**SUMMARY OF SUBMISSIONS TO PORTFOLIO COMMITTEE ON JUSTICE AND CORRECTIONAL SERVICES ON THE COURTS OF LAW AMENDMENT BILL, 2016 (BILL 8 OF 2016) AND RESPONSE BY DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

**Table 1 reflects general comments and recommendations and the DOJCD’s response**

**Table 2 provides a clause by clause summary of the submissions and the DOJCD’s response**

**The summary includes both the written submissions and those made at the public hearings on 31 August 2016**

**TABLE 1**

| **NAME OF DEPARTMENT/INSTITUTION** | **COMMENTS/RECOMMENDATIONS** | **DOJCD RESPONSE** |
| --- | --- | --- |
| Association of Debt Recovery Agents (ADRA) | (a) The need for a responsible debt recovery industry is realized, and abuses which threaten security and industry sustainability must be eradicated and guarded against at all times. Often legislation lends itself to differing interpretations and opportunity for abuse. ADRA endorses and enforces the principle that moral responsibility usurps technical legal argument which lends itself to morally questionable outcomes which are also not in line with its Disciplinary Code.  (b) ADRA has been involved since 2012 in initiatives aimed at amending the legislation now under review in the Bill. It was also joined as a respondent in the *University of Stellenbosch Legal Aid Clinic*-case (the *Stellenbosch-*case) to ensure that the morally responsible industry interests were presented and represented. None of the other opposing respondents in that case were members of ADRA and their conduct was publically condemned. Although every abuse pointed out in the case could have been avoided by due application and enforcement of existing law, ADRA respects the DOJCD’s attempt to prevent such abusive outcomes in future.  (c) It can safely be assumed that the DOJCD has an objective of the Bill, the creation of a responsible and sustainable debt enforcement mechanism, balancing the interests of the creditor and the debtor and accommodating the interest of the general population and more specifically the economy. It should also have as an objective, a user friendly legal system for all parties concerned and should consider the capacity of the court system to accommodate the proposed amendments. ADRA applauds these objectives and focusses its submissions on the provisions which might erode or undermine these fundamental principles.  (d) Following the comments indicated in the specific clauses, ADRA is of the view that the Bill will not achieve the noble objectives of the Bill: The purpose and structure of the cap must be reconsidered and a scientifically researched cap must be introduced. A financial enquiry should only follow should the judgment debtor or an interested party oppose the implementation of an emoluments attachment order (EAO) instalment calculated in terms of the cap. Where a financial enquiry is required, the information required and the manner of presentation of such information should be reconsidered. Provision should be made for the presence and cooperation of the debtor in court. Where such appearance or cooperation cannot be secured, a court may grant a judgment, instalment order or EAO in the debtor’s absence and/or based on the available evidence.  (e) The suggestions above will also result in an alleviation of pressure on overburdened court resources and expedite court proceedings.  (f) Failure to consider the above will lead to an untenable and unsustainable market place where consumers are almost encouraged not to honour their obligations and creditors are left with very little or no recourse to enforce their rights, leading to the escalation of cost of credit and the enforcement thereof. | (a) See the DOJCD’s response next to the relevant clauses. Regarding their recommendation in paragraph (d) in the previous column, that a financial enquiry should only follow when the debtor or an interested party opposes the implementation of an EAO, it is uncertain whether they are proposing another debt collection procedure than the one set out in section 65A of the MCA, or whether it is additional.  (b) Regarding the additional workload for courts, it appears that since rule 12(5) was put into operation and two circulars were issued by the DOJCD directing officials to strictly follow court process and procedures (circular 30 of 2014 and 77 of 2015), most if not all sections 57 and 58 judgments are in any event dealt with by magistrates. Therefore these amendments will not overburden the courts. |
| Law Society of South Africa (LSSA) | (a) The Bill should be reviewed in its entirety and be withdrawn from the parliamentary process to allow stakeholders sufficient time to consider the adverse implications and avoid the need for lengthy debate and delays in Parliament.  (b) The decision in the *Stellenbosch*-case has no doubt been the catalyst for the Bill. The legislative and other defects identified by the court are—   * No limit on the amount of the EAO; * No limit on the number of EAO’s; * No evaluation of affordability; * No judicial oversight; * Forum shopping; * Access to courts compromised; * Involuntary and uninformed consent; * No representations before granting EAO’s; and * Ineffective review remedy.   The LSSA supports changes aimed at addressing most of the above legal defects, but cautions strongly against the introduction of measures which will compromise the power of a magistrate to provide judicial oversight.  (c) The Constitutional Court (CC) has, in dealing with sales in execution in *Jaftha v Schoeman and others; Van Rooyen v Stoltz and Others (CCT74/03)[2004] ZACC 25*, commented that “Judicial oversight permits a magistrate to consider all the relevant circumstances of a case to determine whether there is good cause to order execution. The CC further cautioned that “It would be unwise to set out all the facts that would be relevant to the exercise of judicial oversight. However, some guidance must be provided.”. The CC listed a number of factors that a court might consider, including “the circumstance in which the debt was incurred; any attempts made by the debtor to pay off the debt; the financial situation of the parties; the amount of the debt; whether the debtor is employed or has a source of income to pay off the debt and any other factor relevant to the particular facts of the case before the court.”.  (d) The LSSA is of the view that the same caution should apply to EAO’s and the legislature should avoid impeding judicial oversight by attempting to introduce relevant facts in a prescriptive manner. If a magistrate takes the listed factors into account, it will amount to judicial oversight. The Bill unduly and unnecessarily fetters the discretion of magistrates. | See the DOJCD’s response next to the relevant clauses. It must be pointed out that the DOJCD started with the preparation of the Bill before the application was brought in the *Stellenbosch*-case. A first draft of the Bill was published in February 2013. |
| South African Human Rights Commission (SAHRC) | The SAHRC hosted a roundtable in March 2015 to facilitate discussion on the shortcomings in the EAO system and explore legislative reforms which might be effected to curb the abuses. The SAHRC was also instrumental in the *Stellenbosch*-case in which it was admitted as *amicus curiae*, due to the constitutionality of the provisions relating to EAO’s, particularly the lack of judicial oversight in the issuing of EAO’s and the impact it has on human rights of marginalized and vulnerable persons. | The comments are noted. |
| Parliamentary Committee of the General Council of the Bar of South Africa (PCGCB) | (a) The PCGCB sets out the objectives of the Bill and also refers to the *Stellenbosch*-case. The Bill incorporates the inroads made by the court in attempting to restore justice and fairness to this process. 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, in its current form.  (b) The PCGCB is of the view that given the intended purpose of the Bill, there is little criticism that can be levelled against its contents. | The comments are noted. |
| Legal Aid South Africa (LASA) | (a) 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 is a state of indebtedness from which it is difficult to escape, is welcomed by LASA. It further welcomes the proposals aimed to curb alleged abuses in the EAO system and the provision of an additional mechanism in terms of which judgments may be rescinded or abandoned, without incurring prohibitive legal costs.  (b) The inclusion of the words “she” and “her” in the Bill is noted and in this regard reference is made to the provisions of section 6 of the Interpretation Act, 1957, which provides that words importing the masculine gender include females and words in the singular number include the plural and words in the plural number include the singular. | The comments are noted.  The use of the words “she” and “her” is in line with current legislative practices. |
| The Commission for Gender Equality (CGE) | The CGE is a Chapter 9 Institution and in terms of its mandate obliged to evaluate any proposed policy, practice or law in order to make recommendations that promote, protect, develop and attain gender equality. Accordingly, an evaluation of the Bill has been undertaken. Although the Bill is described as a remarkable legislative proposal, the CGE has found it opportune to make certain recommendations to gender mainstream the Bill. | The comments are noted. See the DOJCD’s response next to the relevant clauses. |
| Microfinance South Africa (MFSA) | (a) The MFSA is a representative body of registered and legal microfinance credit providers which vision it is to ensure a sustainable microfinance industry. The MFSA supports a microfinance regime which is appropriately regulated in order to ensure consumer protection and responsible and fair credit provision.  (b) The following elements need to be considered in crafting the future and modernized legal debt collection regime:   * A respect for both the moral and legal imperatives when applying, accepting, granting and collecting credit by both the supply and demand side players. * Reckless borrowing and ruthless collection are equally unacceptable and places in jeopardy those who borrow with care and dignity as well as providers who act with prudence, respect and good intention. * Enforcement and consumer education especially with regard to credit are two equally important sides of the same coin. This needs to also emphasize the honour in serving the credit you received legally and enjoyed the benefits of. * Affordability and costs need to be determined, through a scientific and practical research process, with the objective to reward both the credit provider/collector and consumer. The rewards respectively should include fair reward for financial risks taken and investments made, whilst consumers should find themselves in an improved financial and personally empowered position. This must happen within a realistic time frame after initial commitments were not met as contractually required. * In line with the cost sensitivity and consumer education, the need to acknowledge the social and economic diversity of South African citizens is important. Overly complicated or one-sided legal processes work against inclusion and to the detriment of the less sophisticated consumer and often small businesses as well. * Transparency in terms of both credit providers and consumers who are “playing the system” need to be achieved on a national level and perpetrators need to be brought to book; likewise those who act with a generally accepted code of good ethics need to, and will, be rewarded ultimately in terms of growth at commercial and personal level. This calls for either the establishment of an EAO register or expanded and improved credit bureau reporting. * On the face of the process which is being followed there is a rush to get it all done. The need for thorough economic and social impact assessment cannot be over emphasized. Due care will benefit all and avoid future damaging and costly processes. * The need to ensure harmonization across all relevant legislation is crucial, especially in terms of matters pertaining to reckless lending and borrowing, consumer education and broad market conduct (enforcement). The principle that legally obtained credit is payable, should one have the means, should in no way be disputable as it is the foundation of credit provision and all efforts should be made across society to entrench this cornerstone. * MFSA fully supports the sanctioning of stakeholders who are abusive and exploitive, but those who are prudent, diligent, law-abiding and proudly South African can fairly claim to have access to a workable, practical and affordable regime.   (b)In 2015 the MFSA did research through Econometrix focusing on a number of matters, including debt collection. Important extracts of the research include:   * Important macroeconomic issues affect the cost of credit and debt collection: * The responsibility for excessive debt lies not only with the credit provider, but also the borrower. Any action moving full responsibility from one to another will have serious implications for the economy concerned. * Borrowing levels remain relatively high, which is cause for concern regarding the sustainability of household incomes in the current economic climate and how an economic slowdown might affect household balance sheets, specifically highly indebted households. Any actions which result in consumers taking on excessive debt, particularly those who are encouraged by the possibility that their debt may never need to be repaid, will have a long-term detrimental effect on the credit market and the economy. Such signals would be encouraged by reducing the cost of credit, keeping credit costs at an artificially low level, making repayment terms too generous or limiting the necessity to collect debts by abolishing or limiting EAO’s. * Key issues need consideration when making decisions regarding regulations that govern the credit industry. An analysis of the lending market and in particular unsecure lending shows, among others, that: * Certain individuals do overspend and are encouraged to do so through advertising and other means including reckless lending. Although protection is needed, it could be dangerous to take steps which relieve them from their responsibility for over-borrowing. * The household sector became significantly more indebted over the period 2004 to 2008 and remains so. This is a measure of the potential debt stress should there be an economic slowdown, unexpected unemployment, shocks to the system or a steady increase in interest rates. * Growth of employment in the public sector was an important contributor towards unsecured lenders advancing money to consumers. The growth of such employment has tailed off and has contributed significantly towards reduced growth in unsecured lending. * The magnitude of the dynamic of a large number of previously disadvantaged individuals entering the middle-class has rendered the high growth in unsecured lending and credit generally as a natural rather than an artificial phenomenon. * Policy should be directed at reducing any incentive to over-borrow and to not meet one’s financial commitments. * There are several issues concerning debt that are of concern in any economy and particularly in a developing economy such as South Africa. At its heart, it is common cause that excessive debt is bad for an economy. Debt is money borrowed which the borrower is obliged to repay in full together with interest as agreed between the parties, in one form or another, or it will result in a loss of capital for the lender. If the borrower defaults on the interest or cost of credit, the lender will also loose revenue. Lenders will start “insuring” their lending by building an additional margin into the cost of credit, which in turn has a negative impact on responsible borrowers, who are the ones ultimately repaying the debt. * The potential economic costs of banning or limiting EAO’s: * Financial institutions will increase their interest rates to compensate for the financial losses incurred because of the non-payment of debt, therefore increasing the total debt service cost in the economy. More money will flow out of the pockets of debt-paying individuals through higher interest rates. In effect, the good payers in one way or another are required to pay for the additional costs and non-repayment of debts associated with non-payers. These outcomes slow economic growth and create unemployment and have a substantial impact in many sectors of the economy as they affect both investment and consumer expenditure patterns. The report calculated the impact on the total economy by calculating the increase in the real rate of interest.   (c) In summary, there is a strong financial and economic incentive to ensure that debts are repaid. There is no doubt that procedures and processes must be properly regulated. Government and institutions, through legislation and control must limit and minimise potential abuses. Protection must be introduced which limits reckless lending and recent steps taken and the recent court judgments are steps in the right direction. However, personal responsibility cannot be taken away and there also remains a case against reckless borrowers and encouraging a culture of non-payment and a right to hand-outs. EAO’s are an efficient and effective manner of collecting debts. A move to limit or abolish them would have extremely damaging economic and social implications for the South African economy. | (a) The comments are noted. The MFSA does not make specific comments on the provisions of the Bill, save to appear to be saying that EAO’s should not be banned or limited and that a register of EAO’s should be implemented. (b) EAO’s are in terms of the Bill, limited to 25% of a debtor’s salary. The capping is discussed under the relevant clause.  (c) A register of EAO’s could assist in providing information on the number of EAO’s against a debtor, but it is foreseen that it will have its difficulties too, for example, consumers with no fixed addresses, or supplying wrong information or identity numbers. The question arises as to who will be responsible for the administration of the register. EAO’s could possibly be listed at credit bureaus which could also assist with information on the number of EAO’s against a debtor.  (d) The proposed amendments must be seen in light of endeavors by the dti to curb reckless lending and end the cycle of over-indebtedness, which is equally damaging to the economy. Regulating EAO’s is intended to foster greater responsibility in granting credit.  The purpose of the Bill is to protect debtors from reckless lending. |
| The Banking Association South Africa (BASA) | BASA is the industry representative body for commercial banks and consists of 32 local and international member banks. It promotes and contributes to the enablement of a conducive, competitive and sustainable banking sector. It understands and supports government initiatives as well as the DOJCD’s intended reforms contained in the Bill and is generally comfortable with the proposed amendments, except as pointed out next to the relevant clauses. | The comments are noted. See the DOJCD’s response next to the relevant clauses. |

**TABLE 2**

| **CLAUSE**  **PROVISIONS** | **NAME OF DEPARTMENT/**  **INSTITUTION** | **COMMENTS/**  **RECOMMENDATIONS** | **DOJCD RESPONSE** |
| --- | --- | --- | --- |
| **1. Clause 2 Amendment of section 36 of the MCA**  (a*)* The substitution for subsection (2) of the following subsection:  ‘‘(2) If a plaintiff in whose favour a default judgment has been granted has **[agreed]** consented in writing that the judgment be rescinded or varied, a court must rescind or vary such judgment on application by any person affected by it.’’  (b) The addition of the following subsections:  ‘‘(3) *(a)* Where a judgment debt has been settled, a court may, on application by the judgment debtor or any other person affected by the judgment rescind that judgment.  *(b)* The application contemplated in paragraph *(a)*—  (i) must be made on the form prescribed by the rules;  (ii) must be accompanied by proof that the judgment creditor has been notified, at least five days prior, of the intended application;  (iii) may be set down for hearing on any day, not less than five days, after lodging thereof; and  (iv) may be heard in chambers.  (4) If an application contemplated in subsection (3)*(a)* is opposed, a court may make a cost order it deems fit.’’. | PCGCB  LASA  CGE  BASA | The proposed amendment of section 36 is patently in the interests of justice as it will serve a particular predicament which is commonly faced by many impoverished persons in a debt collection system. This system 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 where the debt has been settled, will go some way to making the utilization of this process more attainable. The safeguards in the proposed amendment will curtail fraudulent actions and ensure that the rights of judgment creditors are not overlooked.  Although LASA welcomes the use of the prescribed form, the reason for bringing the application in chambers is not clear. If the reason is to expedite the finalization of matters and thus provide greater access to justice to the public, then the proposal is welcomed. It should be noted that in the case of defended civil actions, the provisions of the MCA and the SCA should be adhered to, especially where the application is opposed. Sections 5 of the MCA and 32 of the SCA provide for proceedings to be carried on in open court.  (a) A paragraph *(c)* should be inserted which provides as follows: “*(c)* On presentation of a copy of a rescission order granted by any court a credit bureau must immediately remove all adverse particulars relating to the debt. Any refusal to remove adverse information is an offence and the directors will be liable for a fine or a term of imprisonment not exceeding three years on conviction for any contravention of this provision.”.  (b) The reason for this proposal is that numerous complaints have been received by the CGE where credit bureaus have refused to act in accordance with rescission orders. This has affected many women and men adversely. Credit bureaus display a recalcitrant, arrogant and insensitive approach towards consumers who require the deletion of adverse information in compliance with the NCA. These violations must be addressed more robustly by way of punitive measures.  (a) The phrase “judgment debt” may be interpreted to exclude interest on the judgment capital and permitted costs. BASA recommends that the phrase be appropriately defined to include the required settlement of the interest on the capital and costs.  (b) To prevent frivolous, vexatious and fraudulent applications for the rescission of judgments and to ensure adherence to the *audi alteram partem* rule—   * The court should only be permitted to grant the rescission of the judgment if the judgment is not subject to review or appeal proceedings and reasonable authentic proof of the settlement of the debt is attached to the application for rescission. * The judgment creditor must be served with the application for rescission and not only notified to ensure that the creditor is aware of the application. * The notice and set down periods must be 10 days which would permit the creditor time to consider the application and verify the statements made. * Proof of service must be attached to the application and the creditor must have the right to oppose the application where appropriate. | The comments are noted.  The intention of providing for the application to be brought in chambers is to expedite the matter. The provision reads that the application “may” be heard in chambers, leaving it to the court/magistrate to decide where it should be heard.  (a) It must be pointed out that in terms of section 71A of the NCA, a credit provider must submit information regarding the settlement of, among others, a judgment debt, to all registered credit bureaus within seven days after settlement. The credit bureaus must remove any adverse listing within seven days after receipt of the information from the credit provider. If the credit provider fails to submit information regarding a settlement, a consumer may lodge a complaint with the National Credit Regulator.  (b) The DOJCD does not support the criminalization of the failure of credit bureaus to remove adverse information and suggests that a debtor should be able to lodge a complaint with the National Credit Regulator.  (a) Section 55 of the MCA defines “debt” as “any liquidated sum of money due”. It forms part of Chapter VIII of the MCA which deals with the recovery of debt. Chapter IX, dealing with execution provides in section 61 that 'debts'includes any income from whatever source other than emoluments.  (b) Section 2(3) of the Prescribed Rate of Interest Act, 1975, defines “judgment debt” as a sum of money due in terms of a judgment or an order, including an order as to costs, of a court of law, and includes any part of such a sum of money, but does not include any interest not forming part of the principal sum of a judgment debt.”.  (c) Although different definitions of the same concept should be avoided so as not to create legal uncertainty, a provision could possibly be inserted which provides that “judgment debt” means the capital amount, interest and costs until the date the whole amount is settled. The definition could be included in the amendment to section 36 of the MCA and the insertion of section 23A in the SCA.  (d) Section 36(1) already provides that a court may rescind a judgment in respect of which no appeal lies. An amendment to provide for reasonable authentic proof of the settlement of the debt could be considered.  (e) The intention of bringing an application instead of an automatic procedure is to give the creditor the opportunity to oppose the application for the rescission of judgment. Service could mean service by the sheriff, resulting in more costs which must be paid by the debtor. However, it is agreed that notification could also mean sending, for example, a sms. It is suggested that provision be made to specifically state that the application must be delivered to the judgment creditor.  (f) The intention of the insertion of subclause (3) was to provide for a speedy measure to debtors to have judgments rescinded, including a time frame of five days (one week). If it is felt that it would not afford a judgment creditor sufficient time, the DOJCD does not object to the time frame being 10 days. Section 71A of the NCA allows seven days for the creditor to inform credit bureaus of the payment of a judgment debt and another seven days for the credit bureaus to remove the adverse information.  (g) Taking the comments set out into account, clause 3(3) could possibly read as follows:  ‘‘(3) *(a)* (i) Where a judgment debt has been settled, a court may, on application by the judgment debtor or any other person affected by the judgment rescind that judgment.  (ii) For purposes of this subsection “judgment debt” means the capital amount, interest on that amount and costs payable by the judgment debtor until the date the full amount has been paid.  *(b)* The application contemplated in paragraph *(a)*—  (i) must be made on the form prescribed by the rules;  (ii) must be accompanied by reasonable proof that the judgment debt has been settled;  (iii) must be accompanied by proof that the application has been delivered to the judgment creditor, at least ~~five~~ 10 days prior, of the intended application;  (~~ii~~iv) may be set down for hearing on any day, not less than ~~five~~ 10 days, after lodging thereof; and  (~~i~~v) may be heard in chambers.”. |
| **2. Clause 3 Amendment of section 45 of the MCA**  (a)The substitution for subsection (1) of the following subsection:  ‘‘(1) **[Subject to the provisions of section *forty-six***, **the court shall have jurisdiction to determine any action or proceeding otherwise beyond the jurisdiction if the parties consent in writing thereto:**  **Provided that no court other than a court having jurisdiction under section *twenty-eight* shall, except where such consent is given specifically with reference to particular proceedings already instituted or about to be instituted in such court, have jurisdiction in any such matter]** Subject to the provisions of section 46, the parties may consent in writing to the jurisdiction of either the court for the district or the court for the regional division to determine any action or proceedings otherwise beyond its jurisdiction in terms of section 29(1).’’  (b)The addition of the following subsection:  ‘‘(3) Any consent given in proceedings instituted in terms of section 57, 58, 65 or 65J by a defendant or a judgment debtor to the jurisdiction of a court which does not have jurisdiction over that defendant or judgment debtor in terms of section 28, is of no force and effect.’’. | SAHRC  PCGCB  LASA  CGE  Old Mutual Finance(OMF) | The provisions of this clause are welcomed. The abuse of consumers’ consent to jurisdiction was highlighted in the *Stellenbosch*-case in which it was declared that in causes of action based on the NCA, section 45 of the MCA does not permit a judgment debtor to consent to the jurisdiction of a magistrate’s court other than that in which the debtor is employed or resides.  The proposed amendment of section 45 is clearly aimed at avoiding the deplorable circumstances that gave rise to the *Stellenbosch*-case in which the court declared that section 45 does not permit a debtor to consent to the jurisdiction of a court other than the one in which the debtor resides or is employed. There can be no doubt that the objective of the proposed amendment is in the interests of justice.  The proposed amendment is welcomed as it will provide greater access to justice and will accommodate people in rural areas who are not in a financial position to travel long distances to courts and thus prevents further abuse of this provision.  The amendment is welcomed but it is recommended that a further provision be inserted which reads as follows: “Where any proceeding conducted in a court against a debtor in terms of section 57, 58, 65 or 65J which does not have jurisdiction over a debtor, then any order obtained in such proceedings will not be enforceable against any person.”  The amendment may have unintended consequences in only allowing a person to agree to the jurisdiction of a court in respect of a cause of action (section 29) and no longer in respect of a person (section 28). | The comments are noted.  The comments are noted.  The comments are noted.  (a) The proposed insertion by the CGE seems to provide that if an order is made in court proceedings in a court which does not have jurisdiction, then that order will not be enforceable. It is suggested that the implications of subclause (3) are that subsequent orders are unenforceable. If the court does not have jurisdiction, it cannot make an order against the defendant.  The purpose of the amendment is to do away with the consent to the jurisdiction of a court which does not have jurisdiction over a person in terms of section 28. |
| **3. Clause 4 Substitution of section 57 of the MCA**  **“Admission of liability and undertaking to pay debt in instalments or otherwise**  **57.** (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 or she admits liability, in instalments or otherwise;  *(c)* undertake on payment of any instalment in terms of his or her 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 or her failure to carry out the terms of his or her 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 or she admits liability, with costs, and for an order of the court for payment of the judgment debt and costs in instalments or otherwise in accordance with his or her offer,  and if the plaintiff or his or her attorney accepts the said offer, he or she shall advise the defendant of such acceptance in writing by registered letter.  (1A) The offer referred to in subsection (1)*(b)* must—  *(a)* set out full particulars of the defendant’s—  (i) monthly or weekly income and expenditure;  (ii) other court orders or agreements, if any, with other creditors for payment of a debt and costs in instalments; and  (iii) assets and liabilities;  *(b)* indicate the amount of the offered instalment;  *(c)* be supported by written proof, either by the defendant’s employer or the latest bank statement, showing that the defendant will have sufficient means for his or her own maintenance and that of his or her dependants after payment of the instalment; and  *(d)* be supported by documentary evidence, not more than three months old, relating to his or her expenditure, other court orders or agreements with other creditors for payment of a debt in instalments and assets and liabilities.  (2) If, after having been advised by the plaintiff or his or her attorney in writing that his or her offer has been accepted, the defendant fails to carry out the terms of his or her offer, **[the clerk of]** the court **[shall]** must, upon the written request of the plaintiff or his or her 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]** and subject to subsection (2A)—  **[(i)]***(a)* 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)]***(b)* order the defendant to pay the judgment debt and costs in specified instalments or otherwise in accordance with his or her offer, and such order shall be deemed to be an order of the court mentioned in section 65A(1).  (2A) The written request referred to in subsection (2) must be accompanied by—  *(a)* the summons or if no summons has been issued, a copy of the letter of demand;  *(b)* the defendant’s written acknowledgment of liability and offer;  *(c)* all the particulars and documentary evidence referred to in subsection (1A), in order for the court to be apprised of the defendant’s financial position at the time the offer was made and accepted;  *(d)* a copy of the plaintiff’s or his or her attorney’s written acceptance of the offer and proof of postage thereof to the defendant; and  *(e)* 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 or her 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.  (2B) The court may—  *(a)* request from the plaintiff or his or her attorney more information or the latest documentary evidence of the particulars of the defendant referred to in subsection (1A) in order for the court to be apprised of the defendant’s financial position at the time judgment is requested;  *(b)* act in terms of the provisions of the National Credit Act and the regulations thereunder dealing with over-indebtedness, reckless credit and affordability assessment, when considering a request for judgment in terms of this section, based on a credit agreement under the National Credit Act;  *(c)* if the defendant is employed, and if the court is satisfied that the defendant will have sufficient means for his or her own maintenance and that of his or her dependants after payment of the instalment,  authorise an emoluments attachment order referred to in section 65J; and  *(d)* notwithstanding the defendant’s consent to pay any scale of costs, make a costs order as it deems fit.  (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]** must, within 10 days from the date the judgment was entered, 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]** has the effect of a judgment by default.  (5) The provisions of this section apply subject to the relevant provisions of the National Credit Act where the request for judgment is based on a credit agreement under the National Credit Act.’’. | ADRA | (a) Sections 57. 58 and 65 provide for a very comprehensive “sufficient means” test. As stated in their comments on clause 8 in respect of the proposed new section 65J(1A), the purpose of introducing a cap is negated by also compelling a parallel “sufficient means” test and financial enquiry. ADRA contends that should a cap be introduced, the sufficient means test should be reserved only for opposed matters where the application for an EAO is opposed or its amendment is requested on the grounds that, after having paid the capped amount, the consumer does not have sufficient funds to meet his or her necessary obligations.  (b) ADRA submits that only the following information can reasonably be obtained by the creditor and this information is sufficient for purposes of the “sufficient means” test:   * full particulars of the debtor’s monthly or weekly income and expenditure, supported where reasonably possible by the most recent written proof of which the debtor possesses; * particulars of all court orders in terms of which the debtor was required to pay a judgment debt or other obligation in specified instalments or otherwise; * particulars of agreements with other creditors for the payment of the debt in instalments or otherwise as furnished by the debtor; * a credit bureau report reflecting the debtor’s reported credit exposure which report must not be older than three months at the time the application for consent to judgment and an instalment order is filed.   (c) The proposed requirement that full particulars of the debtor’s assets and liabilities be furnished has no bearing on the debtor’s ability to pay the debt in instalments. It will only be relevant if the court can order that the debtor liquidates certain assets when determining an affordable instalment. In such instance the value of the assets and extent of liabilities must be determined and the question arises how this is to be done. It is suggested that this requirement be excluded.  (d) A defendant’s bank statements cannot show that the defendant will have sufficient means for his or her maintenance and that of his or her dependants. Additional information of what the debtor’s requirements in respect of the maintenance referred to, would be required. In addition, certain expenses in respect of such maintenance might already be provided for as a deduction on the bank statement. To the extent that the “written proof by the defendant’s employer” involves or constitutes the defendant’s salary advice, the same argument holds true.  (e) Apart from a credit bureau report, the availability and accuracy of the written proof of the debtor’s expenditure will depend on what the debtor furnishes and is able to furnish. The same applies to any contribution the debtor’s employer can make to the “sufficient means” test. The employer will be dependent on the debtor to provide relevant information other than existing deductions from the debtor’s salary advice.  (f) Certain debtors will be in possession of and be able to furnish written proof or documentary evidence of most of their expenses, while the majority will not be able to do so. Documentary proof for expenses paid in cash, such as transport and groceries will not exist and most debtors will not have proof of paperless communications such as electronically transferred payments.  (g) The use of the word “must” in section 57(1A) and the corresponding requirement in section 58(1A) will, in view of even a cooperative debtor’s inability to provide documentary evidence as set out, render the process of obtaining an instalment order in terms of sections 57 and 58 or an EAO, a nullity.  (h) An untenable onus is placed on the creditor to place all “particulars”, “written proof” and “documentary evidence” before the court. If all the above is not available to the debtor or the court when interrogating a debtor, it can hardly be expected of a credit provider to satisfy the onus prior to entering into a section 57 or 58 undertaking and approaching a court for relief in terms thereof. It will be impossible for a credit provider to successfully enforce his or her rights and create an unequitable position in the credit cycle. On the plain reading of the provisions, a section 57 or 58 undertaking is of no force or effect unless the written proof and documentary evidence in support of the “sufficient means” test is available and forms part of the undertaking at the time the undertaking is given and the court file when the court considers the application.  (i) The practical inability to comply with the said provisions is further compounded by the provisions that the documentary evidence may not be older than three months and the court may, when considering the application, request the latest documentary evidence. In practice it invariably takes more than three months for the court to process an application for judgment and an order for the payment of the debt in instalments or to have an EAO authorized. A creditor may not be able to place sufficiently recent documentary evidence before the court because, by the time the court considers the application, the information may be older than the three months requirement. The three month requirement may also discourage any arrangement with a debtor to pay the debt other than in one amount or by means of an EAO.  (j) The provision also does not accommodate the nature of a section 57 undertaking and the required documentary evidence will invariably be older than three months by the time the creditor approaches the court for relief based on the breach of the section 57 undertaking.  (k) ADRA also warns against the placing of information which is protected and sensitive in the public domain when it is filed in the court file. It might also be against the provisions of other pieces of legislation, such as the Protection of Personal Information Act.  (l) ADRA suggests that the following be provided by the creditor when seeking judgment:   * full particulars of the debtor’s monthly or weekly income and expenditure, supported where reasonably possible by the most recent written proof in the possession of the debtor; * particulars of all court orders ordering the debtor to pay a judgment debt or other obligation in instalments or otherwise; * particulars of agreements with other creditors for the payment of debt in instalments or otherwise; and * a credit bureau report reflecting the debtor’s reported credit exposure which report must not be older than three months at the time the application for judgment and instalment order is filed.   (m) ADRA is of the view that the general scheme of sections 57, 58 and 65 lends itself to the debtor appearing in court in order to apply the “sufficient means” test. It is contended that in practice the issuing of subpoenas to secure the attendance of a debtor for section 65A-procedures does not work, due to various practical difficulties. Debtors are prejudiced by the number of court appearances the Bill will cause. The procedure is further undermined in that the Bill does not provide for an instance where the debtor does not appear or is not capable of providing the relevant information, that an order can be granted in the debtor’s absence or on the available information.  (n) It is proposed that sections 57(2B)*(d)* and 58(1C)*(d)* should read: “Notwithstanding the defendant’s consent to pay any scale of costs, make a costs order on the scale of costs it deems fit.”. The reason for this suggestion is that the proposed amendment allows the court to make no costs order or to order that each party pays its own costs, which will fly in the face of an agreement between the parties that the debtor will be liable for the legal costs. | (a) The cap and the “sufficient means test” serves different purposes. The cap is crucial to ensuring that the socio-economic circumstances of indebted individuals are not impacted on to the extent that they are unable to afford basic necessities. The “sufficient means test” enables the court to exercise its discretion as to whether to grant and EAO or not.  (b) The reason for requiring the indicated documentary evidence when the offer is made to the plaintiff is that providing particulars to the plaintiff who must accept the offer, or not, will enable the plaintiff to determine at that stage already whether the defendant will be able to afford the instalment. If the defendant cannot afford the instalment, the creditor could advise him or her to approach a debt counsellor or take possible other legal steps to collect the debt.  (c) The reason for further requiring the information and documentary evidence when judgment is requested, is because the magistrate will consider the application for judgment in terms of sections 57 and 58 or an offer in terms of section 65 to pay the debt in instalments, in his or her chambers. The defendant or judgment debtor does not appear before the magistrate at this stage. The magistrate must be apprised of the defendant’s or the debtor’s financial position, to enable him or her to grant judgment and make a fair instalment order.  (d) Regarding the report by a credit bureau, the concern is that there is no central database from where the report can be obtained. The debtor will further have to pay the costs thereof.  (e) It is suggested that subclause (1A) provides as follows:  “(1A) The offer referred to in subsection (1)*(b)* must-  *(a)* set out full particulars of the defendant’s-   * 1. monthly or weekly income and expenditure, supported where reasonably possible by the most recent proof in the possession of the debtor; and   2. other court orders or agreements**,** if any, with other creditors for payment of a debt and costs in instalments; and   3. ~~assets and liabilities; and~~   *(b)* indicate the amount of the offered instalment.  *~~(c)~~* ~~be supported by written proof, either by the defendant’s employer or the latest bank statement, showing that the defendant will have sufficient means for his or her own maintenance and that of his or her dependants after payment of the instalment; and~~  *~~(d)~~* ~~be supported by documentary evidence, not more than three months old, relating to his or her expenditure, other court orders or agreements with other creditors for payment of a debt in instalments and assets and liabilities~~.”.  (f) It is suggested that subclause (2B) be amended to read as follows:  “(2B) The court ~~may~~—  *(a)* may request any relevant information from the plaintiff or his or her attorney ~~more information or the latest documentary evidence of the particulars of the defendant referred to in subsection (1A)~~ in order for the court to be apprised of the defendant’s financial position at the time judgment is requested;  *(b)* must act in terms of the provisions of the National Credit Act and the regulations thereunder dealing with over-indebtedness, reckless credit and affordability assessment, when considering a request for judgment in terms of this section;  *(c)* may, if the defendant is employed, and if the court is satisfied that the defendant will have sufficient means for his or her own maintenance and that of his or her dependents after payment of the instalment, authorise an emoluments attachment order referred to in section 65J; and  *(d)* may, notwithstanding the defendant’s consent to pay any scale of costs, make a costs order as it deems fit.”.  The reason for this suggestion is to compel the court to act in terms of the NCA when it considers a judgment based on a credit agreement in terms of the NCA. The current “may” could be interpreted as to give the court a discretion on whether to act in terms of that Act or not, which is against the letter and spirit of the NCA.  (f) Another option is to provide in sections 57 and 58, as would seem to be suggested by the LSSA at the public hearings, only for judgment for the capital amount, costs and interest. If the full debt is not paid 10 days after the judgment has been granted, a section 65A notice for the debtor to appear in court for a financial inquiry must then be issued. This option, however, has its own difficulties as debtors do not always appear when served with a notice, resulting in the authorisation and issuing of warrants of arrest, which process also seems impractical and undesirable. Debtors often do not bring the relevant documentation to court, resulting in postponements, which have further costs implications for the debtor.  (g) As to ADRA’s submission that the defendant’s assets and liabilities have no bearing on his or her ability to pay the amount, it must be pointed out that rule 45 of the MCA Rules provides that in an offer to pay the judgment debt in instalments in terms of section 65, the debtor must disclose his or her assets and liabilities.  (h) Regarding the suggestion on the costs order, the reason for the specific provision is to curb excessive costs, especially where the defendant has agreed, many times unknowingly, to pay attorney and client costs. It will be in the magistrate’s discretion to make an appropriate cost order, which includes an order as to no costs being paid. |
| LSSA  SAHRC  PCGCB  LASA  CGE  BASA  OMF | (a) Subsection (1A), particularly paragraphs *(c)* and *(d)*, are excessively prescriptive and may lead to practical challenges for the plaintiff or his or her attorney. The defendant may also not be cooperative and may refuse or be unwilling to provide latest bank statements and documentary evidence, not more than three months old, relating to his or her expenditure.  (b) The list of specific requirements will impede the court’s discretion to take all relevant circumstances into account. The Bill is aiming at identifying all the relevant facts to the exercise of judicial oversight, which the CC considered as unwise. The principle of judicial oversight should be retained, with the rules providing some guidance to fulfil such function. Rigid requirements should not be introduced.  (c) In the proposed subsection (2A)*(b)*, the view is held that this is a duplication of what is already provided for in the National Credit Act (NCA). For example, section 83(4) of the NCA provides that a court must consider, among others, the consumer’s current means and ability to pay the consumer’s current financial obligations that existed at the time the agreement was made.  (d) In the proposed subsection (2B)*(a)*, the word “latest” should be replaced with “current” or “relevant”.  (e) It is recommended that subsection (3) should mirror the wording of section 65A(2) of the Magistrates’ Courts Act, 1944 (MCA), which reads as follows:  “If the minutes of the proceedings do not show that the judgment debtor was present in person or represented by any person when judgment was given and if no warrant of execution pursuant to the judgment has been served on the judgment debtor personally, no notice under subsection (1) shall be issued unless the judgment creditor or his or her attorney provides proof to the satisfaction of the clerk of the court that he or she has advised the judgment debtor by registered letter of the terms of the judgment or of the expiry of the suspension ordered under section 48(*e)*, as the case may be, and a period of 10 days has elapsed since the date on which the said letter was posted.”.  The debtor should be informed prior to the proceedings, not subsequent thereto.  The SAHRC welcomes the proposed amendments to section 57 as it creates judicial oversight and brings clarity over rule 12(5) of the MCA Rules which already provides that the clerk of the court must refer any request for judgment based on the NCA to the court. It provides the court with the discretion to engage in a full affordability evaluation.  The amendments proposed in respect of sections 57, 58 and 65 (clauses 4, 5 and 6) provide for judicial oversight and seek to transform what is essentially a procedural process overseen by the clerk of the court, to one in which the financial circumstances of the defendant, his or her basic human rights and those of their dependants are taken into account by the court in determining whether judgment should be granted. These amendments are welcomed in a constitutional democracy.  The proposal is welcomed and will address inconsistencies in the application of this requirement.  The CGE does not support the clause in its current form because of the widespread abuse of vulnerable debtors who are misled into admitting liability regarding debts that have prescribed and recommends the addition of a paragraph *(e)* at subclause (2A) which reads as follows: “*(e)* a debtor may not admit liability to any debt that has prescribed in terms of the Prescription Act and any other law. Where any debtor is misled into admitting liability regarding a prescribed debt this will be a contravention of this Act and the creditor will be liable to a fine or a term of imprisonment not exceeding three years, on conviction.”.  (a) The view is held that the court’s investigation into reckless lending and affordability assessments should be limited to the credit agreement in terms of which judgment or EAO is requested and other credit providers must not be drawn into the proceedings as it will unnecessarily delay the process and lead to additional costs.  (b) The clause in its present format creates legal uncertainty as it is unclear what the effect will be on the offer of the debtor if there is no documentary evidence available and whether such a situation will preclude the creditor from accepting an offer. BASA recommends that the clause should clearly illustrate whether the creditor can proceed to accept the offer if no documentary evidence is available.  (a) Section 57(2B)*(a)* will require a creditor to provide the defendant’s latest bank statement and documentary proof not older than three months relating to expenditure. The creditor will not have access to such information and the defendant will be able to frustrate the application for judgment. The clause should rather provide that the court may request the defendant to provide such further documentary proof to apprise the court of his or her financial position at the time judgment is sought.  (b) Section 57(5): It is not clear what the purpose of adding subsection (5) is. It seeks to make section 57 subject to the relevant provisions of the NCA. It is submitted that the two pieces of legislation should be aligned and that any perceived or anticipated conflict should be dealt with as part of these amendments. | 1. See the DOJCD’s response in respect of ADRA’s submissions above.   (b) Section 83 of the NCA provides that the court may declare that a credit agreement is reckless and may make certain orders. Not all judgments will necessarily be based on credit agreements in terms of the NCA.  (c) Clause (2B) has been changed as indicated.  (c)Subsection (3) is a current provision of section 57 and has been amended to reflect the position that the court must grant judgment and an instalment order. A further amendment is found in that a specific time frame is given (10 days), instead of the “forthwith” which appears to give rise to difficulties. Subsection (3) in essence provides that the debtor must be informed of a judgment and order granted against him or her if they were not present or represented when the judgment and order were granted.  The comments are noted.  The comments are noted.  The comments are noted.  The issue of the collection of prescribed debt has also been raised by the dti. The DOJCD regards this conduct as unethical which should be dealt with by the relevant professional bodies. The South African Law Reform Commission is also currently investigating reforms to the Prescription Act.  (a) The question arises as to how the court will be able to decide whether the debtor will have sufficient means left after making an instalment order or granting an EAO if it cannot take other commitments into consideration. It could also be construed as being against the letter and spirit of the NCA.  (b) The suggested documentary evidence which must support an offer by the debtor is to give the creditor the opportunity to determine whether the debtor is able to afford the offered instalment, already at the time the offer is made. A responsible creditor should not accept an offer which he or she is not sure the debtor will honour. It is, however, agreed that the clause should be clear on this aspect and it is suggested that subclause (1A) be amended as suggested in the response to ADRA’s concerns.  (a) See the DOJCD’s response in respect of the required documentary evidence and suggested amendments to section 57 above.  (b) The purpose of subsection (5) is to confirm that section 57 is subject to the provisions of the NCA. It is intended to provide clarity to judicial officers. (It must be noted that section 172 of the NCA provides that if there is a conflict between a provision of the NCA and a provision of another Act the conflict must be resolved in accordance with Schedule 1. According to Schedule 1 if there is conflict between sections 57 or 58 with Part D of Chapter 4, sections 127, 129, 131, 132, Chapter 7 and section 164 of the NCA, the provisions of the NCA prevail.) |
| **4. Clause 5 Substitution of section 58 of the MCA**  ‘‘**Consent to judgment or to judgment and an order for payment of judgment debt in instalments**  **58.** (1) If any person (in this section called the defendant), upon receipt of a letter of demand or service upon him or her of a summons demanding payment of 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]** must, on the written request of the plaintiff or his or her 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,]** and subject to subsection (1B)—  **[i]***(a)* 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]***(b)* if it appears from the defendant’s written consent to judgment that he or she 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 or she 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).  (1A) If the defendant consents to an order of court for payment in specified instalments referred to in subsection (1)*(b)*, the consent must—  *(a)* set out full particulars of his or her—  (i) monthly or weekly income and expenditure;  (ii) other court orders or agreements, if any, with other creditors for payment of a debt and costs in instalments; and  (iii) assets and liabilities;  *(b)* indicate the amount of the offered instalment;  *(c)* be supported by written proof, either by the defendant’s employer, or the latest bank statement, showing that the defendant will have sufficient means for his or her own maintenance and that of his or her dependants after payment of the instalment; and  *(d)* be supported by documentary evidence, not more than three months old, relating to his or her expenditure, other court orders or agreements with other creditors for payment of a debt in instalments and assets and liabilities.  (1B) The written request referred to in subsection (1) must be accompanied by—  *(a)* the summons or if no summons has been issued, a copy of the letter of demand;  *(b)* the defendant’s written consent to judgment; and  *(c)* if the defendant consents to an order of court for payment in specified instalments referred to in subsection (1)*(b)*—  (i) the written consent; and  (ii) the full particulars and documentary evidence referred to in subsection (1A) in order for the court to be apprised of the defendant’s financial position at the time the defendant consented to judgment.  (1C) The court may—  *(a)* request from the plaintiff or his or her attorney more information or the latest documentary evidence of the particulars of the defendant referred to in subsection (1A) in order for the court to be apprised of the defendant’s financial position at the time the judgment is requested;  *(b)* act in terms of the provisions of the National Credit Act and the regulations thereunder dealing with over-indebtedness, reckless credit and affordability assessment, when considering a request for judgment in terms of this section, based on a credit agreement under the National Credit Act;  *(c)* if the defendant is employed, and if the court is satisfied that the defendant will have sufficient means for his or her own maintenance and that of his or her dependants after payment of the instalment, authorise an emoluments attachment order referred to in section 65J; and  *(d)* notwithstanding the defendant’s consent to pay any scale of costs, make a costs order as it deems fit.  (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.  (3) The provisions of this section apply, subject to the relevant provisions of the National Credit Act, where the application for judgment is based on a credit agreement under the National Credit Act.’’. | ADRA | See the comments in respect of the amendments to section 57 above. | See the DOJCD’s response in respect of ADRA’s submissions on section 57 above. |
| LSSA  PCGCB  CGE  BASA  OMF | The LSSA reiterates that the conditions listed in subsections (1A) to (1C) are excessively prescriptive. It recommends that the phrase “relevant documentary evidence” should replace “documentary evidence, not more than three months old” and “latest bank statement”. Not all debtors necessarily have bank accounts.  See comments in respect of section 57.  As with the amendments to section 57, the CGE recommends the insertion of a provision that deals with the collection of a prescribed debt as follows: “*(e)* A debtor may not admit liability to any debt that has prescribed in terms of the Prescription Act and any other law. Where any debtor is misled into admitting liability regarding a prescribed debt then this will be a contravention of this Act and the creditor will be liable to a fine or a term of imprisonment not exceeding three years on conviction.”.  The view is held that other credit providers should not be drawn into the proceedings, same as their views on clauses 4 and 6.  The same concerns as in respect of the amendments to section 57, regarding the required documentation and the subjecting of section 58 to the NCA, are expressed | (a) See the DOJCD’s response to ADRA’s submissions on section 57. It is suggested that section 58 also be amended in line with the suggested amendments to section 57 above. Clause (1A) could read as follows:  “(1A) If the defendant consents to an order of court for payment in specified instalments referred to in subsection (1)*(b)*, the consent must—  *(a)* set out full particulars of his or her—  (i) monthly or weekly income and expenditure, supported where reasonably possible by the most recent proof in the possession of the defendant; and  (ii) other court orders or agreements**,** if any, with other creditors for payment of a debt and costs in instalments; and  ~~(iii)~~ ~~assets and liabilities~~  (i~~v~~ii) any other information which, in the opinion of the court, is relevant to enable the court to determine whether the defendant will have sufficient means for his or her own maintenance and that of his or her dependants after payment of the instalment; and  *(b)* indicate the amount of the offered instalment~~;~~  *~~(c)~~* ~~be supported by written proof, either by the defendant’s employer, or the latest bank statement, showing that the defendant will have sufficient means for his or her own maintenance and that of his or her dependants after payment of the instalment; and~~  *~~(d)~~* ~~be supported by documentary evidence, not more than three months old, relating to his or her expenditure, other court orders or agreements with other creditors for payment of a debt in instalments and assets and liabilities~~.”.  (b) Subclause (1C) could be amended to read as follows:  “(1C) The court ~~may~~—  *(a)* may request any relevant information from the plaintiff or his or her attorney ~~more information or the latest documentary evidence of the particulars of the defendant referred to in subsection (1A)~~ in order for the court to be apprised of the defendant’s financial position at the time judgment is requested;  *(b)* must act in terms of the provisions of the National Credit Act and the regulations thereunder dealing with over-indebtedness, reckless credit and affordability assessment, when considering a request for judgment in terms of this section;  *(c)* may, if the defendant is employed, and if the court is satisfied that the defendant will have sufficient means for his or her own maintenance and that of his or her dependents after payment of the instalment, authorise an emoluments attachment order referred to in section 65J; and  *(d)* may, notwithstanding the defendant’s consent to pay any scale of costs, make a costs order as it deems fit.”.  The reason for this suggestion is to compel the court to act in terms of the NCA when it considers a judgment based on a credit agreement in terms of the NCA. The current “may” could be interpreted as to give the court a discretion on whether to act in terms of that Act or not.  See the DOJCD’s response in section 57.  See the DOJCD’s response to the CGE on their submission in respect of section 57.  See the DOJCD’s response to BASA’s submission on section 57 above.  See the DOJCD’s response to OMF’s concerns regarding the amendments to section 57 above. |
| **5. Clause 6 Substitution of section 65 of the MCA**  ‘‘**Offer by judgment debtor after judgment**  **65.** (1) If at any time after a court has given judgment for the payment of a sum of money and before the issue of a notice under section 65A(1), the judgment debtor makes a written offer to the judgment creditor to pay the judgment debt in specified instalments or otherwise and such offer is accepted by the judgment creditor or his or her attorney, **[the clerk of]** the court **[shall]** must, subject to subsection (2), at the written request of the judgment creditor or his or her attorney, accompanied by the offer order the judgment debtor to pay the judgment debt in specified instalments or otherwise in accordance with his or her offer **[, and such order shall be deemed to be an order of the court mentioned in section 65A(1)]**.  (2) The offer referred to in subsection (1) must be supported by—  *(a)* written proof, either by the judgment debtor’s employer, or the latest bank statement, showing that the judgment debtor will have sufficient means for his or her own maintenance and that of his or her dependants after payment of the instalment; and  *(b)* documentary evidence, not more than three months old, relating to the judgment debtor’s expenditure, other court orders or agreements with other creditors for payment of a debt in instalments and assets and liabilities as prescribed by the rules.  (3) The court may—  *(a)* request from the judgment creditor or his or her attorney more information or the latest documentary evidence of the particulars of the judgment debtor referred to in subsection (2) and as prescribed by the rules in order for the court to be apprised of the judgment debtor’s financial position at the time the written request, for an order to pay the judgment debt in specified instalments or otherwise, is made;  *(b)* act in terms of the provisions of the National Credit Act and the regulations thereunder dealing with over-indebtedness, reckless credit and affordability assessment when considering a request for an order in terms of this section, if the judgment is based on a credit agreement under the National Credit Act; and  *(c)* if the debtor is employed, and if the court is satisfied that the judgment debtor will have sufficient means for his or her own maintenance and that of his or her dependants after payment of the instalment, authorize an emoluments attachment order referred to in section 65J.  (4) An order made under subsection (1) is deemed to be an order of the court mentioned in section 65A(1).’’ | ADRA  PCGCB  CGE  OMF | See the comments in respect of the amendments to section 57 above.  See the comments in respect of the amendments to section 57 above.  The CGE welcomes the proposed amendments.  While OMF supports the premise that an offer by a judgment debtor to pay a judgment debt in instalments should be based on his or her affordability to do so, it is submitted that the courts are already obliged to do an enquiry into the debtor’s financial position in terms of section 65D(4) before an offer can be made an order of the court. Section 65D(4) grants the court the power to require from a debtor to produce documentary evidence of income and expenses. The additional subsections (2) to (4) are superfluous and will create procedural arbitrage. | (a) It is suggested that subclause (2) be amended as follows:  “(2) The offer referred to in subsection (1) must be supported, ~~by—~~  *~~(a)~~* ~~written proof, either by the judgment debtor’s employer, or the latest bank statement, showing that the judgment debtor will have sufficient means for his or her own maintenance and that of his or her dependants after payment of the instalment; and~~  *~~(b)~~* ~~documentary evidence, not more than three months old, relating to the judgment debtor’s expenditure, other court orders or agreements with other creditors for payment of a debt in instalments and assets and liabilities as prescribed by the rules~~  where reasonably possible by the most recent proof in the possession of the debtor relating to his or her income and expenditure, other court orders or agreements with other creditors for payment of a debt in instalments and assets and liabilities as prescribed by the rules.”. (Rule 45 provides that the offer must be in the form of an affidavit or confirmation and sets out what must be indicated.)  (b) Subclause (3) could be amended to read as follows:  “(3) The court ~~may~~—   1. may request any relevant information from the judgment creditor or his or her attorney ~~more information or the latest particulars of the judgment debtor~~ as referred to in subsection (2) ~~and as prescribed by the rules~~ in order for the court to be apprised of the defendant’s financial position at the time the written request for an order to pay the judgment debt in specified instalments or otherwise, is made;   *(b)* must act in terms of the provisions of the National Credit Act and the regulations thereunder dealing with over-indebtedness, reckless credit and affordability assessment, when considering a request for an order in terms of this section, if the judgment is based on a credit agreement under the National Credit Act;  *(c)* may, if the defendant is employed, and if the court is satisfied that the defendant will have sufficient means for his or her own maintenance and that of his or her dependents after payment of the instalment, authorise an emoluments attachment order referred to in section 65J.”.  See the DOJCD’s response to the PCGCB above.  The comments are noted.  Section 65 deals with the offer of a judgment debtor to pay the judgment debt in instalments, after judgment has been granted, but before a notice to appear in court in terms of section 65A(1) has been issued. In this instance, the debtor does not appear in court. Only after a notice to appear in court in terms of section 65A(1) has been issued, and the debtor appears in court, can a court proceed with an inquiry in terms of section 65D. Section 65D(1) provides that “(1) On the appearance before the court of the judgment debtor ... on the return day of the notice referred to in section 65A(1) or (8)*(b)*, in pursuance of his or her arrest under a warrant referred to in section 65A(6)...call upon him or her to give evidence...”. |
| **6. Clause 8 Substitution of section 65J of the MCA**  ‘‘**Emoluments attachment orders**  **65J.** (1) *(a)* Subject to the provisions of subsection (2), a judgment creditor may cause an order (hereinafter referred to as an emoluments attachment order) to be issued from the court of the district in which the **[employer of the]** judgment debtor resides, carries on business or is employed**[, or, if the judgment debtor is employed by the State, in which the judgment debtor is employed]**.  *(b)* An emoluments attachment order—  (i) **[shall]** must attach the emoluments at present or in future owing or accruing to the judgment debtor by or from his or her employer (in this section called the garnishee), to the amount necessary to cover the judgment and the costs of the attachment, whether that judgment was obtained in the court concerned or in any other court; and  (ii) **[shall]** must oblige the garnishee to pay from time to time to the judgment creditor or his or her attorney specific amounts out of the emoluments of the judgment debtor in accordance with the order of court laying down the specific instalments payable by the judgment debtor, until the relevant judgment debt and costs have been paid in full.  (1A) The amount of the instalment payable or the total amount of instalments payable where there is more than one emoluments attachment order payable by the judgment debtor, may not exceed 25 per cent of the judgment debtor’s salary.  (2) An emoluments attachment order **[shall not]** may only be issued **[—**  ***(a)* unless the judgment debtor has consented thereto in writing or]** if the court has so authorised, whether on application to the court or otherwise, upon proof to the satisfaction of the court that the judgment debtor will have sufficient means for his or her own maintenance and that of his or her dependants after payment of the instalment, 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 the balance owing and declaring that the provisions of subparagraph (i) have been complied with on the date specified therein]**.  (2A) A judgment creditor or his or her attorney must serve, on the judgment debtor and on his or her employer, a notice, in the form prescribed by the rules, of the intention to obtain an emoluments attachment order against the judgment debtor.  (2B) The notice referred to in subsection (2A) must inform the judgment debtor and his or her employer—  *(a)* of the judgment creditor’s intention to obtain an emoluments attachment order in accordance with the authorisation of the court referred to in subsection (2);  *(b)* of the full amount of the capital debt, interest and costs outstanding, substantiated by a statement of account; and  *(c)* that, unless the judgment debtor or his or her employer files a notice of intention to oppose the issuing of the emoluments attachment order within 10 days after service of the notice on them, an emoluments attachment order will be sought.  (2C) *(a)* The notice of intention to oppose contemplated in subsection (2B)*(c)* must state the grounds upon which the judgment debtor or employer wishes to oppose the issuing of the emoluments attachment order.  *(b)* The grounds which may be used to oppose the issuing of the emoluments attachment order include, but are not limited to, the following:  (i) That the amounts claimed are erroneous or not in accordance with the law; or  (ii) that 25 per cent of the judgment debtor’s salary is already committed to other emoluments attachment orders and that the debtor will not have sufficient means left for his or her own maintenance or that of his or her dependants.  *(c)* The notice of intention to oppose must be accompanied by—  (i) a certificate by the employer of the judgment debtor setting out particulars of all existing court orders against the judgment debtor or agreements with other creditors for payment of a debt and costs in instalments;  (ii) the contact details of all the relevant judgment creditors or their attorneys; and  (iii) the latest salary advice of the judgment debtor.  (2D) If a notice of intention to oppose is filed and the judgment creditor or his or her attorney does not accept the reasons for the opposition, he or she or his or her attorney may set the matter down for hearing in court with notice to the judgment debtor and employer and if the opposition is based on overcommitment of the judgment debtor’s salary to existing court orders or agreements with other creditors for payment of a debt and costs in instalments, notice must be given to the other judgment creditors or their attorneys.  (3) *(a)* Any emoluments attachment order **[shall]** must be prepared **[by the judgment creditor or his attorney, shall be]** and signed by the judgment creditor or his or her attorney **[and the clerk of the court, and shall be served on the garnishee by the messenger of the court in the manner prescribed by the rules for the service of process]**.  *(b)* The clerk of the court must ensure that the court—  (i) has authorised the emoluments attachment order; and  (ii) has jurisdiction as provided for in subsection (1)*(a)*,  before issuing an emoluments attachment order authorised in terms of subsection (2) by signing it and may either ask the judgment creditor or his or her attorney for more information or refer the authorisation order to the court in the case of any uncertainty.  *(c)* The emoluments attachment order must be served on the employer of the judgment debtor, (hereinafter called the garnishee) and the judgment debtor by the sheriff in the manner prescribed by the rules for the service of process.  (4) *(a)* Deductions in terms of an emoluments attachment order shall be made, if the emoluments of the judgment debtor are paid monthly, at the end of the month following the month in which it is served on the garnishee, or, if the emoluments of the judgment debtor are paid weekly, at the end of the second week of the month following the month in which it is so served on the garnishee, and all payments thereunder to the judgment creditor or his or her attorney shall be made monthly with effect from the end of the month following the month in which the said order is served on the garnishee.  *(b)* The judgment creditor or his or her attorney **[shall, at the reasonable request of the garnishee or the judgment debtor,]** must furnish **[him or her]** the garnishee and the judgment debtor, free of charge with a monthly statement containing particulars of the payments received up to the date concerned and the balance owing.  (5) An emoluments attachment order may be executed against the garnishee as if it were a court judgment, subject to the right of the judgment debtor, the garnishee or any other interested party to dispute the existence or validity of the order or the correctness of the balance claimed.  (6) *(a)* If, after the service of such an emoluments attachment order on the garnishee, the garnishee believes or becomes aware or it is otherwise shown that the—  (i) judgment debtor, after satisfaction of the emoluments attachment order, will not have sufficient means for his or her own **[and his dependants’]** maintenance**[, the court shall]** or that of his or her dependants; or  (ii) amounts claimed are erroneous or not in accordance with the law,  the garnishee, judgment debtor or any other interested party must without delay and in writing notify the judgment creditor or his or her attorney accordingly.  *(b)* The judgment creditor or his or her attorney must, after receiving the notice contemplated in paragraph *(a)*, without delay set the matter down for hearing in court with notice to the garnishee, judgment debtor or any other interested party referred to in paragraph *(a)*.  *(c)* The court may, after hearing all parties—  (i) rescind the emoluments attachment order or amend it in such a way that it will affect only the balance of the emoluments of the judgment debtor over and above such sufficient means; or  (ii) make any order it deems fit and reasonable in the circumstances.  *(d)* No cost order shall be made with regard to the proceedings contemplated in this subsection.  (7) Any emoluments attachment order may at any time on good cause shown be suspended, amended or rescinded by the court, and when suspending any such order the court may impose such conditions as it may deem just and reasonable.  (8) *(a)* Whenever any judgment debtor to whom an emoluments attachment order relates leaves the service of a garnishee before the judgment debt has been paid in full, such judgment debtor **[shall]** must forthwith advise the judgment creditor or his or her attorney in writing of the name and address of his or her new employer, and the judgment creditor or his or her attorney may cause a certified copy of such emoluments attachment order to be served on the said new employer, together with an affidavit or affirmation by him or her or a certificate by his or her attorney specifying the payments received by him or her since such order was issued, the costs, if any, incurred since the date on which that order was issued and the balance outstanding.  *(b)* An employer on whom a certified copy referred to in paragraph *(a)* has been so served, **[shall]** is thereupon **[be]** bound thereby and **[shall then be]** is deemed to have been substituted for the original garnishee, subject to the right of the judgment debtor, the garnishee or any other interested party to dispute the existence or validity of the order and the correctness of the balance claimed.  (9)**[*(a)*]** Whenever any judgment debtor to whom an emoluments attachment order relates, leaves the service of the garnishee before the judgment debt has been paid in full and becomes self-employed or is employed by someone else, he or she **[shall, or shall]** is, or is pending the service of the emoluments attachment order on his or her new employer, again **[be]** obliged to comply with the relevant order referred to in subsection (1)*(b)*.  (10) *(a)* Any garnishee may, in respect of the services rendered by him or her in terms of an emoluments attachment order, recover from the judgment creditor a commission of up to 5 per cent of all amounts deducted by him or her from the judgment debtor’s emoluments by deducting such commission from the amount payable to the judgment creditor.  *(b)* A garnishee who—  (i) fails to timeously deduct the amount of the emoluments attachment order provided for in subsection (4)*(a)*; or  (ii) fails to timeously stop the deductions when the judgment debt and costs have been paid in full,  is liable to repay to the judgment debtor any additional costs and interest which have accrued or any amount deducted from the salary of the judgment debtor after the judgment debt and costs have been paid in full as a result of such failure.  *(c)* The Rules Board for Courts of Law must make a reference to the provisions of paragraph *(b)* on Form 38 of Annexure 1 to the rules, containing the emoluments attachment order.’’. | SAHRC  PCGCB  BASA  ADRA  LSSA  SAHRC  LASA  BASA  OMF  OMF  ADRA  ADRA  LASA  SAHRC  SAHRC  BASA  OMF  ADRA  LSSA  LSSA  LASA  BASA  LSSA  CGE | The provisions of the amendments to section 65J are briefly set out and the SAHRC appears to be in agreement. The amendments which, among others, provides a jurisdictional link to the person of the debtor is a timely intervention, preventing a constitutional infringement of judgment debtors’ rights to access courts where orders are obtained in courts far away from the debtors’ homes and places of work and which they could not hope to reach. The provision of judicial oversight is also in line with the judgment in the *Stellenbosch*-case.  The amendments are predominantly geared towards protecting the judgment debtor’s basic human rights by assessing his or her ability to pay the judgment debt and to ensure that debtors have sufficient income to provide for themselves and their dependants after deduction of the instalments. The basic human rights of vulnerable people who may be stuck in a perpetual cycle of debt, are safeguarded.  An EAO must be granted as a last resort remedy, meaning the creditor should have exhausted all other remedies or the debtor should have been in arrears regarding debt for at least 9 months. Before granting an EAO the court should consider the quantum of the debt to ensure that the common law *in duplum* principle or statutory *in duplum* has not been breached. A judgment creditor must inform all registered credit bureaus of the granted EAO’s.  (a) The purpose of capping a percentage of a consumer’s salary for repaying arrear debt is to grant the consumer protection whilst simultaneously expediting proceedings thereby avoiding unnecessary legal costs and alleviating the pressure on limited court resources.  (b) Reference is made to foreign jurisdictions where a cap applies, which either is to avoid or to minimize court proceedings.  (c) The implementation of the cap in the format as provided for in the Bill holds advantages for higher income earning consumers only. Lower income earners will always pay the maximum amount which they can afford to pay after having met their necessary obligations in maintaining themselves and their dependants. Higher income earners who can often afford to pay more than 25% of their salary will receive additional protection in that the instalment will always be limited to 25% of the consumer’s salary.  (c) The cap as introduced will render debt review and the debt restructuring process contained in the National Credit Act, 2005 (NCA), redundant. It can safely be assumed that on average well over 25% of a consumer’s income is allocated towards payment of a consumer’s restructured debt. With a cap of 25%, it will be to the advantage of most consumers under debt review to rather allow emolument attachment orders (EAO’s) to be obtained against their salary as, combined such EAO instalments will be less than what the court found after having applied the “sufficient means” test was the amount a consumer can afford to pay under debt review.  (d) Another unintended consequence is that a consumer who is able to pay more than 25% of his or her salary towards arrear debt, but is prevented from doing so, might very well still qualify for new credit in terms of the Affordability Assessment Regulations.  (e) In granting credit the underlying principle to the affordability assessment is that the consumer must have sufficient funds available after meeting **all obligations** to afford the instalments of the credit. The underlying principle to the “sufficient means” test in granting an instalment order in terms of sections 57 and 58 and an EAO is that the consumer must have sufficient means to meet **only necessary obligations** towards the maintenance of the consumer and his or her dependants. It means that the “sufficient means” test in determining which portion of a consumer’s wages are attachable in settling arrear debt is stricter in that sufficient funds for **necessary expenses** are to be protected, whereas sufficient funds to pay **all expenses** are to be protected in the affordability assessment in granting credit. The cap has the opposite outcome resulting in a material number of circumstances where creditors are unable to recover arrear debt from a consumer due to the protection the cap provides whilst that same consumer qualifies for more credit. The suggested cap will frustrate the objectives of the NCA in respect of debt review and creating a responsible lending regime.  (f) The suggested cap will furthermore create legal and industry uncertainty. It does not state whether the 25% of attachable income is gross or net income, whether it provides for multiple incomes of spouses married in community of property or debts which are the joint responsibility of spouses married out of community of property.  (g) Reference is made to the *Stellenbosch*-case in which ADRA was added as a respondent. It is pointed out that counsel for all parties and the court agreed that such a cap is not appropriate without detailed research and consultation.  (h) Should a cap be introduced, it should—   * be thoroughly researched; * provide protection of minimum wages; * not create an undue preference for higher income earners; * be structured so as to alleviate pressure on an already over-extended court capacity; * reduce legal costs which are for the account of the consumer; and * compliment, rather than frustrate other consumer protection legislation.   (i) Legal costs are invariably for the account of the debtor. A proper structured capping system will reduce costs of unnecessary court appearances and work by the creditor’s attorney.  (a) The proposed 25% limit is another example of impeding judicial oversight. A percentage limit will not necessarily amount to a just and equitable outcome. In the *Stellenbosch*-case, the court referred to the International Labour Organisations’ Protection of Wages Convention which provides, among others, that wages may be attached or assigned only in a manner and within limits prescribed by national laws or regulations. Wages must be protected against attachment or assignment to the extent deemed necessary for the maintenance of the worker and his family.  (b) Judicial oversight without a percentage cap will afford both the creditor’s attorney and the debtor the opportunity to test the issue of affordability (of which EAO’s are only a part), under judicial supervision of a full financial enquiry. This includes, among others, the possibility of other sources of income, luxurious expenses and essential expenditure not necessarily subject to an EAO, and if necessary, a review of all EAO’s against the debtor.  (c) A percentage cap has the danger that apart from having to decide at what percentage to peg the cap, it does not take into account the wide variance of salary levels. A well earning debtor may still have sufficient income to survive despite the EAO’s against his salary having exceeded the cap. More importantly, the proponents of the percentage cap theory envisage that the credit provider whose EAO’s falls after the percentage cap has been reached will have to delay the enforcement of his or her judgment and consequently his or her EAO until some of the EAO’s that are being enforced have been satisfied by the judgment debtor and the percentage of the debtor’s salary again falls below the cap. This will have undesirable consequences on the manner in which credit providers will resort to collecting debt and it will ultimately adversely affect the lower income group’s ability to access credit.  The cap will curb instances of employees going home with no pay 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. As was noted by the judge in the *Stellenbosch*-case, the attachment of a large portion of a debtor’s salary is bound to have dire consequences on the debtor’s human rights, such as the right to shelter, health and human dignity. South Africa will not be the first to provide for a cap on the amount that may be attached. Rwanda is used as an example where section 44 of their Civil Procedure Act provides that only a third of debtor’s salary may be attached.  The proposed capping is supported as it would ensure that debtors will have sufficient means for their and their dependants’ maintenance.  (a) To ensure that the combined value of EAO’s does not exceed 25% of the employee’s salary, system changes must be effected which will require an implementation period of between 6 and 12 months.  (b) It is unclear whether the employer is required to desist from complying with the next EAO should combined EAO’s exceed the 25%. Must a preference be exercised regarding a specific judgment creditor?  (c) It is not clear how a situation should be dealt with where a single employee has a number of different employers and what may constitute 25% of his or her salary.  (d) It is also not clear if the reference is to “net salary” or “gross salary”.  The cap of 25% is arbitrary. Where the instalment to be paid by a judgment debtor is based on an affordability assessment, there is no need to cap the salary percentage. If a debtor can afford to pay a higher percentage towards the debt it will be to his or her advantage to pay off the debt quicker.  See their concerns regarding capping of the amount to be committed to EAO’s above.  The wording of subsection (3)*(b)* is confusing. Prior to the granting of a judgment, instalment order or EAO, the court must be satisfied that it has jurisdiction. The authority granted to a clerk in verifying jurisdiction should be limited to the re-issuing of an EAO where an EAO is transferred from one area of jurisdiction to another.  The requirement in subsection (3)*(c)* that the EAO also be served on the debtor should only apply where the debtor was not present when the EAO was authorised. It is suggested that a letter to the debtor by registered post should suffice or the employer be compelled to furnish the debtor with a copy of the EAO.  The additional protection created by this provision is welcomed.  This requirement will root out some of the key abuses which include the never ending orders because the outstanding amount was unknown.  This amendment will allow for a more active role for the garnishee and curb irregularities and fraud. In terms of subsection (10), a garnishee is awarded 5% commission for facilitating the EAO, therefore, the employer should have a greater obligation to control the implementation and termination of EAO’s.  (a) It is unclear what measures the employer must apply to determine whether the debtor has sufficient means and whether the debtor’s expenses are necessary or unnecessary.  (b) A garnishee ordinarily acts upon an EAO on the face of it and will therefore not be able to inform the judgment creditor if it believes that the amounts claimed are erroneous or not in accordance with the law. The employer will not have such information unless the employee brings it to the attention of the employer. The word “believes” suggests a judgment call but no guidance is given as to how the garnishee is expected to exercise same.  It may be preferable to allow the judgment debtor and creditor to first try and resolve the issues between them and only require set down where there is a dispute.  This provision will root out some of the key abuses identified in the EAO system, one of which is the never ending orders because the outstanding balance was unknown.  Regarding the proposed subsection (6)*(d)*, it is submitted that the court ought to be able to make a costs order in appropriate cases, for example, where the garnishee’s belief or motive for instituting the procedure is shown to have been unreasonable. The subsection should have a proviso which reads: “Provided that the garnishee acted reasonably in giving the notice required in paragraph *(a).”.*  The LSSA is strongly opposed to the proposed subsection as it will remove the discretion of the court to grant a cost order. The implication is that the attorneys will inevitably have to bear the costs of the application. The rationale for this proposed provision is not clear, except the ostensible intention to discourage EAO’s.  This section should afford the judgment creditor the right to recover the 5% commission, recovered by the garnishee, from the debtor. Subsection (10)*(a)* should read at the end as follows: “provided that the judgment creditor may recover the 5 per cent commission, actually recovered by the garnishee, from the judgment debtor.”.  The additional protection created by this provision is welcomed.  (a) The proposed amendment will place an administrative burden on the garnishee who is not a party to the proceedings and is merely adhering to a court order. The liability is on the employer even if the order is not delivered to the employer.  (b) The employer will suffer damages in the form of additional costs and interest which is unjust.  (c) Payroll systems, especially of big corporate bodies, are complex and may lead to occasional delay.  (d) The employer must confirm receipt of the EAO.  This provision should be deleted as it is too prescriptive. The Rules Board is equipped to develop the necessary rules in this regard.  The CGE supports the proposed amendments but recommends the following insertion to ensure that the proposed amendment is effective: “(10) The judgment creditor or its attorneys must not revise the amount of the debt that was handed down in the judgment in any way. Any unilateral revision will result in the emoluments order being suspended by the garnishee until such revision is withdrawn by the creditor or its attorneys.”. | The comments are noted.  The comments are noted.  (a) EAO’s are an effective method of debt collection, provided it be done ethically and in accordance with the law. As pointed out earlier in comments, debtors often do not appear in court when summonsed to do so in terms of section 65A(1) or do not bring the required documentation along. They often also do not have assets which can be sold in execution.  (b) Regarding the *in duplum* principle, it is submitted that magistrates be given proper training in this regard.  (c) If credit bureaus do not already record EAO’s, it is suggested that provision could possibly be made as it may assist creditors to check first whether a consumer can afford further credit or whether another EAO can be obtained against a debtor. In this regard, it may be mentioned that section 11 of the Maintenance Amendment Act, 2015 provides as follows: “(2A) On the granting of an application contemplated in subsection (2) by a maintenance court, the maintenance officer or clerk of the court at the request of the maintenance officer, shall, notwithstanding anything to the contrary contained in any law, in the prescribed manner, furnish the particulars of the person against whom a maintenance order has been made and a certified copy of the order of the court contemplated in subsection (2)(*a*)(i), (ii) or (iii), to any business which has as its object the granting of credit or is involved in the credit rating of persons.”.  (b) The abuse of debt collection through EAO’s against public servants has led the National Treasury to include in its Regulations in paragraph 23.3.6 in respect of government employees, that “Discretionary deductions may not exceed 40 per cent of the official’s basic salary, provided that –  *(a)* deductions for insurance premiums do not exceed 15 per cent;  *(b)* other discretionary deductions do not exceed 25 per cent; and  *(c)* the minimum take-home pay is as specified in the agreement with the Accountant- General.”.  The rationale is the hardship caused to employees and their dependants when their take home salaries are reduced to minimal amounts. This protection should be afforded to all.  (c) The dti contends that a cap can co-exist with a sufficient means-test. Capping is done to prevent abuse and affordability is also done to ensure the debtor or consumer will be in a position to afford the garnishee. This will also prevent a situation where creditors would like to have the bigger share of the 25% or would want to lodge a claim to the maximum percentage and to the exclusion of other creditors. Granting a garnishee order without checking if the consumer will afford the future garnishee will further put the already consumer in a very disadvantageous position. Affordability implies that a number of creditors will have to share on the 25% capped amount. In essence, capping is part of the affordability assessment criteria because after having calculated the 25%, one still needs to determine how much a consumer will be left with, in order to determine affordability in relation to other financial commitments. Higher income earners are likely to have other assets that may be attached in execution to satisfy a debt. An EAO in these instances is not the only way to collect a debt.  (d) The cap is therefore crucial to ensuring sound debt collection practices that is balanced.  See the DOJCD’s comments in respect of ADRA’s submissions above.  The comments are noted.  See comments above.  (a) With regard to (b) in the previous column, the dti seems to suggest that all creditors must share in the amount which is capped at 25%. The other option is that no EAO may be effected once the cap is reached.  (b) Subclause (1A) could read as follows: “(1A) The amount of the instalment payable or the total amount of instalments payable where there is more than one emoluments attachment order payable by the judgment debtor, may not exceed 25 per cent of the judgment debtor’s basic salary.  See the DOJCD’s response regarding the capping.  See the DOJCD’s response regarding the capping of the amount as set out above.  The provision is a further protection measure to ensure that valid EAO’s are issued, whether a new or a re-issued EAO or an EAO from another jurisdiction.  Service by registered post seems to be problematic. It is agreed that the debtor will have to pay for the service. A provision could possibly be inserted that the employer must furnish a copy of the EAO to the debtor. Paragraph *(c)* could possibly read:  “*(c)* The emoluments attachment order must be served on the employer of the judgment debtor, (hereinafter called the garnishee) ~~and the judgment debtor~~ by the sheriff in the manner prescribed by the rules for the service of process and the garnishee must furnish the judgment debtor with a copy of the said order within 10 days of receipt thereof.”.  The comments are noted.  The comments are noted.  The comments are noted.  The comments are noted.  The employer will have the debtor’s salary slip which could give an indication if the debtor will have sufficient means (for example, more than one EAO already). Many employers have employee wellness programmes through which employees could bring financial difficulties to the employer’s attention. Perhaps the clause could be amended by the insertion of a provision that if the employer “reasonably believes” or becomes aware of the financial difficulties a debtor may find him-or herself in, that employer must notify the creditor. Employers could put administrative systems in place in terms of which the debtor could be interviewed if there is reason to believe that he or she is in financial difficulties, before a creditor is notified. See the proposed amendment under the response to OMF below.  The suggestion is supported. Paragraph *(b)* could possibly read as follows:  “*(b)* The written notification referred to in paragraph *(a)* must set out the reasons for believing or knowing that the judgment debtor will not have sufficient means for his or her own maintenanceor that of his or her dependents or that the amounts claimed are erroneous or not in accordance with the law.”.  The current paragraph *(b)* becomes paragraph *(c)* which could read as follows:  *“(c)* The judgment creditor or his or her attorney must, after receiving the notice contemplated in paragraph *(a)*, without delay, indicate whether he or she accepts the reasons given in that notification and if not, set the matter down for hearing in court with notice to the garnishee, judgment debtor or any other interested party referred to in paragraph *(a)*.”.  Paragraphs *(c)* and *(d)* then become *(d) and (e)* respectively*.*  ADRA’s concern seems to be valid and their proposition could be considered or paragraph *(c)*(ii) could be amended to include costs orders and then paragraph *(d)* could be deleted. Paragraph *(c)*(ii) could read as follows:  “(ii) make any order, including as to costs, it deems fit and reasonable in the circumstances.”.  See the DOJCD’s response to ADRA’s submission above.  The debtor is already liable for costs which include collection commission. Further costs imposed on the debtor go against the policy imperative of alleviating household indebtedness.  The comments are noted.  (a) Section 65J(4)*(a)* of the Magistrates’ Courts Act, currently provides as follows: “(4) *(a)* Deductions in terms of an emoluments attachment order shall be made, if the emoluments of the judgment debtor are paid monthly, at the end of the month following the month in which it is served on the garnishee, or, if the emoluments of the judgment debtor are paid weekly, at the end of the second week of the month following the month in which it is so served on the garnishee, and all payments thereunder to the judgment creditor or his attorney shall be made monthly with effect from the end of the month following the month in which the said order is served on the garnishee.”. (Own underlining)  (b) The suggested provision in subsection (10) seeks to require employers to be more prudent in compliance with their responsibilities regarding EAO’s, by ensuring that deductions are done timeously as is required by law. Likewise, they should ensure that deductions are stopped timeously, once the debt has been paid off. Otherwise, where does the deducted amount go to, once the debt has been settled?  (c) Although it is appreciated that unnecessary communication may delay deductions, it is a current requirement of the MCA and should be complied with despite possible interruptions by unnecessary communications.  (d) An option could also be to insert the word “unreasonably” in “*(b)* A garnishee who—  (i) unreasonably fails to timeously deduct the amount of the emoluments attachment order provided for in subsection (4)*(a)*; or  (ii) unreasonably fails to timeously stop the deductions when the judgment debt and costs have been paid in full,…”.  It is submitted that an employer could in terms of section 65J (5) or (7) dispute the correctness of the amounts of the EAO or apply for the EAO to be suspended, amended or rescinded by the court who may make an order it deems fit.  (e) With regard to the suggestion that the employer must acknowledge receipt of the EAO, the EAO is served on the employer by the sheriff in terms of section 65J(3) and the return of service or non-service is sent to the creditor.  The provisions of paragraph *(b)* are regarded as important for employers to take cognizance of, hence the provision that it should be displayed on Form 38.  It is not sure what the reason for the proposed insertion is. Although the capital amount cannot be changed, there are costs that are continuously added. |
| **7. Clause 11 Amendment of section 86 of the MCA**  The addition of the following subsection:  ‘‘(5) If a party abandons a judgment given in his or her favour because the judgment and costs have been settled, no judgment referred to in subsection (2) or (3) shall be entered in favour of the other party.’’. | LSSA | Abandonment provisions relate to appeals and not rescission provisions when debt has been paid and the proposed amendment should be deleted. | According to *Jones and Buckle, Juta Online*, “the rubric to the section is a misleading survival from the 1917-Magistrates’ Court Act, where the section was so drawn that only after an appeal was noted, and the parties assumed the positions of appellant and respondent, could a judgment in favour of the respondent be abandoned. They are of the view that section 86 now makes it clear that either party, whether or not an appeal has been noted, may abandon a favourable judgment. |
| **8. Clause 12 Insertion of section 106C in the MCA**  ‘‘**Offences relating to judgments, emoluments attachment orders and instalment orders**  **106C.** (1) Any person who requires the applicant to consent to a judgment or any instalment order or emoluments attachment order prior to the granting of the loan, is guilty of an offence and on conviction liable to a fine or to imprisonment not exceeding three years.  (2) Any person who fraudulently obtains or issues a judgment, or any instalment order or emoluments attachment order in terms of this Act, is guilty of an offence and on conviction liable to a fine or to imprisonment not exceeding three years.’’. | SAHRC  LASA | The SAHRC agrees with the insertion of this section which will act as a deterrent measure.  The proposed insertion of a new section 106C is welcomed. | The comments are noted.  The comments are noted. |
| **9. Clause 13 Insertion of section 23A in the Superior Courts Act, 2013 (Act no. 10 of 2013)**  ‘‘**Rescission of judgment with consent of plaintiff or where judgment debt has been settled**  **23A.** (1) If a plaintiff in whose favour a default judgment has been granted has consented in writing that the judgment be rescinded, a court may rescind such judgment on application by any person affected by it.  (2) *(a)* Where a judgment debt has been settled, a court may, on application by the judgment debtor or any other person affected by the judgment, rescind that judgment.  *(b)* The application contemplated in paragraph *(a)*—  (i) must be made on the form prescribed in the rules;  (ii) must be accompanied by proof that the judgment creditor has been notified, at least five days prior, of the intended application;  (iii) may be set down for hearing on any day, not less than five days, after the lodging thereof; and  (iv) may be heard in chambers.  *(c)* If an application contemplated in paragraph *(a)* is opposed, a court may make a cost order it deems fit.’’. | LSSA  PCGCB  CGE | This proposed section should be deleted. The Rules Board is equipped to develop the necessary rules in this regard.  The incorporation of this section seems eminently reasonable. Should the instance arise where a judgment creditor agrees to a rescission of a judgment where the debt has only been settled in part, it would be in the interests of justice that this information be made available to credit providers to facilitate comprehensive risk assessment.  The proposed amendment is supported because it alleviates the ambiguity that has arisen in the common law relating to the rescission of judgments where debts have been settled. | The Rules Board submitted a request to the DOJCD to provide for substantive provisions in the Superior Courts Act to deal with the rescission of judgment by consent, similar to the corresponding substantive provisions in section 36 of the MCA.  The comments are noted.  The comments are noted.  In line with the DOJCD’s suggestion that the amendment of section 36 be adjusted as a result of comments received, it is suggested that subclause (2) reads as follows:  “(2)*(a)*(i) Where a judgment debt has been settled, a court may, on application by the judgment debtor or any other person affected by the judgment rescind that judgment.  (ii) For purposes of this subsection “judgment debt” means the capital amount, interest on that amount and costs payable by the judgment debtor until the date the full amount has been paid.  *(b)* The application contemplated in paragraph *(a)*—  (i) must be made on the form prescribed by the rules;  (ii) must be accompanied by reasonable proof that the judgment debt has been settled;  (iii) must be accompanied by proof that ~~the judgment creditor has been notified~~ the application has been delivered to the judgment creditor, at least ~~five~~ 10 days prior, of the intended application;  (iv) may be set down for hearing on any day, not less than ~~five~~ 10 days, after lodging thereof; and  (v) may be heard in chambers.  *(c)* If an application contemplated in paragraph *(a)* is opposed, a court may make a cost order it deems fit.”. |
| **10. Clause 14 Transitional provisions**  **14.** (1) All legal proceedings in terms of sections 36, 45, 57, 58, 65, 65E, 65J, 65M, 73 or 86 of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944), which were instituted prior to the commencement of this Act and which are not concluded before the commencement of this Act, must be continued and concluded in all respects as if this Act had not been passed: Provided that, where applicable, the original judgment, instalment order or emoluments attachment order, upon which the proceedings in question are based, was obtained and granted in accordance with the law.  (2) *(a)* A judgment creditor in whose favour a default judgment has been granted and a subsequent instalment order or emoluments attachment order (hereinafter referred to as a subsequent order) made, based on that default judgment, or a judgment debtor or any other person affected by that default judgment or subsequent order based on that default judgment, who has reason to believe that that default judgment or subsequent order was not obtained and granted in accordance with the law, may apply for the review of that default judgment or subsequent order.  *(b)* This subsection applies only to default judgments and subsequent orders in terms of the Magistrates’ Courts Act, 1944.  *(c)* The application contemplated in paragraph *(a)*—  (i) must be made on the form prescribed in the Schedule to this Act;  (ii) must be accompanied by a supporting affidavit;  (iii) must be accompanied by proof that the other party has been notified, at least five days prior, of the intended application;  (iv) may be set down for hearing on any day, being not less than five days after the lodging thereof; and  (v) may be heard in chambers.  *(d)* The court must rescind a default judgment or subsequent order contemplated in paragraph *(a)*, if it is proved that the default judgment or subsequent order was not obtained and granted in accordance with the law or may give any other order it deems fit in the circumstances.  *(e)* No cost order shall be made with regard to an application contemplated in paragraph *(a)*.  *(f)* The clerk or registrar of the court must render reasonable assistance to a party wishing to bring an application contemplated in paragraph *(a)*: Provided that the State or that clerk or registrar shall not be liable for any damage or loss resulting from assistance given in good faith by that clerk or registrar to such party in the form of legal advice or in the compilation or preparation of any process or document.  *(g)* The operation of this subsection shall cease after a period of three years after the date on which this Act, or the date on which the last provisions of this Act, has come into operation.  (3) Despite the amendment of any provision of the Magistrates’ Courts Act, 1944, by this Act, such provision, for purposes of the disposal of any legal proceedings referred to in subsection (1), remains in force as if such provision had not been amended.  (4) An investigation or prosecution or other legal proceedings in respect of conduct which would have constituted an offence referred to in section 106C of the Magistrates’ Courts Act, 1944, which was initiated before the commencement of this Act must be concluded, instituted and continued as if this Act had not been passed. | SAHRC  PCGCB  OMF  ADRA | The SAHRC agrees with the transitional provisions which will allow for a debtor or person with an interest in the matter who suspects irregularity to apply for the review thereof.  (a) Clause 14(1) stipulates that proceedings instituted prior to the enactment of the Bill should be determined as if the proposed amendments had not been passed. By contrast, clause 15(3) stipulates that certain sections of the Bill should be deemed to have come into operation on 8 July 2015. The sections referred to in clause 15(3) correlate with the sections referred to in clause 14(1), save for sections 36 and 86 of the MCA.  (b) For legal certainty, it is suggested that 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. Should the deeming provision in clause 15(3) remain, 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 clause14(1) of the Bill and those applications already instituted between 8 July 2015 and the date of commencement of the remaining provisions.  A notice period of five days to a judgment creditor to bring an existing EAO under review is too short and a 10 day-period is suggested.  The court must be allowed to make a costs order in an appropriate case, for example where the debtor’s or other affected person’s belief is shown to have been unreasonable or unfounded. A proviso should be inserted as follows: “Provided that the judgment debtor or affected person who applies for the review contemplated in paragraph *(a)* acted reasonably in bringing the application.”.  The clerk or registrar of the court is effectively being obligated to provide legal assistance or advice – the proviso clearly envisages the provision of “legal advice”, to which the LSSA is strongly opposed. Imposing an obligation on the clerk or registrar who are not legally trained to provide legal assistance, may have a harmful impact on court proceedings and the parties involved. | The comments are noted.  It is not sure what is meant by applications that the PCGCB refers to? See, however, the DOJCD’s response on the submission of OMF in clause 15.  The suggestion is supported. It will also be in line with earlier responses in respect of the amendment of section 36. Paragraphs (iii) and (iv) could read as follows:  “(iii) must be accompanied by proof that the application has been delivered to the other party ~~has been notified~~, at least ~~five~~ 10 days prior, of the intended application;  (iv) may be set down for hearing on any day, being not less than ~~five~~ 10 days after the lodging thereof;”.  ADRA seems to have a valid concern and their proposal is supported. Paragraph *(e)* could possibly read:  “*e)* No cost order shall be made with regard to an application contemplated in paragraph *(a)*: Provided that the judgment debtor or affected person who applies for the review contemplated in paragraph *(a)* acted reasonably in bringing the application.”.  There is other legislation which requires the clerk or the registrar to render assistance to certain parties, for example, the Constitutional Court Rules, from which the proviso to paragraph *(f)* has been borrowed. What could possibly be deleted is the reference to legal advice, but clerks or registrars should be able to assist certain parties with completion of the form or explaining the process. Proper training of clerks and registrars is crucial. Paragraph *(f)* could read as follows:  *“(f)* The clerk or registrar of the court must render reasonable assistance to a party wishing to bring an application contemplated in paragraph *(a)*: Provided that the State or that clerk or registrar shall not be liable for any damage or loss resulting from assistance given in good faith by that clerk or registrar to such party ~~in the form of legal advice or~~ in the compilation or preparation of any process or document.”. |
| **11. Clause 15 Short title and commencement**  **15.** (1) This Act is called the Courts of Law Amendment Act, 2016, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.  (2) Subject to subsection (3), different dates may be fixed in respect of different provisions of this Act.  (3) Sections 3, 4, 5, 6, 7, 8, 9 and 10 are deemed to have come into operation on 8 July 2015. | OMF | (a) The retrospective effective date of 8 July 2015 is strongly opposed. There lies great systemic risk in reducing all judgments entered into by the courts in terms of the sections to be amended, such as sections 57, 58 and 65, from the period after 8 July 2015 up to the effective date of the Amendment Act (this Bill), to a nullity. Not all amendments in the Bill are specifically aimed at addressing abuses.  (b) Reference is made to the *President of the Republic of South Africa v Hugo 1997 (4) SA 1(CC)* in which the Constitutional Court held that “the need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to know of the law, and be able to conform his or her conduct to the law”. To require compliance with provisions from 8 July 2015, and at a time where a person could not have been aware of its specifics, is unconstitutional. OMF also points out that the Constitutional Court has not yet confirmed the declaration of constitutional invalidity in the *Stellenbosch*-case. | (a) During the public hearings, the representative of the GCB also raised concerns regarding the retrospective provisions.  (b) The DOJCD suggests that the transitional provisions in clause 14 are sufficient to deal with current irregularly obtained judgments and EAO’s. Clause 14(1) provides that all legal proceedings in terms of the sections of the MCA to be amended, which were instituted prior to the commencement of this Act and which are not concluded before the commencement of this Act, must be continued and concluded in all respects as if this Act had not been passed. A proviso is added that, where applicable, the original judgment, instalment order or emoluments attachment order, upon which the proceedings in question are based, should have been obtained and granted in accordance with the law.  (c) Clause 14(2) further creates an opportunity for interested parties to review judgments and EAO’s if they believe they were granted or obtained irregularly. It is also important to take note that the *Stellenbosch*-case is still to be confirmed in the Constitutional Court. It might therefore not be prudent to pre-empt the outcome of the Constitutional Court, especially if its order differs from that of the High Court. |