOs were granted in the area of jurisdiction of courts of the districts in which the employers of the individual applicants resided or carried on business.**⁴⁶ The judgments were granted and

⁴¹ University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others 2015 (5) SA 221 (WCC). Para [16]

⁴² Section 81 of the National Credit Act requires a credit provider to take reasonable steps to assess the proposed consumers' existing financial means, prospects and obligations before entering a credit agreement in order to prevent the granting of reckless credit. In this matter the court found that this affordability assessment was perfunctory in some cases and non-existent in others.

⁴³ At the time when it approved these loans to the individual applicants, SA Multiloan was obliged by section 81 of the National Credit Act 24 of 2005 ("the NCA") to prevent the granting of reckless credit by taking reasonable steps to assess a proposed consumer's existing financial means and obligations before entering into a credit agreement. The eighth applicant's monthly net income was R2260. SA Multiloan granted him a loan of R6,280.00, to be repaid in monthly instalments of R1,574.00 per month

⁴⁴ University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others 2015 (5) SA 221 (WCC). Para [34]

⁴⁵ Para [5]

⁴⁶ Notably, in a survey done by the Law Clinic of the University of Stellenbosch in May 2012, only one out of the 43 emoluments attachment order matters dealt with by the clinic on behalf of debtors at that stage, was issued from the jurisdiction of the court where the employer conducted business.



emolument attachment orders issued in Kimberly, Wynberg and elsewhere.⁴⁷ The EAOs issued against the individual applicants were all issued by a clerk of court without any form of judicial oversight.⁴⁸

The credit providers alleged that the applicants consented to such jurisdiction in terms of section 45 of the Magistrates' Court Act, which provides that '*in certain circumstances parties may consent to the jurisdiction of a court, to determine any action that is otherwise beyond its jurisdiction.*' However, the court found that the consents were not given on an informed basis and the debt collection agencies adopted a patent system of forum shopping which prevented the necessary judicial oversight and evaluation such matters require. The court expressed the view that this violation of a debtor's right to access courts was one of the most disturbing features of the debt collection processes employed by the micro-lenders.⁴⁹

The court considered a number of Constitutional Court judgments which emphasised the general principle that there must be judicial oversight where an applicant seeks an order to execute against or seize control of the property of another person. Judicial oversight should therefore be mandatory and should occur when the emolument attachment order is issued. The lack of judicial supervision and the consequences of the execution process infringes several of the debtors' constitutional rights.

Moreover, the court noted that the ability of people to earn an income and support themselves and their families is central to the right to human dignity as contained in section 10 of the Constitution, 1996.⁵⁰ For this reason, many foreign jurisdictions such as the United States of America, Germany, Australia, Rwanda, England and Wales limit the amount of income that may be attached depending on the amount of the debtor's salary and/or the amount of money that is required by a debtor to support himself or herself.⁵¹ In contrast South African legislation does not provide adequate protective measures such as any statutory limit on the number of emolument attachment orders which may be granted against a debtor or a cap on the amount which may be deducted from his or her salary.

The court ruled that:

- In proceedings brought by a creditor for the enforcement of any credit agreement to which the National Credit Act 34 of 2005 applies, section 45 of the Magistrates' Court Act 32 of 1944 **does not permit** a debtor to consent in writing to the jurisdiction of a Magistrate's Court - other than one in which that debtor resides or is employed. The court furthermore found that the broad approach taken by section 45 directly contradicts and undermines sections 90 and 91 of the National Credit Act, as the underlying rationale to the limitation of jurisdiction contained in sections 90 and 91 is the protection of consumers. Thus, section 45 of the MCA undermines the objects or purposes of the NCA.
- In addition, the court found that **the fact that the NCA's jurisdiction provisions trump section 45 is also supported by the following:**

⁴⁷ Para [52]

⁴⁸ Para [35]

⁴⁹ Para [51]

⁵⁰ Para [41]

⁵¹ Para [44] – [48]



- The interpretative principle that states that when the provisions of a later Act are inconsistent with the provisions of an earlier Act, the later Act supersedes the earlier provisions. The NCA came into force on 1 June 2006, while section 45 of the MCA came into force in July 1945.⁵²
 - The NCA establishes a protective regime aimed at preventing the exploitation and abuse of consumers. The broad consent provided for in section 45 of the MCA fails to protect consumers. In the circumstances it is clear that section 45 of the MCA is inconsistent with sections 90 and 91 of the NCA and is trumped by the latter provisions.
 - Section 65J(2)(b)(i) and section 65J(2)(b)(ii) of the Magistrates' Court Act are **inconsistent with the Constitution, 1996 and invalid to the extent that they fail to provide for judicial oversight** over the issuing of an emolument attachment order against a judgment debtor.
 - Section 45 and section 65J of the Magistrates' Court Act **cannot be read together**, in that the narrow provisions of section 65J cannot be reconciled with the broad provisions of section 45. Section 65J is specifically intended to cover emolument attachment orders and it is a well-established principle in law that where two provisions are contradictory, the provision that is specific trumps the provision that is general. Accordingly, section 65J trumps section 45 and the court declared the emolument attachment orders unlawful, invalid and of no force and effect.
- **Consequences of the judgment**

The EAO judgment neither outlaws EAOs nor does it have an impact on the underlying debt. To the extent that the underlying debt is undisputed and valid, it must be paid back. However, as a result of this judgment, with immediate effect, an EAO can be declared invalid and subsequently rescinded if the:⁵³

- Credit agreement giving rise to the debt is a credit agreement in terms of the NCA and the EAO was made outside of the magistrates' court district where the debtor works or resides (the EAO served by the sheriff on the human resources office of the employer will reflect the name of the magistrates' court which issued it); or the
- EAO was issued after 28 July 2014 by a clerk of the court without there having been judicial oversight. (The reason for the focus on the date is that on 28 July 2014 the magistrates' court rules were amended, with effect that EAOs issued on or after 28 July 2014 should have been considered by a magistrate.)

Unfortunately in cases of invalidity there is no automatic cancellation of the EAO and rescission will need to be applied for and granted.⁵⁴

⁵² Van Niekerk B, (2015). The use of emolument attachment orders, jurisdiction and forum shopping under the spotlight (Accessed at <http://www.derebus.org.za/use-emolument-attachment-orders-jurisdiction-forum-shopping-spotlight/>)

⁵³ Weber Wentzel, (2015). Practical application of emoluments attachment order judgment for employers (Accessed at <http://www.polity.org.za/article/practical-application-of-emoluments-attachment-order-judgment-for-employers-2015-07-24>) The reason for the focus on 28 July 2014 is that the magistrates' court rules were amended, with effect that EAOs issued on or after 28 July 2014 should be considered by a magistrate

⁵⁴ Ibid.



Following the judgement the Justice Department stated that, *'until such time that the Constitutional Court gives final judgment on the matter, creditors and their attorneys countrywide are urged to take this judgment seriously and ensure that judgments and EAO's are obtained with due regard to the sentiments expressed in the Stellenbosch matter and to have those which have not been legally obtained, rescinded.'*⁵⁵

Any decision that invalidates legislation must be confirmed by the Constitutional Court before it has any effect. In addition, the respondents have applied for leave to appeal the judgment and have approached the Constitutional Court with a separate application.

Comment

- The Committee may be interested to note the comment from the court that while the application before the court related to twelve EAOs (all of which were irregularly, if not unlawfully, obtained), during proceedings it came to light that there are 150 000 active cases. In the light of how the debt collecting agents secured the consents, the forum shopping involved and the fact that all the EAOs in this matter were unlawfully obtained in the wrong jurisdiction, it is safe to assume that thousands, if not tens of thousands from the 150 000 cases involving ordinary working people in debt, are having significant portions of their salaries or wages deducted based on unlawfully obtained EAOs. The Judge acknowledged that he was not at liberty to inquire into any, or all, of those orders. Yet he could not in good conscience ignore their plight and he trusted that the Flemix respondents would not pursue EAOs obtained against the debtors in the wrong jurisdiction as that may in fact be illegal. *The Ministers of Justice and Correctional Services, the Minister of Trade and Industry, the National Credit Regulator, the Human Rights Commission and the Law Society must endeavour to ensure that appropriate measures are in place to monitor the situation.*⁵⁶ What has been done to ensure appropriate measure are in place to monitor this situation? These same role-players were also urged by the court to take whatever steps necessary to alert debtors to their rights in terms of this judgement. What steps has the Justice Department taken in this regard?
- What has been the impact of this judgement on proceedings in Magistrates Courts?

5. THE REMOVAL OF ADVERSE CREDIT INFORMATION PROJECT

The Courts of Law Amendment Bill also provides for the rescission or abandonment of court judgements to accommodate the Department of Trade and Industry's removal of adverse consumer credit information project.⁵⁷

⁵⁵Thebe M (2015). Debt collection system to be changed (Accessed at <http://www.derebus.org.za/debt-collection-system-changed/>)

⁵⁶ University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others 2015 (5) SA 221 (WCC) Para [66]

⁵⁷ The Treasury and the Department of Trade and Industry (DTI) were authorised by Cabinet during December 2013 to take measures to assist over-indebted households and also prevent them from becoming over-indebted in the future. This is reflected in "Media Statement: Government moves to protect consumers and assist over-indebted households", issued by the Ministries of Finance, Trade and Industry, 12 December 2013.



The **Removal of Adverse Credit Information Project**, commonly referred to as the “credit amnesty”, was implemented in April 2014.⁵⁸

According to the DTI, the main purpose of the Regulations was to enable blacklisted consumers whose financial circumstances have changed to be able to access credit again. In terms of the Regulations consumers still remained liable for the repayment of any outstanding debt owned in terms of any credit agreement, irrespective of whether any adverse information concerning that specific debt was removed from a credit bureau, unless, of course, the debt prescribed or any other applicable law prohibits its repayment.⁵⁹

On 26 February 2014, the Removal of Adverse Consumer Credit Information and Information relating to Paid Up Judgments Regulations (the 2014 Amnesty Regulations) were published.⁶⁰ The Regulations came into operation on 1 April 2014 and concerned the once-off removal of certain adverse consumer credit information from the records of all consumers, irrespective of the type of credit agreement or amount of debt/credit involved, kept by all the credit bureaux as at 1 April 2014.⁶¹

In terms of the 2014 Amnesty Regulations provision was made not only for the once-off removal of information relating to civil judgments of consumers where the consumers settled the capital amount but also for the **on-going removal** of paid up civil judgements where the consumer has settled the capital amount.⁶² Under the new Regulations, when a consumer has paid up their debt and proof of payment has been provided, the judgement will be removed within seven days after receiving the proof of payment from the Credit Provider.⁶³

The Credit Ombud reported, however, in November 2015 that some consumers complained that although their judgments were paid, the information remained on their credit records.⁶⁴

In response to the DTI's project the Bill proposes amendments to section 36 of the Magistrates Courts Act and section 23 of the Superior Courts Act which are discussed in the next section of this paper.

⁵⁸The DTI to Hold Public Consultation in Polokwane on the Removal of Credit Information (2013) (Accessed at <https://www.thedti.gov.za/editmedia.jsp?id=2921>)

⁵⁹DTI Media Statement Removal of Adverse Consumer Credit Information and Information Relating to Paid Up Judgments (Accessed at <https://www.thedti.gov.za/editmedia.jsp?id=3006>)

⁶⁰Removal of Adverse Consumer Credit Information and Information Related to paid up Judgements Government Gazette NO 37386 (26 February 2014) (Accessed at <https://www.experian.co.za/assets/consumer-information/Published%20regulations%2026022014.pdf>)

⁶¹ Louw KA, (2015). The 2014 credit-information amnesty regulations: What do they really entail? (Accessed at <http://www.dejure.up.ac.za/index.php/volumes/48-vol-1-2015/39-volumes/48-volume-1-2015/276-the-2014-credit-information-amnesty-regulations-what-do-they-really-entail>)

⁶²DTI Regulations – Removal of Adverse Consumer Credit Information and Information relating to paid Up Judgements 2. Requirements, processes and time frames for Credit Bureaus

(a) A registered credit bureau must remove:

(i) adverse consumer credit information (as defined) as reflected on a consumers records held by any such registered credit bureau as at the effective date of these regulations

(ii) information relating to paid up judgements on an ongoing basis

⁶³ NCR, Removal Of Adverse Consumer Credit Information And Information Relating To Paid-Up Judgments

(Accessed at https://www.thedti.gov.za/invitations/consumer_credit.pdf)

⁶⁴Credit Ombud, Incorrect credit information, emolument attachment orders drive 50,14% increase in complaints and enquiries to Credit Ombud in 2014 (Accessed at <http://www.creditombud.org.za/incorrect-credit-information-emolument-attachment-orders-drive-5014-increase-in-complaints-and-enquiries-to-credit-ombud-in-2014/>)



6. ANALYSIS OF THE BILL

The Justice Department drafted amendments to the Magistrate's Court Act and published them for comment in February 2013.⁶⁵ This process has culminated in the Courts of Law Amendment Bill which is considered as follows:

➤ **Clause 1 (Amends Definition section of the MCA)**

Inserts a definition of the National Credit Act.

➤ **Clause 2 (Amends Section 36 of the MCA - What judgements may be rescinded)**

During tight financial times consumers may fall behind in paying their creditors. This may result in creditors taking out a judgment against the debtor. In many cases debtors neglect or fail to defend the actions instituted against them (i.e. a summons). This results in the court granting a default judgement. Such a judgment will include the outstanding capital due, interest and legal fees. Judgments are listed on the debtor's credit profile – also known as being blacklisted.⁶⁶ Only when a debtor has repaid the outstanding debt, legal fees and interest will he or she be permitted to apply for the rescission of judgment. In order to remove his or her name from the so-called blacklist, the judgement in question, must be rescinded by an order of court.

Section 36 of the Magistrates Court Act provides which judgements may be rescinded. **There is, however, no requirement in South African law that obliges a plaintiff/judgment creditor to give a consent to rescission of judgment.** This means there is no provision in law to rescind a lawfully granted judgment where a judgment debt has been satisfied or discharged simply because the judgment is prejudicial to the applicant's business activities (i.e. a negative credit rating). In fact the DTI reports that many creditors refuse to consent to the abandonment of rescission of judgements following the settlements of a debt.⁶⁷ **This means the debtor must approach court for rescission of the judgement – which is time consuming and expensive.**

The DTI has suggested that provision should be made for **an automatic procedure to rescind judgements.**⁶⁸ However, the Justice Department has been reluctant to introduce

⁶⁵Department of Justice and Constitutional Development Working document Magistrates' Courts Amendment Bill (dated 21 February 2013)

⁶⁶Rescission of judgment explained (Accessed at <http://www.fin24.com/Money/Debt/Rescission-of-judgment-explained-20140812>)

⁶⁷Memorandum On Objects Of The Courts Of Law Amendment Bill (Accessed at <http://www.justice.gov.za/legislation/bills/2016-CourtsOfLawBill-Final.pdf>)

⁶⁸ This would be in line with section 71A of the National Credit Act.

71A. Automatic removal of adverse consumer credit information

(1) The credit provider must submit to all registered credit bureaux within seven days after settlement by a consumer of any obligation under any credit agreement, information regarding such settlement where an obligation under such credit agreement was the subject of—

- (a) an adverse classification of consumer behaviour;
- (b) an adverse classification enforcement action against a consumer;
- (c) an adverse listing recorded in the payment profile of the consumer; or
- (d) a judgement debt.

(2) The credit bureau must remove any adverse listing contemplated in subsection (1) within seven days after receipt of such information from the credit provider.



such a provision on the basis that fraudulent rescissions of judgements are a problem.⁶⁹ **As an alternative the Department has proposed an amendment to section 36 that introduces a procedure that it contends is less cumbersome and expensive.**

The amendment provides that once a judgement debt has been settled then the debtor may apply to the court for a rescission of the judgement. This application may be heard in Chambers and must comply with the following requirements:

- Be done using a prescribed form
- Include proof that the creditor has been notified
- Be set down for hearing not less than five days after being lodged

Comment

- Would the introduction of an automatic procedure to rescind judgements as suggested by the DTI not ease the workload of the courts and assist consumers. What would be the implications of introducing such a process (cost/training etc.)?
- The fact that the introduction of an automatic procedure as suggested by DTI cannot happen because of the problem of fraudulent rescissions is a great concern. The Department should be asked to report on: (i) the extent of the problem of fraudulent rescissions of judgements and (ii) on the action being taken to prevent such fraudulent activities?
- In which of the official languages will the prescribed form be available?

Clause 3 (Amends section 45 of the MCA - Jurisdiction by consent of parties)

Section 45 of the Magistrates' Court Act provides that in certain circumstances parties may **consent** to the jurisdiction of a court to determine any action that is otherwise beyond its jurisdiction.

In February 2014 the Department of Justice acknowledged that section 45 of the MCA was *'being acutely and severely abused by most micro-lenders'*.⁷⁰

As has been discussed previously in this paper, credit providers and their attorneys have abused this section to have judgements and EAO's granted in distant courts where the debtor neither resides nor is employed.⁷¹

(3) If the credit provider fails to submit information regarding a settlement as contemplated in subsection (1), a consumer may lodge a complaint against such credit provider with the National Credit Regulator.

(4) For the purposes of this section—

(a) 'adverse classification of consumer behaviour' means classification relating to consumer behaviour and includes a classification such as "delinquent", "default", "slow paying", "absconded", or "not contactable"; and

(b) 'adverse classification of enforcement action' means classification relating to enforcement action taken by the credit provider, including a classification such as "handed over for collection or recovery", "legal action", or "write-off".

(Section 71A inserted by section 22 of Act 19 of 2014)

⁶⁹ Memorandum to the Courts of Law Amendment Bill

⁷⁰ DoJ&CD Directive: Civil Court Judgements/Orders: Irregular granting of section 57 and 58 consent to default judgments and issuing of emolument attachment orders by clerks of civil courts (dated 9 February 2014) (Accessed at <http://sanaps.org.za/wp-content/uploads/2014/10/Report-2-Annexures-A-B-C-D.pdf>)

⁷¹ See for example the case of MBD Securitisation (Pty) Ltd v Boo 2015 (5) SA 450 (FB):



See for example the case of *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2015 (5) SA 221 (WCC).

The applicants Flemix and the Association of Debt Recovery Agents (ADRA) argued before the court that their conduct in using the provisions of Section 45 of the MCA for the purposes of “navigating around” magistrates’ courts which would allegedly “simply refuse to entertain section 58 matters”, does not constitute forum shopping but a means of ensuring that their clients’ (the micro-lenders) were afforded their constitutional right of access to courts.

The Court was not convinced by this argument and pointed out that the Constitutional Court⁷² and the Supreme Court of Appeal⁷³ have criticised the practice of litigants engaging in forum shopping by initiating proceedings in courts of their choosing for the purpose of convenience or procedural advantage. The court found that the conduct of the respondents, in using Section 45 of the MCA to bypass courts in areas in which the debtors, or their employers, reside, in order to obtain judgements in courts which would otherwise not have jurisdiction and which in any event would have no jurisdiction to issue an EAO against that debtor was a patent case of forum shopping.

The Court also expressed the view that, it is a well-established principle in law that where two provisions are contradictory, the provision that is specific trumps the provision that is general. In this case, the provisions of section 65 are specific in that they govern emoluments attachment orders. Accordingly, Section 65J quite clearly trumps section 45. The Judge stated that the protection of consumers is clearly the underlying rationale to the limitation of jurisdiction in sections 90 and 91 of the National credit Act. By contrast, section 45 takes a broad approach to jurisdiction, which directly contradicts and undermines the

Ms Booï was a resident of Alice in the Eastern Cape and was employed by the Department of Health. In 2011 when an agent of Johannesburg-based MBD Securitisation approached Ms Booï at her workplace she signed the documents presented to her but later said she had never heard of MBD and that the R4854.14 she allegedly owed was “unknown to her”.⁷¹ Some months later MBD’s lawyer (Mr Van der Merwe of Nelspruit in Mpumalanga), authorised a firm of attorneys in Hennenman in the Free State, about 700km from Ms Booï’s home in Alice, to apply for a judgment against her. On 13 October 2011 an unidentified person signed the document prepared by Van der Merwe “as if he was the magistrate of Hennenman”. Van der Merwe used this “judgment” to request an emolument order against Ms Booï. Duly signed by the clerk of the court at Hennenman, this allowed MBD to collect R300/month from her salary.

Ms Booï took the matter to court to rescind the judgement against her. The matter was taken on appeal. The Free State High court found MBD had infringed the law and awarded costs against the company. MBD had bought “a number of debtors books” from various companies, but during the transfer of these portfolios, the “physical file” was not supplied to MBD and the company had never been able to obtain it. According to this affidavit, neither the original sale agreement between Ms Booï, (and whoever it was whom she allegedly owed money), nor any copy, was available to prove she was in debt.

In addition to all the legal infractions, the court was unimpressed by the geographical range of the case — and the resulting costs.⁷¹ Instead of issuing summons in Alice, where Ms Booï lived and worked, Johannesburg-based MBD instructed an Mpumalanga attorney, who in turn approached the Hennenman magistrate’s court in the Free State for judgment, “based on a dubious procedure”.⁷¹ Notwithstanding the addresses of the parties and the fact that the cause of action, not to speak of the whole cause of action, a requirement in the Magistrates’ Court - did not arise in that district.⁷¹ The High Court could find only two reasons why the Hennenman court was selected.⁷¹

- One was that this court provided exceptionally efficient service.
- “The other reason is too ghastly to contemplate”: a possible link between MBD and/or its lawyers with someone at the Hennenman court so that “favours can be obtained unduly”.

Although the court could not make any finding in this regard the Judge was of the view that given that it was possible that there was a link between the appellant and/or a legal representative on the one hand and someone or more than one person at the Hennenman Magistrate’s Court and that favours can be obtained unduly the interests of justice required that copies of this judgment be sent to the Law Society for the Northern Provinces, the Minister of Justice and Constitutional Development and the National Credit Regulator for their attention and investigation if so required.

⁷² Chirwa v Transnet Ltd and Others 2008 (4) SA (CC) at 124

⁷³ S v J (695/10) [2010] ZASCA 139 at para 38



objects or purposes of the NCA. The NCA's limitation of section 45 is in the circumstances necessarily implied.⁷⁴

The fact that the NCA's jurisdiction provisions trump section 45 is also supported by the following.⁷⁵

1. The interpretative principle which states that when the provisions of a later Act are inconsistent with the provisions of an earlier act, the later act supersedes the earlier provisions. The NCA came into force on 1 June 2006, while section 45 of the MCA came into force in July 1945.
2. The NCA establishes a protective regime aimed at preventing the exploitation and abuse of consumers. The broad consent provided for in section 45 of the MCA fails to protect consumers. In the circumstances it is clear that section 45 of the MCA is inconsistent with sections 90 and 91 of the NCA and is trumped by the latter provisions.

If section 45 is properly interpreted in the context of the MCA and in the light of the Bill of Rights, it does not apply to causes of action based on agreements covered by the NCA. Section 45 does not permit that debtor to consent to the jurisdiction of a court outside of the district where the debtor works or resides.⁷⁶ The court if found that section 45 **does not permit a debtor to consent in writing to the jurisdiction of a Magistrate's Court other than one in which that debtor resides or is employed.**

The proposed amendment to section 45 seeks to tighten up existing loopholes by providing that:

- Parties may consent in writing to the jurisdiction of another court in terms of section 29 (1) of the MCA⁷⁷ **BUT** any consent given by a debtor in respect of proceedings instituted in terms of sections 57, 58, 65 or 65J to the jurisdiction of a court which does not have jurisdiction in terms of section 28 of the MCA⁷⁸ shall be of no force and effect.

⁷⁴ Para [91]

⁷⁵ Para [92]

⁷⁶ Para [93]

⁷⁷ Section 29 of the MCA - Jurisdiction in respect of causes of action

(1) Subject to the provisions of this Act and the National Credit Act, 2005 (Act 34 of 2005), a court in respect of causes of action, shall have jurisdiction in-

(a) actions in which is claimed the delivery or transfer of any property, movable or immovable, not exceeding in value the amount determined by the Minister from time to time by notice in the Gazette;

(b) actions of ejectment against the occupier of any premises or land within the district or regional division: Provided that, where the right of occupation of any such premises or land is in dispute between the parties, such right does not exceed the amount determined by the Minister from time to time by notice in the Gazette in clear value to the occupier;

(c) actions for the determination of a right of way, notwithstanding the provisions of section 46; (d) actions on or arising out of a liquid document or a mortgage bond, where the claim does not exceed the amount determined by the Minister from time to time by notice in the Gazette;

(e) actions on or arising out of any credit agreement as defined in section 1 of the National Credit Act, 2005 (Act 34 of 2005);

(f) actions in terms of section 16 (1) of the Matrimonial Property Act, 1984 (Act 88 of 1984), where the claim or the value of the property in dispute does not exceed the amount determined by the Minister from time to time by notice in the Gazette; (fA) actions, including an application for liquidation, in terms of the Close Corporations Act, 1984 (Act 69 of 1984);

(g) actions other than those already mentioned in this section, where the claim or the value of the matter in dispute does not exceed the amount determined by the Minister from time to time by notice in the Gazette.

⁷⁸ Section 28 of the MCA - Jurisdiction in respect of persons



Comment

- In the case of *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2015 (5) SA 221 (WCC) the applicants (Flemix Attorneys and the Association of Debt Recovery Agents (ADRA)) argued before the court that it is well-nigh impossible to obtain judgements in certain magistrates courts and they used the provisions of Section 45 of the MCA for the purposes of “navigating around” magistrates’ courts which would allegedly “simply refuse to entertain section 58 matters.”⁷⁹

Clause 4 (Amends section 57 of the MCA - Admission of liability and undertaking to pay debt in instalments or otherwise)

It is interesting to note that the provisions of sections 57 and 58 of the Magistrates’ Courts Act, coupled with the EAO procedure, were originally introduced to create a cheap and quick process to assist both credit providers and consumers.⁸⁰

Section 57 provides that if a debtor who has received a letter of demand or a summons demanding payment of a debt admits in writing to the liability for the debt and offers to pay it off in instalments then *the clerk of the court* (provided certain requirements are satisfied) *is empowered to grant a judgement and instalment order. This is done without any judicial oversight over the process which has led to abuses by unscrupulous attorneys and debt collectors* and even to calls for the repeal of both sections 57 and 58.⁸¹

The impact of the National Credit Act and Rule 12(5) of the Magistrates’ Courts Rules

In 2013 Buchner and Hartzenburg:

- (1) Saving any other jurisdiction assigned to a court by this Act or by any other law, the persons in respect of whom the court shall, subject to subsection (1A), have jurisdiction shall be the following and no other:
- (a) Any person who resides, carries on business or is employed within the district or regional division;
 - (b) any partnership which has business premises situated or any member whereof resides within the district or regional division;
 - (c) any person whatever, in respect of any proceedings incidental to any action or proceeding instituted in the court by such person himself or herself;
 - (d) any person, whether or not he or she resides, carries on business or is employed within the district or regional division, if the cause of action arose wholly within the district or regional division;
 - (e) any party to interpleader proceedings, if-
 - (i) the execution creditor and every claimant to the subject matter of the proceedings reside, carry on business, or are employed within the district or regional division; or
 - (ii) the subject-matter of the proceedings has been attached by process of the court; or
 - (iii) such proceedings are taken under section 69 (2) and the person therein referred to as the ‘third party’ resides, carries on business, or is employed within the district or regional division; or
 - (iv) all the parties consent to the jurisdiction of the court;
 - (f) any defendant (whether in convention or reconvention) who appears and takes no objection to the jurisdiction of the court;
 - (g) any person who owns immovable property within the district or regional division in actions in respect of such property or in respect of mortgage bonds thereon.

⁷⁹ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2015 (5) SA 221 (WCC) paras [54] and [55]

⁸⁰ Comments By The Law Society Of South Africa (LSSA) On The Working Document: Magistrates’ Courts Amendment Bill Relating To Amendments To Sections 36, 57, 58, 65, 65j And 86 (Accessed at <http://www.Lssa.Org.Za/Upload/Documents/Lssa%20comments%20on%20magistrates%20courts%20amendment%20bill.Pdf>)

⁸¹ Kotze C, (2013). Debt collection-Repealing sections 57 and 58 of Magistrates’ Courts Act will be short-sighted. *De rebus* (Accessed at <http://www.saflii.org/za/journals/DEREBUS/2013/180.html>). There are reports of these signed consents being obtained from debtors under duress and sometimes by collection agents impersonating the sheriff of the court.



- Expressed concern that the provisions of sections 57 and 58 of the Magistrates' Courts Act (which had survived the enactment of the National Credit Act (NCA) and the promulgation of the new magistrates' courts rules in 2010) were at the core of practices calculated to exploit defaulting consumers/ debtors.⁸²
- Acknowledged that these provisions had, to an extent, been ameliorated by sections 129 to 133 of the NCA, as well as the Rule 12(5) of the Magistrates Court Rules. Recognition was given in section 172(1) of the NCA, to the potential conflict between sections 57 and 58 of the Magistrates' Courts Act and sections 129 to 133 of the NCA on the basis that should sections 57 and 58 conflict with the NCA, the latter would prevail.⁸³
- Expressed the view, however, that it was unfortunate that the legislature did not see fit to repeal sections 57 and 58 of the Magistrates' Courts Act entirely.⁸⁴ Given that practices based on these sections 57 and 58, in many instances, formed the cornerstone of business models designed to maximise returns from debt collection operations.⁸⁵

In 2014 the Justice Department conducted **an assessment at Ermelo Magistrates court and found that thousands of consent to judgements, in terms of section 57 and 58 of the MCA, were irregularly issued through the courts by the clerk of court. These consents did not comply with either the MCA or the National Credit Act.**⁸⁶ At the time the Department reported that criminal investigations regarding these matters were pending.⁸⁷

Although Rule 12(5) of the Magistrates Court Rules provides that the registrar or clerk of the court **shall refer to the court** any request for judgment on a claim founded on any cause of action arising out of or based on an agreement governed by the National Credit Act, or the Credit Agreements Act, 1980.⁸⁸ The Justice Department acknowledged that **'there are many clerks of civil courts who disregard Rule 12(5) of the MCA.'**⁸⁹ This has meant that in some courts these matters are referred to the courts but in others they are not.⁹⁰ In an effort to improve judicial oversight further amendments to the Magistrates Court rules

⁸² Brown D, 2015. Irrelevance of the recent Court case in the Western Cape High Court regarding issuing of Emolument Attachment Orders within the correct jurisdiction (Accessed at <https://www.linkedin.com/pulse/irrelevance-recent-court-case-western-cape-high-regarding-david-brown?forceNoSplash=true>). This commentator has expressed the view that section 57 has facilitated a modernised form of indentured slavery.

⁸³ Buchner G and Hartzenberg CJ, (2013). Cashing in on collections (Accessed at http://www.derebus.org.za/wp-content/uploads/2016/07/July2013_DR.pdf)

⁸⁴ Ibid

⁸⁵ One of the greatest risks consumers/ debtors are exposed to is the over-recovery of costs, debt collectors' fees and attorneys' collection commission.

⁸⁶ DoJ&CD Directive: Civil Court Judgements/Orders: Irregular granting of section 57 and 58 consent to default judgments and issuing of emolument attachment orders by clerks of civil courts (dated 9 February 2014) (Accessed at <http://sanaps.org.za/wp-content/uploads/2014/10/Report-2-Annexures-A-B-C-D.pdf>)

⁸⁷ Ibid

⁸⁸ This rule had been amended in 2010 to provide that all judgments where the claim is founded on a cause of action arising out of or based on an agreement in terms of the NCA shall be referred to the courts for consideration

⁸⁹ Justice Department Circular from the Acting DDG: Court Services, DoJ&Cd Civil Court Judgements/Orders: Irregular granting of section 57 and 58 consent to default judgments and issuing of emolument attachment orders by clerks of civil courts.(dated 9 February 2014)

⁹⁰ Buchner G and Hartzenberg CJ, (2013). Cashing in on collections (Accessed at http://www.derebus.org.za/wp-content/uploads/2016/07/July2013_DR.pdf).



were published 28 July 2014 requiring clerks of the court to refer National Credit Act cases to the court.⁹¹

In February 2016 Rule 12(5) of the Magistrates Court Rules were further amended to provide that judgments (where the claim of action is based on a cause of action arising out of or based on an agreement in terms of the National Credit Act 75 of 1980) **MUST be referred by the clerks of the civil court to the court for consideration.**⁹²

The apparent conflict between the provisions of Rule 12(5) and sections 57(2) and 58(1) of the MCA, which currently provide that the clerk of the Court shall enter judgment in favour of the creditor, has created the legal interpretation that only clerks of the Court may grant judgments in terms of this section.

Despite some calls to repeal sections 57 and 58 the prevailing view appears to be that provision should be made for greater safeguards to be introduced in the legislation to protect debtors.

Consequently, the amendments to section 57 seek to address some of the existing inconsistencies in the application of the section by; providing that the court, not the clerk, may enter judgment and order payment in instalments; requiring more information about the debtor's financial position and providing that the court must act in terms of the provisions of the NCA when it is considering a request for judgment where the foundation of the request for judgment is a credit agreement under the NCA. For instance:

- (a) If a debtor receives a letter of demand (or summons) and in writing offers to pay the debt then the offer must be supported by *documentary evidence* which provides information on the debtors;
 - (i) monthly expenditure and income as well as other court orders or agreements with creditors; and assets and liabilities;
 - (ii) the amount of the instalment; as well as
 - (iii) written proof that he or she will have sufficient funds.
- (b) If the debtor fails to meet the terms of the offer then it is **the court** (and not the clerk) that must (upon written request by the creditor and or his attorney) grant a judgement for the amount still owing and order the debtor to pay in instalments.
- (c) The written request by the creditor and or his attorney to the court must be accompanied by documentary evidence which includes: the debtors written acknowledgment of liability and offer; the documentary evidence of the debtor's financial position at the time the offer was made and accepted and an affidavit/affirmation stating how the balance claimed has been arrived at.
- (d) The Court may (i) request more information on the defendant's financial position; from the creditor (ii) act in terms of the National Credit Act dealing with reckless credit and affordability assessments.

⁹¹ This rule was amended in 2010 following the case of *African Bank v Additional Magistrate Myambo* 2010 (6) SA 298 (GPD)

⁹² Department of Justice and Constitutional Development Working document Magistrates' Courts Amendment Bill (dated 21 February 2013)



- (e) If the debtor is employed and the court is satisfied the debtor will have adequate means it may then issue an EAO in terms of section 65J.

Comment

- When considering legislative reform with the aim of consumer protection, two factors have to be taken into account i.e. the costs of the protection and the already heavy work load of clerks and magistrates in the civil section of the Magistrate's Court.⁹³ In their submission to the Justice Department when the Bill was published for comment in 2013 the Law Society of South Africa (LSSA) - while acknowledging the abuse of processes that have characterised the use of sections 57 and 58 (although failing to elaborate on the steps the LSSA has taken to prevent the abuse of debt collection processes by attorneys) and the need for a revision of the provisions and agreeing that some judicial oversight is required argued that **complete judicial oversight of the whole judgment process under Sections 57 and 58 as well as the EAO procedure is unnecessary and costly and will create an unnecessary burden on the judiciary.**⁹⁴ Is it not correct that magistrates, (as well as clerks) especially are already overburdened in terms of workload? How will they be impacted with the additional responsibilities set out in this legislation?

Clause 5 (Amends section 58 of the MCA - Consent to judgment or to judgment and an order for payment of judgment debt in instalments)

Section 58 provides that if a debtor consents in writing to a judgment in favour of the creditor for a debt to be paid in specified instalments and he or she fails to comply *the clerk of the court is empowered to grant a judgement and instalment order*. Section 58 allows debtors to sign a consent to judgment when a letter of demand or summons is served. This section provides creditors with a powerful tool to reduce the time and costs incurred when collecting outstanding debts. The challenge is that documents are not explained to debtors who are pressured by debt collectors. Credit providers and their attorneys, through these consents, routinely have the judgments and EAOs granted in distant Courts where the debtor neither resides nor is employed,

In an assessment conducted by the Justice Department at the Ermelo magistrate's court in February 2014 it was found that thousands of consents to judgements, in terms of section 58 of the Magistrates Courts Act granted by the clerks of the court did not comply with either the MCA or the National Credit Act⁹⁵.

The proposed amendments to section 58 provide that:

⁹³ University of Pretoria, (2008). The incidence of and the undesirable practices relating to garnishee orders in South Africa (Accessed at <http://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf>)

⁹⁴ Comments By The Law Society Of South Africa (LSSA) On The Working Document: Magistrates' Courts Amendment Bill Relating To Amendments To Sections 36, 57, 58, 65, 65j And 86 (Accessed at <http://www.Lssa.Org.Za/Upload/Documents/Lssa%20comments%20on%20magistrates%20courts%20amendment%20bill.Pdf>)

⁹⁵ Justice Department Circular from the Acting DDG: Court Services, DoJ&Cd Civil Court Judgements/Orders: Irregular granting of section 57 and 58 consent to default judgments and issuing of emolument attachment orders by clerks of civil courts.(dated 9 February 2014) (Accessed at <http://sanaps.org.za/wp-content/uploads/2014/10/Report-2-Annexures-A-B-C-D.pdf>)



- (a) In a matter where a debtor has consented in writing to a judgement in favour of the creditor for the amount of debt owed **it is the court and not the clerk** which must (on written request of the creditor or his/her attorney) grant a judgement and instalment order.
- (b) If the debtor consents to pay by specified instalments the consent **MUST** documentary evidence and (i) set out details of his or her monthly income; as well as other court orders or agreements with creditors; and assets and liabilities; (ii) Indicate the amount of the instalment; and (iii) include written proof that he or she will have sufficient funds for his or her own maintenance and that of any dependents.
- (c) The written request by the creditor and or his attorney to the court must be accompanied by the summons or letter of demand; the debtors written consent to the judgements and if there debtor consent to paying instalments documentary evidence of the debtor's financial position at the time the debtor consented to the judgement.
- (d) The court may (i) request more information on the defendant's financial position; (ii) act in terms of the National Credit Act where the judgement is based on a credit agreement in terms of the NCA; and (iii) if the debtor is employed and the court is satisfied the debtor will have adequate means issue an EAO in terms of section 65J.

Clause 6 (Amends section 65 of the MCA - Offer by judgment debtor after judgment)

Section 65 of the MCA currently provides that the clerk of the court may make an instalment order where the debtor has offered to pay the debt in instalments – after the judgement has been granted - but before a section 65A(1) notice has been issued.⁹⁶

The Bill proposes amendments to the section in order to:

- (a) Provide that **the court and NOT the clerk may grant an instalment order.**
- (b) Ensure the offer is supported by written proof and documentary evidence
- (c) Ensure the court may:
 - (i) Request more information on the defendant's financial position;
 - (ii) Act in terms of the National Credit Act (when dealing with a credit agreement in terms of the NCA);
 - (iii) Establish if the debtor is employed and if the court is satisfied the debtor will have adequate means issue an EAO in terms of section 65J.

⁹⁶ 65A Notice to judgment debtor if judgment remains unsatisfied:

(1) (a) If a court has given judgment for the payment of a sum of money or has ordered the payment in specified instalments or otherwise of such an amount, and such judgment or order has remained unsatisfied for a period of 10 days from the date on which it was given or on which such an amount became payable or from the expiry of the period of suspension ordered in terms of section 48 (e), as the case may be, the judgment creditor may issue, from the court of the district in which the judgment debtor resides, carries on business or is employed, or if the judgment debtor is a juristic person, from the court of the district in which the registered office or main place of business of the juristic person is situate, a notice calling upon the judgment debtor or, if the judgment debtor is a juristic person, a director or officer of the juristic person as representative of the juristic person and in his or her personal capacity, to appear before the court in chambers on a date specified in such notice in order to enable the court to inquire into the financial position of the judgment debtor and to make such order as the court may deem just and equitable.



Clause 7 (Amends section 65E - Postponement of proceedings pending execution)

The amendments to section 65E of the MCA provide that a **court must be satisfied that the debtor will have sufficient funds to maintain him or herself and dependents** after payment of the instalments in terms of an EAO.

This was identified as a serious problem in the case of *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2015 (5) SA 221 (WCC) where judgements were subsequently granted against the individual applicants and EAOs issued against their earnings by clerks of court without any evaluation of the debtors ability to afford the deductions.⁹⁷

Clause 8 (Amends section 65J of the MCA - Emoluments Attachment Orders)

The emoluments attachment order (EAO) set out in section 65J of the Magistrates' Court Act permits the attachment of a debtor's earnings and obliges his or her employer to pay out of such earnings specific instalments to the judgment creditor or his or her attorney. The instalments are to be paid until the judgment debt and legal costs are paid in full.

The fact that the debtor is a low income earner is immaterial. His or her employer is compelled to deduct from the monthly salary or weekly wages the amount specified in the EAO and pay it to the creditor for the debts allegedly owed. There is no statutory limit on the amount which may be deducted from the earnings of a debtor in terms of an EAO. Nor is there a limit on the number of EAOs which may be granted against a particular debtor.

In the case of *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2015 (5) SA 221 (WCC) the court noted that section 65J creates some safeguards for the implementation of an EAO against a judgment debtor.⁹⁸ However, as was highlighted in the judgement, these protections are effectively meaningless when the person whose salary or wage has been attached under an EAO, is unable to access the court which issued the order.⁹⁹

Hence the court found that sections 65J(2)(b)(i) and 65J(2)(b)(ii) of the MCA are constitutionally invalid to the extent that they allow for EAO's to be issued by a clerk without judicial oversight.¹⁰⁰

The proposed amendments to section 65J create additional safeguards for the implementation of an EAO against a judgment debtor:

- An EAO may only be issued from a court in which the judgement debtor resides, carries on business or is employed.

⁹⁷ Para [5]

⁹⁸ Section 65J of MCA "... must not cause the employee not to have sufficient means for his own and his dependants' maintenance," such as the right to dispute the existence or validity of the order or the correctness of the balance claimed and the power of the court to set aside or amend an EAO on good cause.

⁹⁹ Para [53]

¹⁰⁰ Para [85]



- A cap (of 25%) is applied with regard to the amount that may be committed to an EAO where there is more than one EAO against the debtor.
- An EAO may only be issued if the court is satisfied that the debtor will have sufficient means for his or her maintenance as well as that of any dependents.
- A creditor and his or her attorney must serve on the debtor and his or her employer a notice of an intention to obtain an EAO (this should include the full amount of the debt, interest and costs outstanding).
- The debtor may serve a notice of intention to oppose the EAO (on the basis for instance that the amounts are incorrect; and or that 25% of his or her salary is already committed to other EAO's).
- The clerk of the court must ensure the court has authorised the EAO and has the jurisdiction required.
- The EAO must be served by the sheriff.
- The employer and the debtor MUST be furnished with a free monthly statement setting out details relating the payments and the balance owing.
- If the employer becomes aware that the debtor will not have adequate funds for his or her maintenance (or that the amounts claimed are incorrect) the creditor must be informed and must set the matter down for a hearing. The court may after the hearing rescind, amend or make another order.
- The employer will be LIABLE to repay the debtor any additional costs or interest if the EAO amount is not deducted timeously or he or she fails to stop the deductions when the judgement debt and costs have been paid in full.

Comment

- How did the Department determine that the amount of the instalment payable or total amount of instalments payable where there is more than one EAO payable by the debtor may not exceed a cap of 25% of the debtor salary? Does this mean that the credit provider whose EAO falls after the percentage cap has been reached will have to delay the enforcement of his/her judgment (and consequently the EAO) until some of the EAOs that are being enforced against the debtor have been satisfied and the percentage of the debtor's salary again falls below the cap? How will this be managed?

Clause 9 (Amends Section 65M of the MCA - Enforcement of certain judgments of Supreme Court)

Currently, section 65M of the MCA provides that only a district court may conduct financial inquiries in respect of judgments of a district court or a division of the High Court for the payment of any amount of money. The amendment seeks to enable a court of a district to deal with judgments from the regional division and for such judgments to be transferred to the district court for the debt collection process.

Clause 10 (Amends Section 73 of the MCA)

A consequential amendment to the section.



Clause 11 (Amends section 86 of the MCA - Respondent may abandon judgment)

This clause amends section 86 of the MCA, to provide that if a party abandons a judgment in his or her favour because the judgment debt has been settled, no judgment shall be entered in favour of the other party.

Clause 12 (Amends section 106 of the MCA – Offences relating to judgements, emolument attachment orders and instalment orders)

This clause inserts a new section 106C in the MCA which seeks to criminalise conduct in respect of any person who:

- Requires another person applying for a loan, to consent to judgment or any instalment order or EAO prior to the granting of a loan.¹⁰¹
- Fraudulently obtains or issues a judgment or any instalment order or EAO.

Anyone found guilty of these offences shall be liable on conviction to a fine or three years imprisonment.

Various reports and investigations have revealed that judgments and EAO's have been obtained fraudulently - with processes being abused and court officials colluding with external parties to grant judgments and EAO's unlawfully.¹⁰² Although the existing criminal law can be applied the creation of a specific offence to deal with abuse of judgments and court orders is overdue.

Clause 13 (Amends section 23 of the Superior Courts Act – Rescission of judgement with consent of plaintiff or where judgement debt has been settled)

Clause 13 proposes the insertion of a new section into the Superior Courts Act to provide for; (i) rescission of a judgement with the consent of the creditor or (ii) rescission of a judgement where the debt has been settled. This is part of the DTI's removal of adverse credit information project which seeks to assist certain categories of consumers by removing adverse credit information from credit bureaux.

Clause 14 (Transitional arrangements) and Clause 15 (Short title and commencement)

The transitional clauses provide for a three year window period in respect of which:

¹⁰¹ Section 90(2)(k)(iii) of the NCA already declares the practice of requiring the consent of a person applying for a loan, to judgment or EAO prior to the granting of the loan, unlawful. Unlawful provisions are void and when an agreement contains an unlawful provision, a court must sever that provision from the agreement, or alter the provision to render it lawful if it is reasonable to do so. Alternatively, a court may declare the entire agreement unlawful (section 90(3) and (4) of the NCA).

¹⁰² Kruger A, Major garnishee fraud uncovered (Accessed at <http://www.fin24.com/Companies/Financial-Services/Major-garnishee-fraud-uncovered-20131122>)



- All legal proceedings initiated in terms of those sections of the MCA to be amended by the provisions of the Courts of Law Amendment Bill (sections 36, 45, 57, 58, 65, 65E, 65J, 65M, 73 and 86) shall be concluded as if the Bill had not been enacted.
- Any judgement credit or debtor who was granted a default judgement, instalment order or EAO (in terms of the MCA) which was not obtained and granted in accordance with the law may apply for a review and the court must rescind such a judgement or order if it was granted irregularly.
- Any investigation, or prosecution or other legal proceedings in respect of conduct which would be an offence (in terms of the proposed section 106C) and which was initiated before the commencement of the Courts of Law Amendment Bill must proceed as if the Bill had not been passed.

Although provisions of retrospectivity are usually frowned upon, the Department is of the view that in this instance, many debtors will be assisted if provisions of retrospectivity are introduced. Provision is therefore made for some of the clauses in the Bill to apply with effect from 8 July 2015 (the date of the judgment of the Western Cape Division of the High Court in the University of Stellenbosch Law Clinic case) in which it declared certain parts of section 65J of the MCA to be unconstitutional.

7. CONCLUSION

The EAO system was created for a legitimate purpose – to repay the money owed by debtors to creditors when the debtor was unwilling (rather than unable) to satisfy the debt.¹⁰³ However, EAO's are supposed to be used as a measure of last resort and various abuses of the process which have been outlined by this paper include:¹⁰⁴

- (a) Forum shopping for courts by debt collectors which would entertain their applications for judgments and the issuing of EAOs.¹⁰⁵
- (b) The absence of any judicial oversight
- (c) No evaluation is done of the affordability of the amount to be deducted from the employee's salary.¹⁰⁶
- (d) No statutory limit on the amount which may be deducted from the earnings of a debtor in terms of an EAO. (The affordability assessment was either perfunctory or

¹⁰³ According to the LSSA the EAO is perhaps the most effective manner in which a judgment debt is collected and, provided it is implemented in a proper and structured manner, will ensure that the consumers obligations are met, which is after all one of objectives of the NCA. To get rid of this procedure altogether, as has been suggested in some circles, will have dangerous repercussions including, inter alia, creditors resorting to more drastic and expensive methods of debt recovery (e.g. sales in execution of movable property), the resurgence in extreme cases of unlawful methods of debt collection and making it costly, if not impossible, for historically disadvantaged consumers to access credit.

¹⁰⁴ SA News, Probe into abuse of Emolument Attachment Orders (2 September 2015) (Accessed at <http://www.sanews.gov.za/business/probe-abuse-emolument-attachment-orders>). Government has appointed Q LINK Holdings (Pty) Ltd to investigate the extent and abuse of Emolument Attachment Orders for credit (EAOs) in the public service

¹⁰⁵ Van Rensburg D, (2015) Landmark judgment is not end of garnishee war (Accessed at <http://citypress.news24.com/Business/Landmark-judgment-is-not-end-of-garnishee-war-20150712>). In 2015 one commentator estimated that 40% to 50% of EAOs are issued by courts in incorrect jurisdictions. The total number of current EAOs would be "at least" 1 million. That means a conservative estimate of 400 000 unlawful ones being active at the moment, aside from the hundreds of thousands more that have already taken their illegitimate pound of flesh.

¹⁰⁶ Patel A and Fletcher T, (2015). Emoluments Attachment Orders: No more 'rubber stamping' by Clerks, (Accessed at <https://www.cliffedekkerhofmeyr.com/en/news/publications/2015/employment/employment-alert-10-july-emoluments-attachment-orders-no-more-rubber-stamping-by-clerks.html>)



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