**SUMMARY OF SUBMISSION TO THE SELECT COMMITTEE ON SECURITY AND JUSTICE ON THE COURTS OF LAW AMENDMENT BILL, 2016 (BILL 8 OF 2016) AND RESPONSE BY DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

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| **COMMENTS/ RECOMMENDATIONS: LSSA** | **DOJCD RESPONSE** |
| **CLAUSE 5 AND 6**  (a)The court will be in an invidious position as it will be unable to consider the circumstances of the judgment debtor at the time the credit agreement was entered into.  (b) the Court is not in a position to effectively consider issues pertaining the financial position of the defendant at the time the judgment is requested.  Proposes that the proposed section 57(2B)(b) and 58(1(C)(c) be deleted. | **These comments were submitted by the LSSA when the Portfolio Committee considered the Bill. The Department reiterates those responses which were made during those deliberations, as follows:**  **“..The provisions in question were inserted to provide substantive provisions in the Magistrates’ Courts Act, in line with what is already provided for in rule 12(5) of the Magistrates’ Courts Rules, namely,** **that the registrar or clerk of the court must refer to the court any request for judgment on a claim founded on any cause of action arising out of or based on an agreement governed by the National Credit Act. Due to different interpretations of the law, it appeared that rule 12(5) was not adhered to by all magistrates’ courts. Sections 57 and 58 are amended further to provide that only a court may grant judgments in terms of these sections, as opposed to the current provisions that a clerk of the court must grant these judgments.**  **… It is uncertain as to why a court will not be in a position to consider the financial position of a debtor at the time the credit agreement was entered into. The plaintiff will be in possession of the supporting documents necessary to conduct an affordability assessment before the credit agreement was entered into. How will a court be able to consider whether there was reckless lending as is provided for in the National Credit Act?”**  **The Department stands by these responses as given above, and does not agree with the LSSA’s proposal.** |
| **CLAUSE 9**  **(a) The proposed 25% cap**  **(b) The proposed 5% commission** | **This was also considered by the Portfolio Committee when it considered the Bill. The Department reiterates those responses which were made during those deliberations, as follows:**  **“(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 overburdened 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.”**  **The Department does not agree with the submission of the LSSA with regard to the 25% cap.**  **Further, it is noted that the cap is only in respect of emoluments as it impacts on the take-home salary of a debtor. There are other means to collect a debt from those who have the means to settle them, such as execution. Setting a cap on all means to collect a debt will have unintended consequences.**  **(b) the LSSA also made the submission with regard to the 5% commission to the Portfolio and the response of the Department was as follows:**  **“…Section 65J(10)*(a)* provides that a garnishee may recover from the judgment creditor a commission of up to five per cent of all amounts deducted from the debtor’s salary in respect of an EAO. This is the current provision in section 65J(10).**  **… The Department has already responded to this issue by stating that the debtor already has to pay collection commission. Furthermore, this provision, which is an existing provision, cannot simply be amended without thorough investigation and consultation.”**  **We reiterate that the provision to recover 5% collection commission from the judgment creditor IS AN EXISTING PROVISION.**  **In any event, suggesting that a debtor, who is already over-indebted, pay an additional 5% will add 5% to an already growing debt (interest and other legal costs), which further exacerbates the cycle of debt.**  **The Department does not agree with the submission of the LSSA with regard to the 5% commission.** |
| **COMMENTS/ RECOMMENDATIONS: FIRST RAND BANK (FRB)** |  |
| **Proposed Insertion of Section 55A**  **Change “must” to “may”** | **The Department disagrees with the proposal. A magistrate has a discretion in considering other relevant factors. The proposed amendment does not limit the factors to those grounds that have been listed. The factors that must be considered are those factors that will enable magistrates to arrive a just and equitable order. These are the bare minimum that must be considered, and it will lead to greater certainty and consistency in arriving at just and equitable orders in the Magistrates’ courts.** |
| **Proposed Section 65J (2C)(c)(i):**  **(a) Concern is expressed that the employer of a judgment debtor will not be able to provide the certificate proposed.**  **Proposed Section 65J(10)(b):**  **(b) Concern is expressed that the provision is onerous with regard to the garnishee / employer in so far as the employer is liable to pay the debtor additional costs and interest, where the employer unreasonably (*our emphasis*) fails to deduct or stop an EAO.** **It is** **proposed that the garnishee / employer should have the right to claim any amounts paid above the judgment debt and costs from the judgment creditor.** | **(a) Proposed section 65J(2C)(c)(i) relates to a notice of opposition filed by the debtor or the employer against the granting of an EAO. The information required that led to the opposition of the granting of an EAO will be within the employers’ knowledge, as the employer is deducting money from the salary of an employee. The employer must therefore produce the necessary information to support an opposition.**  **The Department does not agree that the proposal amendment is too onerous.**  **(b) The insertion of this provision must be seen in light of proposed amendment section 65 J (4) (b), which requires quarterly statements to be submitted by the judgment creditor to the employer, which sets out the payments received and the balance owing. This report puts the employer in a possession of the required information to enable the employer to continue deducting or to stop an EAO.**  **The proposed amendment is inserted to ensure accountability of the employer in so far as the making or stopping an EAO is concerned. It must be reiterated that the provision will only apply where the employer “unreasonably” fails to deduct or stop an EAO. This implies that where an employer did not have the required information, the employer cannot be said to have acted unreasonably. During the PC deliberation, a similar question was raised, and the word “unreasonably” was subsequently inserted.**  **The Department does not agree that the proposed amendment is too onerous, and does not agree with the suggestion of FRB.** |