



**COMMENTS OF LEGAL AID SOUTH AFRICA ON PROPOSED
COURTS OF LAW AMENDMENT BILL (B8-2016)**

August 2016

1. INTRODUCTION

Legal Aid SA has received the invitation to comment on the Courts of Law Amendment Bill (B8-2016) and submits the comments below.

2. OBJECTS OF BILL

The purpose of the Bill is to amend various sections of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944) (the MCA), in order to address alleged abuses in the emoluments attachment order (EAO) system.

It further aims to amend the sections of the MCA dealing with the rescission or abandonment of court judgments to accommodate the Department of Trade and Industry's removal of adverse consumer credit information project.

The amendments have a bearing on civil debts and are aimed at protecting debtors who often find themselves in financial difficulties as a result of debts incurred by them and who cannot escape the "debt trap" due to the abuses that seem to be taking place in this area of the law and also to put in place measures that will assist them in overcoming the effects of court judgments relating to their continued indebtedness.

The Bill further amends the Superior Courts Act, 2013 (Act No. 10 of 2013) (the SCA), to provide for the rescission of judgments with the consent of the judgment creditor and for the rescission of judgments where the judgment debt has been settled.

Any effort to alleviate the plight of certain debtors who often 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, is welcomed by Legal Aid SA.

Legal Aid SA further welcomes the proposals aimed to curb alleged abuses in the EAO system and the provision for an additional mechanism in terms of which court judgments may be rescinded or abandoned without incurring prohibitive legal costs.

3. COMMENTS

Legal Aid SA wishes to comment as follows:-

3.1 INTERPRETATION AND THE SHORTENING OF THE LANGUAGE OF STATUS

Legal Aid SA notes the inclusion of the words 'she' and 'her' in the Amendment Bill and wish to refer to the provisions of section 6 of Interpretation of Laws Interpretation Act 33 of 1957 in this regard.

6 Gender and number

In every law, unless the contrary intention appears-

(a) Words importing the masculine gender include females; and

(b) Words in the singular number include the plural, and words in the plural number include the singular.

3.2 CLAUSE 2:

This clause amends section 36 of the MCA, which deals with the rescission of judgments and further provides that an application for rescission of judgment brought by way of the prescribed form may be made in chambers and a court may make a cost order it deems fit.

Although Legal Aid SA welcomes the use of the prescribed form, the reason for bringing the application for rescission of judgment in chambers is not clear. If the reason for bringing the application for rescission of judgment in chambers is to expedite the finalisation of matters and thus provide greater access to justice to the public, then this proposal is welcomed by Legal Aid SA. It should however be noted that in the case of defended civil actions the provisions of the Magistrate's Court Act and the Superior Courts Act should be adhered to, especially where the application for rescission is opposed.

Section 5 of the Magistrate's Court Act 32 of 1944 further directs that courts are to be open to the public save for certain exceptions:

5 Courts to be open to the public, with exceptions

(1) Except where otherwise provided by law, the proceedings in every court in all criminal cases and the trial of all defended civil actions shall be carried on in open court, and recorded by the presiding officer or other officer appointed to record such proceedings.

(2) The court may in any case, in the interests of good order or public morals, direct that a civil trial shall be held with closed doors, or that (with such exceptions as the court may direct) minors or the public generally shall not be permitted to be present thereat.

(3) If any person present at any civil proceedings in any court disturbs the peace or order of the court, the court may order that person to be removed and detained in custody until the rising of the court, or, if in the opinion of the court peace cannot be otherwise secured, may order the court room to be cleared and the doors thereof to be closed to the public.

Insofar as the High Court is concerned (clause 13) section 32 of the Superior Courts Act 10 of 2013 S provides that proceedings should be carried on in open court:

32 Proceedings to be carried on in open court

Save as is otherwise provided for in this Act or any other law, all proceedings in any Superior Court must, except in so far as any such court may in special cases otherwise direct, be carried on in open court.

3.3 CLAUSE 3:

In *University of Stellenbosch Legal Aid Clinic & 15 Others v Minister of Justice and Correctional Services & 16 Others*, (the *Stellenbosch* case) 2015 (5) DS 221 (WCC), the Court declared that section 45 does not permit a judgment debtor to consent in writing to the jurisdiction of a magistrate's court other than that in which the judgment debtor resides or is employed, in respect of the enforcement of a credit agreement to which the NCA applies.

In the past, consumers were often required or found themselves consenting to the jurisdiction of a magistrate's court far away from where he or she is either residing, carrying on business or employed. In consequence, the consumer ended up not being able to access such far away courts to challenge the order should the consumer wish to do so.

Legal Aid SA welcomes the proposed amendment of section 45 of the MCA which deals with consent to the jurisdiction of a court as it will provide greater access to justice and will accommodate people in rural areas that are not in a financial position to travel long distances to courts and thus prevent further abuse of this rule.

3.4 CLAUSE 4:

The amendment of section 57 to provide that only a court, not the clerk may enter judgment and order payment in installments is welcomed by Legal Aid SA. This proposal will address inconsistencies in the application of this requirement.

3.5 CLAUSE 8:

This clause amends section 65J of the MCA, which provides for the issuing of EAO's. The most important amendments are the following, namely a cap of 25% is placed on the judgment debtor's salary with regard to the amount that may be committed to EAOs.

Legal Aid SA supports abovementioned proposal as this would ensure that debtors will still have sufficient means for his or her own maintenance and that his or her dependants after payment of the instalment.

Legal Aid SA welcomes the following additional protection that is proposed, namely:-

- The garnishee (employer) and debtor must be furnished with a free monthly statement setting out details relating to payments made and the balance owing. Currently the judgment creditor must furnish such a statement on reasonable request by the garnishee or judgment debtor.
- A garnishee will be liable to repay the debtor if he or she does not deduct the instalment amount timeously or fails to stop deductions when the judgment debt has been paid in full. It seems that employers do not deduct the EAO's timeously, resulting in interest being added to the unpaid amount or do not stop the deductions when the judgment has been paid in full. In order for employers to be mindful of their duties, a sanction is provided whereby the employer must repay amounts that became due as a result of his or her failure to deduct the amount or any amounts timeously or to stop payments by the judgment debtor after the debt has been settled in full.

3.6 CLAUSE 12:

Due to the concerns raised regarding fraudulently obtained or issued judgments or any instalment order or emoluments attachment order the insertion of a new section 106C in the MCA is welcomed by Legal Aid SA.

The amendment seeks to criminalise conduct in terms of which a person (creditor) requires another person applying for a loan, to consent to judgment or any instalment order or EAO prior to the granting of a loan and where any person fraudulently obtains or issues a judgment or any instalment order or EAO. It must be pointed out that 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).

Furthermore, numerous judgments and EAO's are obtained fraudulently. This provision could also act as a deterrent for court officials not to collude with external parties in granting judgments and EAO's unlawfully. This proposal is welcomed by Legal Aid SA.

4.CONCLUSION

Subject to the comments above, the proposed Amendment Bill is welcomed by Legal Aid SA.

LEGAL AID SOUTH AFRICA