**SHORT 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**

**Note 1: The Parliamentary Committee of the General Council of the Bar of South Africa (PCGCB), South African Human Rights Commission (SAHRC), Legal Aid South Africa (LASA) are generally in support of the provisions of the Bill.**

**Note 2: Insertions by way of double underlining and deletions by way of strikethrough.**

**Note 3: A narrative of the Constitutional Court judgment in the Stellenbosch-case is attached as Annexure A.**

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| **1. Clause 1: Definitions (as introduced)**  A definition of the National Credit Act, 2005, is inserted in the Bill. | | | | | | |
| **INSTITUTION/PORTFOLIO COMMITTEE COMMENTS/ RECOMMENDATIONS ON CLAUSE 1** | **DOJCD RESPONSE** | | | | | **PROPOSED AMENDMENTS** |
| **Portfolio Committee (PC)**  The PC requested clarity on the interpretation of “days” in the MCA. | (a) Section 1 of the Magistrates’ Courts Act, 1944 (MCA) does not contain a definition, of “days” or “court days”. Section 4 of the Interpretation Act, 1957 then provides that where a particular number of days is prescribed for the doing of any act, or for any other purpose, the period must be reckoned exclusively of the first and inclusively of the last day, unless the last day falls on a Sunday or on any public holiday, in which case such Sunday or public holiday must be excluded.  (b) The Superior Courts Act, 2013 (SCA), the Uniform Rules of the High Court, the Constitutional Court Rules, the Supreme Court of Appeal Rules and the MCA Rules all contain some form of definition of “court day” or “business day”. It appears therefore that in many provisions relating to courts of law, there is a definition of “court days”. | | | | | “Section 1 of the Magistrates’ Courts Act, 1944, is hereby amended by the insertion—  *(a)* after the definition of “court” of the following definition:  “**‘court day’** means any day other than a Saturday, Sunday or public holiday, and only court days shall be included in the computation of any time expressed in days prescribed by this Act or fixed by any order of court;”; and  *(b)* after the definition of “Minister” of the following definition:  “**‘National Credit Act’** means the National Credit Act, 2005 (Act No. 34 of 2005);”. |
| **2. Clause 2: Amendment of section 36 of the MCA (as introduced)**  *(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.’’. | | | | | | |
| **INSTITUTION/PORTFOLIO COMMITTEE COMMENTS/ RECOMMENDATIONS ON CLAUSE 2** | **DOJCD RESPONSE** | | | | | **PROPOSED AMENDMENTS** |
| **LASA**  The reason for bringing the application in chambers is not clear. | The intention of the application to be brought in chambers is to expedite the matter. | | | | | Section 36 of the Magistrates’ Courts Act, 1944, is hereby amended—  *(a)* by 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~~ may rescind or vary such judgment on application by any person affected by it.’’; and  *(b)*by the addition of the following subsections:  ‘‘(3) *(a)* Where a judgment debt, the interest thereon at the rate granted in the judgment and the costs ~~has been settled~~ have been paid in full, whether the consent of the judgment creditor for the rescission of judgment has been obtained or not, 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 a form which correspond substantially with the form prescribed ~~by~~ in the rules;  (ii) must be accompanied by reasonable proof that the judgment debt, the interest and the costs have been paid;  (iii) must be accompanied by proof that the application has been served on the judgment creditor ~~has been notified~~, at least ~~five~~ 10 court days prior~~,~~ to the hearing of the intended application;  (~~iii~~)(iv) may be set down for hearing on any day, not less than ~~five~~ 10 court days, after ~~lodging~~ service thereof; and  (~~i~~v) may be heard by a magistrate in chambers.  (4) ~~If an application contemplated in subsection (3)~~*~~(a)~~* ~~is opposed, a~~ A court may make any cost order it deems fit with regard to an application contemplated in paragraph *(a)*. |
| **Commission for Gender Equality (CGE)**  Complaints have been received where credit bureaus have refused to act in accordance with rescission orders. Provision should be made compelling a credit bureau to immediately on presentation of a copy of a rescission order granted by any court, remove all adverse particulars relating to the debt. Failure or refusal to remove adverse information will be an offence. | 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 | | | | |
| **Banking Association of South Africa (BASA)**  (a) The phrase “judgment debt” should be defined.  (b) Only judgments which are not subject to review or appeal proceedings should be allowed to be rescinded.  (c) Reasonable authentic proof of the settlement of the debt must be attached to the application for rescission.  (d) The judgment creditor must be served with the application for rescission and not only notified.  (e) The notice and set down periods must be 10 days instead of five days.  (f) Proof of service must be attached to the application and the creditor must have the right to oppose the application where appropriate. | A definition of “judgment debt” was proposed which included the costs and interest, but it must be pointed out that various sections of the MCA refer to the “judgment debt and costs”, implying that costs are not part of the judgment debt. See a proposed amendment in the next column. | | | | |
| **PC**  In a proposed definition of “judgment debt”, in which “interest” was included, it was suggested that provision be made for the interest as granted by the court. | See the response of DOJCD above and a proposed amendment in the next column. | | | | |
| **Law Society of South Africa (LSSA)**  The further basis for obtaining a rescission of judgment, namely, where the debt has been settled, is welcomed, but the procedure for bringing the application for rescission should be deleted as it is already provided for in rule 55. | (a) The amendment seeks to assist judgment debtors with a fast and cheap mechanism to have a judgment rescinded which has been settled because adverse credit information has far-reaching socio-economic consequences. Most people cannot afford an attorney or do not have the legal skills to bring an ordinary rule 55 application on their own.  (b) It is submitted that it is the Legislature’s prerogative to provide for procedural aspects in an Act of Parliament, in order to provide protection to vulnerable people in the society. The crux is that there is judicial oversight over the rescission of judgments and the court has a judicial discretion.  (c) The Rules Board raised similar concerns than those of the LSSA regarding the provisions of section 23A (clause 13), relating to procedure, with the DOJCD, but the same would apply to clause 2.  (d) The DOJCD wishes, however, to highlight other provisions of the proposed amendment of section 36 that may be problematic:  (i) Currently, section 36(2) provides that a court must rescind or vary a judgment. The new subclause (3) provides that a court may rescind the judgment. The intended section 23A of the SCA also provides that a court may rescind the judgment. (Own underlining). It is suggested that all the provisions be brought in line by also using the word “may” in section 36(2). It will also strengthen the principle of judicial discretion.  (ii) The provisions of subclause (2) and subclause (3) could also be interpreted to mean that if consent is given for the rescission of a judgment where the debt has been paid, it must be by way of the usual application procedure (in section 36(2)), which was not the intention. Section 36(2) aims to provide for the rescission of judgment, with the consent of the judgment creditor, where there are other reasons for the application for rescission and the new subclause (3) where the debt has been settled. | | | | |
| **3. Clause 3: Amendment of section 45 of the MCA (as introduced)**  *(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.’’. | | | | | | |
| **INSTITUTION /PORTFOLIO COMMITTEE COMMENTS/ RECOMMENDATIONS ON CLAUSE 3** | | **DOJCD RESPONSE** | | | | **PROPOSED AMENDMENTS** |
| **CGE**  The amendment should also provide that any order given in proceedings in terms of section 57, 58, 65 or 65J in a court which does not have jurisdiction over a debtor, will not be enforceable against any person. | | 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. | | | | There are no further amendments to clause 3. |
| **Old Mutual Finance(OMF)**  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 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. | | | |
| **4. Clause 4 Substitution of section 57 of the MCA (as introduced)**  **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.’’. | | | | | | |
| **INSTITUTION /PORTFOLIO COMMITTEE COMMENTS/ RECOMMENDATIONS ON CLAUSE 4** | | | **DOJCD RESPONSE** | | | **PROPOSED AMENDMENTS** |
| **PC**  The PC enquired about the possibility of establishing a centralized register of debtors and the establishment of a national credit bureau. | | | The DOJCD met with the dti and National Treasury. There was general agreement that the practicalities of a general database under a national credit bureau could be carefully considered by the National Credit Regulator as the controlling body over credit bureaus. The dti indicated that EAO’s are recorded by credit bureaus. | | | **“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, supported where reasonably possible by the most recent proof in the possession of the defendant;  (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)[[1]](#footnote-1), 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~~[[2]](#footnote-2)—  *(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, 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 dependants after payment of the instalment~~ after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate, authorise an emoluments attachment order referred to in section 65J[[3]](#footnote-3); and  *(d)* may, 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~~after it has received knowledge that judgment has been entered and an order made, 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.’’. |
| **Association of Debt Recovery Agents (ADRA)**  (a) ADRA applauds the objectives of the Bill, but is of the view that the provisions of the Bill will not achieve these objectives. In respect of clauses 4 (amendment of section 57), 5 (amendment of section 58) and 6 (amendment of section 65), they are of the view that —  (i) some provisions regarding required information and documents are too prescriptive and impractical;  (ii) the creditor could provide the following 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; and  (iii) the provision that the court may make a costs order it deems fit, notwithstanding the debtor consenting to a particular scale of costs, will fly in the face of an agreement between the parties that the debtor will be liable for the legal costs.  (b) ADRA was requested by the PC at the public hearings to provide rephrasing for some of the clauses of the Bill to accommodate and enhance the objectives of the Bill. The main feature of their proposed phrasing in respect of sections 57 and 58 is that sections 57 and 58 are to be used for judgments only in so far as natural persons are concerned. Instalment orders may be made against juristic persons. Recovery of the judgment debt appears to be in terms of their suggested amendments to section 65J. | | | (a) See the proposed amendments to accommodate some of ADRA’s concerns. The reason for the specific provision regarding costs 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  (b) ADRA proposed substantial changes in their further submission, which, in the view of the DOJCD, require thorough investigation and consultation.  (c) Pursuant to the CC judgment in the *Stellenbosch*-case, further amendments to section 57 have been made to include a reference to a “just and equitable” order. | | |
| **LSSA**  (a) Subclauses (2A) and (2B) encroach on the jurisdiction of the Rules Board by prescribing the content of an application for judgment.  (b) The evidence and content prescribed in the proposed amendment is impractical and the evidence falls within the knowledge and possession of the debtor. The evidentiary requirement impacts on judicial discretion and is adequately covered in both the common law and the sufficiency of means in section 65D(1) and (4).  (c) The proposed phrase in subsection (3) “within 10 days from the date the judgment was entered” is impractical as notice of judgment is received by the judgment creditor’s attorney many days later in the post. There is also no indication of the consequence of failure to advise the judgment debtor of the judgment within 10 days. | | | (a) Except for paragraph *(c)*, subclause (2A) contains existing provisions of section 57(2).  (b) As a result of ADRA’s submission regarding the required information and documentary evidence, the DOJCD has proposed some amendments to clause 4 in the next column.  (c) A proposed amendment to rectify the concern regarding the 10 day period is made in the proposed amendments in the next column. There is currently also no specific provision in section 57 providing for consequences in the case of failure to advise the judgment debtor of the judgment and order. In terms of section 65A(2), however, no notice to a debtor to appear in court will be issued until a registered letter has been forwarded to the debtor. | | |
| **CGE**  Provision should be made specifically prohibiting admission of liability in respect of a debt that has prescribed. | | | The conduct by which prescribed debt is collected is regarded as unethical which should be dealt with by the relevant professional bodies. The South African Law Reform Commission is investigating reforms to the Prescription Act. | | |
| **BASA**  (a) The court’s investigation into reckless lending and affordability assessments should be limited to the credit agreement in respect of which judgment or an EAO is requested and other creditors should not be drawn into the proceedings.  (b) The clause must illustrate whether the creditor can proceed to accept the offer by the defendant if no documentary evidence is available. | | | (a) The question arises as to how the court will determine if a debtor has sufficient means left after payment of an instalment order or EAO if it cannot take other commitments into consideration.  (b) The provision regarding the required information and documentary evidence has been amended in line with ADRA’s proposal. | | |
| **OMF**  Concerns regarding the required documentary evidence are expressed and the reason behind subclause (5) is questioned. | | | The provision regarding the required information and documentary evidence has been amended. Subclause (5) strengthens the principle that section 57 is subject to the provisions of the NCA. | | |
| **5. Clause 5: Amendment of section 58 of the MCA (as introduced)**  **“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.’’. | | | | | | |
| **INSTITUTION/PORTFOLIO COMMITTEE COMMENTS/ RECOMMENDATIONS ON CLAUSE 5** | | | | **DOJCD RESPONSE** | | **PROPOSED AMENDMENTS** |
| **ADRA**  (a) The requested particulars and documentary evidence are too prescriptive and too impractical to obtain.  (b)Their rephrasing of clause 5 as requested by the PC at the public hearings on 31 August 2016 proposes that only judgment can be granted against a natural person and not an instalment order too. See their views set out under the amendment of clause 4 (amendment of section 57) above. | | | | (a) Some amendments have been made in the next column to address ADRA’s concerns.  (b) ADRA proposed substantial changes in their further submission, which, in the view of the DOJCD, require thorough investigation and consultation. | | **“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, supported where reasonably possible by the most recent proof in the possession of the defendant[[4]](#footnote-4);  (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~~;  (iii) 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.~~  (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)* 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 the 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, 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 dependants after payment of the instalment~~ after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate, 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.  (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.’’. |
| **LSSA**  The requirements regarding the information and documentary evidence are impractical. The proposed amendment is too prescriptive and unnecessarily fetters the court’s discretion regarding sufficiency and relevance of evidence. | | | | The DOJCD has already made some amendments as suggested by ADRA, which would address some of the concerns raised by the LSSA.  Pursuant to the CC judgment in the *Stellenbosch*-case, further amendments to section 58 have been made to include a reference to a “just and equitable” order. | |
| **CGE**  Provision should be made specifically prohibiting admission of liability in respect of a debt that has prescribed. | | | | See the DOJCD’s response to the CGE on their submission to the amendment of section 57. | |
| **BASA**  **OMF**  See their submissions regarding section 57. | | | | See the DOJCD’s response on their submission to the amendment of section 57. | |
| **6. Clause 6 Substitution of section 65 of the MCA (as introduced)**  ‘‘**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).’’ | | | | | | |
| **INSTITUTION /PORTFOLIO COMMITTEE COMMENTS/ RECOMMENDATIONS ON CLAUSE 6** | | | | **DOJCD RESPONSE** | | **PROPOSED AMENDMENTS** |
| **ADRA**  ADRA has similar concerns than those expressed in respect of the proposed amendments to sections 57 and 58 regarding | | | | See the proposed amendments to section 65 in line with the proposed amendments to sections 57 and 58 and to provide for “just and equitable” orders as per the CC judgment in the *Stellenbosch*-case. | | **“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~~, 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.  (3) The court ~~may~~—  *(a)* may request any relevant information 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~~[[5]](#footnote-5) 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)* 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; and  *(c)* may, 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~~ after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate, 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).’’. |
| **OMF**  They welcome the premise that an affordability test should be done before an instalment order is made, but courts are already obliged to make an enquiry in terms of section 65D(4), in terms of which a court may require certain documentary evidence. | | | | In terms of section 65, 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), is made without the debtor having to appear in court. Section 65D requires the presence of the debtor in court. | |
| **7. Clause 7 Amendment of section 65E of the MCA (as introduced)**  The substitution for subsection (1) of the following subsection:  ‘‘(1) If at the hearing of the proceedings in terms of a notice under section 65A(1) the court is satisfied—  *(a)* that the judgment debtor has movable or immovable property which may be attached and sold in order to satisfy the judgment debt or any part thereof, the court may—  (i) authorise the issue of a warrant of execution against such movable or immovable property or such part thereof as the court may deem fit; or  (ii) authorise the issue of such a warrant together with an order in terms of section 73; or  *(b)* that there is a debt due to the judgment debtor which may be attached in terms of section 72 to satisfy the judgment debt and costs or part thereof, the court may authorise the attachment of that debt in terms of that section; or  *(c)* that the judgment debtor or, if the judgment debtor is a juristic person, the director or officer summoned as representative of the juristic person, at any time after receipt of a notice referred to in section 65A(1), has made an offer in writing to the judgment creditor or his or her attorney to pay the judgment debt and costs in specified instalments or otherwise, **[whether by way of an emoluments attachment order or otherwise,]** or, if such an offer has not been made, that the judgment debtor is able to pay the judgment debt and costs in reasonable instalments, the court may order the judgment debtor to pay the judgment debt and costs in specified instalments and, **[if the judgment debtor is employed by any person who resides, carries on business or is employed in the district**, **or if the judgment debtor is employed by the State in the district,]** where the judgment debtor is a natural person, 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, in addition authorise the issue of an emoluments attachment order by virtue of section 65J(1) for the payment of the judgment debt and costs by the employer of the judgment debtor,  and postpone any further hearings of the proceedings.’’. | | | | | **Pursuant to the CC judgment in the *Stellenbosch*-case, it is suggested that clause 7 be amended as follows:**  ‘‘(1) If at the hearing of the proceedings in terms of a notice under section 65A(1) the court is satisfied—  *(a)* that the judgment debtor has movable or immovable property which may be attached and sold in order to satisfy the judgment debt or any part thereof, the court may—  (i) authorise the issue of a warrant of execution against such movable or immovable property or such part thereof as the court may deem fit; or  (ii) authorise the issue of such a warrant together with an order in terms of section 73; or  *(b)*that there is a debt due to the judgment debtor which may be attached in terms of section 72 to satisfy the judgment debt and costs or part thereof, the court may authorise the attachment of that debt in terms of that section; or  *(c)* that the judgment debtor or, if the judgment debtor is a juristic person, the director or officer summoned as representative of the juristic person, at any time after receipt of a notice referred to in section 65A(1), has made an offer in writing to the judgment creditor or his or her attorney to pay the judgment debt and costs in specified instalments or otherwise, **[whether by way of an emoluments attachment order or otherwise,]** or, if such an offer has not been made, that the judgment debtor is able to pay the judgment debt and costs in reasonable instalments, the court may order the judgment debtor to pay the judgment debt and costs in specified instalments and, **[if the judgment debtor is employed by any person who resides, carries on business or is employed in the district**, **or if the judgment debtor is employed by the State in the district,]** where the judgment debtor is a natural person and is employed[[6]](#footnote-6), ~~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~~ and after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate, in addition authorise the issue of an emoluments attachment order by virtue of section 65J(1) for the payment of the judgment debt and costs by the employer of the judgment debtor,  and postpone any further hearings of the proceedings.’’ | |
| **8. Clause 8 Substitution of section 65J of the MCA (as introduced)**  **“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.’’. | | | | | | |
| **INSTITUTION/PORTFOLIO COMMITTEE COMMENTS/ RECOMMENDATIONS ON CLAUSE 8** | | | | **DOJCD RESPONSE** | | **PROPOSED AMENDMENTS** |
| **PC**  (a) The Bill does not show if the 25% cap will be shared when there are more than one creditor.  (b) Other creditors should be informed if an EAO is requested against a debtor.  (c) With regard to the service of the EAO on both the employer and on the debtor as provided for in section 65J(3)*(c)*, which would be costly for the debtor, the DOJCD suggested that the employer must furnish the debtor (employee) with a copy of the EAO. The PC was of the view that the employer might not comply and that it is advisable that the EAO be served on the debtor by the sheriff.  (d) Aspects such as stokvels, the maintenance of extended family members and contributions to burial associations must also be taken into account in determining affordability.  (e) Awareness sessions to make the public aware of their rights should take place and the services by the Foundation of Human Rights should be more utilized.  (f) The Department undertook to inform the PC of the CC judgment in the *Stellenbosch*-case. | | | | (a) Provision has been made in the proposed amendments to section 65J in the next column for restructuring of the amount payable by a debtor if there are more than one EAO.  (b) Provision has been made for informing other creditors.  (c) Provision has been made for service of the EAO on the debtor, if the debtor was not present or represented when the EAO was authorised.  (d) It is submitted that aspects such as stokvels, the maintenance of extended family members and contributions to burial associations will be addressed in the proposed new section 55A, listing the factors a court must take into account to make a just and equitable order and other amendments to section 65J.  (e) Awareness raising on this issue could be brought to the attention of the media component of the DOJCD.  (f) A summary of the CC judgment in the *Stellenbosch-*case and proposed amendments to give effect to the judgment are found at the end of this document. | | **“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) *(a)* 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.[[7]](#footnote-7)  *(b)* For purposes of this subsection, “basic salary”[[8]](#footnote-8) means the annual gross salary a judgment debtor is employed on divided by 12 and excludes additional remuneration for overtime or other allowances.  *(c)*(i) When a court considers—  *(aa)* the authorization of an emoluments attachment order[[9]](#footnote-9); or  *(bb)* any other order contemplated in this section[[10]](#footnote-10),  and after having considered all submissions before the court and after having called for and considered all further available documents, the court is satisfied that other emoluments attachment orders exist against the judgment debtor, the court must postpone the further consideration of the authorization or other order and set the matter down for hearing.  (ii) The party[[11]](#footnote-11) applying for the authorization of an emoluments attachment order or other order contemplated in this section, must serve notice of the date of the hearing referred to in subparagraph (i) on the other creditors or their attorneys, and on the judgment debtor, if he or she was not present or represented when the consideration of the authorization of an emoluments attachment order or other order was postponed.  (iii) The court may after hearing all parties at the ensuing hearing, make an order regarding the division of the amount available to be committed to each of the emoluments attachment orders, after satisfying itself that each order is just and equitable and the sum of the total amount of the emoluments attachment orders is appropriate and does not exceed 25 per cent of the judgment debtor’s basic salary.  (2) An emoluments attachment order **[shall not]** may only [[12]](#footnote-12)be issued **[—**  ***(a)* unless the judgment debtor has consented thereto in writing or]** if the court has so authorised, after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate[[13]](#footnote-13), 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, which must correspond substantially with ~~in~~ the form prescribed ~~by~~ in the rules, of the intention to ~~obtain~~have an emoluments attachment order issued against the judgment debtor in accordance with the authorization of the court referred to in subsection (2)[[14]](#footnote-14).  (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~~ have an emoluments attachment order issued against the judgment debtor 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 basic 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 —  *(aa)* all existing court orders against the judgment debtor or agreements with other creditors for payment of a debt and costs in instalments; and  *(bb)* when reasonably attainable[[15]](#footnote-15), the amounts needed by the debtor for necessary expenses and those of the persons dependent on him or her and for the making of periodical payments which he or she is obliged to make in terms of an agreement or otherwise in respect of his or her other commitments[[16]](#footnote-16).  (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 over commitment 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.  (2E)[[17]](#footnote-17) The court may, after hearing all parties and after satisfying itself that the order is just and equitable—  *(a)* 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~~ the sufficientmeans necessary for his or her maintenance and that of his or her dependents; or  *(b)* make any order, including an order regarding the division of the amount available to be committed to all the emoluments attachment orders, after satisfying itself that the amount is appropriate and does not exceed 25 per cent of the judgment debtor’s basic salary and an order as to costs.  (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~~[[18]](#footnote-18) 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 if the judgment debtor was not present or represented when the emoluments attachment order was authorised, also on the judgment debtor, by the sheriff in the manner prescribed by the rules for the service of process.[[19]](#footnote-19)  (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~~ quarterly[[20]](#footnote-20) 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 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 maintenance or that of his or her dependents or that the amounts claimed are erroneous or not in accordance with the law.  *(~~b~~ 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)*.  *(~~c~~ d)* The court may, after hearing all parties and after satisfying itself that the order is just and equitable—  (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~~ the sufficient means necessary for his or her maintenance and that of his or her dependents; or  (ii) make any order, including an order regarding the division of the amount available to be committed to all the emoluments attachment orders, after satisfying itself that the amount is appropriate and does not exceed 25 per cent of the judgment debtor’s basic salary and an order as to costs. ~~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) 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,  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.’’. |
| **BASA**  (a) An EAO must be granted as a last resort remedy. (b) The *in duplum* principle should be kept in mind. (c) Credit bureaus should be informed of all EAO’s.  (d) Provisions regarding the cap of 25% are unclear.  (e) Provisions regarding the duties of the employer, where the debtor seems not to have sufficient means after payment of the EAO, and where an employer does not timeously deduct the instalment of the EAO or does not timeously stop the deductions, are not clear. | | | | (a) EAO’s are an effective method of debt collection, provided it be done ethically and in accordance with the law. 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) Magistrates’ should be given proper training regarding the *in duplum* principle.  (c) It is understood from the dti that EAO’s are reported to credit bureaus.  (d) See the proposed amendments regarding the cap.  (e) See the proposed amendments regarding the duties of the employer. | |
| **OMF**  (a) The cap of 25% is arbitrary.  (b) Regarding the provision that an employer or other interested party must notify the creditor if the debtor will not have sufficient means after deduction of the EAO amount, who must set the matter down for hearing, it is suggested that the debtor and creditor should first try to resolve the issues between them. | | | | (a) (i)The rationale behind the cap is the hardship caused to employees and their dependants when their take home salaries are reduced to minimal amounts.  (ii) 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. . 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.  (b) See the proposed amendments to accommodate the OMF’s proposal. | |
| **ADRA**  (a) Introduction of a cap should be thoroughly researched, protect minimum wages, alleviate pressure on court capacity, not create an advantage for higher income earners, reduce costs and compliment other consumer protection legislation.  (b) The clarity and the cost-effectiveness of some provisions are questioned.  (c) In its further submission ADRA proposed the rephrasing of section 65J, containing protection of the minimum wage and a progressive sliding scale of attachable emoluments for each income group. The amount of the EAO is determined by the employer and if there is objection, the matter is set down in court for a financial inquiry, otherwise the EAO takes effect. Forms need to be served on the employer and employee setting out their rights in plain language. | | | | (a) The reason for introducing a cap is set out above.  (b) Amendments have been made where appropriate.  (c) The proposals by ADRA are far-reaching and need thorough investigation and consultation. | |
| **LSSA**  (a) The reason for the proposed cap is questioned.  (b) Some provisions are too prescriptive and encroach on the jurisdiction of the Rules Board as it deals with procedure.  (c) Provisions regarding costs seem unfair.  (d) The 5% commission recovered by the garnishee from the creditor should in turn be recovered from the debtor. | | | | (a) The reason for introducing a cap is set out above.  (b) It remains the prerogative of the Legislature to provide for matters of the nature contained in the proposed amendments. . Amendments have been made where appropriate.  (c) Amendments have been made where appropriate.  (d) The debtor is already liable for collection commission. | |
| **CGE**  A provision preventing the creditor to revise the amount of the debt must be inserted. Creditors are continuously adding costs to the original amount which already includes judgment costs, legal costs and interest in most instances. | | | | Provision is made in the MCA Rules for the costs that can be recovered from the debtor for debt recovery proceedings. The protective measures introduced in the Bill should be sufficient to protect debtors. | |
| **9. Clauses 9 and 10**  There are no further amendments to clauses 9 and 10 which amend sections 65M and 73, respectively. | | | | | | |
| **10. Clause 11 Amendment of section 86 of the MCA (as introduced)**  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.’’. | | | | | | |
| **INSTITUTION/PORTFOLIO COMMITTEE COMMENTS/ RECOMMENDATIONS ON CLAUSE 11** | | | | **DOJCD RESPONSE** | | **PROPOSED AMENDMENT** |
| **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*, section 86 can be regarded that either party, whether or not an appeal has been noted, may abandon a favourable judgment. The DOJCD sees, therefore, no reason why this section could not be utilized by a judgment creditor where the judgment debt has been settled. It could possibly also be utilized to give up a judgment which has been obtained irregularly as reports (and the *Stellenbosch*-case) have shown. | | There is no further amendment of section 86. |
| **11. Clause 12 Insertion of section 106C in the MCA (as introduced)**  There is no further amendment to section 106C which criminalises certain conduct pertaining to the obtaining of irregular judgments and orders. | | | | | | |
| **12. Clause 13 Insertion of section 23A in the Superior Courts Act, 2013 as introduced**  ‘‘**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.’’. | | | | | | |
| **INSTITUTION/PORTFOLIO COMMITTEE COMMENTS/ RECOMMENDATIONS ON CLAUSE 13** | | | | **DOJCD RESPONSE** | | **PROPOSED AMENDMENT** |
| **LSSA**  The insertion of provisions relating to the rescission of judgment with the consent of the judgment creditor is welcomed, but the provisions relating to the application for rescission is unnecessary and encroaches on the jurisdiction of the Rules Board. | | | | (a) See the DOJCD’s response in respect of clause 2 (amendment of section 36 of the MCA).  (b) The Rules Board also raised similar concerns in relation to the insertion of section 23A. | | ‘‘**Rescission of judgment with consent of plaintiff or where judgment debt has been ~~settled~~paid**[[21]](#footnote-21)  **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, the interest thereon at the rate granted in the judgment and the costs has have been ~~settled~~ paid, whether the consent of the judgment creditor for the rescission of judgment has been obtained or not, 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 a form which correspond substantially with the [[22]](#footnote-22)form prescribed in the rules;  (ii) must be accompanied by reasonable proof that the judgment debt, the interest thereon and the costs have been paid;  (iii) must be accompanied by proof that the application has been served on the judgment creditor ~~has been notified~~, at least ~~five~~ 10 business days prior~~,~~ to the hearing of the intended application;  (~~iii~~ iv) may be set down for hearing on any day, not less than ~~five~~ 10 business days~~,~~ after ~~the lodging~~ service thereof; and  (~~i~~v) may be heard by a judge in chambers.  *(c)* ~~If an application contemplated in paragraph~~ *~~(a)~~* ~~is opposed, a~~ A court may make any cost order it deems fit with regard to an application contemplated in paragraph *(a)*.’’. |
| **13. Clause 14 Transitional provisions (as introduced)**  **“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. | | | | | | |
| **INSTITUTION/PORTFOLIO COMMITTEE COMMENTS/ RECOMMENDATIONS ON CLAUSE 14** | | | | **DOJCD RESPONSE** | | **PROPOSED AMENDMENT** |
| **PCGCB**  Clause 14(1) and clause 15(3) are in contrast. Concerns were raised about the retrospective provisions in clause 15. | | | | The retrospective provisions in clause 15 have been deleted. | | **“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 a form which must correspond substantially with 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 application has been served on the[[23]](#footnote-23)other party ~~has been notified~~, at least ~~five~~ 10 court days prior, of the intended application;  (iv) may be set down for hearing on any day, being not less than ~~five~~ 10 court days after the lodging thereof; and  (v) may be heard by a magistrate 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)*: Provided that the judgment debtor or affected person who applies for the review contemplated in paragraph *(a)* acted reasonably in bringing the application.  *(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.”. |
| **OMF**  The notice periods are too short. | | | | The notice periods have been changed to 10 days. | |
| **ADRA**  The court must be allowed to make a costs order in appropriate cases, for example, if it is shown that the application was unreasonable or unfounded. | | | | The DOJCD agrees and an amendment has been made. | |
| **LSSA**  The clerk or registrar of the court who are not legally trained, is effectively being obligated to provide legal assistance which may have a harmful impact on court proceedings and the parties involved. | | | | 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. | |
| **14. Clause 15 Short title and commencement (as introduced)**  **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. | | | | | | |
| **INSTITUTION/PORTFOLIO COMMITTEE COMMENTS/ RECOMMENDATIONS ON CLAUSE 15** | | | | **DOJCD RESPONSE** | | **PROPOSED AMENDMENT** |
| **OMF**  The retrospective date is strongly opposed because there is a risk in reducing all judgments entered into in terms of the sections to be amended to a nullity. | | | | The retrospective provisions have been deleted, in line with the CC judgment in the *Stellenbosch*-case. | | **“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), d~~ 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.~~”. |
| **The Constitutional Court’s judgment in the *Stellenbosch*-case:**  (a) The University of Stellenbosch Legal Aid Clinic brought an application to the Western Cape Division of the High Court (WCHC) on behalf of some of their clients who are low wage earners and who were subject to exploitative lending practices and debt collection procedures, to have certain parts of section 65J(2) of the MCA, declared unconstitutional as they fail to provide for judicial oversight over the issuing of an emoluments attachment order (EAO), against a judgment debtor. The application further sought an order declaring EAO’s obtained with the written consent of the debtors in jurisdictions alien to them, invalid on the basis that it was not permitted by legislation.  (b) The WCHC declared that the words “the judgment debtor has consented thereto in writing” in section 65J(2)*(a)*, and the provisions of section 65J(2)*(b)*(i) and (ii) were inconsistent with the Constitution of the Republic of South Africa, 1996, (the Constitution) and invalid to the extent that they fail to provide for judicial oversight over the issuing of an EAO against a judgment debtor. The WCHC also declared that section 45 of the MCA does not permit a debtor to consent in writing to the jurisdiction of a magistrate’s court other than the one in which the debtor resides or is employed, in proceedings for the enforcement of a credit agreement to which the NCA applies.  (d) The CC handed down its judgment on 13 September 2016. It held that even though the *Jaftha-* and *Gundwana*-cases dealt with the right to access to housing in section 26 of the Constitution, they find analogous application in this case, where indigent debtors run the risk of losing a part of their only property, namely, their income. Taking away the basic income that indigent debtors rely on for their subsistence without court supervision, is also against the right to dignity, which underlies the socio-economic rights of housing, food and health care. It may also implicate the right to protection against arbitrary deprivation of property afforded under section 25 of the Constitution.  (e) The CC did not confirm the declaration of invalidity as it held that it is not the words in question that are unconstitutional, but the lack of certain words providing for judicial oversight, that was the constitutional defect. The CC retained the provisions sought to be deleted (the words in section 65J(2)*(a)* relating to the consent of a judgment debtor and the provisions of section 65J(2)*(b)*(i) and (ii)), but read in, in these two paragraphs, that the issuing of an EAO must have been authorised by the court and that the court must be satisfied that it is just and equitable that an EAO be issued and that the amount is appropriate.  (f) With effect from the date of the judgment, no EAO may be issued unless the court has authorised the issuing of such an EAO after satisfying itself that it is just and equitable and that the amount is appropriate, notwithstanding consent to an EAO by the judgment debtor or compliance with the requirements where an instalment order has already been made.  (g) The DOJCD is, however, of the view that the provisions of the Bill, aiming to delete the provisions relating to consent or compliance with certain requirements where there is already an instalment order, should be kept intact and that only the order relating to a just and equitable order and an appropriate amount, be inserted. That would mean amendments to clauses 4, 5, 6, 7 and 8 of the Bill (amendments to sections 57, 58, 65, 65E and 65J of the MCA). The Bill should ensure that any possible abuse of EAO’s, for instance consent to an EAO, should be minimised. Clause 15(3) providing for retrospective effect, should be deleted as the CC made a prospective order. The dti and the National Treasury agree with this approach.  (h) The suggested amendments to clauses 4, 5, 6, 7 and 8, to accommodate the CC’s order, are indicated in the relevant columns above.  (i) In line with the CC’s judgment that an EAO must be authorised by a court, after satisfying itself that it is just and equitable to issue an EAO and that the amount is appropriate, the DOJCD is of the view that the magistrates’ courts should be provided with guidance as to the factors a court should be considering to come to a just and equitable order. In this regard it is suggested to insert a stand-alone section with a list of factors, in the MCA, which will, as an umbrella provision, cover all relevant sections dealing with EAO’s. A possible insertion in the MCA could read as follows:  “**Factors to be taken into account when considering an order which is just and equitable**  **55A[[24]](#footnote-24).**  For purposes of Chapters VIII and IX[[25]](#footnote-25) of this Act, the factors a court must take into account when considering an order which is just and equitable, include, but are not limited to—  *(a)* the size of the debt;  *(b)* the circumstances in which the debt arose;  *(c)* the availability of alternatives to recover the debt;  *(d)* the interests of the plaintiff or judgment creditor;  *(e)* the rights and needs of the elderly, children, persons with disabilities and households headed by women;  *(f)* social values and implications;  *(g)* the amount and nature of the defendant’s or judgment debtor’s income;  *(h)* the amounts needed by him or her for necessary expenses and those of the persons dependent on him or her and for the making of periodical payments which he or she is obliged to make in terms of an order of court, agreement or otherwise in respect of his or her other commitments; and  *(i)* whether the order would, in the circumstances of the case, be grossly disproportionate.”.  (j) The listed factors were borrowed from the CC judgment in the *Jaftha*-case and other case law, section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 (Act No. 19 of 1998) and section 65D(4) of the MCA. It is also submitted that paragraph *(h)* will take care of the PC’s concern that aspects such as stokvels, maintenance of extended family and contributions to burial societies, should also be taken into account when an EAO is authorised. | | | | | | |

**ANNEXURE A**

**Summary of judgment of the Constitutional Court in *University of Stellenbosch Legal Aid Clinic and others v Minister of Justice and Correctional Services and* *Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* [2016] ZACC 32 and possible amendments to the Courts of Law Amendment Bill**

**1. Background**

1.1 The University of Stellenbosch Legal Aid Clinic (*Stellenbosch*-case) brought an application on behalf of some of their clients who are low wage earners and who were subject to exploitative lending practices and debt collection procedures, to have certain parts of section 65J(2) of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944)(the MCA), declared unconstitutional as they fail to provide for judicial oversight over the issuing of an emoluments attachment order (EAO), against a judgment debtor. The application further sought an order declaring EAO’s obtained with the written consent of the debtors in jurisdictions alien to them, invalid on the basis that it was not permitted by legislation.

1.2 The Western Cape Division of the High Court (WCHC) declared that the words “the judgment debtor has consented thereto in writing” in section 65J(2)*(a)*, and the provisions of section 65J(2)*(b)*(i) and (ii) were inconsistent with the Constitution of the Republic of South Africa, 1996, (the Constitution) and invalid to the extent that they fail to provide for judicial oversight over the issuing of an EAO against a judgment debtor. The WCHC also declared that section 45 of the MCA does not permit a debtor to consent in writing to the jurisdiction of a magistrate’s court other than the one in which the debtor resides or is employed, in proceedings for the enforcement of a credit agreement to which the National Credit Act, 2005 (Act No. 43 of 2005)(the NCA), applies.

1.3 Section 167 of the Constitution provides that the Constitutional Court (CC) makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force. Section 167 of the Constitution further provides that a person, when it is in the interests of justice and with leave to the CC, may appeal directly to the CC from another court. (An appeal was lodged against certain parts of the order of the WCHC).

1.4 The CC handed down its judgment in the *Stellenbosch*-case on 13 September 2016. A minority judgment was given by Jafta J (the first judgment) and two majority judgments were given by Cameron J (the second judgment) and Zondo J (the third judgment), respectively. Cameron J and Zondo J each concurred in one another’s judgment. Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Froneman J, Khampepe J, Madlanga J, Mhlantla J and Nkabinde J concurred in both the second and third judgments.

**2. The first judgment**

2.1 In the first judgment, Jafta J held that it must be investigated whether the impugned provision does not provide for judicial oversight at the time an EAO is issued and if it does not, whether the omission limits the right entrenched in section 34 of the Constitution, which provides for the right to access to courts. Reference is made to the CC’s judgment in *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others [2004] ZACC 25; 2005 (2) SA 140 CC; 2005 (1) BCLR 78* *CC* in which the CC defined “judicial oversight” as denoting, a decision by a court, following a consideration of facts. Section 65J must therefore be interpreted to determine whether it empowers the court or a clerk of the court to grant an EAO. The first judgment went on to set out its interpretation of section 65J, referring to other provisions preceding section 65J and concluded that a court does not mean a clerk of the court or a registrar or messenger of the court and furthermore, in terms of section 12 of the MCA, only a magistrate “may hold a court”.

2.2 As a result, Jafta J held that section 65J provides for judicial supervision. Therefore, assuming that the Constitution requires judicial supervision when EAO’s are issued, the section meets the requirement and therefore he cannot confirm the order of invalidity made by the WCHC.

2.3 With regard to section 45 of the MCA dealing with the consent of parties to the jurisdiction of a court, the first judgment held that it may be more accurate to say that section 90 and 91 of the NCA “limit” section 45, rather than “conflict” with it.

**3. The second judgment**

3.1 The second judgment disagreed with the overall approach or outcome in the first judgment. There are two major differences with the first judgment. The first difference relates to an issue of principle. The first judgment assumes that the Constitution requires judicial supervision when orders issued from a court are executed and finds that this is how the contested provision must be interpreted. The second judgment held that it is not a principle that should merely be assumed in deciding this case. The CC has established in its jurisprudence that execution of court orders is part of the judicial process and requires judicial oversight. An EAO may deal with the enforcement of a debt, but it is a substantive decision in itself, as the court grants an order that a debt must be paid through a debtor’s wages, but the court also decides how the debt is to be paid. An EAO is burdensome, it severely constricts that autonomy of the debtor to decide how the debt is to be paid off, it is inflexible as it does not adapt to the debtor’s changing circumstances. A debtor’s personal circumstances may have changed between when a judgment debt is entered and when an EAO is sought and it is crucial that these considerations be taken into account at the time an EAO is sought.

3.2 The second judgment held that even though the *Jaftha-* and *Gundwana*-cases dealt with the right to access to housing in section 26 of the Constitution, they find analogous application in this case, where indigent debtors run the risk of losing a part of their only property, namely, their income. Taking away the basic income that indigent debtors rely on for their subsistence without court supervision, is also against the right to dignity, which underlies the socio-economic rights of housing, food and health care. It may also implicate the right to protection against arbitrary deprivation of property afforded under section 25 of the Constitution.

3.3 The second difference with the first judgment relates to the order of confirmation of unconstitutionality. The first judgment denies the order of confirmation, but instead, it parses the provision at issue to render it conformable with the assumption that judicial oversight is constitutionally necessary and that the provision was incorrectly applied, having regard to the provisions as a whole (section 65J read with the provisions preceding it). The second judgment held that no language links section 65J directly to sections 65A, 65D or 65E as the first judgment would have. Not all EAO’s are issued through this process and for those that have been issued outside the section 65E process, there is no guarantee of judicial oversight.

3.4 The second judgment further discussed the provisions of section 65J(2), which is the focus of the challenge. In terms of section 65J(2), an EAO may be issued under two alternative circumstances. First, the order may be issued if the debtor consents in writing, or if “the court has so authorised”. The conjunction “or” seems to make linguistically plain that an EAO may be obtained through the debtor’s written consent even when the court has not authorised it. In addition, section 65J(1) posits that a judgment creditor and not a court, causes an EAO to be issued from a court. Once issued, section 65J(5) provides that the order may be executed “as if it were a court judgment”. This wording, according to the second judgment, unpalatably signals the portents of judicially unsanctioned execution and the interpretive approach of the first judgment is, “unduly strained”.

3.5 The second judgment concluded that the safest and most secure remedy, one that recognizes the plain meaning of the language and the constitutional limits it transgresses, is to strike the offensive legislation down as was done by the WCHC. The second judgment further held that the provisions of the Magistrates’ Courts Rules cannot be used to save the impugned provisions as an invalid statutory scheme cannot be save by a regulation. It must also be borne in mind that section 65J is not limited to judgment debts that arise out of the NCA or the Credit Agreements Act, 1980 (Act No. 75 of 1980). The language of the provision shows it permits judicially unsanctioned enforcement of judgment debts, which is unconstitutional.

3.6 Paragraph 3 of the order of the WCHC reads as follows:

“3. It is declared that in proceedings brought by a creditor for the enforcement of any credit agreement to which the National Credit Act 34 of 2005 (“the National Credit Act”) applies, section 45 of the Magistrates’ Courts Act does not permit a debtor to consent in writing to the jurisdiction of a magistrates’ court other than that in which that debtor resides or is employed.”.

The second judgment added the additional jurisdictional instance that the WCHC omitted, namely, where the goods are kept.

3.7 With regard to retrospectivity, the second judgment held that it was inclined to issue a prospective order. It is true that the grievous effect of a prospective order is that past EAO’s, unscrupulously procured or issued, will continue to be operative, unless individually challenged. The judge was persuaded by the consideration that the issue is complex and best regulated by the Legislature.

**4. The third judgment**

4.1 Zondo J concurred in the second judgment but wrote the third judgment separately. He held that in order to determine whether the MCA provides for judicial oversight when issuing EAO’s, it is necessary to inquire into whether it is the court, or someone else, that has the power to issue such orders. In his analysis, Zondo J considered the use of the words “issued from the court” in section 65J(1)*(a)*. Reference is made to the wording of section 65A(1)*(a)* which provides that the judgment creditor “may issue, from the court of the district” in which the debtor resides, carries on business or is employed, a notice calling upon the debtor to appear before the court for an inquiry into the financial position of the debtor and to make such an order as the court may deem just and equitable. The judge pointed out that in terms of section 65E(1)*(c),* which relates to proceedings in terms of section 65A(1), the court is empowered to authorise the issue of an EAO by virtue of section 65J(1) and not to issue the EAO itself. He took the view that in order for section 65J(1)*(a)* to be read to mean that it is the court that issues EAO’s, one would have to read the phrase “issued from the court” to mean “issued by the court”. Interpreting the phrase this way would mean that section 65J(1)*(a)* allows a judgment creditor or his or her attorney to cause the court to issue an EAO, a meaning that is inconsistent with the independence of the judiciary as it would mean that the court acts according to the dictates of the judgment creditor or his or her attorney. The word “issue” when used in relation to court processes is normally used to refer to an administrative function in a court and not to a judicial function. Various other sections of the MCA dealing with the issuing of process used the words ‘from” or “out” of” the court, for example, section 4 and section 65A(1). The judgment further deals with the concept of “issue”. Ultimately, it was held that it is not the court itself that has the power to issue an EAO, but rather the clerk of the court.

4.2 The third judgment also considered section 65J(2) which precludes the issuing of and EAO unless certain conditions have been met. Under paragraph *(a)* there are two conditions, either consent by the debtor to an EAO or the court has so authorised. Where the court has so authorised, there is judicial oversight, but where the debtor has consented, there is not. The judge also referred to section 65J(5) which provision is to the effect that an EAO may be executed as if it were a court judgment. The view is held that there would be no need for this provision if the position was that an EAO is always issued by a court since, in such a case, an EAO would be a court order.

4.3 The judge concluded that there is no justification in law that section 65J(1)*(a)* must be construed to mean that it is the court that issues EAO’s. There are cases where the court authorizes the issue of EAO’s and there are cases where EAO’s are issued without court intervention and to the extent that the MCA makes provision for the latter, it is inconsistent with section 34 of the Constitution and therefore invalid.

4.4 The third judgment pointed out that the order by the WCHC was an order of notional severance in terms of which the WCHC simply declared some words of section 65J(2)*(a)* and the provisions of section 65J(2)*(b)*(i) and (ii), to be inconsistent with the Constitution and invalid to the extent that they fail to provide for judicial oversight over the issuing of EAO’s. Zondo J was of the view that this was not an appropriate remedy as it was the absence of words providing for judicial oversight, that was the constitutional defect and not the existing words or provisions in question. Accordingly, the order of constitutional invalidity made by the WCHC was not confirmed, but the reading-in, and severance of, certain words in section 65J(2)*(a)* and *(b)*, were ordered to remedy the constitutional defect.

4.5 The order made in the third judgment, which is supported by the majority, reads as follows:

“1. The appeals are dismissed with costs.

2. The order of constitutional invalidity made by the Western Cape Division of the High Court is not confirmed.

3. The use of the word “or” after the word “writing” and the omission of the word “and” in the place of the word “or”, and the omission of the words “after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate” after the word “authorised” in section 65J(2)(a) of the Magistrates’ Courts Act, 1944 are inconsistent with the Constitution and invalid.

4. The use of the word “will” after the words “an emoluments attachment order” and the omission of the word “may” in the place of the word “will” in section 65J(2)(a) of the Magistrates’ Courts Act, 1944 are inconsistent with the Constitution and invalid.

5. The omission of:

(a) a semi-colon in the place of the full-stop at the end of section 65J(2)(b)(ii) of the Magistrates’ Courts Act, 1944;

(b) the word “and” at the end of section 65J(2)(b)(ii) of the Magistrates’ Courts Act, 1944; and

(c) sub-paragraph (iii) under section 65J(2)(b) of the Magistrates’ Courts Act, 1944 reading:

“been granted an order of court authorising that an emoluments attachment order be issued after satisfying itself that it is just and equitable that the order be issued and that the amount is appropriate.”

is inconsistent with the Constitution and invalid.

6. Section 65J(2) of the Magistrates’ Courts Act, 1944 shall be read as though:

(a) the word “or” after the word “writing” in paragraph (a) is replaced with the word “and”;

(b) the words: “after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate.” appear after the word “authorised” in paragraph (a);

(c) the word “will” after the words “an emoluments attachment order” in paragraph (b)(i) is replaced with the word “may”;

(d) the full-stop at the end of paragraph (b)(ii) is replaced with a semi-colon and the word “and” appears after the semi-colon;

(e) the provision:

“(iii) been granted an order of court authorising that an emoluments attachment order be issued after satisfying itself that it is just and equitable that the order be issued and that the amount is appropriate.”

appears as paragraph (b)(iii) after paragraph (b)(ii).

7. The orders in 2, 3, 4, 5, 6 and 8 operate with effect from the handing down of this judgment.

8. It is declared that section 65J(2)(a) and (b) of the Magistrates’ Courts Act, 1944 reads as follows:

(Words struck through are deleted and words underlined are inserted):

“**65J. Emoluments attachment orders**

. . .

(2) An emoluments attachment order shall not be issued—

(a)unless the judgment debtor has consented thereto in writing ~~or~~ and the court has so authorised after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate, whether on application to the court or otherwise, 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~~ may 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~~.~~ ; and

(iii) been granted an order of court authorising that an emoluments attachment order be issued after satisfying itself that it is just and equitable that the order be issued and that the amount is appropriate.”

9. The respondents who opposed confirmation of the order of constitutional invalidity made by the Western Cape Division of the High Court are ordered to pay the applicants’ costs jointly and severally, the one paying the other to be absolved, including the costs of three counsel.”.

**5. Effect of the order on the issuing of EAO’s**

The effect of the order is that with effect from the date of the judgment, namely, 13 September 2016, no EAO may be issued unless the court has authorised the issuing of such emoluments attachment order after satisfying itself that it is just and equitable and that the amount is appropriate, notwithstanding consent to an EAO by the judgment debtor or compliance with the requirements where an instalment order has already been made.

**6. Effect of the order on the Courts of Law Amendment Bill**

6.1 The effect of the order on the Courts of Law Amendment Bill (the Bill), currently before the Portfolio Committee on Justice and Correctional Services, is that the provisions which have been deleted to do away with the consent of a debtor to an EAO or the issuing of an EAO in the instance where an instalment order has already been made, and the judgment creditor or his or her attorney has complied with certain requirements, might have to be revisited. The CC retained the provisions sought to be deleted (the words in section 65J(2)*(a)* relating to the consent of a judgment debtor and the provisions of section 65J(2)*(b)*(i) and (ii)), but read in, in these two paragraphs, that the issuing of an EAO must have been authorised by the court and that the court must be satisfied that it is just and equitable that an EAO be issued and that the amount is appropriate.

6.2 The effect in essence is that the issuing of an EAO must be authorised by the court, whether the debtor consents to an EAO or not, or whether there is compliance with certain requirements where an instalment order has already made or not. The following options regarding the contents of the Bill could be explored:

6.2.1 Seeing that the effect in essence is that an EAO must be authorised by the court, the first option is to keep the provisions of the Bill intact, (the deletion of the provisions as to consent or an existing instalment order) and add the words “after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate”, in the provisions of the Bill relating to the authorization of an EAO. (It is proposed in the Bill that a court, when considering a judgment in terms of sections 57 or 58 or an instalment order in terms of section 65, may authorize the issuing of an EAO.) Guidance should also be given to the courts as to what factors could be considered to make a “just and equitable” order.

6.2.2 The second option would be to retain the provisions of the MCA sought to be deleted in the Bill and to add thereto the order as given by the CC.

6.2.3 The DOJCD is of the view that option 1 is more appropriate because the Bill should ensure that any possible abuse of EAO’s, for instance consent to an EAO, should be minimised. The Department met with the Department of Trade and Industry (dti) and the National Treasury (NT), which both agree with this approach.

1. Subclause (1A) has been amended to provide for “monthly or weekly income and expenditure, supported where reasonably possible by the most recent proof in the possession of the defendant;” and “other court orders or agreements, if any, with other creditors for payment of a debt and costs in instalments;” It therefore still provides for “particulars and documentary evidence”. [↑](#footnote-ref-1)
2. The reason for this amendment is to compel the court to act in terms of the National Credit Act (NCA) when it considers a judgment based on a credit agreement in terms of the NCA. The current “may” in the chapeau could be interpreted as to give the court a discretion on whether to act in terms of the NCA or not. [↑](#footnote-ref-2)
3. Wording was brought in line with the CC judgment in the *Stellenbosch*-case. [↑](#footnote-ref-3)
4. Amendments in line with the amendments to section 57 in clause 5. [↑](#footnote-ref-4)
5. The proposed amendment will bring the provisions in line with similar provisions in sections 57 and 58. [↑](#footnote-ref-5)
6. The proposed amendments to sections 57, 58 and 65 provide that the court may authorize an EAO where the debtor is employed. It is suggested that a similar provision be inserted in section 65E – the words to be deleted imply that the debtor must be employed. [↑](#footnote-ref-6)
7. The PC raised a concern regarding the sharing of the 25% cap where there is more than one EAO against a judgment debtor. A possible solution is suggested in paragraph *(c).* The dti and National Treasury support the proposed amendment. [↑](#footnote-ref-7)
8. National Treasury raised a concern that the phrase “basic salary” may not be well understood and should possibly be defined. The definition was borrowed from the definition used in paragraph 23.1 of the National Treasury Regulations. [↑](#footnote-ref-8)
9. Authorisation for an EAO in terms of the Bill may be granted in terms of sections 57, 58, 65, 65E and 74D or by application as per section 65J(2). [↑](#footnote-ref-9)
10. Subclauses (2D), (6)*(c)* and (7). [↑](#footnote-ref-10)
11. The word “party” is used because it may be the judgment creditor or any other person affected by a judgment which could bring the application. [↑](#footnote-ref-11)
12. The CC in the *Stellenbosch*-case did not confirm the declaration of unconstitutionality of the provisions sought to be deleted in subclause (2), but read in provisions to ensure judicial oversight over the authorization of EAO’s. In essence the CC ordered that authorization by a court is required before an EAO can be issued, whether the judgment debtor has consented thereto or not (subsection (2)*(a)*)or whether there was compliance with certain requirements in respect of existing instalment orders or not (subsection (2)*(b)).* The DOJCD recommends, however, that an EAO should only be issued after authorization by a court and that the provisions of subclause (2) remain intact. In other words, the consent provisions in subsection (2)*(a)* and the provisions of subsection (2)*(b)* should remain in square brackets as originally indicated in the Bill. [↑](#footnote-ref-12)
13. As per the CC judgment in the *Stellenbosch*-case. [↑](#footnote-ref-13)
14. The intention of subclauses (2A) – (2D) was to notify the employer and debtor that the creditor intends to have an EAO issued in accordance with the authorization by the court, which intention might possibly not be conveyed correctly in the current wording of subclause (2A). This is another further protection measure, as the circumstances of the debtor could have changed from the date the EAO was authorised until the date the EAO is actually issued. [↑](#footnote-ref-14)
15. The employer might need to ask the debtor for more information as most of the expenses will not show on the salary advice. [↑](#footnote-ref-15)
16. Wording borrowed from section 65D(4). [↑](#footnote-ref-16)
17. Subclause (2D) appears not to spell out what the court can order. It is suggested that a provision similar to subclause (6)*(d)* be inserted as subclause (2E). [↑](#footnote-ref-17)
18. The intention was that the word “authorization” should refer to the order of the court authorizing the EAO, but the danger exists that it could be confusing and it is suggested that the word be removed. [↑](#footnote-ref-18)
19. The judgment debtor will pay for the service of the EAO. It was proposed that the employer (garnishee) should furnish the employee (debtor) with a copy of the EAO, but the PC was of the view that the employer might not comply with this requirement. An option is to provide that the EAO be served on the debtor when he or she was not present or represented when the order was made. [↑](#footnote-ref-19)
20. According to the LSSA subclause (4)*(b)* is impractical and will place a huge financial burden on attorneys. The reason behind subclause (4)*(b)* is for the debtor (and employer) to know what is outstanding as many debtors are kept in the dark and have no idea what they are paying and for how long. It is also understood that many businesses make use of outside firms to handle the EAO’s against their employees which will in all likelihood have the information available. However, to ensure fairness also to the creditor, it is suggested that it be made a quarterly requirement. ADRA suggested a bi-monthly report. [↑](#footnote-ref-20)
21. See the footnotes in respect of the amendment of section 36 of the MCA (clause 2). [↑](#footnote-ref-21)
22. See the explanation in respect of the amendment of section 36 in clause 2. [↑](#footnote-ref-22)
23. The amendments to paragraph *(c)* seek to bring the application procedure in line with the application procedure provided for in section 36 of the MCA and the insertion of section 23A in the SCA. [↑](#footnote-ref-23)
24. The insertion of a section 55A is suggested because the Chapter dealing with the recovery of debts starts with section 55. [↑](#footnote-ref-24)
25. Chapter VIII deals with the recovery of debts and consists of sections 55-60. Chapter IX deals with execution and consists of sections 61-79. Sections 57, 58, 65, 65E, 65J and 73 which are amended in the Bill, will therefore be covered by the suggested umbrella provision. [↑](#footnote-ref-25)