

CONSOLIDATED MEMORANDUM ON THE COURTS OF LAW AMENDMENT BILL [B8-2016]

Prepared by: Adv Tanya Golden SC in her capacity as the Chairperson of the Parliamentary Committee of the General Council of the Bar of South Africa (*"the GCB"*)

1. The purpose of this memorandum is to furnish written submissions on the Courts of Law Amendment Bill [B8-2016] (*"the Bill"*).
2. It is apparent from the long title of the Bill and the memorandum on the objects of the Bill (*"the memorandum"*) that its purpose is, *inter alia*, to:
 - 2.1. amend the Magistrates' Court Act, No. 32 of 1944 (*"the MCA"*) in order to further regulate the process pertaining to emoluments attachment orders and to address alleged abuses of that process;
 - 2.2. amend certain sections of the MCA dealing with rescission of judgments – in circumstances where the judgment debt has been satisfied – and abandonment of judgments, in order to accommodate the Department of Trade and Industry's (*"the DTI"*) project to remove adverse consumer credit information;
 - 2.3. amend the MCA to further regulate the payment of debts in instalments or otherwise;

- 2.4. amend the MCA to provide for certain offences and penalties relating to judgments, emoluments attachment orders and instalment orders;
 - 2.5. amend sections of the MCA to further regulate jurisdiction by consent of the parties; and
 - 2.6. amend the Superior Courts Act, No. 10 of 2013 ("*the SCA*") to provide for rescission of judgments with the consent of the judgment creditor and/or in circumstances where the judgment debt has been satisfied (also to facilitate the DTI's aforementioned project).
3. It appears from the memorandum that the proposed amendments are primarily geared towards alleviating "*the plight of certain debtors who find themselves at the receiving end of a debt collecting system and certain common law principles that keep debtors in a state of indebtedness, from which it is difficult to escape*".
 4. There have been recent developments in this area of the law which seek to address abuses of the debt collection process by creditor providers and/or their legal representatives.¹ The Bill incorporates the inroads made by the courts in attempting to restore justice and fairness to this process, having particular

¹ See *The University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2015 (5) SA 221 (WCC)

regard to the constitutional rights of debtors. Debtors who fall victim to these kinds of abuses are predominantly low-income earners who may not have the means and/or the knowledge to enforce protection of their fundamental human rights.

5. This area of the law has long called for further regulation to ensure that the rights of creditors and debtors alike are taken into account in a process which is essentially creditor-driven. Especially since the protection of creditors' interests seem to take prevalence in this process (in its current form), regardless of the debtor's financial circumstances, basic human rights and ability to provide for themselves and their dependants.
6. What follows below is a summary of the amendments proposed in the Bill. Given the intended purpose of the Bill, there is little criticism that can be levelled against its contents. The Parliamentary Committee of the GCB does however wish to make certain comments thereon.
7. Clause 1 of the Bill proposes to insert a definition of the National Credit Act, No. 34 of the 2005 (*"the NCA"*) into the definition section of the MCA.
8. Clause 2 of the Bill seeks to amend section 36 of the MCA which concerns rescission of judgments. The amendment makes provision for the rescission of a default judgment with the written

consent of the judgment creditor and prescribes the procedure for the envisaged rescission application.

9. Section 36 of the MCA in its current form does not make provision for:

9.1. a judgment to be rescinded in the absence of agreement by the judgment creditor, despite the judgment debt having been settled; and

9.2. the procedure to be employed by a judgment debtor in seeking to rescind such a judgment.

10. According to the memorandum, the rationale behind the proposed amendment is the following:

"The dti embarked on a project aimed at the removal of adverse consumer credit information. The project involves, amongst others, the amendment of legislation dealing with the rescission or abandonment of judgments in order to assist certain categories of consumers in accessing credit by removing adverse credit information from [the] credit bureaux. The dti reported that many judgment creditors refuse to consent to the rescission of judgments or to abandon judgments following the settlement of the debt. This results in the debtor having to apply to the court for the rescission of the judgment, often at great cost. The dti suggested that the MCA be amended to provide for an automatic procedure to rescind judgments, in line with section 71A of the NCA. However, reports of fraudulent rescissions of judgments have emerged leading to the concern that a complete automatic rescission of judgment without the intervention of the court might lead to further fraudulent actions. It is vital that the judgment creditor's rights are also protected. Accordingly, the amendment to section 36 seeks to make the application for rescission of judgment, where the debt has been

settled, less cumbersome and inexpensive, by providing for a standard prescribed form to be used. Application for rescission of judgment brought by way of the prescribed form may be made in chambers and a court may make such cost order it deems fit. It can be set down for hearing on any date not less than five days after being lodged."

11. The proposed amendment of section 36 of the MCA is patently in the interests of justice. It will serve to address a particular predicament which is commonly faced by many impoverished persons in a debt collecting system which often serves to perpetuate their financial problems rather than to alleviate them. The implementation of a quick and inexpensive process for the rescission of judgments in respect of which the debt has been settled, will go some way to making the utilisation of this process more attainable. The safeguards proposed in the amendment, i.e. that the application be determined by a court, as opposed to by way of an automatic rescission of judgment, will certainly serve to curtail the fraudulent actions referred to in the memorandum, whilst ensuring that the rights of judgment creditors are not overlooked.
12. Clause 3 of the Bill seeks to amend section 45 of the MCA to permit parties to consent to the jurisdiction of a magistrate's court to determine causes of action which would otherwise be beyond the scope of its jurisdiction. The proposed amendment also prescribes that such consent will be of no force and effect in

proceedings instituted in terms of sections 57², 58³, 65⁴ and 65J⁵ of the MCA.

13. According to the memorandum, the original purpose of section 45 of the MCA was to allow parties to consent to the jurisdiction of a lower court where the amount of the claim exceeded the monetary jurisdiction of that court. The memorandum states further that,

"the proviso in section 45 as it currently exists had been used to consent to the jurisdiction of a specific magistrate's court. In consenting to the jurisdiction of a magistrate's court, consumers are often required or find themselves consenting to the judgment of a magistrate's court far away from where the consumer is either residing, carrying on business or employed. In consequence, the consumer ends up not being able to access such far away courts to challenge the order should the consumer wish to do so."

14. The proposed amendment addresses both of the following issues:

14.1. that, subject to section 46 of the MCA, parties may consent in writing to the jurisdiction of either the district or regional court in respect of any proceedings otherwise beyond its jurisdiction in terms of section 29(1) of the MCA; and

² This section concerns the admission of liability and undertaking to pay debt in instalments or otherwise.

³ This section concerns the consent to judgment and an order for payment of the judgment debt in instalments.

⁴ This section concerns offers by judgment debtors after judgment.

⁵ This section concerns emoluments attachment orders.

- 14.2. the decision of University of Stellenbosch Legal Aid Clinic & 15 Others vs Minister of Justice and Correctional Services & 16 Others in which the Western Cape Division of the High Court declared that section 45 of the MCA does not permit a judgment debtor to consent in writing to the jurisdiction of a magistrate's court other than the one in which the judgment debtor resides or is employed.
15. The proposed amendment of section 45 of the MCA is clearly aimed at avoiding a repetition of the deplorable circumstances that gave rise to the abovementioned case. There can be no doubt that the objective sought to be achieved by the proposed amendment is in the interests of justice.
16. Clause 4 of the Bill proposes amending section 57 of the MCA. This section makes provision for the admission of liability and an undertaking to pay a debt in instalments or otherwise. In its current form, this section permits the clerk of the court to grant judgment against a defendant, without further notice to the latter, for payment of the judgment debt plus costs, when the defendant defaults on his/her undertaking to make payment.
17. Clause 5 of the Bill amends section 58 of the MCA. This section permits a clerk of the court to grant judgment and an instalment

order where the defendant has consented to the granting thereof.

18. Section 65 of the MCA permits the clerk of the court to make an instalment order where the judgment debtor has offered to pay the judgment debt in instalments. The judgment creditor or his/her attorney may request, in writing, that such an order be made. Clause 6 of the Bill proposes amending this section of the MCA to provide for a court to make the instalment order after consideration of the judgment debtor's financial circumstances.
19. The amendments proposed by clauses 4, 5 and 6 of the Bill provide for judicial oversight in that they require that a court makes the judgments and/or orders currently delegated to the clerk of the court. Importantly, they also require that the court take into consideration the defendant's financial position in determining whether the judgment should be granted.
20. Clause 4, 5 and 6 of the Bill propose to transform what is essentially a procedural process overseen by a clerk of the court, to one in which the financial circumstances of the defendant, his/her basic human rights and those of his/her dependants are taken into account by the court in determining whether judgment should be granted. These amendments are welcomed in a constitutional democracy.

21. Clause 8 of the Bill proposes amending section 65J of the MCA which deals with the issuing of emoluments attachment orders. A number of amendments are proposed, which are predominantly geared towards protecting the judgment debtor's basic human rights by assessing his/her ability to pay the judgment debt. They include, *inter alia*:
 - 21.1. that an emoluments attachment order may only be issued by the court in whose jurisdiction the judgment debtor resides, carries on business or is employed;
 - 21.2. the imposition of a cap of 25% on the amount of a debtor's salary that may be deducted in terms of an emoluments attachment order;
 - 21.3. further regulation of the procedure in terms of which an emoluments attachment orders may be granted; and
 - 21.4. penalising employers who fail to deduct the instalments timeously and/or fail to stop deductions when the judgment debt has been satisfied.
22. The amendments proposed in respect of section 65J of the MCA, similarly to clauses 4, 5 and 6 of the Bill, seek to ensure that judgment debtors have sufficient income to provide for themselves and their dependents, after deduction of the instalments. They safeguard the basic human rights of vulnerable

debtors who may be stuck in a perpetual cycle of debt from which they are unable to escape in order to provide for their dependents.

23. Clauses 7 and 10 of the Bill essentially propose consequential amendments to sections 65E(1)(c) and 73 of the MCA respectively, to bring them in line with the proposed amendments to the process concerning emoluments attachment orders.
24. Clause 9 of the Bill seeks to amend section 65M of the MCA to enable a district court to deal with judgments from the regional division and for such judgments to be transferred to the district court for the debt collection process.
25. Clause 11 of the Bill envisages amending section 86 of the MCA. This section concerns the abandonment of judgments. The proposed amendment provides that if a party abandons a judgment given in his or favour because the judgment debt and costs have been settled, judgments referred to in sections 86(2) or (3) of the MCA shall not be entered in favour of the other party.
26. Clause 12 of the Bill proposes the insertion of section 106C into the MCA. The proposed section renders it a criminal offence to:

26.1. require an applicant for the granting of a loan to consent to a judgment, instalment order or emoluments attachment order prior to being granted the loan;

26.2. fraudulently obtain or issue a judgment, instalment order or emoluments attachment order;

and imposes a penalty upon conviction of such offences.

27. This amendment should act as a deterrent to credit providers and/or court administrative staff who have or intend to abuse the debt collection process and exploit the vulnerable position in which debtors may find themselves.

28. Clause 13 of the Bill seeks to introduce section 23A into the SCA to provide for the rescission of judgments with the consent of the judgment creditor or in circumstances where the judgment debt has been satisfied.

29. The incorporation of this section in the latter instance seems eminently reasonable. However, should the instance arise where a judgment creditor is prepared to agree to rescission of a judgment in circumstances where the judgment debt has only been settled in part, limited as these instances may be, it would be in the interests of justice that this information be made available to credit providers to facilitate comprehensive risk assessment.

30. Clause 14 of the Bill provides for transitional provisions to facilitate a smooth transition for incorporation of the proposed amendments to the MCA. It also provides for legal certainty by stipulating in clause 14(1) of the Bill that proceedings instituted prior to the enactment of the proposed amendments should be determined as if the proposed amendments had not been passed.
31. By contrast, clause 15(3) of the Bill proposes that certain sections of the Bill should be deemed to come into operation on 8 July 2015.
32. However, the sections referred to in clause 15(3) correlate with the sections referred to in clause 14(1) of the Bill, save for sections 36 and 86 of the MCA.
33. Given the correlation between the sections referred to in clauses 14(1) and 15(3) of the Bill, and if legal certainty is sought to be achieved, perhaps clause 14(1) should apply to all such applications, including those instituted between 8 July 2015 and the date of commencement of the remaining provisions of the Bill.
34. Should the deeming provision in clause 15(3) of the Bill remain, perhaps it would be of assistance for it to be framed in such a manner that it is clear how it should operate in relation to clause

14(1) of the Bill and those applications already been instituted between 8 July 2015 and the date of commencement of the remaining provisions.