

SUBMISSION BY THE LAW SOCIETY OF SOUTH AFRICA TO THE NATIONAL COUNCIL OF PROVINCES ON THE COURTS OF LAW AMENDMENT BILL [B 8B-2016]

The Law Society of South Africa (LSSA) is the umbrella body of attorneys in the Republic of South Africa. Its constituents are the Black Lawyers Association (BLA), the National Association of Democratic Lawyers (NADEL), the Cape Law Society (CLS), the KwaZulu-Natal Law Society (KZNLS), the Law Society of the Free State (LSFS) and the Law Society of the Northern Provinces. Conscious of its public obligation, the LSSA constitutes the collective voice of the approximately 25 000 attorneys and approximately 5 500 candidate attorneys.

The LSSA keenly followed the deliberations of the Parliamentary Portfolio Committee on the various versions of the Courts of Law Amendment Bill and also submitted written comment.

The LSSA wishes to take this opportunity to submit its comments to the National Council of Provinces, and supplement them, if it pleases the Council.

1. AD CLAUSES 5 AND 6 - SUBSTITUTION OF SECTIONS 57 AND 58 OF THE MAGISTRATES' COURTS ACT:

- 1.1 In terms of the proposed Sections 57 and 58, a court must, when considering a request for judgment based on a credit agreement under the National Credit Act (NCA), act in terms of the provisions of the NCA and the regulations thereunder pertaining to over-indebtedness, reckless credit and affordability assessment. [Sections 57(2B)(b) and 58(1C)(b)].
- 1.2 The above proposed amendments will place the court in an invidious position as it will be unable, for purposes of an application in terms of Sections 57 or 58, to consider the circumstances of the judgment debtor at the time the credit agreement was entered into under the NCA.
- 1.3 The court will be empowered under the proposed amendment to request any relevant information regarding the defendant's financial position at the time the judgment is requested. [Sections 57(2B)(a) and 58(1C)(a)]. The court is not in a position to effectively consider issues pertaining to over-indebtedness, reckless credit and affordability assessment at the time the credit agreement was entered into. The credit agreement may, for example, have been entered into years before the current application serves before the court.
- 1.4 We accordingly recommend that the proposed sections 57(2B)(b) and 58(1C)(c) be deleted.

2. AD CLAUSE 9 – SUBSTITUTION OF SECTION 65J OF THE MAGISTRATES' COURTS ACT:

2.1 THE PROPOSED 25 PER CENT CAP

- 2.1.1 The LSSA is concerned that the retention of the proposed 25% cap is inherently flawed and unconstitutional within the South African context.

2.1.2 The LSSA is of the view that the proposed 25% cap will:

- Impede on the judicial oversight function of the courts; and
- Lead to unfair outcomes for creditors in situations where affluent debtors can afford payments in excess of the 25% cap.

2.1.3 Impeding judicial oversight

It is submitted that judicial oversight, without a percentage cap, will afford both the creditor's attorney and the debtor the opportunity to test the issue of affordability (of which emolument attachment orders are only a part) under judicial supervision of a full financial enquiry.

This includes, among other, the possibility of additional sources of income, expenditure committed to luxuries, essential expenditure by the debtor not necessarily subject to an emolument attachment order and, if necessary, a review of all emolument attachment orders against the debtor (similar to that provided for in Section 87 of the National Credit Act).

2.1.4 Defining judicial oversight

Jafta J, in the minority Constitutional Court judgement¹ in the *Stellenbosch* case correctly remarked that:

"The phrase 'judicial oversight' was defined in Jaftha² by this Court as denoting a decision by a court, following a consideration of relevant facts. In that case the Court observed: 'Judicial oversight permits a magistrate to consider all the relevant circumstances of a case to determine whether there is good cause to order execution . . . Even if the process of execution results from a default judgment the court will need to oversee execution against immovables. This has the effect of preventing the potentially unjustifiable sale in execution of the homes of people who, because of their lack of knowledge of the legal process, are ill-equipped to avail themselves of the remedies currently provided in the Act.'" [Emphasis added].

2.1.5 Judicial Oversight – relevant circumstances

The Constitutional Court³ has indeed listed a number of factors that a court might consider, including:

¹ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* [2016] ZACC 32, para 74

² *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* [2004] ZACC 25; 2005 (2) SA 140 (CC), para 55

³ *Ibid, Jaftha v Schoeman, para 56*

- the circumstances in which the debt was incurred;
- any attempts made by the debtor to pay off the debt;
- the financial situation of the parties;
- the amount of the debt;
- whether the debtor is employed or has a source of income to pay off the debt;
- any other factor relevant to the particular facts of the case before the court.

The Court further cautioned that:

"It would be unwise to set out all the facts that would be relevant to the exercise of judicial oversight. However, some guidance must be provided." [Emphasis added].

2.1.6 Judicial oversight – a constitutional necessity

Cameron J, in the majority judgment⁴, comments that: *"All this accentuates the importance of the High Court's encompassing approach to execution against property and the constitutional necessity for judicial supervision over it."* [Emphasis added].

Judicial oversight, as defined by the Constitutional Court, is a constitutional necessity. The legislature should therefore avoid, at all costs, impeding on the constitutional necessity for judicial oversight in an unconstitutional manner by introducing the 25% cap.

The LSSA is of the view that the same caution, as expressed by the Constitutional Court in paragraph 7 above, applies to emolument attachment orders.

We submit that the introduction of the 25% cap will effectively prevent a court from considering all relevant circumstances. Some relevant circumstances will effectively become irrelevant once the 25% cap is reached.

2.1.7 Unfair outcomes

The LSSA is of the view that the proposed 25% cap does not take into account the wide variance of salary levels debtors may earn – the well earning debtor may still have sufficient income to survive on despite the EAOs against his or her salary having exceeded the percentage cap.

Moreover, a court is prohibited from taking the financial situation of the debtor into consideration, if the proposed 25% cap is introduced.

This will effectively defeat the purpose of judicial oversight in this context. The minority judgment emphasised that: *"A court to which an application is made must*

⁴ Ibid, *University of Stellenbosch Legal Aid Clinic*, para 132

*do so after taking into account factors set out here. This will provide the poor and vulnerable debtors with immediate protection.*⁵ [Emphasis added].

In a similar vein, the majority judgment commented that:

*“The broader approach takes fuller account of the harsh effects in the absence of judicial oversight, acknowledging that they threaten the livelihood and dignity of low-income earners, a distinctly vulnerable group in our society.”*⁶

A 25% cap will also offer a means of escape for affluent members of society who are in indeed in a position to pay their debts, in excess of the proposed 25% cap.

2.1.8 Absence of 25% cap in other sections

There is no 25% cap applicable to a court order referred to under Section 65A(1) of the Act. The court is, pursuant to Section 65A(1) empowered to inquire into the financial position of the judgment debtor and to make such order as the court may deem just and equitable.

Furthermore, the judicial discretion of the courts remains unfettered when dealing with debt review applications and administration orders.

There appears to be no permissible reason why the 25% cap is only introduced with reference to emolument attachment orders.

2.1.9 The LSSA supports measures aimed at protecting the livelihood and dignity of low-income earners, but suggests that this can be achieved without impeding on the judicial oversight of courts and without resulting in unfair outcomes for creditors.

The proposed 25% cap will effectively impede unconstitutionally on a court’s judicial oversight and will lead to unfair outcomes in the context of affluent debtors.

2.2 THE PROPOSED 5 PER CENT COMMISSION

2.2.1 The LSSA is steadfast in its view that provision should be made for the judgment creditor to be afforded the right to recuperate the 5 per cent commission, recovered by the garnishee under section 65J(10)(a), from the judgement debtor. The *judgment creditor* should not bear the burden of this 5 per cent commission.

2.2.2 The LSSA suggests that Section 65J(10)(a) be amended to read:

“65J (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

⁵ Ibid, *University of Stellenbosch Legal Aid Clinic*, para 93

⁶ Ibid, *University of Stellenbosch Legal Aid Clinic*, para 93

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, provided that the judgment creditor may recuperate the 5 per cent commission, charged by the garnishee, from the judgment debtor."

2.2.3 Alternatively, the garnishee should be in a position to recover the 5 per cent commission from the judgment debtor as opposed to the judgment creditor. A further alternative is for the garnishee to make such deductions without commission payable, in the same manner as other statutory deductions, as recommended by *Jones and Buckle*.

2.2.4 In *Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa*, which is the authoritative reference guide on civil procedure in the Magistrates' Courts, the following recommendations are made:

"An emolument attachment order undoubtedly imposes an additional administrative burden upon the garnishee, but it is questionable whether he should be recompensed in the manner provided for. An emolument attachment order primarily serves the convenience of the judgment debtor who is relieved of the responsibility of having to make regular payments. The garnishee should, therefore, rather be recompensed for his additional administrative expenses by the judgment debtor, or the deduction under an emolument attachment order should be placed on the same basis as other deductions regularly made by employers (income tax, insurance premiums, medical fund contributions and the like) for which they are not remunerated."

The LSSA wishes to express its appreciation to the Committee for considering its submission.