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**PORTFOLIO COMMITTEE AMENDMENTS TO THE COURTS OF LAW  
AMENDMENT BILL [B8B – 2016]<sup>1</sup>**

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**TABLE OF CONTENTS**

1. INTRODUCTION .....	1
2. OBJECTIVES OF THE COURTS OF LAW AMENDMENT BILL [B8 – 2016] ...	1
3. PORTFOLIO COMMITTEE PROCESS .....	2
4. MAIN PORTFOLIO COMMITTEE AMENDMENTS .....	2
5. SOURCES .....	5

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**1. INTRODUCTION**

The Courts of Law Amendment Bill [B8B – 2016] as amended by the Portfolio Committee on Justice and Correctional Service, is currently before the Select Committee on Justice and Security. The Bill aims to (a) curb alleged abuses in the emoluments attachment order system that allows employers to pay a certain amount of a debtor's salary over to his or her creditor; and (b) provide for an additional mechanism to overturn (rescind) or abandon court judgments without incurring excessive legal costs. The amendments seek to alleviate the plight of certain debtors and assist them to break free from a cycle of indebtedness due to abuse by unscrupulous debt collectors and creditors.

**2. OBJECTIVES OF THE COURTS OF LAW AMENDMENT BILL [B8 – 2016]**

The Bill:

- Amends various sections of the Magistrates' Courts Act 32 of 1944, in order to address alleged abuses in the emoluments attachment order (EAO) system.
- Amends sections of the Magistrates' Courts Act dealing with the rescission or abandonment of court judgments to accommodate the Department of Trade and Industry's project to remove adverse consumer credit information in order for them to be able to access credit.
- Amends the Superior Courts Act 10 of 2013, to provide for the rescission of judgments (a) with the consent of the judgment creditor and (b) where the judgment debt was paid in full.

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<sup>1</sup> Members are also referred to the paper by G Nesbitt, 'Courts of Law Amendment Bill [B8-2016]: Summary and Analysis' which sets out the current debt collecting process and challenges in respect of emoluments attachment orders in more detail.

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- Inserts a new Section 55A into the Magistrates' Courts Act to provide guidance to the courts about the factors they need to consider to make a just and equitable order.

### 3. PORTFOLIO COMMITTEE PROCESS

- The Courts of Law Amendment Bill [B8 – 2016] was referred to the Portfolio Committee on Justice and Correctional Services on 11 May 2016.
- The Portfolio Committee advertised for public comment in various newspapers in all official languages, and held public hearings on the bill on 31 August 2016.
- While the bill was before the Portfolio Committee, the Western Cape High Court, in an application brought by the Stellenbosch University Legal Aid Clinic ("Stellenbosch case"), declared certain sections of the Magistrates Courts Act 32 of 1944 constitutionally invalid.
- According to the applicants, the said sections failed to provide for judicial oversight over (a) the issuing of emoluments attachment orders; and (b) in instances where the order is granted in a different jurisdiction than where the judgment debtor resides.
- The Constitutional Court must confirm an order of constitutional invalidity made by a High Court in order for it to be effective. The Constitutional Court, however, in its judgment in September 2016, did not confirm the order of constitutional invalidity.
- Instead, the Constitutional Court "read in" certain wording into the affected sections of the Magistrates Court Act, 1944 in order to make the provisions constitutionally compliant.
- The amendment Bill thus seeks to give effect to the Constitutional Court judgement to add in the wording to the Magistrates Court Act as proposed by the Constitutional Court.
- The Portfolio Committee additionally sought permission from the National Assembly to amend section 55 of the Magistrates Court Act, 1944 in order to provide guidance to the courts on which factors to consider to make a "just and equitable" order.
- With the National Assembly's permission the Portfolio Committee subsequently amended the Bill to insert a new section 55A into the Magistrates Court Act 32 of 1944.

### 4. MAIN PORTFOLIO COMMITTEE AMENDMENTS

- On 10 May 2017, the Portfolio Committee on Justice and Correctional Services reported the Bill with the following amendments:
  - **Clause 1: Inserts a definition of 'court day'** to mean any day other than a Saturday, Sunday or public holiday, and to make it clear that only court days are counted for the purposes of determining any time expressed in days prescribed by the Magistrates' Courts Act or fixed by a court order.
  - **Clause 2: Amends Section 36 of the Magistrates Courts Act** in order to allow a judgment debtor or any other person affected by the judgment to





make an application to court for the judgement to be rescinded if the debt and related costs and interest have been paid in full. This section also provides that the application must be (i) made on a form as prescribed in the rules of court and (ii) accompanied by (aa) reasonable proof that the judgment debt, the interest and the costs have been paid and (bb) proof that the application has been served on the judgment creditor, at least 10 court days before the hearing of such application.

- o **Clause 3 amends section 45 of the Magistrates Courts Act** to make it clear that a defendant or a judgment debtor cannot consent to the jurisdiction of a court whose jurisdiction is outside of the jurisdiction in which the defendant or judgment debtor resides – such consent would have no force or effect.
- o **Clause 4 inserts a new Section 55A in the Magistrates Courts Act** and gives guidance to magistrates' courts regarding the factors which should be taken into account when considering an order which is "just and equitable", in line with the Constitutional Court judgment in the Stellenbosch case. Factors include *inter alia* the:
  - (a) Size of the debt;
  - (b) Circumstances in which the debt arose;
  - (c) Availability of alternatives to recover the debt;
  - (d) Interests of the plaintiff or judgment creditor;
  - (e) Rights and needs of the elderly, children, persons with disabilities and households headed by women;
  - (f) Amount and nature of the defendant's or judgment debtor's income;
  - (g) Amounts needed by the defendant or judgment 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 order of court, agreement or otherwise in respect of his or her other commitments.
- o **Clause 5 substitutes Section 57 of the Magistrates Courts Act** with new wording to bring it in line with the wording of the relevant provisions of the National Credit Act 34 of 2005, where a request for judgment is based on a credit agreement under the National Credit Act.

Section 57 now provides that where the defendant or judgment debtor has agreed to pay the debt in instalments, but is in default of such repayment, the court (and not the Clerk of the Court) must be provided with *inter alia* the:

- (a) Summons or a copy of the letter of demand;
- (b) Defendant's written acknowledgment of liability and offer;
- (c) Particulars and documentary evidence that will apprise the court of the defendant's financial position at the time the offer was made and accepted;
- (d) Proof that the defendant received a notice or demand for payment of the debt,



- (e) Affidavit or certificate by the plaintiff or his or her attorney setting out the defendant's failure to pay his or her debt,
  - (f) Details of any payments the defendant has made since the date of the letter of demand or summons; and
  - (g) Manner in which the balance claimed was calculated.
- o **Clause 6 substitutes Section 58 of the Magistrates Courts Act** with new wording to bring it in line with the wording of the relevant provisions of the National Credit Act 34 of 2005. Section 58 now allows the court to request any **relevant information from the plaintiff or his or her attorney regarding the defendant's financial position at the time the judgment is requested**. The Court can authorise an emoluments attachment order in respect of an employed defendant if it is satisfied that (a) such an order is just and equitable and (b) the amount is appropriate, not excessive and affordable for the defendant. The court can change the repayment amount even where a defendant has agreed to pay a specific amount to the plaintiff.
- o **Clause 7 substitutes Section 65 of the Magistrates Courts Act** with new wording to bring it in line with the wording of the relevant provisions of the National Credit Act 34 of 2005. Section 65 now allows the court to request any **relevant information from the plaintiff or his or her attorney regarding the defendant's financial position at the time of a written offer by the defendant to repay the judgment debt in instalments**. The Court can authorise an emoluments attachment order in respect of an employed defendant if it is satisfied that (a) such an order is just and equitable and (b) the amount is appropriate, not excessive and affordable for the defendant.
- o **Clause 8 amends Section 65E of the Magistrates Courts Act**. Subsection (1) now provides that the court can (a) authorise the issue of an emoluments attachment order (if it is just and equitable), and (b) postpone proceedings to consider whether or not to make an order for (i) a warrant of execution against the movable or immovable property which may be attached and sold in order to satisfy the judgment debt or any part thereof, or (ii) the judgment debtor to pay the judgment debt and costs in reasonable specified instalments.
- o **Clause 9 amends section 65J of the of the Magistrates Courts Act** to provide that (a) **an emoluments attachment order can only be granted by a court in which the judgment debtor resides, carries on business or is employed**, (b) the amount to be deducted from the judgment debtor's salary cannot exceed 25 per cent thereof, and (c) the judgment debtor and his/her employer must be given (i) notice of intention to have an emoluments attachment order issued, (ii) an opportunity to oppose the issuing of such order and (iii) quarterly statements detailing repayment and the outstanding balance. The employer / garnishee is obliged to pay the emoluments attachment order, but can request for the matter to be set down for hearing if the repayment amount is unreasonable or excessive or the statement of balance / repayments is erroneous or unlawful.
- o **Clause 10 amends section 65J of the of the Magistrates Courts Act** to allow a district court to deal with high court or regional court judgments and for such judgments to be transferred to the district court for the debt collection process.





- o **Clause 11 amends the heading of section 73 of the Magistrates' Courts Act to read 'Suspension of execution of debt'.** In terms of section 73 the court can suspend execution against a judgment debtor (in full or in part) and impose such conditions as it deems fit when a judgment debtor is unable to pay the judgment debt in full, but can pay reasonable periodical instalments or consents to the execution of a garnishee order.
- o **Clause 12 amends Section 86 of the Magistrates Courts Act** by the addition of a subsection that provides that if a party abandons a judgment in his or her favour because the judgment debt has been paid, no judgment shall be entered in favour of the other party.
- o **Clause 13 inserts a new section 106C into the Magistrates Courts Act** to align it with the provisions of the National Credit Act that **makes it an offence for a person (creditor) to require any person applying for a loan to consent to judgment or any instalment or emoluments attachment order *before* the granting of such loan.** It is thus also unlawful for the creditor to fraudulently obtain or have such judgment, instalment or emoluments attachment order issued. ***This provision is specifically aimed at curbing (a) abuse in respect of the issuing of judgments and court orders, and (b) collusion between court officials and external parties in the granting thereof.***
- o **Clause 14 inserts a new section 23A in the Superior Courts Act, 2013** to provide for the rescission of a judgment (a) with the consent of the judgment creditor or (b) where the judgment debt has been paid.
- o **Clause 15 provides for transitional arrangements** by providing *inter alia* that lawful proceedings that are not yet finalised by the time the new amendments come into operation should continue in terms of the previous provisions. Proceedings may not continue where judgments and emoluments attachment orders were unlawfully obtained or issued. Any party may apply for the court to review and rescind unlawfully obtained default judgments.
- o **Clause 16 contains the short title and the commencement provisions.** In terms hereof, (a) the Courts of Law Amendment Act, 2017 **will come into operation on a date to be fixed by the President by proclamation in the Government Gazette** and (b) different dates may be fixed in respect of different provisions of this Act

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## 5. SOURCES

Courts of Law Amendment Bill [B8 - 2016]

Courts of Law Amendment Bill [B8B - 2016]

Nesbitt, G (2016). Courts of Law Amendment Bill [B8-2016]: Summary and Analysis. Research Unit, Knowledge and Information Section, Parliament of South Africa.



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Parliament of South Africa (2017). Final Report of the Portfolio Committee on Justice and Correctional Services on the Courts of Law Amendment Bill [B8 - 2016] (National Assembly – section 75), dated 10 May 2017. Announcements, Tablings and Committee Reports. No 56 – 2017. 10 May 2017. pp 3-4

Portfolio Committee Amendments to the Courts of Law Amendment Bill [B8A - 2016]

*University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2015 (5) SA 221 (WCC)

*University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* CCT 127/15