



## **SOUTH AFRICAN HUMAN RIGHTS COMMISSION**

### **SUBMISSION ON THE COURTS OF LAW AMENDMENT BILL [B8– 2016]**

*Submitted to the Portfolio Committee on Justice and Correctional Services, 12 August 2016*

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#### **1. Introduction**

The South African Human Rights Commission (SAHRC/Commission) welcomes the Courts of Law Amendment Bill [B – 2016] ('Bill') which seeks, *inter alia*, to curb the alleged abuses in the emoluments attachment order (EAO) system by introducing various protective mechanisms.

Through its mandate, the SAHRC has been closely monitoring the alleged abuses in the EAO system and the egregious impact it has on human rights. It therefore commends Parliament for processing legislation which shall bring relief to many who have been victims of abuse in the EAO and attempts to strike a balance between the rights of the judgment creditors to collect their dues, and the rights of the judgment debtor to have access to justice.

#### **2. SAHRC Mandate**

The SAHRC is a constitutionally created independent state institution. It is mandated by section 184 of the Constitution of the Republic of South Africa<sup>1</sup> which states,

184. (1) The South African Human Rights Commission must-
- (a) promote, respect for human rights and a culture of human rights;
  - (b) promote the protection, development and attainment of human rights; and

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<sup>1</sup> Act 108 of 1996. Hereinafter the 'Constitution'.

- (c) monitor and assess the observance of human rights in the Republic.

In September 2014, the new South African Human Rights Commission Act 40 of 2013 came into effect, repealing its predecessor the Human Rights Commission Act 54 of 1994. Section 13 of the new Act expands on the powers and functions of the Commission.

Accordingly, section 13(1) (a) (i) provides,

- (a) The Commission is competent and is obliged to-
  - (i) Make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of human rights within the framework of the Constitution and the law, as well as appropriate measures for the further observance of human rights;

Section 13(1) (b) (v) further states,

- (b) The Commission-
  - (v) Must review government policies relating to human rights and may make recommendations.

In accordance with the above outlined mandate that SAHRC makes the submission on the Bill to the Portfolio Committee on Justice and Correctional Services (the Portfolio Committee).

## **2.1 SAHRC activities related to the EAO system**

In March 2015, the Commission hosted a roundtable in Johannesburg entitled “*A focus on consumer - credit: the implication of micro lending on access to justice*” to facilitate discussion on the shortcomings in the EAO system and explore legislative reforms which might be effected to curb the widespread abuses.<sup>2</sup> A number of presentations were made during the roundtable highlighting the prevalent abuse in the system and the egregious impact of such practices on poor people.

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<sup>2</sup> Report on the Roundtable Discussion on “consumer-credit: the implication of micro lending on access to justice” 11 March 2015, hosted by the SAHRC.

The Commission was also instrumental in the court case in, *University of Stellenbosch Legal Aid Clinic & Others v Minister of Justice and Correctional Services & Others*.<sup>3</sup> In light of the fact that the matter proceeded to the Constitutional Court, the Commission made application for admission as *amicus curiae* in the matter. The Commission's interest in intervening as *amicus curiae* was due to the constitutionality of the provisions relating to EAOs in the Magistrates' Court Act, 1944 (MCA). Further, the SAHRC was particularly concerned by the lack of judicial oversight in the issuing of an EAO and the impact it has on the human rights, (especially the right to human dignity), of marginalised and the vulnerable persons.

During the court case, the Commission gave an exposition of the treatment of EAOs in foreign and international law as well as the appropriate remedies. In its submissions, both before the High Court and the Constitutional Court, the Commission highlighted that one way of curbing abuses was through capping the amount which can be attached. It was highlighted that "red flags" should be raised where an EAO exceeded 30% of the debtor's salary. The Commission indicated that in certain jurisdictions such as the USA, Australia, Germany and Rwanda, EAOs were capped.

### **3. Specific concerns with the Bill**

#### **3.1 Clause 3: Consent to the jurisdiction of a court**

Clause 3 amends section 45 of the Magistrates' Court Act, 1944 (MCA) which deals with consent to the jurisdiction of a court. The Bill introduces a new subsection (3) which provides that consent to the jurisdiction of the court in proceedings instituted in terms of sections 57, 58, 65 or 65J which does not have jurisdiction over the defendant or judgment debtor is of no force and effect.

The SAHRC welcomes the provisions contained in this clause. Proscribing any consent to jurisdiction which does not have jurisdictional link with the judgment debtor will guard against consumers' right of access to courts being violated. The erstwhile abuse by judgment creditors on the consumers' consent to jurisdiction was highlighted in the Stellenbosch case. Judge Desai in the *Stellenbosch LAC case*, declared that in causes of action based on agreements covered by the National Credit Act, 2005, section 45 of the MCA does not permit a judgment debtor to consent in writing to the jurisdiction of a magistrate court other

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<sup>3</sup> *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice And Correctional Services and Others* (16703/14) [2015] ZAWCHC 99; 2015 (5) SA 221 (WCC); [2015] 3 All SA 644 (WCC); (2015) 36 ILJ 2558 (WCC) (8 July 2015) (Hereinafter the 'Stellenbosch LAC case').

than in which the judgment debtor resides or is employed.<sup>4</sup> This clause is therefore in line with the *Stellenbosch LAC case*.

### **3.2 Clause 4: Admission of liability**

The clause amends section 57 of the MCA which provides for the admission of liability and undertaking to pay debt in instalments or otherwise. The amendments redress the previous position whereby in instances where the defendant failed to fulfil his or her undertaking, it was the clerk of the court who was required to grant judgment against the defendant and order the defendant to pay the judgment debt and costs in specified instalments.

The amendment provision provides that is the prerogative of the court, not the clerk, to grant such an order. In a further amendment, the clause introduces subsection (1A) which requires that the judgment debtor's offer wherein he or she admits liability and offers to pay the amount of the debt, should set out amongst others: his/her income and expenditure; similar court orders or agreements where such exist; and bank statements indicated whether he or she will have sufficient means for his or her own maintenance and that of his or her dependants after paying the instalment.

The amendment further states that in causes of actions based on agreements covered by the NCA, the court may act in terms of the provisions of the NCA.

The clauses create judicial oversight in the granting of such orders. It may be argued that judicial oversight already exists since Rule 12(5) of the Magistrates' Court Rules provides that:

*“(5) 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 (Act 75 of 1980), and the court shall thereupon make such order or give such judgment as it may deem fit”.*

However, due to differing opinions in interpretation, in some courts these matters were referred whereas in some they were not. Thus, the clarity brought about by the amendment is welcomed.

Further, the amendment provides the court with the discretion to engage in a full affordability evaluation. This evaluation is anchored on important factors such as whether the instalment amount consented to by the debtor will leave the debtor with sufficient income to maintain

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<sup>4</sup> University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice And Correctional Services and Others 2015 (5) SA 221 (WCC) para 93.

himself and his family and whether any other EAOs exists against the judgment debtor. Another novel amendment is the fact that the court is empowered to deviate from the amount which the judgment debtor has consented to pay and determine an amount which it deems fit after having taken into consideration a plethora of factors.

### **3.3 CLAUSE 8: Emoluments attachment orders**

This clause amends section 65J of the MCA, which deals with the issuing of EAOs.

The first fundamental and crucial change introduced by the amendment is that an EAO may now only be issued from the court in which the judgment debtor resides, carries on business and only if the court has so authorised.

The amendment creates subsection (1A) which provides 25% as the cap amount that may be committed to EAOs where the judgment debtor has more than one EAO against him or her.

The clause also introduces the procedure of a notice of intention to obtain an EAO in subsection (2A). Such a notice must be served on the judgment debtor and his or her employer. The judgment debtor is empowered to file a notice of intention to oppose. Where the judgment creditor or his or her attorney does not accept the reasons for opposing the issuing of an EAO, the matter may be set down for hearing in court. If there is no notice of intention to oppose, then the EAO may be issued in accordance with the authorisation by the court.

It is now mandatory for the judgment creditor or his or her attorney to furnish the garnishee (employer) and judgment debtor with a free monthly statement detailing the payments made thus far and the balance owing.

Another crucial amendment is in subsection (6) which now provides that if the garnishee believes or becomes aware that the judgment debtor will not have sufficient means for his own or her own, or, his or her dependants' maintenance or that the amounts claimed are erroneous or not in accordance with the law, the garnishee must immediately inform the judgment creditor or his or her attorney, who must forthwith set the matter down for hearing with regards to that particular EAO.

According to subsection (10b) a garnishee that fails to deduct the instalment amount timeously or fails to stop deductions when the judgment debt has been paid in full will be liable to repay the debtor. This sanction introduced in subsection (10b) will ensure that an

employer play an active role in processing the payments of instalments and avoid the erstwhile practice of irregular payments and inconsistencies.

The amendment which provides a jurisdictional link to the person of the judgment debtor is a timely intervention. It will prevent a constitutional infringement of the judgment debtors' rights to access courts where judgment creditors were obtaining orders in courts far away from the debtors' homes and places of work where they could not hope to reach.

Also, the amendment now provides for judicial oversight in the issuing of an EAO since it now provides that an EAO may only be issued where a court has so authorised. This is in line with the *Stellenbosch LAC case*. The cap of 25% will curb instances of employees going home with a zero or near zero take-home pay. The objective conditions in South Africa where there are high levels of indebtedness and poverty warrant the need for a cap on the amount that may be committed. As was noted by Judge Desai in the *Stellenbosch case*, the attachment of a large portion of a debtor's salary is bound to have direct dire consequences on the judgment debtor's other human rights, such as the right to shelter, the right to health and the right to human dignity.<sup>5</sup> South Africa will not be the first jurisdiction to provide for a cap on the amount or proportion of earnings that may be attached as a protective mechanism. For instance, in Rwanda, section 44 of the Civil Procedure Act provides that only one third of the salary of a debtor can be attached.

The mandatory requirement providing for the provision of free monthly statements to the debtor and his or her employer will root out some of the key abuses identified in the EAO system.<sup>6</sup> Some of these abuses that this provision will quell are the practice of the never ending orders because the current outstanding balance was unknown.<sup>7</sup>

The amendments in subsection (6) will allow for a more active role for the garnishee and curb irregularities and fraud. Currently, in terms of section 65J (10) of the MCA, the garnishee employer is awarded 5% commission for facilitating the EAO on the employee's salary. Therefore, the employer should have a greater obligation to control the implementation and termination of EAOs.

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<sup>5</sup> *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice And Correctional Services and Others* 2015 (5) SA 221 (WCC) paras 39 – 41.

<sup>6</sup> "Garnishee orders: continued abuse and exploitation" <https://www.ensafrica.com/news/Garnishee-orders-continued-abuse-and-exploitation?Id=836&STitle=forensics%20ENSight>

<sup>7</sup> *Ibid.*

### **3.4 CLAUSE 12: Offences**

A new section (106C) is inserted into the Bill. This section creates a criminal sanction for the conduct whereby a person requires another person whilst applying for a loan, to consent to judgment or any instalment order or EAO prior to the granting of loan and where any person fraudulently obtains or issues a judgment or any instalment order or EAO.

The creation of a specific criminal sanction will act as a deterrent measure and prevent court officials from fraudulently and unlawfully issuing EAOs.

### **3.5 CLAUSE 14: Transitional provisions**

This clause provides for transitional arrangements. This transitional approach will allow for a judgment debtor or person who has an interest in the matter who suspects irregularity to apply for the review of the judgment or order. This is at no cost to the applicant.

## **4. Conclusion**

The Commission encourages the Committee to consider the recommendations of the SAHRC during its further deliberations on the Bill and avails itself for further engagements with the Committee.