**NOTE TO PORTFOLIO COMMITTEE ON JUSTICE AND CORRECTIONAL SERVICES: CRITICAL ISSUES THAT THE COURTS OF LAW AMENDMENT BILL SEEKS TO ADDRESS**

**1. Introduction:**

The Department of Justice and Constitutional Development (DOJCD) was requested to provide the Portfolio Committee on Justice and Correctional Services (the Portfolio Committee), with a note containing information on the critical issues that the Courts of Law Amendment Bill (the Bill) seeks to address, with the view of the Portfolio Committee having local radio talks to involve communities in consultation on the Bill.

**2. Objects of the Bill**

The Bill aims to curb abuses in the emoluments attachment order system (EAO’s). It also seeks to introduce an additional mechanism in terms of which default judgments can be rescinded or abandoned without incurring great legal costs, especially where judgment debts have been fully paid up. The amendments are intended to come to the aid of 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.

**3. Background to the Bill**

**3.1** **What is an EAO / garnishee?**

3.1.1 “Emoluments” means the salary or wages of a person and an emoluments attachment takes place when the employer of a debtor is instructed by a court order to deduct a specific amount (instalment) from the salary or wages of a debtor, in order to recover a judgment debt owed by the debtor to a judgment creditor. Section 65J of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944) (the Magistrates’ Courts Act), deals with EAO’s.

3.1.2 EAO’s are sometimes also referred to as garnishee orders. Section 72 of the Magistrates’ Courts Act provides that the court may, on application by the judgment creditor or when making an order during an inquiry into the financial position of the judgment debtor (section 65E(1)*(b)*), order the attachment of any debt at present or in future owing or accruing to a judgment debtor by or from any other person (excluding the State), to an amount sufficient to satisfy the judgment and the costs of the proceedings for attachment.

**3.2 When can an EAO be issued?**

3.2.1 In terms of section 65J (2) of the Magistrates’ Courts Act, an EAO may only be issued when-

(a) the debtor has consented to that in writing;

(b) the court has authorised the EAO, whether on application to the court or otherwise, and the court has not suspended such authorisation; or

(c) the judgment creditor or his or her attorney has first—

(i) sent a registered letter to the judgment debtor 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 by the judgment creditor or a certificate by his or her attorney setting out 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 the balance owing.

3.2.2 A prerequisite for the issuing of an EAO is that there must be a judgment granted against the debtor. A debtor usually consents to judgment and an EAO when he or she admits liability for the debt and agrees to pay it in instalments, in terms of section 57 of the Magistrates’ Courts Act. If the debtor fails to pay the instalments as agreed, the creditor may approach the clerk of the court for judgment and an instalment order. A debtor may also consent to judgment and an instalment order in terms of section 58 of the Act, in which case the creditor may immediately approach the clerk of the court for judgment and an instalment order. In terms of section 65, the clerk of the court may give an instalment order when the judgment debtor offers to pay the judgment debt in instalments, after judgment has been granted, but before a notice to appear in court for a financial inquiry is issued.

3.2.3 The court may, when the debtor appears for an inquiry into his or her financial position in terms of section 65A of the Magistrates’ Courts Act, authorize an EAO in terms of section 65E(1)*(c)*. An application in terms of rule 55 of the Magistrates’ Courts Rules could also be brought in terms of which the court is asked to authorize an EAO. Rule 55 of the Magistrates’ Courts Rules provides for the requirements to bring an application to the court. In short, every application must be supported by an affidavit as to the facts upon which the applicant relies for relief. Notice must be given to the other party or parties and to the registrar or clerk of the court and certain time limits apply.

3.2.4 Where an instalment order has already been made, which could be in terms of sections 57, 58, 65 or 65E(1)*(c)* of the Magistrates’ Courts Act, an EAO can be issued if the debtor has not complied with the order. The creditor or his or her attorney must, however, first send a letter to the debtor warning him or her that an EAO will be issued if the outstanding amount is not paid within 10 days and must set out the outstanding amount in an affidavit or certificate, before requesting the clerk of the court to issue the EAO. (The EAO is in the form of Form 38 of Annexure 1 to the Magistrates’ Courts Rules, which is prepared by the creditor or his or her attorney and signed by the clerk of the court.)

3.2.5 (a) It must be pointed out, however, that rule 12(5) of the Magistrates’ Courts Rules (which is secondary legislation) provides as follows:

“(5) The registrar or clerk of the court must 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, 2005 or the Credit Agreements Act, 1980 (Act No. 75 of 1980), and the court shall thereupon make such order or give such judgment as it may deem fit.”.

It means that judgments in terms of sections 57 and 58 which are based on the National Credit Act, 2005, must be considered and granted by a court (a magistrate) and not the clerk of the court as provided for in these two sections. This has given rise to the interpretation that rule 12(5) was interpreted as being in contradiction with the primary legislation (sections 57 and 58 which state that the clerk of the court must grant judgment).

(b) Two circulars were issued by the DOJCD to court officials to emphasize the need to strictly follow court process and procedures as prescribed by legislation, especially that judgments in terms of sections 57 and 58, based on the National Credit Act, must be granted by a court and to bring the judgment in *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)* (the *Stellenbosch-*case), to the attention of court officials. The *Stellenbosch-*case will be discussed in paragraph 3.3 below.

**3.3 Abuses of the EAO system**

3.3.1 Consumers wanting credit (often in order to pay for their basic needs), are often forced to sign contracts before they can obtain credit. In many instances, in terms of these contracts, they unknowingly commit themselves to a life of indebtedness. For instance, they agree to the jurisdiction of a court far from where they work or live and which, ordinarily, does not have jurisdiction to grant judgments or issue EAO’s against the particular debtor, and they consent to judgments and EAO’s being granted against them if they default in honouring their debts. Judgments and EAO’s are then irregularly granted against these debtors, leaving them with very little or no take-home money. Investigations by the DOJCD also revealed a lack of knowledge, inexperience and the inconsistent application of the law by court officials.

3.3.2 (a) All of these abuses resulted in an application brought in the *Stellenbosch*-case to have certain provisions of the Magistrates’ Courts Act, declared unconstitutional and invalid because they do not provide for judicial oversight over the authorization and issuing of EAO’s. In other words, EAO’s can only be issued by a court which looks at the financial position of the debtor in order to ensure that the debtor still has enough money to look after his or her family once after the EAO is deducted from a salary. EAO’s may no longer be issued because the judgment debtor has consented to it or where an instalment order has already been granted. The court was also asked to give clarity on whether section 45, which provides that the parties can consent to the jurisdiction of the magistrate’s court, permits a debtor to consent to the jurisdiction of a court other than that in which the debtor resides or is employed, in respect of the enforcement of a credit agreement to which the National Credit Act applies.

(b) The court noted all of the abuses and declared that some provisions of the Magistrates’ Courts Act are inconsistent with the Constitution and invalid because they fail to provide for judicial oversight over the issuing of an EAO. The court also declared that section 45 of the Magistrates’ Courts Act does not permit a debtor to consent to the jurisdiction of a court other than that in which the debtor resides or is employed, in respect of the enforcement of a credit agreement to which the National Credit Act applies

(c) In terms of section 167(5) of the Constitution, the Constitutional Court must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa or a court of similar status, before that order has any force. The decision of the Constitutional Court is awaited.

**4. Important issues addressed in the Bill**

**4.1 Rescission of judgment in magistrates’ courts**

Another difficulty that debtors come up against is that when they have paid a judgment debt fully and want to get credit, their credit records with credit bureaus show the judgment and they are then refused further credit. Although section 71A of the National Credit Act provides for an automatic procedure in terms of which credit providers must submit information regarding the settlement of judgment debts to all registered credit bureaus and credit bureaus must remove the adverse listing, the DOJCD has received reports of fraudulently rescinded judgments. The proposed amendment of section 36 of the Magistrates’ Courts Act envisages a simple application procedure to enable debtors to apply for the rescission of judgment where the debt has been settled, but still with judicial oversight to avoid fraudulent rescissions and to comply with the *audi alteram partem* principle, giving a creditor the opportunity to object to the application for rescission.

**4.2 Jurisdiction of magistrates’ courts**

The proposed amendment of section 45 provides that consent given by debtors that their matters in terms of sections 57, 58, 65 and 65J may be heard in magistrates’ courts in areas where they do not live or work, has no legal validity. Sections 57, 58, 65 and 65J all relate to proceedings or matters which have a bearing on EAO’s. This amendment aims to set right the abuses in terms of which debtors are forced to consent to the jurisdiction of a “far away” court, making it difficult for them to oppose judgments and EAO’s granted in those courts.

**4.3 Judgments in terms of sections 57 and 58 of the Magistrates’ Courts Act**

4.3.1 Sections 57 and 58 at present provide that the clerk of the court must grant judgments requested in terms of these sections. Section 57 requires that the summons or a copy of the letter of demand, the defendant’s written acknowledgment of debt and offer, a copy of the written acceptance of the offer and an affidavit or affirmation by the plaintiff or a certificate by his or her attorney stating in which respects the defendant has failed to carry out the terms of his offer and showing how the balance claimed is arrived at, must accompany the request for judgment and an instalment order. No evidence of affordability is placed before the clerk of the court.

4.3.2 Section 58 requires that the summons or a copy of the letter of demand and the consent to judgment must be placed before the clerk of the court. No evidence of affordability is placed before the clerk of the court.

4.3.3 Clerks of the court are not legally trained and are often inexperienced, resulting in judgments and instalment orders being granted in cases where they should not have been granted. As sections 57 and 58 read at present, no judicial oversight is required as explained above.

4.3.4 Sections 57 and 58 put in place a mechanism in terms of which judgments and instalment orders can be obtained in a quick and less expensive way. These sections provide that the (clerk of) the court, may grant a judgment and an instalment order in cases where a letter of demand has been received, therefore bypassing the necessity of a summons and the service thereof, which add to the costs that a debtor must bear. In order to retain the benefits of sections 57 and 58, but to ensure judicial oversight and a fair outcome, the amendments to sections 57 and 58 aim to give the authority to grant judgments in terms of these sections to a court (a magistrate), who is legally trained and who must assess the plight of the debtor properly and carefully. Because the debtor does not appear before the magistrate at this stage, more documentary evidence is necessary so that the magistrate can consider the debtor’s financial position. If the claim is based on a credit agreement in terms of the National Credit Act, the court may act in terms of the provisions of that Act relating to over-indebtedness, reckless credit and affordability assessment. If the court finds that there was reckless provision of credit, it may make certain orders, such as declaring the credit agreement reckless or that the debtor is over-indebted, which in turn has further effects on the credit agreement. It is suggested that these amendments will bring an end to the abuses taking place.

**4.4 Instalment orders in terms of section 65 of the Magistrates’ Courts Act**

4.4.1 Section 65 at present provides that if a debtor offers to pay the judgment debt in instalments after a judgment has been granted against him or her, but before a notice to appear in court for a financial enquiry is issued, the clerk of the court must make that offer an order of court. In terms of rule 45 of the Magistrates’ Courts Rules, the written offer must be in affidavit or affirmation form, setting out the full names of the judgment debtor, his or her residential and business address; the name and address of his or her employer; his or her marital status; the number of his or her dependents, their age and their relationship to him or her; his or her assets and liabilities; his or her gross weekly or monthly income (including that of his or her spouse and dependents) and expenses; the number of emoluments attachment orders or other court orders against him or her and the total amount payable thereunder; and his or her offer and the dates of the proposed instalments.

4.4.2 The amendment to section 65 seeks to give a court the authority to grant an instalment order, instead of the clerk of the court, therefore providing for judicial oversight and greater protection to the debtor.

**4.5 EAO’s in terms of section 65J of the Magistrates’ Courts Act**

4.5.1 Section 65J at present provides for the following:

(a) An EAO must be issued from the court of the district in which the employer of the debtor resides, carries on business or is employed, or if the debtor is employed by the State, where the debtor is employed.

(b) As already indicated, an EAO may only be issued where the judgment debtor has consented to that in writing, or the court has so authorized or where there already is an instalment order and the judgment creditor has complied with certain provisions in respect thereof.

(c) The judgment creditor or his or her attorney must at the reasonable request of the garnishee or debtor, furnish them with a statement, free of charge, containing particulars of payments and the balance owing.

(d) If it is shown that the debtor, after satisfaction of the EAO, will not have sufficient means for his or her own and his or her dependents’ maintenance, the court must rescind the EAO or amend it in such a way that it will affect only the balance of the income of the debtor over and above such sufficient means.

(e) An EAO may, at any time on good cause shown, be suspended, amended or rescinded by the court.

(f) A garnishee (the employer) may recover a commission of up to 5% of amounts deducted from the debtor’s salary in respect of services rendered in terms of an EAO.

4.5.2 To curb the abuses that have been taking place with regard to EAO’S, the Bill aims to amend section 65J in the following manner:

(a) An EAO may only be issued from the court of the district in which the judgment debtor resides, carries on business or is employed, no longer the place where the employer of the debtor resides, carries on business or is employed. This is to the advantage of the debtor.

(b) An EAO may only be issued if the court has so authorized.

(c) A cap of 25% of the debtor’s salary is placed on the amount that may be committed to EAO’s.

(d) A “pre-EAO procedure” is introduced, which provides further protection to debtors. It provides for the following:

(i) The judgment creditor must give a notice of intention to obtain an EAO, in accordance with the authorization by the court and this must be served on the judgment debtor and on the employer.

(ii) A notice of intention to oppose the issue of an EAO must state the grounds on which the EAO is opposed. If a notice of intention to oppose is filed and the creditor or his attorney does not accept the reasons for opposition, the matter may be set down for hearing in court. If the debtor does not give notice of an intention to oppose the issuing of an EAO, the EAO will be issued in accordance with the authorization by the court. The debtor is also provided with guidelines in the Bill on what grounds the EAO can be opposed, for instance that the amounts are incorrect or are not in accordance with the law or that there will be an over-commitment of the debtor’s salary to EAO’s.

(e) The clerk of the court must ensure that the court has, in fact, authorised the EAO and that the courts has jurisdiction before issuing the EAO.

(f) The judgment creditor or attorney must furnish the employer (the garnishee) and the debtor with monthly statements, containing particulars of payments and the balance owing, free of charge.

(g) After service of an EAO on the debtor and employer, if a garnishee believes or becomes aware or it is otherwise shown that the debtor does not have sufficient means left to support his or her family or that the amounts claimed are incorrect or not in accordance with the law, the judgment creditor or attorney must be notified without delay. The judgment creditor or attorney must then request the court to rescind or amend the EAO or make an order that the court thinks is fit and reasonable.

(h) A garnishee who fails to deduct the amount of the EAO on time or fails to stop deductions after the full debt has been paid, is liable to repay additional costs and interest or any amount deducted after the debt has been paid, to the judgment debtor.

**4.6 Criminalisation of conduct relating to judgments, EAO’s and instalment orders**

4.6.1 Sections 106,106A and 106B of the Magistrates’ Courts Act deal with offences and penalties for non-compliance with court orders and certain actions by garnishees and employers. During the consultation process it was suggested by some commentators that the practice of forcing persons to consent to judgments and instalment orders before any loan will be considered favourably, should be criminalised. The National Credit Act already declares this practice unlawful. Unlawful provisions have no legal effect and when an agreement contains an unlawful provision, a court must remove that provision from the agreement, or alter the provision to make it lawful if it is reasonable to do so. Alternatively, a court may declare the entire agreement unlawful.

4.6.2 Numerous judgments and EAO’s are obtained fraudulently or irregularly – sometimes by agreement between external parties and court officials and sometimes because court officials (clerks of the court) do not have sufficient experience. Although the existing criminal law can be applied when an offender is apprehended, it is suggested that an offence, dealing specifically with this abuse in respect of judgments and court orders, be created. Such an offence will emphasise that this is wrong and assist in preventing the abuses that are taking place. It could also act as a deterrent for court officials, forcing them to consider judgments and court orders properly and not to deal with parties for purposes of obtaining judgments or court orders in a fraudulent manner.

4.6.3 The proposed new section 106C furthermore criminalises conduct by which a person 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 one fraudulently obtains or issues a judgment or any instalment order or EAO. The penalty is a fine or imprisonment not exceeding three years.

**4.6.4 Rescission of judgments in the High Courts**

Clause 13 inserts a new section 23A in the Superior Courts Act, 2013, to provide for the rescission of judgments in the High Court where the judgment creditor has consented to the rescission and to allow a court to rescind a judgment if the judgment debt has been paid in full. This is to provide for provisions relating to the rescission of judgment with the consent of a judgment creditor and to bring it in line with the suggested amendment of section 36 of the Magistrates’ Courts Act.

**4.6.5 Transitional provisions**

(a) To ensure legal certainty, some transitional provisions have been inserted in the Bill. They provide that any legal proceedings in terms of the sections to be amended must continue as if the Bill had not been passed if they were not finalised before the commencement of the Bill. However, this does not apply where the original judgment, instalment order or EAO was obtained and granted in contradiction of the law.

(b) In order to assist debtors who are currently subject to judgments, instalment orders or EAO’s which have been obtained and granted irregularly, provision is made for a quick manner of review of the judgment or order. If a judgment creditor, a judgment debtor or another person who has an interest in that judgment or order, has reason to believe that that judgment or order was not obtained and granted in accordance with the law, he or she may apply to the court to review that judgment or order. The application must be made on a form which is part of the Bill and the other party must be informed of the application so that he or she can oppose it, if necessary. The clerk of the court (or the registrar of a regional court) must assist a person who wishes to apply for the review of the judgment or the order. The court must rescind the judgment or order if it is proved that the judgment or order was not granted or obtained in accordance with the law or the court may give any other order which is suitable in the circumstances. This procedure will only be available for a period of three years after the Bill or the last provisions of the Bill have come into operation, so that it is not abused.

(c) It must be emphasised that this procedure will only apply where there is reason to believe that the judgment or the order was granted or obtained in contradiction with the law. If a debtor wants the court to rescind the judgment or the order for other reasons, he or she must follow the correct procedures in terms of the law that is applicable.

**5. Conclusion**

5.1 Because most judgments are based on some form of a credit agreement in terms of the National Credit Act, consumers must know their rights in terms of that Act, such as the following:

(a) The right to be given documents in an official language that the consumer understands;

(b) The right to be given documents in plain language which the consumer can read and understand to enable him or her to make informed decisions;

(c) The right to be given written documentation relating to the credit transaction in a manner that the consumer chooses; and

(d) The right to receive periodic statements.

5.2 Consumers must further be aware that the credit provider must provide the consumer with a pre-agreement statement which details the terms and conditions of the intended credit agreement and a quotation setting out the principal debt, all fees and charges, interest and the instalments.

5.3 Consumers should also be aware that some credit agreements may be unlawful whilst other may contain provisions that are unlawful.

5.3.1 Unlawful credit agreements may be agreements where, for example, the consumer is a person under the age of 18 years who was not assisted by a guardian, the consumer was declared mentally unfit, the consumer was placed under an administration order and the administrator did not consent to the agreement, or where the credit provider offers credit to a consumer which automatically becomes a credit agreement unless the consumer rejects the offer.

5.3.2 Credit agreements may not have provisions in them such as the following:

(a) Provisions that mislead the consumer or subject the consumer to potential fraud;

(b) Provisions that the consumer has waived certain rights that may apply to credit agreements, such as the right to restructure his or her debt;

(c) Provisions that require the consumer to leave his or her identity document, bank cards or PIN numbers with the credit provider; or

(d) Provisions that require the consumer to sign in advance any documentation relating to the enforcement of the credit agreement. The enforcement of the agreement takes place if the consumer fails to comply with his or her obligations in terms of the agreement and may include obtaining judgment against the consumer. Consumers should, therefore, be on the lookout for provisions in credit agreements stating that they consent to judgment, EAO’s or to the jurisdiction of a specific court which is not the court of the place where he or she lives or works and consumers should also not sign a blank document.