



Emoluments Attachment Orders: In light of the widespread fraudulent and undesirable practices in emoluments attachment orders should this debt collection mechanism continue to exist?

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Statement of originality

I, Abongile Athi Swana, hereby declare that this dissertation is an original piece of work, unless indicated otherwise in the text, and is made available for photocopying and for inter-library loan.

Signed:.....

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Abstract

With an estimated percentage of 12.2 percent of South Africa's public sector with Emoluments Attachment Orders (EAOs) against their salaries, it is evident that this debt collection mechanism is popular in South Africa.¹ This dissertation analyses EAOs in comparison to other debt collection mechanisms that are currently employed in South Africa with the aim of reforming an effective debt collection mechanism that will adequately strike a balance between the rights of a creditor as well as those of a debtor in so far as access to and the granting of credit is concerned.

The first half of this dissertation critically analyses debt collection mechanisms such as warrants of execution, and demonstrates that none of the current mechanisms are as effective as EAOs. The second half of this dissertation will critically analyse EAOs in light of the reported abuses and discrepancies. Significantly, this dissertation critically evaluates the watershed case of *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* and the implications of this judgment on EAOs.²

Moreover, and based on foreign best practice and the rampant abuse in South Africa, this research will suggest that EAOs require far more scrutiny and as a matter of urgency require a limit to be placed on the maximum that may be deducted from a debtor's salary. Ultimately, this dissertation demonstrates that given the impact that abolishing EAOs would have on our economy and the debt collection in its entirety, EAOs should remain in existence. However, in so remaining, they must undergo intense reform urgently.

¹ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013) 77.

² *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99

Chapter One- Introduction

1. Introduction

An emoluments attachment order (EAO) is a debt collection mechanism that is administered through an order of court, which entitles a creditor to attach a portion of a debtor's salary, in monthly or weekly instalments to satisfy his claim.³

These instalments are deducted by the debtor's employer from the debtor's wage or salary and handed over to the creditor.⁴ This debt collection mechanism is regulated by section 65 J of the Magistrates' Court Act as well as rule 46 of the Magistrates' Court Rules.⁵ These orders are often confused with garnishee orders, which are also a debt collection mechanism that allows a creditor to attach a debt that is due to the debtor, in order to satisfy his claim. Garnishee orders are regulated by section 72 of the Magistrates' Court Act as well as rule 47 of Magistrates' Court Rules.⁶

Typically, debt collection amongst individuals is administered either by the creditor himself (usually when he is able to reach consensus with the debtor) or a debt collector or attorney.

A debt collector is an agent that specialises in debt collection and whose conduct is governed, primarily, by the Debt Collectors Act.⁷ An attorney is an officer of the court who may amongst other things, engage in debt collection on behalf of a creditor. An attorney's conduct, in this context, is primarily regulated by the Attorneys Act⁸. Both debt collectors and attorneys who operate as debt collectors must also adhere to the Rules of the Magistrates' Court, and the National Credit Act which regulates, inter alia, the granting of credit in South Africa, interest rates as well as chargeable fees and costs.⁹

2. Background

EAOs are currently regulated by section 65 J of the Magistrates' Court Act.¹⁰ According to this section, an EAO may only be issued if the judgment debtor has consented to it in writing, or where the court has authorised it (on application or otherwise), and on condition that such authorisation has not been suspended. Alternatively, the order may be granted if a creditor or

³ Section 65 J of Act 32 of 1944; University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013) 4.

⁴ *Ibid*, 46

⁵ *Ibid*, 4.

⁶ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013) 4.

⁷ Act 114 of 1998.

⁸ Act 53 of 1979.

⁹ Act 34 of 2008; Rules of the Magistrates' Court Act 32 of 1944.

¹⁰ Act 32 of 1944.

his attorney has first sent to the debtor a letter of demand claiming payment of the money owed to him.¹¹ This letter is sometimes a prerequisite to obtaining an EAO, particularly when it is a matter that is covered by the National Credit Act.¹² Moreover, the letter must warn the debtor that should he fail to pay the said amount, an EAO will be issued within 10 days of postage of the letter of demand.¹³ Thereafter the creditor is obliged to file with the clerk of the court an affidavit or affirmation or a certificate from his attorney which sets out the amount owed as at the date of the order, specifying the instalments and the costs associated with it.¹⁴

EAOs have become increasingly popular, with reported statistics of „between 10% and 15% of South Africa“s workforce“ having active EAOs effected against their salaries in October 2012.¹⁵ Along with the increasing usage of this mechanism, published research and forensic investigation has revealed an increase in the number of 'undesirable' practices in the administration of these orders.¹⁶ These have included practices such as:

- Consent to judgment by the debtor¹⁷ being obtained by way of fraudulent misrepresentation.¹⁸ This usually happens when debtors are given blank papers to sign. Alternatively this occurs when the debtor is asked to sign certain documents which are misrepresented as documents forming part of the credit transaction whereas they are actually consents to judgment.¹⁹
- EAOs being issued outside the jurisdiction in which the debtor“s employer resides, is employed or carries on business.²⁰ This is contrary to section 65 J (1) (a) of the Magistrates“ Court Act which requires the EAO to be issued in the jurisdiction in which the debtor“s employer resides, is employed or carries on business.²¹
- The duplication of EAOs in respect of the same principal debt.²²

¹¹ S 65J (2) (b) (i) of Act 32 of 1944.

¹² S 129 of Act 34 of 2005.

¹³ S 65J (2) (b) (i) of Act 32 of 1944.

¹⁴ S 65J (2) (b) (ii) of Act 32 of 1944.

¹⁵ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013) 4.

¹⁶ *Ibid*, 7.

¹⁷ 65J (2) of Act 32 of 1944.

¹⁸ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013) 40.

¹⁹ *Ibid*.

²⁰ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa*“ (2008) 7.

²¹ Act 32 of 1944.

²² University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa*“ (2008) 11.

- An unreasonable portion of the debtor's salary is being attached, notwithstanding the fact that the remaining portion of the debtor's salary is insufficient for the debtor's basic necessities and that of his dependents.²³
- There is a lack of judicial oversight with regards to the issuing of EAOs as this task, particularly in the past, is often left to the clerks of the court, who may not have the relevant skills, and who also may be susceptible to fraud.²⁴ It is believed that this practice continues despite amendments to the Magistrates' Court rules (to be discussed in detail in chapter two and three below) which oblige a clerk to refer the matter (s 57 and 58 orders) to the court to make an order which it deems fit.

In 2008 the University of Pretoria published a research paper entitled „*The Incidence of and the Undesirable Practices relating to Garnishee Orders in South Africa*“ which investigated, amongst other things, EAOs and other abuses in the debt collection process as noted above.²⁵ However, currently, there has been no significant legislative action taken in response to the concerns raised in the report.

In 2012 the Minister of Finance as well as the chairperson of the Banking Association of South Africa (BASA) issued a joint media statement to the effect that they had noted abuse in salary attachment orders (i.e. EAOs). Further, that their members would not be engaged or a party to these incidences. Moreover, that they would support initiatives that are against credit providers issuing pre-signed consent orders to debtors and finally that they would actively engage with the legislature to restrict consent orders to maintenance orders only.²⁶

Various other concerns, principally relating to inter alia, the issue of insufficient judicial oversight in EAOs and EAOs being issued from incorrect jurisdictions, have been raised by various legal scholars, legal practitioners and members of the public²⁷ resulting in the

²³ Ibid 13.

²⁴ Ibid 9.

²⁵ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa*“ (2008).

²⁶ Joint statement by the Minister of Finance and the chairperson of the Banking Association of South Africa (2012), available at: http://www.treasury.gov.za/comm_media/press/2012/2012110101.pdf, accessed on 20 April 2015.

²⁷ Department of Justice and Constitutional Development, Working document Magistrates' Courts Amendment Bill (2013), available at: http://www.northernlaw.co.za/Documents/magistrate_court/Working%20document%20Magistrates%20Courts%20Amendment%20Bill%2021Feb13.pdf, accessed on 20 April 2015.

formulation of a working document on the Magistrates' Court Amendment Bill.²⁸ Moreover, in the recent landmark case of *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others*,²⁹ the issue of judicial oversight, amongst other irregularities observed in EAOs, was brought up once again by the applicants.³⁰

According to the working document of the Magistrates' Courts Amendment Bill (2013), the provision in the Magistrates' Court Act that allows for a debtor to consent to judgment should be amended such that only a Magistrate is authorised to determine whether or not such an order should be granted, after assessing the debtor's financial position.³¹ This piece of legislation has not yet been passed and is therefore not yet in effect.

In February 2013, the cabinet minister responsible for finance, Mr Gordahn also expressed concerns with regards to attachment orders in his budget speech, stating the following:

*We are concerned by the abuse of emoluments attachment orders that have left many workers without money to live on after they have serviced their debts every month. We are in discussion with the National Credit Regulator, the Department of Justice and banks, to ensure that the lending market remedies its behaviour. In the meanwhile, all employers, including the public sector, can play a role and assist their workers to manage their finances and to interrogate all Emoluments attachment or garnishee orders to ensure that they have been properly issued. I also call on the various law societies to take action against members who abuse the system.*³²

It in addition to the concerns raised above with regards to undesirable practices in EAOs and debt collection in general, several pieces of legislation regulate the conduct of inter alia, debt collectors and attorneys. In this regard one may consider section 15 of the Debt Collectors Act that prohibits a debt collector from making use „of fraudulent or misleading representations; including:³³

²⁸Department of Justice and Constitutional Development, Working document Magistrates' Courts Amendment Bill (2013), available at: http://www.northernlaw.co.za/Documents/magistrate_court/Working%20document%20Magistrates%20Courts%20Amendment%20Bill%2021Feb13.pdf, accessed on 20 April 2015.

²⁹ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others*, Case No: 16703/14.

³⁰ Ibid.

³¹ Ibid, 2.

³² University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013) 4-5.

³³ Act 114 of 1998.

- I. The simulation of legal procedures;
- II. The use of simulated official or legal documents"

Despite prohibitions of this nature in various pieces of legislation, the widespread fraud and undesirable practices still persist.³⁴

Moreover, despite the promulgation of the amended rules to the Magistrates' Court Act, which require judicial oversight in the issuing of EAOs, many irregularities continue to exist.³⁵

The alleged fraud and widespread irregularity in this process led the Stellenbosch Legal Aid clinic to bring an application on the 24th of November 2014, in the Western Cape Division of the High Court, on behalf of 15 impoverished consumers, against 13 credit providers as well as Flemix and Associates (the law firm that facilitated the EAOs), to have the EAOs issued against their salaries declared null and void.³⁶ The law clinic also sought, inter alia, the words „the judgment debtor has consented thereto in writing“ in section 65 J (2) (b) (i) of the Magistrates' Courts' Act inconsistent with the Constitution of the Republic of South Africa to the extent that it fails to provide for judicial oversight over the issuing of an EAO against a debtor.³⁷

On the 8th of July 2015 Desai J, handed down judgment in favour of the consumers ordering that the EAOs issued against the consumers were „unlawful, invalid and of no force and effect.“ Furthermore, it was declared that (inter alia):

The words „the judgment debtor has consented thereto in writing“ in section 65J (2)(a) of the Magistrates' Court Act and section 65J(2)(b)(i) and section 65J(2)(b)(ii) of the Magistrates' Court Act, are inconsistent with the Constitution of the Republic of South Africa Act, 1996 and invalid to the extent that they fail to provide for judicial oversight over the issuing of an emolument attachment order against a judgment debtor. ”³⁸

³⁴ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013); P Rafferty, „Debt collection practitioners- the biggest threat to debt collection practices“, (2013) 66 *De Rebus*, 27.

³⁵ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013) 4-5.

³⁶ University of Stellenbosch Legal Aid Clinic News, available at: <http://blogs.sun.ac.za/law/legal-aid-clinic/>, accessed on 20 April 2015.

³⁷ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2014 (16703/14) [2015] ZAWCHC 99.

³⁸ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99.

The court declared further that in any proceedings brought by a creditor to enforce a credit agreement (as defined in the NCA), section 45 of the Magistrates' Court Act does not permit a debtor to consent in writing to the jurisdiction of a magistrates' court other than that in which the debtor resides or is employed.³⁹

The decision is still yet to be confirmed by the Constitutional Court.⁴⁰ Moreover, the respondents have taken the High Court's decision in this regard on appeal. Thus the declaratory order is not yet in effect and so, notwithstanding this judgment, abuses and discrepancies therefore still exist in EAOs and the need to address these issues persists.⁴¹

3. Rationale

The underlying rationale behind EAOs has been for them to act as a measure for creditors to collect from debtors what is owed to them; and for debtors to pay amounts due to creditors responsibly, thereby allowing for the free flow of credit and effective collection on such credit granted by creditors.⁴² However, in light of the reported and alleged fraudulent and undesirable practices debtors are at a disadvantage as their ability to cope financially is significantly and negatively affected.⁴³ By the same token creditors are at a disadvantage due to the fact that they are more reluctant to grant credit to debtors if there is no guarantee that credit granted will be paid off by the debtor.⁴⁴ This then begs the question; should EAOs even exist? This is the underlying question that this research paper seeks to answer.

4. Purpose Statement

The purpose of this study is to examine the implementation and administration of EAOs to identify the challenges and discrepancies in this system of debt collection. Further, to determine how, if at all, these identified shortcomings could be addressed or remedied to ensure a more equitable system that is consistent with the values and norms that underpin our constitution. In particular, the study will draw on foreign law so as to extrapolate possible mechanisms for implementation in South Africa. It will also consider, in the alternative, whether EAOs should be abolished altogether in South Africa, given the implications that

³⁹ This is necessary as it will have the effect of rendering portions of legislation invalid; *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99;

⁴⁰ Pete et al Civil Procedure: A Practical Guide, (2010), 309.

⁴¹ M Thebe, „Debt collection system to be changed“ 2015 *De Rebus*, July.

⁴² University of Pretoria Research Report on „The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report“ (2013), 10.

⁴³ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99.

⁴⁴ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99; Respondents' Answering Affidavit, Part 1, 73.

doing so may have on South Africa's economy, and on the lives of impoverished consumers in South Africa.

5. Research Questions

1. What legal framework regulates EAOs in South Africa?
 - 1.1 What are the challenges to the status quo; and are these challenges being reviewed by the Department of Justice?
2. How should the current EAO system be amended to ensure compliance with the Constitution and best practice internationally?
3. What is the foreign position insofar as debt collection mechanisms are concerned; and can South Africa extrapolate any plausible measures from these foreign jurisdictions?
4. In the event that no measures prove to be adequate or plausible, should EAOs be abolished altogether? If so, what are the alternatives to the current EAO system?

6. Research Methodology

The research methodology of this proposed thesis will be qualitative in nature (i.e. desktop research). The main source of information for this research will be legislation; in particular, the Magistrates' Court Act which sets out the law regarding EAOs. The published research of various legal academics in accredited law journals, on-going litigation, and other works of reference will also be used. Moreover, this research will draw on authoritative case law on the topic.

7. Literature review

Gardner, the CEO of financial well-being firm Summit Financial Partners, submits that „after the birth of micro lending in 1992 lenders, collectors and attorneys have found that EAOs are the most effective and cost-effective collection mechanism.“⁴⁵ EAOs, which are said to be more successful than „debit orders, payroll deductions and cash deposits“ are inexpensive to implement.“⁴⁶ Although EAOs are said to be one of the most effective debt collection measures, they still present various difficulties such as:⁴⁷

- Jurisdiction.

⁴⁵ C Gardner „The complexity of emoluments attachment orders“ 2007 *HR Highway*, October, 22.

⁴⁶ Ibid.

⁴⁷ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa*“ (2008); University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013).

- Consent.
- Insufficient regulatory control on the amount which can be deducted from the debtor's salary.
- Lack of judicial oversight over the issuing of EAOs.
- Reported fraud.
- Duplicated debt.
- A negative impact on the national economy.

Botes and Aukema hold that where credit providers engage in reckless lending and enforce it through EAOs, they play a significant role in the labour unrest which is experienced in the labour market in South Africa and it is for this reason that, employers should be concerned and take steps to try and remedy the situation.⁴⁸ It has become common cause that a number of abuses occur in the context of EAOs and these negatively impact consumers. These abuses include fraudulently obtained court orders, uninformed consent on the part of the consumer where they unknowingly consent to default judgment against them, or where they consent to jurisdiction far from their place of work or residence.⁴⁹

Further, Botes and Aukem suggest a number of measures that employers could implement to deal with the undesirable practices and these include:⁵⁰

- to educate their employees about reckless lending and their rights through workshops and notices
- To employ experts scrutinize EAOs to detect any defect or fraudulences.

Aukema and Botes paint a clear picture of the impact that reckless lending and undesirable practices have on employees as well as how this negatively impacts on employers too. Moreover, the authors put forward a number of suggestions for measures that employers could implement to curb these consequences. However, the number of employers who would be willing and able to implement these measures and incur these costs may prove to be very little as it seems that many employers are more concerned with profit making than implementing such measures. This, however, is not to say that absolutely no employers would engage in these measures as there are a few employers who are benevolent and concerned with the welfare of their employees. Whether this is enough of an incentive for

⁴⁸ Ibid

⁴⁹ Drawn from a variety of sources cited throughout this thesis.

⁵⁰ Ibid

employers to embrace the measures suggested by Botes and Aukema, is a separate question altogether.

The University of Pretoria, in its follow up research report of 2013, has recommended, amongst other things, that prior to the employer making a deduction from the employee's salary, there should be a consultation with the employee, during which the debt is verified and the order and its effects are clearly explained to the debtor, more especially with regards to the amount that will be deducted from the debtor's salary.⁵¹ If this is done at this early stage, any other irregularities in the order may be easily determined and dealt with.⁵²

The University also recommends that the clerks of the courts should be trained and that employees themselves should be educated on financial management and on EAOs as well as other debt collection measures and their effect on a debtor's financial circumstances.⁵³ Compliance measures, such as reporting attorneys who engage in unlawful conduct when debt collecting to the Law Society, are also suggested by the University of Pretoria.⁵⁴

All these measures are sensible however; if debtors are not aware of them it seems that they may be redundant. Thus it would seem that the government should also play an active role by investing in such measures and ensuring that consumers are educated about their rights as well as the various dispute resolution mechanisms that are at their disposal.

Bentley, a well renowned attorney submits that responses to undesirable and fraudulent practices in EAOs such as statements to the effect that EAOs should be abolished are simply „throwing out the baby with the bath water.“⁵⁵ He further argues that the focus should be on dealing with these abuses and practices „rather than compromising ethical and law abiding credit providers' chances of recovery because of these.“⁵⁶ He further suggests that „the baby and the bath water“ can be separated through the implementation of certain changes.⁵⁷ Amongst the changes he proposes are the following:⁵⁸

⁵¹ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013) 90.

⁵² Ibid 91.

⁵³ Ibid 92.

⁵⁴ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013) 93.

⁵⁵ B Bentley „Separating the baby and the bathwater“ 2013 *De Rebus*, March, 23.

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ B Bentley „Separating the baby and the bathwater“ 2013 *De Rebus*, March, 23-25.

- That „the collection costs in terms of section 65 J recovery be capped at an acceptable fixed amount dependent on the size of the debt plus collection commission at 10% per installment, and the collection of attorney and client costs to be prohibited.“
- That an „EAO national register, recording all authorized EAOs with the effect that no employer shall be authorized thereto to deduct from an employee's salary unless the EAO has been served by the sheriff with the cost schedule attached hereto and such EAO must appear on the EAO register“.
- That „the Justice Department must provide training to Magistrates and clerks on the provisions relating to the NCA, EAOs interest and costs.“
- „The Law Society of South Africa and all provincial law societies“ should appoint standing committees to investigate complaints of alleged debt collection abuses by members of the public“
- „appropriate steps be taken against members found guilty of debt collection abuses“

It is evident that Bentley advances good suggestions to the problem which could certainly be plausible solutions.

The University of Pretoria refers to the systems of debt collection and attachment of salaries that other jurisdictions employ. However, no legal scholar has attempted to consider these mechanisms and attempted to create a system that South Africa may employ. This research paper will draw mechanisms from other jurisdictions that South Africa may apply, taking into account the South African context in so far as its background, social, economic and political factors are concerned.

In light of some of the literature discussed above, one can ascertain that although EAOs were intended to operate as an effective debt collection mechanism they have brought about a number of discrepancies in so far as the granting and collecting of credit is concerned with the result that many stakeholders are calling for a re-evaluation of the law relating to EAOs, or alternatively, the abolishment of EAOs.

Various legal scholars and practicing attorneys such as Bentley have put forward a number of suggestions in dealing with this problem, such as ensuring that there is more judicial oversight over EAOs, as well as the establishment of a national EAOs register which will record all current EAOs issued and all information relating to these EAOs.

8. Conclusion

In light of all these suggestions, this paper will demonstrate that EAOs need not be abolished and that for their effective operation they have to undergo reform. To this end this dissertation will draw from the systems of wage attachment in foreign jurisdictions, consider published research by South African tertiary institutions and make recommendations to the legislature for legislative reform in this regard.

Chapter Two: General Debt Collection Mechanisms in South Africa

1. Introduction

Data presented by the South African Reserve Bank revealed that in September 2006 credit extended to the private sector by credit providers amounted to at least R1.2 trillion.⁵⁹ Moreover, as at March 2014 the National Credit Regulator reported that South African consumers owe credit providers R1.5 trillion.⁶⁰ This clearly demonstrates that much of South Africa's population are over indebted and that there is a need for an effective debt collection mechanism that balances the rights of both debtors and creditors in a legally permissible and reasonable manner.

Further, the National Credit Regulator reported that in 2013 household indebtedness amounted to 74.3 per cent.⁶¹ This is an alarming figure as it denotes that a large portion of household income, seemingly amongst the lowest earning members of society, goes towards paying off debts. To this end and in addition to the remedies set out in the Magistrates' Court Act, the National Credit Act has created further debt relief mechanisms aimed at assisting consumers, such as debt review. The National Credit Act (NCA) seeks to regulate, more effectively, access and distribution of credit and should be read together with the Magistrates' Court Act⁶²

The debt collection mechanisms this paper will examine relate to, primarily, those set out in the Magistrates' Court Act. These generally relate to debts amounting to R200 000 and

⁵⁹ „Credit Extension to Households- Prepared for the National Credit Regulator“; (2006), 5, available at: <http://www.ncr.org.za/pdfs/Public%20Report.pdf>, accessed on 4 August 2015.

⁶⁰ National Credit Regulator, Annual Report, (2014), available at: <http://www.ncr.org.za/documents/pages/NCR%20AR%202014%20lr.pdf>, accessed on 25 August 2015. Debt Rescue, a debt mediation company, also reports that “South Africa is a deeply indebted country with the total consumer debt totalling R1.47 trillion. This means that most South Africans owe more than 75% of their gross monthly income to creditor.

⁶¹ Ibid.

⁶² Act 34 of 2008.

below as per jurisdictional requirements of the Magistrates' Court Act.⁶³ Seemingly, these types of debts represent the debts of the low income earning individuals in South Africa.⁶⁴

It should be emphasised from the outset that this paper will only deal with judgments sounding in money (*ad pecuniam solvendam*), where the defendant is ordered to pay a sum of money and thus discussions that ensue below will be limited to such type of judgments.⁶⁵

This chapter will review the debt collection methods in existence, with the exception of the EAOs, which will be examined in chapter three (and will be reviewed in detail following commentary by various legal scholars and legal practitioners).

Moreover, this chapter will briefly discuss the impact of the National Credit Act and the Debt Collectors Act on the general debt collection mechanisms. Finally, this chapter will consider the *in duplum* rule as well as the reckless lending provisions in the National Credit Act, and the abuses thereof, as contributing factors to the debt problems in South Africa.

2. General Debt Collection Measures in terms of the Magistrates' Court Act

2.1. Background and context

A large number of low income and over-indebted debtors are indebted to micro lenders, retailers and other financial institutions.⁶⁶ These types of debts attract high interest rates and exorbitant administration and collection costs which make it increasingly difficult for debtors to break free from the cycle of debt.⁶⁷ Creditors seek to collect on these debts using various debt collection mechanisms. However, as per the recent High Court judgment in the matter of *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others*, which will be examined in detail in chapter three, the applicants demonstrated that although the debt collection system has evolved, much improvement is still needed, particularly in so far as EAOs are concerned.⁶⁸

In light of this background, one has to consider the debt collection mechanisms in existence to determine the extent to which they may be reformed.

⁶³ Section 29 of Act 32 of 1944; HJ Erasmus & DE Van Loggerenberg *Jones and Buckle The Civil Practice of the Magistrates' Courts in South Africa* 9 ed (1996) at 305 („Jones & Buckle“).

⁶⁴ C Gardner, „The complexity of emolument attachment orders“ 2007 *HR Highway*, October, 21.

⁶⁵ H Coetzee, „The impact of the National Credit Act of civil procedural aspects relating to debt enforcement“, University of Pretoria LLM Thesis (2009), 45.

⁶⁶ C Gardner, „The complexity of emolument attachment orders“ 2007 *HR Highway*, October, 21.

⁶⁷ C Gardner, „The complexity of emolument attachment orders“ 2007 *HR Highway*, October, 21.

⁶⁸ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99.

In terms of the Magistrates' Court Act, there are five main debt collection mechanisms. These include:⁶⁹

- Warrants of execution;
- Garnishee Orders in terms of section 72;
- Administration orders in terms of section 74;
- The section 65A enquiry; and
- EAOs in terms of section 65J.

Before analysing each of these remedies below, it is prudent to briefly set out the legal process a creditor would have to follow to enable him to competently execute on an outstanding debt due to him.

2.2. Process prior to debt collection: Legal steps to be taken in order to secure judgment

2.2.1. A general overview

Prior to the commencement of legal proceedings the plaintiff will usually send a letter of demand to the defendant.⁷⁰ This serves as a „request for payment or a request for the performance of a legal obligation“. It is typically sent in an attempt of resolving the matter amicably and without engaging in formal litigation, which is often time consuming and costly.⁷¹ Such a demand may take the form of an oral request or a written demand.

Under certain circumstances, such a demand is compulsory. Section 129 of the National Credit Act, for example, requires a credit provider to draw a consumer's default to their attention in writing and propose that the debtor consults with a debt counsellor, alternative dispute resolution agent, consumer court or an ombud with the relevant jurisdiction.⁷² Ten days after the credit provider has sent this notice and where the consumer has not responded to such a notice or has responded to it by rejecting the credit provider's proposals and provided the consumer has been in default under such a credit agreement for at least 20 business days, the credit provider may approach the court for an order to enforce such an agreement.⁷³

⁶⁹B Bentley „Separating the baby and the bathwater“ 2013 *De Rebus*, March, 2.

⁷⁰Pete et al *Civil Procedure: A Practical Guide*, (2010), 93.

⁷¹Ibid.

⁷²Section 129 of Act 34 of 2008.

⁷³Section 130 (1) of Act 34 of 2008; see note 219 below.

In the case of *Sebola and Another v Standard Bank of South Africa Ltd and Another*, the court emphasised the importance of the section 129 notice, holding that

*„access to debt counselling and extra-judicial resolution will undoubtedly have their most potent impact when the guillotine is about to fall. And it is at that point, before the credit provider resorts to court process, that the legislation insists the consumer should have the benefit of a notice.“*⁷⁴

At this stage (i.e. when the creditor has sent a letter of demand or section 129 notice as the case may be) the debtor may already have incurred costs as the creditor is permitted to charge the debtor for the costs incurred in the preparation and delivery of the letter of demand.⁷⁵ This is the case even where the debtor has paid the debt due and provided the costs so claimed were stated in the letter of demand.⁷⁶

Finally, a demand may also take the form of the institution of legal proceedings (i.e. in the form of a summons), but this is often done as the first step in the legal process and not as a way of resolving a matter amicably.

Once summons has been issued in court and served on the defendant, either with or without a letter of demand, the defendant may decide to:

- defend the matter on the merits or on technical grounds;⁷⁷ or
- settle the matter out of court by paying the amount claimed from him;⁷⁸ or
- admit to liability and undertake to make payments to the plaintiff in instalments in terms of s 57 of the Magistrates' Court Act;⁷⁹ or
- consent to judgment as provided for in section 58 of the Magistrates' Court Act.⁸⁰

According to section 57 of the Magistrates' Court Act, a debtor who has received a letter of demand or summons, may in writing, admit to liability to the plaintiff for the amount

⁷⁴ 2012 (5) SA 142 (CC) at par 60.

⁷⁵ Section 56 of Act 32 of 1944.

⁷⁶ Ibid.

⁷⁷ Ibid, 31.

⁷⁸ Ibid, 32.

⁷⁹ H Coetzee, „The impact of the National Credit Act of civil procedural aspects relating to debt enforcement“, University of Pretoria LLM Thesis (2009), 32; Section 57 of Act 32 of 1944.

⁸⁰ H Coetzee, „The impact of the National Credit Act of civil procedural aspects relating to debt enforcement“, University of Pretoria LLM Thesis (2009), 32; Section 58 of Act 32 of 1944.

claimed, together with costs in the letter or summons.⁸¹ Furthermore, the debtor may undertake in writing, to pay this amount in instalments and agree that in the event that he should fail to pay as agreed, the plaintiff may take default judgment against him for the amount owed as well as costs.⁸² Thus where the debtor fails to pay the amount as undertaken, the creditor will be entitled to obtain judgment without further notice.⁸³

Section 58 of the Magistrates' Court Act allows a debtor who has received a letter of demand or summons, to consent unconditionally in writing to judgment in favour of the creditor in respect of the amount and costs claimed by the creditor.⁸⁴ This is intended to operate as a quick and simple way of resolving the dispute and obtaining judgment.⁸⁵ In terms of section 58, „the clerk shall... enter judgment in favour of the plaintiff”, if the consent to judgment complies with all the formalities of section 58. The clerks of the court must refer the matter to the court if there is reason to question the plaintiff's entitlement to judgment.⁸⁶

Consequently, this procedure, in terms of sections 57 and 58, has been subject to abuse by unscrupulous debt collectors and attorneys, particularly for the purposes of obtaining an EAO against the debtor's salary.⁸⁷ What follows below are a few examples of such abuses as perpetrated by some unscrupulous debt collectors and attorneys.⁸⁸

Firstly, in obtaining a consent to judgment from a debtor, there exists no obligation on the part of an attorney to ascertain whether the debtor has sufficient financial means to fulfil their obligations as per the consent to judgment.⁸⁹ To this end, attorneys and debt collectors often merely insert the following clause or something similar in preparing such consents to judgments: „I confirm that after the satisfaction of the Emolument Attachment Order I will have sufficient means for my own and my dependents' maintenance.”⁹⁰ Evidently this is not a true representation of the debtor's financial position. Consequently a debtor may not have

⁸¹ Section 57 of Act 32 of 1944.

⁸² Ibid.

⁸³ H Coetzee, „The impact of the National Credit Act of civil procedural aspects relating to debt enforcement”, University of Pretoria LLM Thesis (2009), 32; Section 57 of Act 32 of 1944.

⁸⁴ Act 32 of 1944; H Coetzee, „The impact of the National Credit Act of civil procedural aspects relating to debt enforcement”, University of Pretoria LLM Thesis (2009), 32.

⁸⁵ C Kotze, „Debt collection: Repealing ss 57 and 58 of Magistrates' Courts Act will be short sighted”, 2010 *De Rebus*, September; *African Bank v Myambo NO and Others* 2010 (6) SA 298 (GNP).

⁸⁶ Section 58 of Act 32 of 1944; rule 12 (7) of Act 32 of 1944; *African Bank Ltd v Additional Magistrate Myambo NO and Others* 2010 (6) SA 298 (GNP) (9 July 2010).

⁸⁷ C Kotze, „Debt collection: Repealing ss 57 and 58 of Magistrates' Courts Act will be short sighted”, (2010) *De Rebus*.

⁸⁸ G Buchner, „The debt collection scandal” 2015 *De Rebus*, May, 98.

⁸⁹ G Buchner, „The debt collection scandal” 2015 *De Rebus*, May, 98.

⁹⁰ Ibid.

the financial means to meet their obligations as per the „consent“ and this may hamper the debtor’s financial position as it places more financial constraints on the debtor. Moreover, many of these debtors do not truly appreciate what it is that they are consenting to as well as the consequences that it may have.⁹¹

Secondly, default judgments in terms of sections 57 or 58 were granted and issued routinely by the clerks of the court with no judicial oversight.⁹² Quite recently, however, with the amendments to the Rules of the Magistrates’ Court which require the clerk of the court to refer the matter to a Magistrate, we have seen the exercise of some judicial oversight over such default judgments.⁹³ However, this is to be qualified by the fact that this is in respect of claims arising out of the National Credit Act.⁹⁴ Thus, although this is a commendable amendment, it is somewhat insufficient as it applies solely to debts to which the National Credit Act applies.⁹⁵

Thirdly, the Attorneys Act allows the law societies of the various provinces to prescribe collection commission and attorney-and-client fees in so far as debt collection matters under their jurisdiction are concerned.⁹⁶ Moreover, regulation 47 of the NCA can be seen as an attempt to curtail costs in collection matters.⁹⁷ However, it is interesting to note that regulation 47(b) (ii) still allows for collection costs on an attorney-and-client scale and for collection commission to be charged in terms of the Attorneys Act.⁹⁸ This clearly makes the debt collection market a lucrative one and operates as an incentive for the exploitation of debtors.⁹⁹

⁹¹ Section 65A (1) of Act 32 of 1944; University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 13.

⁹² Ibid; note 327 below.

⁹³ G Buchner, „The debt collection scandal“ 2015 *De Rebus*, May, 98; *African Bank Ltd v Additional Magistrate Myambo NO 2010 (6) SA 298 (GNP)*; Business Enterprises: University of Pretoria „Considering debt collection mechanisms in South Africa: An evaluation of selected contentious issues“, available at: http://issuu.com/onelaw/docs/onelaw_-_1, accessed on 20 October 2015.

⁹⁴ Rule 12(5) and (7) of Act 32 of 1944; Business Enterprises: University of Pretoria „Considering debt collection mechanisms in South Africa: An evaluation of selected contentious issues“, available at: http://issuu.com/onelaw/docs/onelaw_-_1, accessed on 20 October 2015.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ G Buchner, „The debt collection scandal“ 2015 *De Rebus*, May, 98.

⁹⁸ Ibid.

⁹⁹ Ibid.

Finally, many unscrupulous attorneys use section 45 of the Magistrates' Court Act to circumvent the process.¹⁰⁰ This occurs where the attorney incorporates in a debtor's consent to judgment in terms of sections 57 or 58, wording to the effect that the debtor has consented to the jurisdiction of a specifically named court, one which is usually many kilometers from where the debtor resides or is employed or the debtor's employer's place of business.¹⁰¹ Consequently, it becomes financially difficult if not impossible for many debtors to challenge such legal proceedings.¹⁰²

In practice, if a judgment creditor obtains judgment in terms of the section 57 or 58 procedure, it can be implemented swiftly and at a low cost.¹⁰³ Such advantages make these procedures rather lucrative and while many scholars and legal practitioners have called for the repeal of these sections, others have held that repealing sections like these would be short sighted as they are amongst the very few sections that operate as effective tools for debt collectors. It has therefore been suggested that instead of repealing these sections altogether, effective safeguards should rather be put in place.¹⁰⁴

2.2.2. Short cut-judgments

One should take cognisance of the fact that it is not necessary for a trial in the strict sense¹⁰⁵ to proceed before the plaintiff can obtain judgment in his favour.¹⁰⁶ As discussed above, a creditor may obtain judgment by consent in terms of sections 57 and 58 of the MCA. Further, a plaintiff may, even in the absence of consent from the debtor, apply for default or summary judgment against the defendant.¹⁰⁷ Such judgments are also known as short cut judgments.¹⁰⁸

Default judgment may be taken where the defendant fails to do either of the following;

¹⁰⁰ Business Enterprises: University of Pretoria „Considering debt collection mechanisms in South Africa: An evaluation of selected contentious issues“, available at:http://issuu.com/onelaw/docs/onelaw_-_1, accessed on 20 October 2015.

¹⁰¹ Section 45 of Act 32 of 1944; Business Enterprises: University of Pretoria „Considering debt collection mechanisms in South Africa: An evaluation of selected contentious issues“, available at:
http://issuu.com/onelaw/docs/onelaw_-_1, accessed on 20 October 2015.

¹⁰² Business Enterprises: University of Pretoria „Considering debt collection mechanisms in South Africa: An evaluation of selected contentious issues“, available at:http://issuu.com/onelaw/docs/onelaw_-_1, accessed on 20 October 2015.

¹⁰³ C Kotze, „Debt collection: Repealing ss 57 and 58 of Magistrates' Courts Act will be short sighted“, 2010 *De Rebus*, September, 98; C Gardner „The complexity of emolument attachment orders“ 2007 *HR Highway*, October, 22.

¹⁰⁴ Ibid.

¹⁰⁵ That is to say, from pre-trial proceedings right up to the passing of judgment by the court.

¹⁰⁶ Pete et al *Civil Procedure: A Practical Guide*, (2010), 206.

¹⁰⁷ Pete et al *Civil Procedure: A Practical Guide*, (2010), 206.

¹⁰⁸ Ibid.

- Appear at the trial;¹⁰⁹
- Enter an appearance to defend within the period set out in the summons¹¹⁰; or
- To deliver a plea and thereafter having being served a notice of bar in terms of rule 12(1) (b)¹¹¹, calling upon him to file his plea within 5 days.¹¹²

By contrast, summary judgment may be granted where the defendant has entered an appearance to defend solely for purposes of delay and has no *bone fide* defence.¹¹³ If summary judgment is granted the court will grant final judgment without the parties going to trial.¹¹⁴ To this end, summary judgment is considered to be a severe and „extraordinary“ procedure in that it circumvents the *audi alteram partem* principle which requires both parties to be heard.¹¹⁵

Due to the fact that summary judgment is such a drastic procedure only certain claims may be the subject of a summary judgment application.¹¹⁶ These, according to Rule 14 (1) of the Magistrates“ Court Rules are claims;¹¹⁷

- That are „based on a liquid document;
- For a liquidated amount in money;
- For delivery of specified movable property ;or
- For ejection“

A detailed discussion of each of these claims is beyond the scope of this chapter as this chapter merely seeks to give an overview of debt collection mechanisms that are currently employed in South Africa as alternatives to EAOs.

¹⁰⁹ Pete et al Civil Procedure: A Practical Guide, (2010), 206; Rule 32 (2) of the Magistrates Court Rules

¹¹⁰ Ibid; Rule 12(1) (a) of the Magistrates Court Rules

¹¹¹ Rules of the Magistrates Court Act 32 of 1944.

¹¹² Pete et al Civil Procedure: A Practical Guide, (2010), 208.

¹¹³ Pete et al Civil Procedure: A Practical Guide, (2010), 215.

¹¹⁴ Ibid.

¹¹⁵ Pete et al Civil Procedure: A Practical Guide, (2010), 215.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

2.3. The process following judgment

Once the judgment creditor obtains judgment¹¹⁸ in their favour; either via a trial, a shortcut judgment, or a consent to judgment by the debtor; the judgment debtor is obliged to comply with the order and satisfy the debt.¹¹⁹

However, where such a debtor fails, refuses or is reluctant to comply with the order given, the judgment creditor may elect how to proceed. That is to say he may do nothing or he may write to the debtor and demand that he complies with the granted order.

Alternatively, the creditor may proceed by way of execution as a formal process of enforcing or giving effect to the judgment passed.¹²⁰ This is done by issuing a warrant of execution in the Magistrates' Court.¹²¹ It should be noted that where a creditor does not execute against the debtor within three years from the date judgment was pronounced, he will be barred from executing against the debtor unless the creditor makes an application to court for the superannuation of the judgment.¹²²

Other debt collection mechanisms that are available to the judgment creditor include: the section 65 enquiry, placing a debtor under administration, obtaining an emoluments attachment order against the debtor, or an application for the attachment of a debtor's monies via a garnishee order, each of which will be discussed below (with the exception of the EAO which will be discussed at length in chapter 3).

3. The main debt collection mechanisms in South Africa

What follows below is a brief disposition and critique of the four main debt collection mechanisms that are employed in South Africa.

3.1. The section 65A Enquiry

Where a creditor has decided to proceed by way of a warrant of execution and the return of service is a *nulla bona*¹²³, the creditor has various options at his disposal.¹²⁴ Firstly, he may

¹¹⁸ „Judgment“ in this regard refers to a command to the party against which judgment is given to do something, coupled with a warrant to the sheriff to enforce the command; Pete et al Civil Procedure: A Practical Guide, (2012), 267.

¹¹⁹ H Coetzee, „The impact of the National Credit Act of civil procedural aspects relating to debt enforcement“, University of Pretoria LLM Thesis (2009), 32.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Section 63 of Act 32 of 1944; HJ Erasmus & DE Van Loggerenberg *Jones and Buckle The Civil Practice of the Magistrates' Courts in South Africa* 9 ed (1996) at 305 („Jones & Buckle“).

¹²³ This means that the sheriff could not find any attachable assets; C P Smith Civil Practice in Magistrates' Courts: The Practitioner's Manual, (2014), 161.

¹²⁴ C P Smith Civil Practice in Magistrates' Courts: The Practitioner's Manual, (2014), 161.

apply for the debtor to be placed under sequestration.¹²⁵ However, this is a costly application as it is brought in the High Court.¹²⁶ Furthermore, such an application may prove to be ineffective if the debtor does not have assets that can be realised for the benefit of the debtor's creditors.¹²⁷

Alternatively a creditor may opt to use the 65A enquiry which is a method of debt collection contained in section 65 of the Magistrates' Court Act.¹²⁸ According to this method, an enquiry is set up at which the financial position of the judgment debtor is fully assessed in order to establish how much the judgment debtor can afford to pay the judgment creditor in satisfaction of their debt.¹²⁹ The purpose of this enquiry is to determine the debtor's income and expenses in order to ascertain the extent to which the debtor is able to pay the outstanding debt, albeit in instalments.¹³⁰

Once the full financial position of the debtor is determined the court will make an order with regards to the monthly instalment amounts that the debtor is able to reasonably afford.¹³¹ It is also possible for the court to order that the debtor be placed under administration at this stage.¹³²

In the past this enquiry was made more effective by the threat of arrest in the event of failure to pay any due instalment - imprisoned for being in contempt of court (disobeying an order of the court).¹³³ However, imprisonment for failure to satisfy a judgment debt was eventually declared unconstitutional in the case of *Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others*¹³⁴. This judgment has seemingly weakened the creditor's remedy for an unsatisfied debt as it has apparently removed the fear of a harsh sanction.¹³⁵

It should be noted that it is possible for the judgment debtor to make a written offer to the creditor to pay the debt in instalments, prior to the commencement of the section 65A (1)

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ C P Smith Civil Practice in Magistrates' Courts: The Practitioner's Manual, (2014), 166.

¹²⁸ Pete et al *Civil Procedure: A Practical Guide*, (2010), 333.

¹²⁹ Ibid, 355.

¹³⁰ C P Smith Civil Practice in Magistrates' Courts: The Practitioner's Manual, (2014), 162.

¹³¹ Pete et al *Civil Procedure: A Practical Guide*, (2010), 333.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ 1995 (4) SA 631.

¹³⁵ C Kotze, „Debt collection: Repealing ss 57 and 58 of Magistrates' Courts Act will be short sighted“, 2010 *De Rebus*, September, 98; B Bentley „Separating the baby and the bathwater“ 2013 *De Rebus*, March, 2.

proceedings.¹³⁶ Consequently, if the judgment creditor accepts the offer, it may be presented by the creditor to the clerk of the court and made an order of the court.¹³⁷ To this end, it is deemed to be an order in terms of section 65A (1).¹³⁸

It seems that one of the distinguishing factors between the section 65A financial enquiry and administration (both of which will be discussed below) is that administration is usually done on a voluntary basis, whereby the debtor makes an application in terms of section 65I, whereas the section 65A enquiry need not be initiated by the debtor himself and is usually instigated by a creditor.¹³⁹

Essentially, section 65A is seemingly useful as it requires a debtor to appear in court where his true financial position is revealed and he is ordered to make payments to the creditor which the court deems to be just and equitable.¹⁴⁰

Although the section 65A enquiry may be a useful mechanism it lacks appropriate sanctions (such as imprisonment for failure to satisfy the judgment debt) which reduce its effectiveness and utility.¹⁴¹ It is for this reason that a creditor may decide to proceed by way of execution against the debtor's property.

3.2. Execution by obtaining a warrant of execution and attaching the property of the debtor

In practice, once judgment has been granted, the judgment debtor is usually given some time to satisfy the judgment.¹⁴² During this time, the judgment debtor may make arrangements with the attorney representing the judgment creditor as to payments of the judgment debt, interest and costs.¹⁴³ If this is done, there is no need to issue a warrant of execution.¹⁴⁴ However, where no arrangements are made and no agreement exists between the judgment debtor and the judgment creditor's attorney, which is usually the case, the judgment creditor may arrange for a warrant of execution to be issued by the clerk of the court and delivered to the sheriff for the purposes of attachment.¹⁴⁵

¹³⁶ C P Smith *Civil Practice in Magistrates' Courts: The Practitioner's Manual*, (2014), 161.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ Sections 65A, 65I and 74 of Act 32 of 1944.

¹⁴⁰ Section 65A (1) (a) of Act 32 of 1944.

¹⁴¹ 1995 (10) BCLR 1382 (CC).

¹⁴² Pete et al *Civil Procedure: A Practical Guide*, (2012), 342.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ Pete et al *Civil Procedure: A Practical Guide*, (2012), 342.

The warrant serves the purpose of instructing the sheriff to attach the property of the judgment debtor so that if the judgment debt remains unpaid after the attachment the attachment property can be sold at a public auction and the proceeds used to pay the money owed to the judgment creditor.¹⁴⁶ Execution is usually effected through the attachment and sale of property.¹⁴⁷ At this stage the property to be attached is pointed out by the debtor to the sheriff who will compile an inventory of all the moveable property attached (as much as is needed to satisfy the writ) as well as its value.¹⁴⁸

The movable property is then stored by the sheriff until instructed by the execution creditor or the court to publically sell (auction) the property for cash in order to satisfy the debt.¹⁴⁹ The date for the appointed sale shall not be less than 15 days after attachment and, not later than 10 days prior to the sale date, the execution creditor must, after consulting the sheriff, prepare a notice of sale and provide two copies to the sheriff to enable him to affix one copy to the court house (or another building where the court is situated or alternatively a place that is near to the sale venue).¹⁵⁰

It should be noted that an attachment lapses after four months from the date of attachment unless a sale in execution is pending or where this period is extended by an order of court.¹⁵¹ Moreover, only property belonging to the debtor may be attached.¹⁵² This means that the process may be further frustrated by interpleader applications by credit providers or other persons claiming ownership over the property, many of which could be false claims.¹⁵³ Furthermore, such sales in execution may also generate very little return yet the costs of initiating them are high.¹⁵⁴

Section 66 of the Magistrates' Court Act requires a judgment creditor to attach the movable property of the debtor first and only if this proves to be insufficient may the judgment creditor then proceed to attach the immovable property of a judgment debtor; however, the

¹⁴⁶ Pete et al *Civil Procedure: A Practical Guide*, (2010), 334.

¹⁴⁷ Section 66 (3) of Act 32 of 1944.

¹⁴⁸ Rule 41 of Act 32 of 1944.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ C P Smith *Civil Practice in Magistrates' Courts: The Practitioner's Manual*, (2014), 154.

¹⁵² Section 68 (1) of Act 32 of 1944; B Bentley „Separating the baby and the bathwater“ 2013 *De Rebus*, March, 2.

¹⁵³ B Bentley „Separating the baby and the bathwater“ 2013 *De Rebus*, March, 2.

¹⁵⁴ B Bentley „Separating the baby and the bathwater“ 2013 *De Rebus*, March, 2.

latter is an extreme and complicated process.¹⁵⁵ In this regard, in the case of *Jafitha v Schoeman and Others; Van Rooen v and others*, the Constitutional Court held that section 66 (1) (a) of the MCA is unconstitutional in so far as it allows for the attachment of the immovable property of a debtor without judicial oversight.¹⁵⁶ The court decided this in light of the fact that section 66 (1) (a) violates section 26 (1) of the Constitution which guarantees the right to adequate housing.¹⁵⁷

Following this landmark decision, and as per amendments made to the Magistrates' Court Rules, the immovable property of a debtor may only be attached once the court, after taking into account all the relevant circumstances, makes an order declaring the property specially executable.¹⁵⁸ To this end a creditor is to make an application to the court with a supporting affidavit for the attachment of immovable property.¹⁵⁹ The supporting affidavit must allege, *inter alia*:¹⁶⁰

- Whether there are any other means of satisfying the judgment;
- The debtor's family situation and that of other occupants of the property;
- Whether the NCA applies and if so, the extent to which it has been complied with; and
- The prescribed allegations relating to constitutional rights.

Moreover, the creditor must give notice (in the form required by section 66 2(a) of the Magistrates' Court Act) to the debtor and any other persons residing on the property or having an interest in the property.¹⁶¹ The purpose of this notice is to advise all parties with an interest in the property of the proposed execution and it affords interested parties the opportunity to make submissions before the court (either in the form of an affidavit or via *viva voce*).¹⁶²

¹⁵⁵ H Coetzee, „The impact of the National Credit Act of civil procedural aspects relating to debt enforcement“, University of Pretoria LLM Thesis (2009), 45; C P Smith *Civil Practice in the Magistrates' Court: The Practitioner's Manual*, (2014), 156.

¹⁵⁶ 2005 (2) SA 140 (CC).

¹⁵⁷ Ibid.

¹⁵⁸ Rule 43 of Act 32 of 1944.

¹⁵⁹ C P Smith *Civil Practice in Magistrates' Courts: The Practitioner's Manual*, (2014), 156.

¹⁶⁰ Ibid, 157.

¹⁶¹ Section 66 2(a) of Act 32 of 1944.

¹⁶² Ibid.

It may be held that the *Jaftha* case has brought about significant change in so far as judicial oversight over attachment of a debtor's immovable property is concerned. This is commendable in light of our constitutional dispensation that fortifies an individual's right to housing in terms of section 26. However, such a constraint on the part of a creditor who may not easily attach a debtor's immovable property to satisfy their debt may operate as a contributing factor to making an EAO more plausible, effective and attractive to a creditor.

Consequently, due to the fact that the average debtor is generally a low income earner and vulnerable member of society, he may not have movable or immovable property of a substantial value or may not own any property at all, thereby reducing the execution process to redundancy.¹⁶³ Furthermore, in many instances debtors may purport to hold no assets while concealing assets in an attempt to frustrate the execution process.¹⁶⁴ This seemingly makes this execution process costly, time consuming and, at times, almost redundant or nugatory.

The execution process therefore proves to be a complex process with little incentive or reward unless the debtor has significant property, which in most cases involving low income earners is not the case.¹⁶⁵ Thus, a creditor may feel compelled to employ other collection mechanisms such as EAOs or garnishee orders. The debtor, on the other hand, may wish to obtain some form of relief, whilst simultaneously ensuring that his creditors are paid, by instituting an application to be placed under administration or seeking some form of debt-relief under the recently promulgated National Credit Act (which will be discussed below at page 40, heading 5.).

3.3. Administration orders

3.3.1. A general overview

An administration order is an order of the court that allows for a debtor's outstanding amounts to be restructured such that he is required to pay a specified amount of money to an administrator, who will then distribute the amount to the debtor's creditors on a pro rata basis.¹⁶⁶

¹⁶³ C Gardner, „The complexity of emolument attachment orders“ *HR Highway* October 2007, 22.

¹⁶⁴ Bentley B „Separating the baby from the bathwater“, (2013) 41, *De Rebus*, 2.

¹⁶⁵ *Ibid.*

¹⁶⁶ HJ Erasmus & DE Van Loggerenberg *Jones and Buckle The Civil Practice of the Magistrates“ Courts in South Africa* 9 ed (1996) at 305 („Jones & Buckle“).

Administration orders are often regarded as a modified form of insolvency that can be applied to three categories of persons, namely;¹⁶⁷

- a debtor against whom judgment has been taken but who cannot pay the amount immediately;
- a debtor against whom no judgment has been taken, but who is unable to meet his financial obligations and does not have sufficient assets capable of attachment to satisfy such liabilities;
- a debtor against whom judgment has been taken for money, who has been called before the court for an inquiry into his financial position and applies for an order placing his estate under administration.

Such orders are regulated by section 74 of the Magistrates' Court Act which provides that

(1) where a debtor-

a) is unable forthwith to pay the amount of any judgment obtained against him in court, or to meet his financial obligations and has not sufficient assets capable of attachment to satisfy such judgment or obligations; and

b) states that the total amount of all his debts due does not exceed the amount determined by the Minister from time to time by notice in the Gazette¹⁶⁸,

Such court or the court of the district in which the debtor resides or carries on business or is employed may, upon application by the debtor or under section 65I, subject to such conditions as the court may deem fit with regard to security, preservation or disposal of assets, realization of movables subject to hypothec (except movables referred to in section 34 bis of the Land Bank Act 1944(Act No 13 of 1944), or otherwise, make an order in this Act called an administration order) providing for administration of his estate and for the payment of his debts in instalments or otherwise.¹⁶⁹

According to section 74 (2) of the Magistrates' Court Act, an administration order shall not be invalidated solely because the debtor's debts are found to exceed R50 000.¹⁷⁰ However, in such a case the court may, if it deems fit, rescind the order.¹⁷¹ This seems to suggest an element of flexibility in so much as the granting of administration orders is concerned.

¹⁶⁷ HJ Erasmus & DE Van Loggerenberg *Jones and Buckle The Civil Practice of the Magistrates' Courts in South Africa* 9 ed (1996) at 305 („Jones & Buckle“).

¹⁶⁸ R50 000- GN R1411 in GG 19435 of 30 October 1998.

¹⁶⁹ Act 32 of 1944.

¹⁷⁰ Act 32 of 1944.

¹⁷¹ Act 32 of 1944.

Typically, however, it appears that this procedure is most often used in instances where the debt is below R50 000.00.

The purpose of the administration order is to assist the debtor over a period of financial embarrassment without the need for sequestration.¹⁷² The effect of the order is that the debtor's payments will be restructured by an administrator, thus granting the debtor temporary relief from the predations of creditors.¹⁷³ In this sense an administration order is best described as a „debt relief measure“.¹⁷⁴ The provisions of section 74 are therefore designed to obtain some form of *concurso creditorum* easily, quickly and inexpensively.¹⁷⁵ While an administration order is intended to be a form of protection for the debtor and beneficial to creditors as they obtain a certain amount from the debtor towards the settlement of the debt, it has been subject to many abuses (which will be discussed immediately below) which impede it from achieving its purpose.¹⁷⁶

3.3.2. Possible abuses in administration orders

According to section 74 E, the court shall appoint an administrator.¹⁷⁷ However, the Act is silent as to the requirements that a person must fulfil in order to become an administrator. This has led to the courts appointing as administrators persons without appropriate qualifications.¹⁷⁸ For example, people with unsettled debts, people who are also currently under administration and people who have been struck off the roll attorneys for misconduct.¹⁷⁹ The appointment of persons who may be incapable of assisting the debtor in restructuring their debts may thus defeat the very purpose of administration which is debt relief for the consumer.

Section 74 E (3) provides that an administrator who is not an officer of the court (that is to say, not an attorney), is required to give security to the satisfaction of the court.¹⁸⁰ It has been found that certain persons or entities try to avoid this burden by entering into arrangements

¹⁷² HJ Erasmus & DE Van Loggerenberg *Jones and Buckle The Civil Practice of the Magistrates* "Courts in South Africa 9 ed (1996) at 305 („Jones & Buckle“).

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ HJ Erasmus & DE Van Loggerenberg *Jones and Buckle The Civil Practice of the Magistrates* "Courts in South Africa 9 ed (1996) at 305 („Jones & Buckle“).

¹⁷⁶ A Boraine, „Some thoughts on the reform of administration orders and related issues“, (2003), *De Jure*, 231; HJ Erasmus & DE Van Loggerenberg *Jones and Buckle The Civil Practice of the Magistrates* "Courts in South Africa 9 ed (1996) at 305 („Jones & Buckle“).

¹⁷⁷ Act 32 of 1944.

¹⁷⁸ A Boraine, „Some thoughts on the reform of administration orders and related issues“ (2003) (2) *De Jure*, 231.

¹⁷⁹ Ibid.

¹⁸⁰ Act 32 of 1944.

with attorneys in terms of which the attorney will pose as the appointed administrator and front for the administration company.¹⁸¹

It has also been reported that a large number of debtors are misled or given inaccurate or incomplete information with regards to the process of administration.¹⁸² For example, they are rarely advised of the cost implications of the court application, the administrator's fees as well as the effect that the administration order will have on them.¹⁸³ Thus consumers are disempowered and cannot be said to have made an informed decision when entering into the administration process.

In many instances debtors who are under administration incur further debt without disclosing the fact that they have been placed under administration to the new creditor.¹⁸⁴ It has also been noted that administrators often collude indirectly in this process so as to generate more business for themselves.¹⁸⁵

3.3.3. Some practical difficulties experienced with the current administration order procedure

3.3.3.1. General difficulties

The general belief by practitioners is that the current R50 000 limitation (only debtors with debts less than R50 000 may apply for administration) should be adjusted.¹⁸⁶ Most commentators propose an increase to R100 000, while one commentator proposed R150 000 and another no limitation at all.¹⁸⁷

Reasons in support of this increase include the fact that this amount no longer reflects inflation rates and it does not take into account the large number of individuals that are heavily indebted in excess of this amount. Furthermore, the cap excludes debtors whose debts exceed R50 000 but cannot prove advantage to their creditors in order to be placed in sequestration in terms of the Insolvency Act.¹⁸⁸

¹⁸¹ A Boraine, „Some thoughts on the reform of administration orders and related issues“ (2003) (2) *De Jure*, 231.

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ A Boraine, „Some thoughts on the reform of administration orders and related issues“ (2003) (2) *De Jure*, 231.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ A Boraine, „Some thoughts on the reform of administration orders and related issues“ (2003) (2) *De Jure*, 231.

¹⁸⁸ M Roestoff et al, „Consumer Debt Relief in South Africa; Lessons from America and England; and Suggestions for the Way Forward“ 2012 24, *SA Merc LJ*, 66.

Another difficulty with administration orders is that they exclude debtors whose debts are a party to credit agreements as contemplated in the NCA and who cannot qualify for debt review.¹⁸⁹ The end result of this is that there is a category of debtors who do not qualify for administration, debt review and sequestration but who are over-indebted and unable to pay their debts as they fall due.¹⁹⁰ Not only does this operate unfavourably to a debtor who is in financial distress but it also operates to the detriment of creditors who have limited recourse in claiming their unpaid debts from debtors.¹⁹¹

As far as the position of administrators is concerned, the following issues were raised:¹⁹²

- Some believe that only practising attorneys should be allowed to take appointments as administrators whilst others call for the preservation of the status quo but with more regulation.
- An important aspect that has not been given sufficient attention is the fact that the administration order has no time limit. In theory a debtor can thus remain under administration for the rest of his or her life. In principle, this is unacceptable and other systems propose a three to five year period for the repayment of the debt in general.

In the case of *Anglo American Platinum Ltd and Others v Jacomina Johanna Pienaar and Others*¹⁹³ the Applicant, being a company acting on behalf of its employees who were under the administration of the respondents, sought declaratory relief concerning:

- *The first to third respondents' unlawful and/or unprofessional conduct in recovering excessive fees from the third to ninth applicants, under s 74K of the MCA;*
- *The administrator's duty to account to the debtor for fees and costs that she incurs in the administration;*
- *The relationship between the provisions of the MCA and the provisions of the National Credit Act 34 of the 2005 ("The NCA);*
- *The maximum fees and costs that can be recovered by an administrator; and*

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ M Roestoff et al, „Consumer Debt Relief in South Africa; Lessons from America and England; and Suggestions for the Way Forward“ 2012 24, *SA Merc LJ*, 66.

¹⁹² A Boraine, „Some thoughts on the reform of administration orders and related issues“ (2003) (2) *De Jure*, 231.

¹⁹³ *Anglo American Platinum Ltd and Others v Jacomina Johanna Pienaar and Others* (pending case).

- *The circumstances in which, and the terms on which, the administrator can add new creditors to be repaid through the administration regime.*¹⁹⁴

In this case, the applicants alleged that the respondents had overcharged the applicants by deducting 44% of the payment amount, in contravention of section 74L which entitles an administrator to deduct no more than 12,5% of the payment received.¹⁹⁵

Although the provisions of the MCA clearly provide that new creditors cannot receive any dividend until the original creditors (that is, creditors at the time the administration order was granted) have been repaid in full, the respondents consistently continued to pay new creditors on equal footing with pre-existing creditors.¹⁹⁶ In this regard, the respondents were requested by the applicants to explain the legal basis on which they did so.¹⁹⁷ Although still pending, this case depicts how the administration process may be abused by administrators who charge debtors under administration in excess of what they are permitted to charge in terms of the Magistrates' Court Act.

Moreover, it seems that many administrators often persuade debtors to be placed under administration even where it will not be beneficial to the debtor, thereby acting solely in their own interests.¹⁹⁸ For example, many debtors who would benefit by negotiating with their creditors for a reduction in instalments are often persuaded to undergo administration and this extends the debtor's payments significantly.¹⁹⁹ This has been considered to amount to touting and is in contravention of the Attorneys Act.

Before the commencement of the National Credit Act calls were made for the abolishment of administration orders on the basis that the NCA would adversely affect such administration orders. The reasons advanced for the proposed abolishment are discussed below.

3.3.3.2. Over-indebtedness because of delictual claims

According to section 79 of the National Credit Act, where it appears from the information available that a consumer is unable or will not be able to satisfy his obligations under a credit agreement to which he is a party at the time, in a timeous manner, the consumer will be

¹⁹⁴ Anglo American Platinum Ltd and Others v Jacomina Johanna Pienaar and Others (pending case).

¹⁹⁵ Ibid.

¹⁹⁶ Anglo American Platinum Ltd and Others v Jacomina Johanna Pienaar and Others (pending case).

¹⁹⁷ Ibid.

¹⁹⁸ A Boraine, „Some thoughts on the reform of administration orders and related issues“ (2003) (2) *De Jure*, 231.

¹⁹⁹ Ibid.

regarded as being over- indebted.²⁰⁰ Delictual claims are not contemplated as credit agreements in terms of section 8.²⁰¹ The difficulty that this presents consumers with is that a consumer who becomes over-indebted as a result of a delictual claim against him will not be afforded the same protection as a consumer who is over indebted as a result of a credit agreement as defined in section 8.²⁰² Thus, for example, a person who has become excessively indebted as a result of a delictual claim against them (e.g. arising out of a motor vehicle collision) will not be able to include this debt in their application for administration. This clearly has the result of excluding an entire host of debtors and operating to their detriment.²⁰³

3.3.3.3. Indefinite period of administration

The provisions of the Magistrates' Court Act that deal with administration orders (section 74) do not stipulate a time frame for the administration process to run. At best, they provide that the process is terminated when the debtor fulfils all his obligations; that is to say, when all costs and creditors have been paid in full.²⁰⁴ This means that debtors may be trapped in the administration process indefinitely and this operates contrary to the fundamental purpose of administration orders which is debt relief. In this regard, it has been proposed that should administration orders remain in effect, a clause should be introduced in the Magistrates' Court Act which specifies the number of years²⁰⁵ following the granting of the administration order, in which the debtor is discharged from the process.²⁰⁶

In practice, the administration process often fails as many debtors are unable to make regular payments as per the administration order.²⁰⁷ Moreover, the administration process is of a limited scope as it only caters for debtors with debts that are less than R50 000 in value.²⁰⁸ Furthermore, due to the fact that there is no stipulated timeframe for the discharging of debts, the process becomes indefinite and amounts to nothing more than the rescheduling of the debtor's instalments. The administration process therefore seems to echo and mirror the debt review process in terms of the NCA (discussed below) which is also not particularly

²⁰⁰ Act 34 of 2005.

²⁰¹ Ibid.

²⁰² Media Statement by the South African Law Reform Commission concerning its review of administration orders (Project 127): Questionnaire on abolition of administration orders, 2008.

²⁰³ Ibid.

²⁰⁴ Act 32 of 1944.

²⁰⁵ A period of 8 years has been proposed.

²⁰⁶ Media Statement by the South African Law Reform Commission concerning its review of administration orders (Project 127): Questionnaire on abolition of administration orders, 2008; M Roestoff et al, „Consumer Debt Relief in South Africa; Lessons from America and England; and Suggestions for the Way Forward“ 2012 24, *SA Merc LJ*, 66-67.

²⁰⁷ A Boraine, „Some thoughts on the reform of administration orders and related issues“ (2003) (2) *De Jure*, 218.

²⁰⁸ Ibid.

successful.²⁰⁹ It is therefore evident that in order for this debt collection mechanism to be effective, various checks should be put in place.²¹⁰ For example, a regulatory body for administrators should be established, as was done in the case of debt collectors in the Debt Collectors Act.²¹¹

3.4. Section 72 Garnishee applications

A judgment creditor who has obtained judgment in their favour may elect to utilise the garnishee procedure.²¹²

Section 72 of the Magistrates' Court Act allows a creditor to attach a debt which accrues to the debtor, in satisfaction of the creditor's claim.²¹³ The matter is then effectively between the garnishee and the creditor as should the garnishee fail or refuse to pay in terms of the garnishee order the creditor may proceed against him or proceed in terms of the section 65A enquiry.²¹⁴

Garnishee orders are to be distinguished from EAOs in that garnishee orders allow a judgment creditor attach a debt due to the judgment debtor, whereas an EAO allows a judgment creditor to attach a portion of the debtor's salary in satisfaction of his claim.²¹⁵

An application for a garnishee order is an ex parte application and such an application must be supported by an affidavit or affirmation or a certificate by the applicant's attorney.²¹⁶ Once the court is satisfied that all the papers are in order it will make an order to the effect that the person owing the amount to the debtor pay the amount directly to the creditor, failing which that he appear before the court to show good cause as why he should not be required to pay the amount to the creditor.²¹⁷

Good cause for not being required to pay the debt may include the debtor disputing liability to the judgment creditor, raising a set off against the judgment creditor, alleging a valid

²⁰⁹ A Boraine et al, „A comparison between formal debt administration and debt review- the pros and cons of these measures and suggestions for law reform (Part 2)“, (2012) (45) (2) *De Jure*, 265.

²¹⁰ A Boraine, „Some thoughts on the reform of administration orders and related issues“ (2003) (2) *De Jure*, 248.

²¹¹ Section 2 of Act 114 of 1998.

²¹² Pete et al *Civil Procedure: A Practical Guide*, (2010), 349.

²¹³ Act 32 of 1944.

²¹⁴ Pete et al *Civil Procedure: A Practical Guide*, (2010), 349.

²¹⁵ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 10.

²¹⁶ Pete et al *Civil Procedure: A Practical Guide*, (2010), 349.

²¹⁷ *Ibid*, 350.

counter-claim against the judgment creditor or alleging that some other person has laid claim on the debt in question.²¹⁸

If the garnishee fails to show good cause as to why he should not be held liable for the debt or fails to appear in court on the set date, the court may order that the garnishee pay the debt, failing which, the judgment creditor may execute against the garnishee.²¹⁹

It is clear from all the above mentioned methods of debt collection that in order to satisfy his claim, the creditor must obtain judgment first and thereafter proceed with execution against the creditor. This can be a very lengthy, costly, complicated and expensive process which can work to both the creditor and debtor's disadvantage as they incur expenses in litigation so, often, an amicable solution is the best for all parties involved.

4. The impact of the National Credit Act on the general debt collection mechanisms in the Magistrates' Court Act: A brief overview

Chapter 6, part C of the NCA deals specifically with debt enforcement procedures of a credit agreement as contemplated in the Act.²²⁰ These cannot be read in isolation and must therefore be read with the general debt collection measures discussed above. This is significant in light of the fact that many EAOs that granted by the courts arise out of credit agreements which are regulated by the National Credit Act. It is therefore important to take cognisance of the impact that the NCA has on debt collection measures as regulated by the Magistrates' Court Act.

The National Credit Act, being a piece of legislation that serves to provide new approaches to debt enforcement on the one hand, whilst also striving to achieve debt relief on the other hand, has significantly influenced the debt collection system in South Africa.²²¹ It also seeks to protect consumers.²²²

Amongst the important provisions of the NCA that have impacted on the debt collection measures alluded to above is section 129(1) (a) which requires a credit provider to send a

²¹⁸ Ibid.

²¹⁹ Pete et al *Civil Procedure: A Practical Guide*, (2010), 350.

²²⁰ Act 34 of 2005.

²²¹ C V Heerden and H Coetzee, *Debt Counselling v Debt Enforcement: Some procedural questions and answers* BMW Financial Services (SA) (Pty) Ltd v Donkin 2009 6 SA 63 (KZD) (Obiter), 2010, 756; Nedbank Ltd and Others v National Credit Regulator and Another 2011 (3) SA 581 (SCA) at par 2.

²²² Sebola and Another v Standard Bank of South Africa Ltd and Another 2012 (5) SA 142 (CC) at par 39.

letter of demand to the debtor prior to approaching a court of law to enforce their rights under the credit agreement.²²³

In the matter of *Kubyana v Standard Bank of South Africa Ltd* the court held that the purpose of this section is to draw the debtor's attention to his default and notify him of the various options that he has in order to remedy this default.²²⁴ The court held further that the creditor is regarded as having dispatched such notice where, in the case of a postage, the creditor can prove that he has delivered the notice to the correct address and that (through a notice from the post office) the notice has arrived at the designated address.²²⁵

Further, in the matter of *African Bank Limited v Additional Magistrate Myambo N.O and others*, the court had to decide whether a debtor to a credit agreement in terms of the NCA can validly consent to judgment in terms of section 58 of the MCA and if so, what implications will the NCA have on the procedure set out in section 58.²²⁶ Holding that the NCA does not repeal section 58 but instead operates alongside it, the court held that a credit provider seeking to obtain judgment by consent against a debtor has to comply with section 129 of the NCA. This case depicts the importance of this section as creditors are obliged to comply with the section 129 notice prior to issuing summons to a debtor.

Following this landmark decision as well as the amendments to the Magistrates' Court Rules, there are more stringent requirements for a creditor (in respect of a debt arising out of the NCA) to comply with, such as the mandatory issuance of the section 129 notice.²²⁷ This seemingly contributes to making the debt collection mechanisms in terms of the Magistrates' Court Act less functional and effective as opposed to EAOs.

Another difficulty presented by section 129 is the issue of delivery.²²⁸ At what point can a creditor claim to have delivered the notice and fulfilled his obligations?²²⁹ Although many courts differed over the issue of delivery the Constitutional Court in the case of *Kubyana v Standard Bank of South Africa Ltd (CC)* settled the matter.²³⁰ In this case the court held that a creditor may be held to have complied with delivery where he has delivered the notice as per

²²³ Supra note 6 and 7.

²²⁴ [2014] ZACC 1.

²²⁵ Ibid.

²²⁶ D Vlcek, „Drowning debt collection in paper (2010) (10) (9) *Without Prejudice*, 40.

²²⁷ [2014] ZACC 1; Rule 12 (5) and (7) of the Magistrates' Court Act 32 of 1944; D Vlcek, „Drowning debt collection in paper (2010) (10) (9) *Without Prejudice*, 40.

²²⁸ M R Tsusi, „The new approach to s 129 of the National Credit Act" 2014 *De Rebus*, June.

²²⁹ Ibid.

²³⁰ Ibid.

the debtor's instructions to the address nominated by the debtor.²³¹ Moreover, he is required to deliver the notice by registered mail and once the post office has sent the notification to the debtor's address, the onus then shifts to the debtor to prove that the notice did not come to his attention and provide supporting reasons in this regard.²³²

For present purposes the primary thrust of the NCA is that creditors, where credit agreements are involved (which is more often than not) must comply with the provisions of the NCA and this will mean, invariably, that the creditor must send out a compulsory demand in terms of section 129 before issuing summons. Further, where a creditor seeks to take default judgment, in practice many jurisdictions of the Magistrate's court require the creditor to demonstrate compliance with the NCA.

5. Debt relief under the National Credit Act

Debt collection and debt relief mechanisms are inextricably linked in South Africa. Where debt relief is afforded to the debtor by either setting aside the credit agreement in question or suspending it, the debtor is believed to be in a better position (financially) to settle his debts. A brief discussion of one of the debt relief measures as provided for in the NCA is therefore essential to this study.²³³

5.1. Debt Review

Debt review is a procedure whereby a debt counsellor reviews a debtor's outstanding instalments in attempt to re-arrange the debtor's repayment plan in consultation with the debtor's creditors.²³⁴

An application for debt review may be made in terms of section 86 of the National Credit Act which requires a consumer to „apply to a debt counsellor in the prescribed manner and form to have the consumer declared over-indebted.²³⁵ An application for debt review may not be made in respect of, and does not apply to, a particular credit agreement if at the time of that application the credit provider under that credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement.“²³⁶

²³¹ M R Tsusi, „The new approach to s 129 of the National Credit Act“ 2014 *De Rebus*, June.

²³² Ibid.

²³³ A Boraine et al, „A comparison between formal debt administration and debt review – the pros and cons of these measures and suggestions for law reform (Part 1)“ (2012) (45) (2) *De Jure*, 93.

²³⁴ A Boraine, „A comparison between formal debt administration and debt review- the pros and cons of these measures and suggestions for law reform (Part 1)“ (2012) (45) (2) *De Jure*, 93.

²³⁵ Act 34 of 2005.

²³⁶ Act 34 of 2005.

This section does not allow for a debt counsellor to accept an application for debt review where the consumer is not over-indebted.²³⁷

Also quite pertinent to this discussion is section 86 (10) which provides that where a consumer is in default under a credit agreement, whilst the debtor is under debt review, the credit provider may give notice to terminate the review within 60 days from the date on which the consumer had applied for debt review.²³⁸ This has the effect of allowing the creditor to exclude their credit agreement from the debt review process.

The advantage, however, of these debt review proceedings is that unless a debt counsellor has rejected the consumer's application for debt review or if the consumer has defaulted under a credit agreement that is being reviewed in terms of section 86 of the National Credit Act a credit provider who has received notice of court proceedings for the re-arrangement of the debtor's obligations (as contemplated in section 83 or 85) may not exercise or enforce his rights or security under such a credit agreement through litigation or any other judicial means.²³⁹ This effectively means that actions relating to credit agreements in question are stayed during the debt review process.

At the National Debt Mediation Conference in 2012 Paul Slot, the President of the Debt Counsellors Association of South Africa (DCASA), revealed that at least 56 percent of consumers used more than 75 per cent of their monthly income to repay debt.²⁴⁰ This means that consumers are left with 25 per cent of their income to pay household expenses such as food, education and transport.²⁴¹ This is an astonishing figure considering the fact that debt counselling is meant to relieve the consumer from financial distress. Slot holds that the cause of this problem is that often during an application for credit consumers do not disclose their full budget costs to creditors who then in turn deduct immense instalments thus exacerbating the debtor's financial distress.²⁴²

Once a debtor under debt counselling repays their debt the debt counsellors issue to them a Clearance Certificate which means that the consumer now qualifies for new debt.²⁴³

²³⁷ Ibid.

²³⁸ Section 86 (10) of Act 34 of 2005.

²³⁹ Section 86 of Act 34 of 2005.

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² Debt Counsellors Association of South Africa- Community Forum, „Impact of the NCA on the Consumer and Debt Counsellor, 16 February 2012, available at: <http://www.dcasa.co.za/forum/index.php?topic=9.0>, accessed on 29 July 2015.

²⁴³ Ibid.

However, according to Slot, this is not the case as a consumer's status at the credit bureau remains the same until the credit provider updates their systems.²⁴⁴ As a result of such a delay consumers find it very difficult to apply for new credit.²⁴⁵

Another important issue that needs attention is that of the conduct of the debt counsellors. It is alleged that many debt counsellors act improperly especially to induce the debtor into entering into the debt counselling process. For example, some debt counsellors allegedly fail to give sufficient information pertaining to the debt review process.²⁴⁶ This is contrary to the debt counselling principles and guidelines set up by the National Credit Regulator, which require a debt counsellor to convey to a debtor, prior to initiating the debt review process, what debt review is, the process to be followed as well as the consequences of debt review amongst other things.²⁴⁷

Another difficulty that debt review presents is the issue of end balance differences. These occur when a consumer applies for debt review and pending the application process the creditor continues to add interest to the debtor's debt thus causing a difference in the amounts owing by the debtor as reflected on the Payment Distribution Agency's (PDAs) system and those reflected in the creditors' system.²⁴⁸ As a result of this difference, the consumer has to pay the difference to the creditor despite being notified by the PDA that they have fulfilled all their obligations under the debt review process.²⁴⁹

Although the PDAs have tried to assist in reducing the difference somewhat by making sure that they add interest to the balance of the debt counsellor right away,²⁵⁰ the creditor's computer will have added some interest and fees during that short time period.²⁵¹ Some debt counsellors have proposed that the figure in the original certificate of balance should be the

²⁴⁴ Debt Counsellors Association of South Africa- Community Forum, „Impact of the NCA on the Consumer and Debt Counsellor, 16 February 2012, available at: <http://www.dcasa.co.za/forum/index.php?topic=9.0>, accessed on 29 July 2015.

²⁴⁵ Ibid.

²⁴⁶ M Roesftoff et al, „The Debt Counselling Process- Closing the Loopholes in the National Credit Act 34 of 2005“ *PER* 2009, 4.

²⁴⁷ National Credit Regulator, „Debt Counselling- Principles & Guidelines“, available at: <http://www.ncr.org.za/pdfs/Guidelines/Principles%20&%20Guidelines/DEBT%20COUNSELLING%20%20%20PRINCIPLES%20GUIDELINES%20%20-%20BASA%20training%202008.pdf>, accessed on 30 July 2015.

²⁴⁸ Debtfree- South Africa's debt counselling magazine, „Why does the bank say I still owe money? End Balance Differences“, November 2014, 26, available at: <http://debtfreedigi.co.za/wp-content/uploads/2014/12/Debtfree-DIGI-November-2014-optimised-Version.pdf>, accessed on 30 July 2015.

²⁴⁹ Ibid.

²⁵⁰ Ibid, 27.

²⁵¹ Ibid.

final amount owing by the debtor whilst others have called for some kind of a middle ground between the amount reflected on the PDAs system and that of the creditors' system.²⁵²

Finally, one has to take cognisance of the fact that „the NCA contains no provisions in terms of which a credit provider may compel a consumer to comply with a section 138 consent order or with a court-induced restructuring order“.²⁵³ This indicates that perhaps debt review may not be particularly effective or beneficial to the creditor who is seeking to receive at least part of what is owed to them.

6. The *in duplum* rule

The *in duplum* rule is aimed at inter alia, protecting consumers from unscrupulous lenders who attempt to collect exorbitant amounts of interest from debtors.²⁵⁴ Whether this purpose is achieved or not, as discussed below, is a different question altogether.

One of the discrepancies that has been observed in debt collection is the abuse of the *in duplum* rule by some attorneys and debt collectors who charge defaulting debtors amounts of interest that are in excess of the principal amount.²⁵⁵ This rule originated at common law (Roman Law)²⁵⁶ and was thereafter codified (albeit in a modified form) in statute, in particular, the NCA as discussed below.²⁵⁷

6.1. At common law

This rule provides that once interest charged on a principal debt becomes equal to the amount of the principal debt then such interest cannot accrue any further and thus ceases to run.²⁵⁸ Once the debtor pays a portion of the debt this decreases the interest, thereby reviving the running of interest to the point at which the interest equals the principal debt once again.²⁵⁹

The court has also ruled that „the *in duplum* rule is not applicable in respect of arrear interest accruing after the creditor has commenced proceedings to enforce payment of the debt.“²⁶⁰

²⁵² Ibid.

²⁵³ A Boraine et al, „A comparison between formal debt administration and debt review- the pros and cons of these measures and suggestions for law reform (Part 2)“, (2012) (45) (2) *De Jure*, 265.

²⁵⁴ *Bhokile Elliot Shiba v Swaziland Development and Savings Bank & 4 Others* (1716/2006) [2012] SZHC 150 (17th July 2012).

²⁵⁵ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 37.

²⁵⁶ WG Schulze, „*The in duplum Rule: A Short List of Some Unresolved Issues*“ (2006) (18) *SA Merc LJ*, 419.

²⁵⁷ Section 103 (5) of Act 34 of 2008.

²⁵⁸ ML Vessio, „A short discussion on the effects of the *in duplum* rule upon commencement of litigation and after judgment: A view both “inside” and “outside” the National Credit Act“, *Obiter* (2010), 727.

²⁵⁹ Ibid.

²⁶⁰ *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)* 1998 (1) ALL SA 413 (A)

Many creditors have sought to avoid the effect of the *in duplum* rule by initiating litigation proceedings against their debtors for the amounts owed.²⁶¹ However this process has proven to be quite costly and does not seem to be beneficial to either the debtor or the creditor.²⁶²

It is for this reason that many creditors try to circumvent the *in duplum* rule by novation.²⁶³ Novation occurs where an obligation is discharged such that another obligation substitutes the former obligation.²⁶⁴ For example, the creditor and debtor could agree to extinguish the existing debt and substitute it with a new one before interest on the old debt has accumulated to equal the capital amount; thereby avoiding the *in duplum* rule coming into operation.²⁶⁵ It appears that this is not only beneficial to the creditor who is able to avoid the *in duplum* rule.

6.2. The statutory *in duplum* rule

The common law *in duplum* rule has been codified in a somewhat adapted form in section 103 (5) of the National Credit Act which provides that:

*...amounts contemplated in section 101 (1) (b) to (g) that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the defaults occurs.*²⁶⁶

It should be noted that the amounts contemplated in section 101 (1) (b) to (g) are initiation fees, service fees, interest and collection costs, to name a few.²⁶⁷ Thus the statutory rule is wider in that, unlike the common law which only covers interest, the statutory rule encompasses other costs as well.²⁶⁸

The existence of such a statutory *in duplum* rule does not negate the common law rule as the Supreme Court of Appeal in the case of *Nedbank Limited and Others v The National Credit Regulator and Another* held that the statutory rule is distinct and applies to all those credit agreements that are regulated by the National Credit Act.²⁶⁹ This means that the common law

²⁶¹ M Oppenheimer, „Getting clever in devastating times“ (2010) (10) (5) *Without Prejudice*, 32.

²⁶² *Ibid.*

²⁶³ *Ibid.*

²⁶⁴ M Oppenheimer, „Getting clever in devastating times“ (2010) (10) (5) *Without Prejudice*, 32.

²⁶⁵ *Ibid.*

²⁶⁶ Act 34 of 2005.

²⁶⁷ ML Vessio, „A short discussion on the effects of the *in duplum* rule upon commencement of litigation and after judgment: A view both “inside” and “outside” the National Credit Act“, *Obiter* (2010), 728.

²⁶⁸ *Ibid.*

²⁶⁹ 2011 (3) SA 581 (SCA).

rule will apply to all those debts to which the NCA does not apply.²⁷⁰ The *in duplum* rule has also been described as an indirect debt relief mechanism in that it precludes interest from accumulating to a certain point thus precluding a creditor from claiming an excessive amount of interest and relieving debtors who are financially distressed of an additional financial burden.²⁷¹

Though this rule is clearly mandatory and in operation, some debt collectors, attorneys and creditors abuse this rule, disregard it and simply fail to observe it thus operating as a contributing factor to the irregularities within the debt collection system in South Africa.²⁷²

Out of frustration, Peter Rafferty, an attorney at Raffertys Incorporated in Centurion has exclaimed that many practising attorneys disregard the mechanisms of section 103 and the *in duplum* rule so as to exploit the unknowing debtor. He further states that many of these attorneys are of the opinion that the fee caps imposed by section 103 do not apply to lawyers' fees, which is incorrect.²⁷³

It is rather concerning that some legal practitioners who are meant to be upholding the law seem to be attempting to circumvent and abuse it, thereby negatively affecting vulnerable debtors who may either lack the sufficient knowledge to raise such issues or, even where they do not, simply cannot afford legal representation in this regard. This is especially concerning as procedures such as debt review stem from the NCA which is a fairly new piece of legislation that is aimed at, inter alia, ensuring better regulation in so far as credit control is concerned.²⁷⁴ Whether or not it is achieving this purpose is another question altogether. However, what has become evident is that there is a need for an effective debt collection mechanism that balances the rights of debtors and creditors reasonably.

7. Reckless lending

In addition to the failure on the part of participants such as debt collectors, creditors and attorney's to adhere to the *in duplum* rule, many of these participants also fail to adhere to the reckless lending provisions when granting credit as provided for in the National Credit Act.

²⁷⁰ Ibid.

²⁷¹ M Kelly- Louw, „The Statutory *in duplum* Rule as an Indirect Debt Relief Mechanism“, (2011) (23) *SA Merc LJ* 354-355.

²⁷² P Rafferty, „Debt collection practitioners- the biggest threat to debt collection practices“, (2013) (66) *De Rebus*, 27.

²⁷³ P Rafferty, „Debt collection practitioners- the biggest threat to debt collection practices“, Jan/Feb (2013) 66 *De Rebus*, 27.

²⁷⁴ The preamble to the National Credit Act 34 of 2005.

Consequently, debtors who are financially distressed become trapped in the cycle of debt. This makes it even more difficult for creditors to collect on debts owed to them.

The preamble to the National Credit Act aims to promote the responsible granting of credit and to this extent, prohibits reckless lending.²⁷⁵

*Section 3(c) further elaborates on this objective by indicating that one of the purposes of the NCA is promoting responsibility in the credit market by encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and discouraging reckless credit granting by credit providers and contractual default by consumers.*²⁷⁶

According to section 81 of the NCA, prior to granting credit to a consumer, the creditor is required to take reasonable steps in assessing that the consumer understands the proposed credit agreement in so far as costs, risks and the consumer's obligations are concerned.²⁷⁷ Furthermore, the creditor has to assess the consumer's credit history, their „existing financial means, prospects and obligations“.²⁷⁸ A failure on the part of the credit provider to conduct such an assessment will render the credit agreement reckless as contemplated in section 80 of the Act.²⁷⁹ It will also be deemed to be reckless lending if the credit provider conducted an assessment which indicated that the consumer would not have the financial means to enter into to such an agreement or where it is clear that such a consumer did not understand the risks and costs associated with the agreement and the credit provider nevertheless continued to enter into such an agreement with the consumer.²⁸⁰

It is interesting to note that section 82²⁸¹ allows a creditor to determine its own evaluative mechanism, subject to the guidelines published by the National Credit Regular (NCR). Unfortunately, to date no such guidelines have been published by the NCR.²⁸² It is rather alarming that credit providers are given so much autonomy over their obligations in terms of the NCA given the risk that this poses to debtors who may be vulnerable to precarious creditors.

²⁷⁵ A Boraine et al, „The money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005“ (2011) (44) (2) *De Jure*, 392.

²⁷⁶ *Ibid.*

²⁷⁷ Act 34 of 2005.

²⁷⁸ Section 81(2) (a) (iii) of Act 34 of 2005.

²⁷⁹ Act 34 of 2005.

²⁸⁰ Section 80 of Act 34 of 2005.

²⁸¹ Act 34 of 2005.

²⁸² A Boraine et al, „The money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005“ (2011) (44) (2) *De Jure*, 392.

Where a credit agreement is found to be reckless the court may make an order declaring it as such and set it aside wholly or in part where it is just and reasonable to do so.²⁸³ Alternatively, the court may suspend the agreement²⁸⁴, determine whether the consumer is over-indebted and if this is the case the court may make an order that the debtor be placed under debt review in terms of section 87 of the Act²⁸⁵.

A defence that is available to a credit provider who is accused of reckless lending is that the consumer had failed truthfully to answer the questions put to them by the credit provider as part of the assessment contemplated in section 81 thus materially affecting the creditor's ability to make a proper assessment in this regard.²⁸⁶ Once again, this may be abused by creditors who may not conduct reasonable assessments, engage in reckless lending and then argue that the debtor did not disclose their important information fully and honestly. It appears, however, that the courts will be critical of this in their determination as to whether the credit provider has engaged in reckless lending or not.²⁸⁷

It is accepted that the National Credit Act has attempted to curb the debt problem in South Africa and perhaps it has to a certain extent. However, unscrupulous creditors and debt collectors have, as indicated above, found ways to circumvent the requirements of the Act, whilst some have simply disregarded the Act altogether.²⁸⁸

8. The Impact of the Debt Collectors Act on debt collection in South Africa

Significantly, the Debt Collectors Act establishes a council of debt collectors which serves the purpose of regulating debt collectors.²⁸⁹ Debt collectors in this regard refer to attorneys or other persons who are employed to collect on debt in consideration for payment.²⁹⁰ To this end the Act provides for the formulation of a code of conduct to regulate debt collectors.²⁹¹

²⁸³ Section 83 (2) (a) of Act 34 of 2005.

²⁸⁴ The effect of which is that the consumer is not required to make any payments in terms of that agreement, no interest may be charged and the rights of the creditor under that agreement are unenforceable- Section 84 (1)(a) and (b) of Act 34 of 2005.

²⁸⁵ The consequences of debt review will then follow as discussed above- (see from supra note 64).

²⁸⁶ Section 81 (4) (a) of Act 34 of 2005.

²⁸⁷ A Boraine et al, „The money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005“ (2011) (44) (2) *De Jure*, 392.

²⁸⁸ P Rafferty, „Debt collection practitioners- the biggest threat to debt collection practices“, Jan/Feb (2013) 66 *De Rebus*, 27.

²⁸⁹ The preamble to the Debt Collectors Act 114 of 1998.

²⁹⁰ Section 1 of Act 114 of 1998.

²⁹¹ Section 14 of Act 114 of 1998.

Such a regulatory body is evidently needed for other debt collection mechanisms as well, for example in so far as administrators are concerned.

Furthermore, the Act sets out specific offences that may be committed by debt collectors as well as the relevant sanctions in this regard.²⁹² More importantly, the Act stipulates what fees a debt collector may recover. Many debt collectors fail to adhere to this and this is disappointing.²⁹³

In addition to the provisions of the Debt Collectors Act, attorneys who practice in debt collection are further regulated by the Attorneys Act.²⁹⁴ Although the Attorneys Act does not specifically deal with fees that may be levied by attorneys on collection, section 69 (d) empowers each law society to determine applicable tariffs payable to practitioners in respect of professional services rendered by them where no other law prescribes them.²⁹⁵ These tariffs will be discussed in detail in chapter three.

What is interesting to note, and is rather frustrating even on the part of fellow attorneys, is the lack of adherence to these tariffs by some attorneys which results in high fees being charged against debtors with the result that the prospect of debtors getting out of the debt cycle that they are trapped in is diminished.²⁹⁶

9. Conclusion

It is evident that creditors have limited options in so far as debt collection is concerned as in essence they may either attempt to negotiate with the debtor and reach a settlement amicably (which seldom occurs) or they may obtain civil judgment against the debtor and execute against their estate. Such litigation proves to be costly and lengthy. Furthermore, the debt collection mechanisms such as administration orders, the 65A inquiry and debt review (under the NCA) were initially effective but due to either ambiguity and/or discrepancies in the legislation governing them, or abuse in the administration thereof; have proved to be rather ineffective and problematic for the reasons discussed above.

²⁹² Section 15 and 16 of Act 114 of 1998.

²⁹³ P Rafferty, „Debt collection practitioners- the biggest threat to debt collection practices“ (2013) (66) *De Rebus*, 27.

²⁹⁴ Act 53 of 1979.

²⁹⁵ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 48; Act 53 of 1979.

²⁹⁶ P Rafferty, „Debt collection practitioners- the biggest threat to debt collection practices“; (2013) (66) *De Rebus*, 27.

Moreover, though the legislature has attempted to afford debtors some protection and better regulate the debt collection system through the *in duplum* rule and the reckless lending provisions in the NCA, these attempts appear to have been almost fruitless. This has made EAOs (as a debt collection measure) effective and lucrative which justifies their increase in usage. The question that emerges, however, is whether such mechanism sufficiently serves its purpose as an effective, ethical and legally compliant debt collection mechanism. This issue will be examined in the following chapter.

Chapter Three: Emoluments Attachment Orders (EAOs)

1. Background

With a total value of new credit granted increasing from R110.18 billion to R117.64 billion for the quarter ending December 2014, it is evident that the need for credit is increasing.²⁹⁷

The basic premise behind the granting of credit is that it should enable consumers to purchase and finance items (such as cars, houses and tertiary education) that they would not otherwise have been able to using their current and tangible incomes.²⁹⁸ This is done by enabling them to pay off items purchased on credit in instalments over an extended period of time.²⁹⁹ Thus it may be said that „credit unlocks a diverse range of opportunities, some of which are economic, others educational and yet others simply improvement of standard of living“.³⁰⁰

In addition to the need for access to credit, is the need for effective debt collection as it has been held that the cost of slow and non-collection of debt is invariably passed on to other debtors.³⁰¹ That is to say, that slow payers and debtors that fail to pay off their debts adversely affect new borrowers as they effectively have to bear such costs associated with slow and non-payers.³⁰² For example, the real rate of interest may increase in this regard.³⁰³ Moreover, debt repayments affect the country’s economy as it is reported that if debts are repaid timeously our GDP could increase by R9.7 billion while employment opportunities

²⁹⁷ NCR Consumer Credit Market Report Fourth Quarter-December 2014

²⁹⁸ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Respondents’ Answering Affidavit, Part 1, 15.

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid.*

³⁰¹ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Respondents’ Answering Affidavit, Part 1, 73.

³⁰² *Ibid.*

³⁰³ *Ibid.*

could increase by 72 800.³⁰⁴ Given such an impact there is a clearly existing strong incentive for the proper regulation of debt collection in South Africa.

In chapter two an analysis was made with regards to the various modes of debt collection with the exception of the EAO. It became evident that the debt collection mechanisms discussed therein, such as execution, proved to be problematic in one respect or another. The EAO has thus become a very plausible debt collection mechanism, being identified as one of the most effective, expeditious and cost-effective debt collection mechanisms in South Africa.³⁰⁵

This chapter will critically analyse EAOs with reference to the legislative framework that governs them as well as reports prepared by the University of Pretoria regarding EAOs and irregularities observed in them. Moreover, this chapter will draw on the watershed case of *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* („the Stellenbosch case“) which has had a significant impact on EAOs.

2. The Emoluments Attachment Order: A brief overview

An EAO is an order of the court that is made in terms of section 65J of the Magistrates' Court Act.³⁰⁶ This order allows a judgment creditor to collect the amount owed to him from the judgment debtor in monthly or weekly instalments which are deducted by the debtor's employer from the debtor's salary.³⁰⁷ The garnishee-employer (debtor's employer) is obligated, as per the order, to make such deductions on behalf of the judgment creditor.³⁰⁸

An EAO obliges the debtor's employer to make monthly or weekly deductions from the debtor's salary (depending on how the debtor is paid) until the judgment debts and costs are

³⁰⁴ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Respondents' Answering Affidavit, Part 1, 73.

³⁰⁵ C Gardner, „The complexity of emolument attachment orders“ 2007 *HR Highway*, October, 21.

³⁰⁶ Act 32 of 1944.

³⁰⁷ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa*“ (2008), 30.

³⁰⁸ *Ibid.*

paid in full, while a garnishee order entitles the creditor to a debt owed to a debtor and is usually a once-off arrangement.³⁰⁹

Another interesting distinction between a garnishee order and an EAO is that a garnishee order is served on both the debtor and the garnishee while an EAO is only served on the debtor's employer.³¹⁰ This is alarming, considering the fact that the EAO has far reaching consequences such as attaching a portion of the debtor's salary on a continuous basis until the full debt is settled.³¹¹

As noted above, EAOs are regulated by section 65J and rule 46 of the Magistrates' Court Act, while garnishee orders are regulated by section 72 and rule 47 of the Magistrates' Court Act.³¹² Both these mechanisms are modes of debt collection which have become increasingly popular with creditors over the years.³¹³

A court may grant a garnishee order where the creditor makes an ex parte application to the court or during a section 65 A (1) enquiry.³¹⁴

An EAO usually follows where a creditor has taken default judgment against the debtor or where the debtor has consented in terms of section 57 and 58 of the Magistrates' Court Act.³¹⁵ Alternatively, EAOs may be obtained during the section 65A (1) enquiry or on application by the creditor.³¹⁶ Thus, ultimately, an EAO may only be granted where a creditor has obtained a judgment sounding in money against a debtor.³¹⁷

³⁰⁹ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 10.

³¹⁰ Ibid.

³¹¹ Section 65 J 1 (b) (ii) of Act 32 of 1944; University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa*“ (2008), 14.

³¹² University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa*“ (2008), 31.

³¹³ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa*“ (2008), 34.

³¹⁴ Sections 65A (1), 65E (1) and 72 (1) of Act 32 of 1944.

³¹⁵ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa*“ (2008), 34.

³¹⁶ C P Smith Civil Practice in Magistrates' Courts: The Practitioner's Manual, (2014), 166.

³¹⁷ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa*“ (2008), 34.

3. Legislative Framework

According to section 65 J (2) an EAO may only be issued under the following circumstances:³¹⁸

- (a) *Where the judgment debtor has consented to the order in writing or where the court has authorised it on application or otherwise; or*
- (b) *Where the judgment creditor (or his attorney) has:*
 - (i) *sent a registered letter to the judgment debtor, advising him of the amount claimed and warning him that should he fail to pay the amount, an EAO will be issued within 10 days from the date on which the letter was posted; and*
 - (j) *filed an affidavit with the clerk of the court which sets out the amount owed and the payments made thus far.*

Once these requirements have been complied with the order, which is drafted by the creditor or his attorney, is issued by the court and served on the garnishee-employee by the sheriff.³¹⁹ If it appears that the debtor does not have sufficient financial means to meet his obligations under the order, or that after satisfying the EAO, he will not have sufficient means for his maintenance and that of his dependants, he may apply to the court to rescind or amend the order appropriately.³²⁰ Moreover, an EAO may be suspended if good cause is shown and when this is done, the court may impose whatever conditions that it deems just and equitable.³²¹

4. A detailed analysis of section 65J of the Magistrates' Court Act

4.1. An Emoluments Attachment Order granted where the debtor has consented to judgment (s 65 J (2) read with s 57 and 58 of the MCA)

Consent to the EAO may be granted where the debtor makes an offer (in writing) to pay the amounts due (failing which default judgment may be taken against them by the creditor)³²² or where the debtor unconditionally consents to judgment in terms of section 58.³²³

³¹⁸ Act 32 of 1944; C P Smith Civil Practice in Magistrates' Courts: The Practitioner's Manual, (2014), 166; University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 12.

³¹⁹ Section 65J (4) and (5) of Act 32 of 1944; C P Smith Civil Practice in Magistrates' Courts: The Practitioner's Manual, (2014), 166.

³²⁰ Section 65J (6) of Act 32 of 1944; C P Smith Civil Practice in Magistrates' Courts: The Practitioner's Manual, (2014), 166.

³²¹ Section 65J (7) of Act 32 of 1944.

³²² Section 57 of Act 32 of 1944; University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 12.

³²³ Act 32 of 1944; University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 12.

In so far as consents to judgment are concerned it is interesting to note that the clerks of the court do not have any mechanism to verify the authenticity of the debtor's signature and whether or not the instalment amounts are reasonable.³²⁴ Consequently, there have been reported cases of allegedly forged signatures, incomplete consents and alleged misrepresentation and duress on the part of debt collectors.³²⁵

It is, however, commendable that amendments to the Magistrates' Court Rules now provide for more judicial oversight in respect of the granting of default judgment in terms of sections 57 and 58 of the Act.³²⁶ The rules now require the clerk of the court to refer applications for default judgment in terms of sections 57 and 58 to a Magistrate.³²⁷

However, as pointed out in chapter two, this amendment is of limited utility as it only allows the court (as opposed to the clerk) to grant default judgment in the case of a debt arising out of a credit agreement as defined and regulated by the National Credit Act.³²⁸

To further exacerbate this problem is the fact that debtors often do not appreciate the implication of interest and other costs that are charged on their debts, the result being that they may propose, or consent to, instalments that are not realistically affordable or consent in circumstances where the consent is not informed.³²⁹ Recommendations with regards to such consents to judgment will be discussed in chapter five below.

4.2. Where the court authorises the EAO in its chambers or at the S 65A enquiry

A debtor may be required to appear before the court for an inquiry into their financial position and thereafter an EAO may be authorised in accordance with the amount of money

³²⁴ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 40.

³²⁵ Ibid; University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa*“ (2008), 75-78.

³²⁶ G Buchner, „The debt collection scandal“ 2015 *De Rebus*, September, 98; *African Bank Ltd v Additional Magistrate Myambo NO 2010 (6) SA 298 (GNP)*; Business Enterprises: University of Pretoria „Considering debt collection mechanisms in South Africa: An evaluation of selected contentious issues“, available at: http://issuu.com/onelaw/docs/onelaw_-_1, accessed on 20 October 2015.

³²⁷ Rule 12(5) and (7) of Act 32 of 1944; G Buchner, „The debt collection scandal“ 2015 *De Rebus*, September, 98; *African Bank Ltd v Additional Magistrate Myambo NO 2010 (6) SA 298 (GNP)*.

³²⁸ Rule 12(5) and (7) of Act 32 of 1944; Business Enterprises: University of Pretoria „Considering debt collection mechanisms in South Africa: An evaluation of selected contentious issues“, available at: http://issuu.com/onelaw/docs/onelaw_-_1, accessed on 20 October 2015.

³²⁹ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 24.

that the debtor may reasonably be able to pay.³³⁰ An EAO may also be issued in terms of section 74D of the Magistrates' Court Act where an administration order provides for the payment of instalments.³³¹ It should also be noted that such EAOs may also be authorised in chambers.³³²

These would seemingly be effective ways to ensure that there is proper judicial oversight over the granting of EAOs which could make EAOs less susceptible to fraud and other undesirable irregularities. Common irregularities appear to include ordering EAOs that attach more than what a debtor can afford.³³³ Perhaps, for this reason, section 65A proceedings should be utilised more often and become the norm.

4.3. Where the creditor makes a direct request to the clerk of the court

Where a debtor has not consented to judgment and the court has not authorised the EAO during a section 65A (1) enquiry or in chambers the creditor (or his attorney) may make a direct request to the clerk of the court for the authorisation of an EAO in their favour.³³⁴ In this regard the creditor must first send a letter of demand to the debtor. This letter serves the purpose of alerting the debtor to the amount owed as well as the fact that an EAO will be issued against the debtor, after 10 days of postage of such a registered letter, should he fail to make the necessary payment.³³⁵ Thereafter, the creditor is required to file an affidavit with the clerk of the court (or a certificate from his/her attorney), confirming that they have sent the registered letter and stipulating, inter alia, the amount of the judgment debt, instalments due, costs, amounts paid and amount still outstanding.³³⁶

It is interesting to note that these documents along with the EAO itself are served on the debtor's employer and not on the debtor with the result that the debtor is often unaware of the EAO against his salary and, most importantly, the amount to be deducted until such a

³³⁰ Section 65A (1) of Act 32 of 1944; University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 13.

³³¹ Act 32 of 1944.

³³² Section 74D and 74 (1) of Act 32 of 1944; University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 13.

³³³ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Applicants' Founding Affidavit, Part 1, 35-36.

³³⁴ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 13.

³³⁵ Section 65J (2) of Act 32 of 1944; University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 13.

³³⁶ Ibid.

deduction is made and reflected on the debtor's pay slip.³³⁷ Evidence to support this is that 92% of employers, based on research conducted by the University of Pretoria, do not consult with or at the very least even inform their employees of the pending deduction against their salary.³³⁸

4.4. The effect of an Emoluments Attachment Order

An EAO has the effect of attaching the debtor's present or future portions of the debtor's salary which are sufficient to cover the judgment debt owed as well as the costs of such judgment.³³⁹ The judgment debtor's employer is obliged to make the necessary deductions in order to satisfy the debt.³⁴⁰ It should be emphasised that a failure on the part of the garnishee-employer to make the necessary deductions as per the court order may result in the issuing of a warrant of execution by the judgment creditor (or his attorney), attaching the garnishee's property in satisfaction of the arrears owing to the judgment creditor.³⁴¹ In addition to this the garnishee-employer is entitled to deduct a 5 % commission on all deductions made by him on behalf of the creditor.³⁴² This commission is deducted from the amount to be paid to the creditor by the garnishee-employer.³⁴³

Considering that an EAO has far reaching consequences (i.e. attaching the debtor's earnings until such time as the judgment debt and costs are settled),³⁴⁴ far more emphasis must therefore be placed on ensuring that such EAOs are granted with utmost precision and with sufficient judicial oversight.³⁴⁵ In this regard it is suggested that the legislature amend section

³³⁷ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 40.

³³⁸ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa*“ (2008), 120.

³³⁹ Section 65 J (1) (b) of Act 32 of 1944; University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 16.

³⁴⁰ Section 65 J (1) (b) of Act 32 of 1944; University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 17.

³⁴¹ Section 65 J (5) of Act 32 of 1944; University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 17.

³⁴² Section 65 J (10) of Act 32 of 1944; Section 65 J (1) (b) of Act 32 of 1944; University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 17.

³⁴³ Ibid.

³⁴⁴ Section 65 J (1) (b) of Act 32 of 1944; University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 16; *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Applicants' Founding Affidavit, Part 1, 2-3.

³⁴⁵ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, par 84-85.

65J such that all applications for an EAO are directed to a Magistrate, in chambers or otherwise, such as during the section 65A (1) enquiry.³⁴⁶

It is also understandable why many employers would be reluctant to challenge these EAOs, considering the fact that they are obliged to make the necessary deductions in implementing the EAO.³⁴⁷

4.5. Rescission or amendment of an Emoluments Attachment Order

Section 65J (6) of the Magistrates' Court Act allows for the rescission or amendment of an EAO on application by the debtor.³⁴⁸ To succeed in this the debtor must show that after the emolument has been deducted from his salary he will not have sufficient financial means left for himself and/or his dependents.³⁴⁹ Consequently the order should be stopped or the amount adjusted (lowered) accordingly.³⁵⁰ This should certainly operate as an effective mechanism to prevent the debtor from being exploited by having excessive amounts deducted from their salary thus leaving them with little or no income left over for their basic necessities. However, it is surprising to note that a large number of debtors still have more than three quarters of their income attached through an EAO.³⁵¹

It should be noted that section 65J (6) specifically makes reference to the „court“ having to rescind or amend the EAO thus an application to the court which issued the EAO is needed.³⁵² This is problematic for a debtor whose salary has been attached excessively and where the EAO was not issued in an area, in which the debtor resides, carries on business or is employed.³⁵³ This effectively limits the debtor's ability to have an EAO rescinded or amended on the basis of financial constraints.³⁵⁴

³⁴⁶ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others*, Case No: 16703/14, 30.

³⁴⁷ Section 65 J (1) (b) of Act 32 of 1944; University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 17.

³⁴⁸ Act 32 of 1944; University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 18.

³⁴⁹ *Ibid.*

³⁵⁰ *Ibid.*

³⁵¹ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Applicants' Founding Affidavit, Part 1, 35-36.

³⁵² Section 65J (6) of Act 32 of 1944; *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Applicants' Founding Affidavit, Part 1, 26.

³⁵³ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Applicants' Founding Affidavit, Part 1, 27.

³⁵⁴ *Ibid.*

4.6. Statement of account

Section 65J (4) (b) allows for the debtor to request a statement of account from the judgment creditor (or his attorney).³⁵⁵ This statement must be free of charge and it must contain all the particulars of the payments made by the debtor, as well as the balance owed by the debtor.³⁵⁶ Despite this provision the Law Clinic of the University of Pretoria has observed instances where attorneys or debt collectors have charged a fee for rendering statements to a debtor.³⁵⁷

It is suggested that the relevant law societies conduct an investigation into this and where necessary impose penalties on those who have breached their duties as it appears that this duty is often breached.³⁵⁸

5. Discrepancies and irregularities observed in EAOs

Despite EAOs being commonly used, there have been certain irregularities that have been observed in EAOs.³⁵⁹

The irregularities relate to the following:³⁶⁰

1. EAOs being issued from incorrect jurisdictions;
2. Consents to judgment in respect of EAOs being obtained improperly by creditors and debt collectors;
3. The overcharging of interest by creditors and their failure to observe the *in duplum* rule
4. Debt collectors charging debtors incorrect fees for services rendered in the debt collection process;
5. The duplication of debts and claims against debtors; and
6. A failure on the part of the legislature to place a cap on the maximum amount that may be deducted from the debtor's salary.

Each of these discrepancies will be discussed in detail below.

³⁵⁵ Act 32 of 1944; University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 18.

³⁵⁶ Ibid.

³⁵⁷ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 43.

³⁵⁸ Ibid.

³⁵⁹ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, 23.

³⁶⁰ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), extracted from the entire report holistically.

5.1. Jurisdiction

5.1.1. The court in which an Emoluments Attachment Order may be issued

According to section 65J (1) (a), an EAO is “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.”³⁶¹ Rule 46 (1) of the Magistrates’ Court Rules provides that where an EAO is issued from a court other than that which judgment was passed, the judgment creditor must attach a certified copy of such a judgment in the order.³⁶² Section 45 of the Magistrates’ Court Act also allows a party to legal proceedings to consent to the jurisdiction of a specific Magistrates’ Court in certain circumstances.³⁶³

In the unreported case of *Protea Furnishers SA (Edms) Bpk h/a Barnets Meubeleerders v Margaret Balakista in haar hoedanigheid as Klerk van die Siviele Hof, Pretoria en and ere* the court held that in so far as EAOs are concerned, parties to the proceedings may consent to the jurisdiction of a specific court.³⁶⁴

In practice debt collection practitioners often use this provision to issue an EAO in a court which would not otherwise have had jurisdiction.³⁶⁵ This is often done to circumvent or frustrate a debtor’s attempt to query the veracity of the EAO as it would be difficult and costly for debtor to travel to the particular court in which the order was issued to challenge the order.³⁶⁶ This then led to forum shopping³⁶⁷ amongst debt collectors.³⁶⁸ This seemingly became the norm rather than an exception as the Law Clinic of the University of Stellenbosch reports that out of the 43 cases surveyed, only one EAO had been issued from the court in which the debtor’s employer actually carried on business.³⁶⁹ A factor that further exacerbates

³⁶¹ Act 32 of 1944.

³⁶² University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 13.

³⁶³ Ibid.

³⁶⁴ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 14.

³⁶⁵ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 34.

³⁶⁶ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 35.

³⁶⁷ This occurs when debt collectors seek to issue EAOs from whichever court was most willing to grant it with the effect that the process would be expeditious and easy.

³⁶⁸ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 35.

³⁶⁹ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 36; *Score Price & Price v Nyawo NEP* (case

this problem is that many clerks of the court lack the knowledge and/or understanding of the rules of court relating to the issuing and serving of EAOs.³⁷⁰

For example, in a questionnaire conducted by the University of Pretoria Law Clinic it was revealed that out of the 8 clerks that were interviewed in the North West province, 75% of them did know in which court an EAO may be issued and served.³⁷¹ This is a shocking statistic considering the fact that the clerks of the court deal with multiple EAOs on a daily basis and if an error pertaining to jurisdiction is not raised by a debtor (or his employer) and, for whatever reason, is overlooked by the clerks, such an EAO may be susceptible to irregularities pertaining to jurisdiction.³⁷²

However, in the Stellenbosch case, the court made a declaratory order to the effect 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.*³⁷³

It is accepted that this is a commendable declaration which seeks to prevent unscrupulous judgment creditors or debt collectors from engaging in forum shopping and using section 45 to circumvent a debtor's ability to verify the veracity of the EAO.³⁷⁴ However, the respondents in this case have appealed to the Constitutional Court and because the High Court made a declaratory order regarding the invalidity of sections 65J (2) (b) (i) and 65J (2) (b) (ii) of the MCA, this declaration will be of no force until it is confirmed by the Constitutional Court.³⁷⁵ To this end we await the verdict of the Constitutional Court.³⁷⁶

number: 21824/07) in: University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa*“ (2008), 71.

³⁷⁰ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa*“ (2008), 106.

³⁷¹ Ibid.

³⁷² Ibid.

³⁷³ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99.

³⁷⁴ Ibid.

³⁷⁵ Pete et al *Civil Procedure: A Practical Guide*, (2010), 309.

³⁷⁶ M Thebe, „Debt collection system to be changed“ 2015 *De Rebus*, July, 1.

5.1.2. Service of EAOs

Section 65J (3) of the Magistrates' Court Act requires an EAO to be served by a sheriff on the debtor's employer.³⁷⁷ Consequently the debtor may only become aware of the deduction when it appears on his pay slip or when the amount is deducted from his bank account.³⁷⁸ This provision is prejudicial to the debtor as they are not afforded an adequate opportunity to verify, query or question the EAO before it is effected against their salary.³⁷⁹ Under certain circumstances the warrant of execution is served on the branch where the employee works but which is not the branch at which the payroll is administered.³⁸⁰ This causes delays in payment and the employee effectively has to bear the costs associated therewith.³⁸¹

It is evident that the purpose for requiring an EAO to be issued from the court in which the judgment debtor's employer resides, carries on business or is employed, is to enable a debtor to engage in determining the validity or amount of such an EAO or to rescind or amend the EAO as provided for in section 65J (6).³⁸² However, due to the irregularities observed, such as EAOs being issued from incorrect jurisdictions, a more plausible solution would be in addition to serving the EAO on the debtor's employer, to serve the EAO on the judgment debtor himself as well.

5.1.3. Consent to judgment

As noted above, as an expeditious way to obtain judgment debtors may consent to judgment in terms of sections 57 or 58 of the Magistrates' Court Act.³⁸³ Effectively this means that the debtor merely has to fill in the requisite consent to judgment form which the creditor will then use to obtain judgment against the debtor.³⁸⁴ It is only where the clerk of the court has reason to doubt the documentation supplied by the creditor that he will then refer the matter

³⁷⁷ Act 32 of 1944.

³⁷⁸ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 41.

³⁷⁹ Ibid.

³⁸⁰ Ibid.

³⁸¹ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 41.

³⁸² Section 65J of Act 32 of 1944; *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Applicants' Founding Affidavit, Part 1, 27.

³⁸³ Supra note 14

³⁸⁴ Ibid.

to a Magistrate.³⁸⁵ Evidently there is a lack of judicial oversight over the process and it is susceptible to much abuse and fraud.

In the Stellenbosch case the court made a declaratory order to the effect that the words „the judgment debtor has consented thereto in writing“ in section 65J (2) (a) of the Magistrates“ Court Act as well as section 65J (2) (b) (i) and section 65J (2) (b) (ii) of the Magistrates“ Court Act are inconsistent with the Constitution of the Republic of South Africa to the extent that they fail to provide for sufficient judicial oversight.³⁸⁶ Conversely, the respondents argued that sufficient judicial oversight exists by virtue of the amendments to the Magistrates“ Court Rules which require a clerk to refer the matter to a Magistrate.³⁸⁷ Moreover, the respondents argue that judicial oversight is also present where an EAO is ordered during the section 65A enquiry and by virtue of the fact that an EAO is granted in the court where the debtor“s employer resides or carries on business, thereby enabling the debtor or his employer to query the EAO.³⁸⁸ However, as noted above, this decision has been appealed by the respondents and is yet to be confirmed by the Constitutional Court.³⁸⁹

5.1.4. Interest and the *in duplum* rule

It is accepted that credit providers are permitted to charge interest on the capital amount owed when a debt is handed over (either through cession or otherwise). Moreover, information such as the capital amount and interest must be brought to the attention of the new collector to ensure an accurate calculation of the amount owed and to be collected.³⁹⁰

However, certain irregularities, such as the calculation of interest from an incorrect date, have been observed.³⁹¹ Furthermore, according to Regulation 42 of the National Credit Act, a maximum of 5% interest per annum may be charged on short term credit transactions.³⁹² Such transactions are those whereby the loan amount is less than R8 000 and the repayment period is less than 6 months.³⁹³ It is interesting to note that where debtors had defaulted on

³⁸⁵ Section 58 of Act 32 of 1944; rule 12 (7) of Act 32 of 1944; *African Bank Ltd v Additional Magistrate Myambo NO and Others* 2010 (6) SA 298 (GNP) (9 July 2010).

³⁸⁶ Case No: 16703/14.

³⁸⁷ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Respondents“ Answering Affidavit, Part 1, 93.

³⁸⁸ *Ibid.*, 94.

³⁸⁹ M Thebe, „Debt collection system to be changed“ 2015 *De Rebus*, July, 1.

³⁹⁰ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 51.

³⁹¹ *Ibid.*

³⁹² University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 54.

³⁹³ *Ibid.*

payments on such debts certain credit providers have been said to have charged interest at a consistent rate of 60% over the entire repayment period.³⁹⁴ This is questionable in light of the explicit threshold placed on the rate of interest that may be charged in terms of the regulations to the NCA as well as the *in duplum* rule as discussed in chapter two.

One should bear in mind that an EAO is aimed at operating as an effective debt collection mechanism, enabling creditors to collect on debts owed to them until full satisfaction has been made.³⁹⁵ However, where unscrupulous creditors and debt collectors charge excessive amounts of interest this is not only in contravention of the *in duplum* rule³⁹⁶ but it also defeats the purpose of an EAO as debtors may never be able to settle their debts fully.

5.1.5. Fees charged

South African legislation, such as the Attorneys Act³⁹⁷ as well as the Debt Collectors Act³⁹⁸, allows for debt collectors and attorneys to collect fees on debt collection.³⁹⁹ Although the Attorneys Act does not directly deal with fees to be levied by attorneys on collections, section 69 (d) empowers each law society to determine applicable tariffs payable to practitioners in respect of professional services rendered by them where no other law prescribes them.⁴⁰⁰

The relevant tariffs used for EAOs are set out in Part 1 of Table B of schedule 2 to the Magistrates' Court Rules.⁴⁰¹ The rules allow for VAT to be added to these fees.⁴⁰² It is reported that by-laws of various law societies allow for attorneys to charge collection commission of 10% of the amount collected and this amount is capped at R1 000 for each payment on installment.⁴⁰³ Such collection commission is said to cover all the work done in receipt of a payment from the debtor as well as accounting to the client for an amount received

³⁹⁴ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 54.

³⁹⁵ Section 65j (1) (b) (i) of Act 32 of 1944.

³⁹⁶ At common law and in terms of section 103(5) of Act 34 of 2005 as discussed extensively in chapter two.

³⁹⁷ Act 53 of 1979.

³⁹⁸ Act 114 of 1998.

³⁹⁹ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 48.

⁴⁰⁰ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 48; Act 53 of 1979.

⁴⁰¹ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 48.

⁴⁰² Ibid.

⁴⁰³ Ibid.

on their behalf.⁴⁰⁴ Debt collectors, on the other hand, may charge commission of 10% of each installment, up to a maximum amount of R407 per installment.⁴⁰⁵

Despite such explicit directives by the legislature, many attorneys have been reported to have been charging excessive fees.⁴⁰⁶ On investigation by the Law Clinic of the University of Pretoria it was discovered that in agreements between debtors and creditors that formed the basis of applications for EAOs, there was a clause to the effect that the debtor agrees to paying the amount of the debt owing, interest and fees on an attorney-and-client or even an attorney and–own-client scale (the most harsh form of fees that may be charged).⁴⁰⁷ These clauses appear despite the fact that the Magistrates’ Court Act does not have the statutory authority to order such costs.⁴⁰⁸ Furthermore, these fees may cause the amount owed to increase substantially thereby exploiting an unknowing debtor who does not appreciate the adverse impact that these clauses could have on their debts.⁴⁰⁹

In addition to this it has been discovered that many creditors enter into agreements with their attorneys or debt collectors in terms of which the collectors will receive 25% of the amount collected from the debtor.⁴¹⁰ Often collectors simply add this contingency fee to the capital amount and claim it from the debtor thereby unreasonably inflating the debtor’s debt.⁴¹¹

One should, however, take cognisance of the fact that the Debt Collectors Act provides for a council that investigates the conduct of debt collectors and imposes penalties on those who have engaged in improper conduct or conduct that is contrary to the Debt Collectors Act.⁴¹² These penalties range from payment of fines to compensating persons who have been prejudiced by the conduct of the debt collector.⁴¹³ Moreover, the debt collector’s registration may be withdrawn or suspended by the council.⁴¹⁴ Thus there appears to be formal

⁴⁰⁴ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*” (2013), 48.

⁴⁰⁵ Ibid.

⁴⁰⁶ Ibid.

⁴⁰⁷ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*” (2013), 48.

⁴⁰⁸ Ibid.

⁴⁰⁹ Ibid.

⁴¹⁰ *JD Group (Pty) Ltd v John Koks* (case number: 0033056/2005) in: University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa*” (2008), 68.

⁴¹¹ Ibid.

⁴¹² Sections 3, 15(2) and (3) of Act 114 of 1998.

⁴¹³ Section 15 (c) and (f) of Act 114 of 1998.

⁴¹⁴ Section 15 (3) (a) of 114 of 1998.

enforcement in place and the council must be encouraged to achieve substantive enforcement in this regard.

The legislature has also attempted to curb the irregularities by amending the Debt Collectors Act so that it is equally applicable to attorneys who practice as debt collectors.⁴¹⁵ These amendments appear in the Draft Debt Collectors Amendment Bill 2015 which has been tabled for comments which are expected to be submitted to the Department of Justice on the 30th of November 2015.⁴¹⁶ A decrease in the irregularities and discrepancies complained of above is expected if the bill is passed and the debt collectors' council performs vigorous investigations enquiring into these irregularities. Moreover, the various law societies should also take appropriate action against their members who engage in such unethical conduct.

5.1.6. Duplication of debts

Poor administration on the part of creditors may lead to the handing over of debts to multiple debt collectors who each collect on such debts from a single debtor.⁴¹⁷ The debtor is then held to be accountable for the same amount twice unless he disputes it.⁴¹⁸

By way of example, a debtor who purchased furniture on credit from a furniture store⁴¹⁹ was handed over to a debt collector for collection and thereafter to another debt collector.⁴²⁰ Consequently, both collectors sought judgment in respect of the same debt.⁴²¹ Fortunately, the debtor was able to dispute these amounts.⁴²² However, not many debtors have the knowledge or even the means to dispute such issues.⁴²³ This is especially important considering that majority of debtors who have EAOs against their salaries are low earning and perhaps not literate.⁴²⁴

⁴¹⁵ M Thebe, „Bill to deal with debt collection issues „2015 *De Rebus*, October, 1.

⁴¹⁶ Ibid.

⁴¹⁷ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa*“ (2008), 73.

⁴¹⁸ Ibid.

⁴¹⁹ *RNT NDWANDWE* (case number 181/03 (Nongoma); 104/04 (Piet Retief) in; University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa*“ (2008), 73.

⁴²⁰ Ibid.

⁴²¹ Ibid.

⁴²² *RNT NDWANDWE* (case number 181/03 (Nongoma); 104/04 (Piet Retief) in; University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa*“ (2008).

⁴²³ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa*“ (2008), 73.

⁴²⁴ C Gardner, „The complexity of emolument attachment orders“ 2007 *HR Highway*, October, 21.

5.1.7. No cap on the maximum amount that may be deducted

The legislature has placed no cap on the maximum amount that may be deducted from the debtor's salary.⁴²⁵ This means that the debtor may after all deductions have been made return home with little or no income at all to satisfy his and/or his dependents' needs.⁴²⁶ This would then be good cause for a rescission or amendment to the order.⁴²⁷ However, for this the debtor has to make an application to court and many debtors are not even aware that they have such recourse available to them.⁴²⁸

To further exacerbate this problem is the fact that no limit has been placed on the number of EAOs that may be attached to a debtor's salary with the result that the debtor may have multiple EAOs of substantial amounts attached to their salary. Once again, this may negatively impact on the debtor's ability to cope financially. For example, the Law Clinic of the University of Pretoria reported that it had observed instances whereby 12, 19 or even 30 deductions had been made from the salary of a single employee.⁴²⁹ This is an astonishing figure which indicates the need for better regulation of EAOs. Related to this is the fact that many credit providers grant credit recklessly and thereafter seek to use EAOs as security to collect on their debts, despite the number of EAOs already attached to a debtor's salary.⁴³⁰ This is believed to be one of the factors that contributed to the Marikana strike in that excessive EAOs had been issued against the salaries of mine workers. It was alleged that the sole criterion for the granting of credit to these debtors was whether the debtors had been employed or not.⁴³¹ The need for urgent amendments in this regard is imminent and recommendations for such amendments are discussed fully in chapter five below.

⁴²⁵ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 47.

⁴²⁶ Ibid.

⁴²⁷ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 47; Section 65 J (6) and (7) of Act 32 of 1944.

⁴²⁸ Ibid.

⁴²⁹ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 55.

⁴³⁰ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa*“ (2008), 56.

⁴³¹ G Buchner, „The credit explosion“ 2015 *De Rebus*, October, 98

6. EAOs: Not only a problem for employees but for employers as well

As alluded to above, section 65J (1) (b) obliges an employer to deduct the an amount from the debtor's salary in order to satisfy the judgment debt.⁴³² While many employers find this to be a tedious task, notwithstanding the 5 % commission that they may claim and deduct, it has more adverse implications for the employer than one could imagine.⁴³³ This is especially in light of the widespread irregularities and abuses observed in EAOs.⁴³⁴

Apart from humanitarian principles such as benevolence and care for their staff members employers ought to be concerned with the EAOs against their employees' salaries as over-indebtedness can cause problems in the workplace.⁴³⁵ Moreover, an employee who has direct access or autonomy over the funds of the company may be tempted to utilise these for an improper purpose thereby causing the company to lose unwarranted funds.⁴³⁶ Collectively, over indebted employees may decide to demand wage increases which if not granted, may lead to instability in so far as labour relations are concerned.⁴³⁷

It is believed that such over indebtedness and labour unrest precipitated the Marikana strike in which many employees were injured and some even killed.⁴³⁸ It was the above mentioned abuses in respect of EAOs, amongst other abuses, that led to the landmark decision in the Stellenbosch case which is expected to have significant consequences on EAOs as a debt collection mechanism. A detailed discussion of the case is therefore necessary.

7. The landmark case of The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others

In this case the first applicant, the University of Stellenbosch Legal Aid Clinic, brought an application to the Western Cape High Court in its own interest, in that of its clients (the

⁴³² Act 32 of 1944.

⁴³³ Botes and Aukema „Blood from a stone“ (2014) (14) (8) *without prejudice*, 36.

⁴³⁴ Ibid.

⁴³⁵ Ibid.

⁴³⁶ Ibid, 37.

⁴³⁷ Ibid.

⁴³⁸ P Bond, „Debt, uneven development and capitalist crisis in South Africa: from Marikana microfinance mashonisas to Moody's macroeconomic monitoring“, Background paper 2/3 for the Rosa Luxemburg Stiftung Workshop, available at: <http://ccs.ukzn.ac.za/files/Bond%20Berlin%20paper%20on%20debt%20and%20uneven%20development%20in%20contemporary%20South%20Africa.pdf>, accessed on 28 October 2015.

second to sixteenth applicants) as well as the public interest.⁴³⁹ The purpose of this application was to declare the words „the judgment debtor consented thereto in writing or“ in section 65J (2) (a) as well as section 65J (2) (b) (i) and (ii) of the Magistrates“ Court Act inconsistent with the Constitution of the Republic of South Africa to the extent that it fails to provide for judicial oversight over the issuing of EAOs against judgment debtors in all cases.⁴⁴⁰

Moreover, the applicants sought declaratory relief regarding the legality of the EAOs that had been issued against the individual applicants, the proper interpretation of section 45 of the Magistrates“ Court Act, and a mandatory interdict relating to the credit agreements which formed the basis of the EAOs obtained against the applicants.⁴⁴¹

7.1. Applicants‘ General Contentions

The applicants accepted that section 65J of the Magistrates“ Court Act had established certain safeguards for the implementation of EAOs against debtors.⁴⁴² Amongst those mentioned were the debtor’s right to dispute the validity and veracity of the EAO as well as the court’s power to rescind or amend an EAO on good cause shown or where it is shown that the debtor will not have sufficient financial means to satisfy the EAO and cater for his needs and those of his dependants.⁴⁴³ However, the applicants accurately pointed out that these safeguards may be reduced to a nugatory effect where a debtor whose salary has been attached under an EAO is unable to approach the court which issued the order.⁴⁴⁴

The EAOs in question related to those that had been granted in favour of the fourth to sixteenth respondents (private companies, all of whom were represented by the seventh respondent Flemix and Associates) against the second to sixth applicants.⁴⁴⁵ The applicants“ affidavits revealed that although the EAOs were issued in the Stellenbosch Magistrates“

⁴³⁹Section 38 (1) (a) and (d) of the Constitution of the Republic of South Africa Act 108 of 1996; Bundle Part 1, 7.

⁴⁴⁰ Ibid, 6.

⁴⁴¹ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Applicants“ Founding Affidavit; Part 1, 6.

⁴⁴² *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Applicants“ Founding Affidavit; Part 127.

⁴⁴³ Section 65J (6) and (7) of Act 32 of 1944; *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99 Applicants“ Founding Affidavit; Part 1, 27.

⁴⁴⁴ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Applicants“ Founding Affidavit; Part 1, 27.

⁴⁴⁵ Ibid, Part 1, 16.

Court, the court at which most of the applicants were employed or resident, this was not the court which the creditors used to issue the EAOs against them.⁴⁴⁶

Moreover, there were multiple EAOs issued against many debtors' salaries and the amounts so attached were exorbitant.⁴⁴⁷ In addition to this it was discovered that the amounts deducted were unreasonable, with an amount of R1 100 being attached from the salary of a debtor who earns R1 200 and amount of R736 being attached from a debtor who earns no salary at all.⁴⁴⁸ This is alarming as it would imply that the respondents failed to have due regard to the provisions of section 65J which clearly indicate that the debt is deducted from the debtor's salary.⁴⁴⁹ Moreover, this would imply that the respondents had engaged in reckless lending which is contrary to the provisions of the NCA.⁴⁵⁰

The manner in which the consent to judgment, installments and to a specific court was also challenged by the applicants as it was submitted and evidence was led to the effect that that the debt collector in question would arrive at the home or workplace of the debtor without identifying themselves and persuade the debtor to sign the documentation in order to avoid embarrassment without the debtor fully understanding the contents thereof.⁴⁵¹ Moreover, no copies of the documents were provided to the debtor.⁴⁵²

Amongst the documents that the debtor was allegedly given to sign were the following:

1. A notice of default which identifies the creditor and sets out the amount allegedly owed by the debtor, without fully setting out how this amount was calculated.⁴⁵³ The purpose of this notice is to purportedly comply with section 129 of the NCA.⁴⁵⁴ However, the debtor has no knowledge of the contractual relationship between himself and the creditor.⁴⁵⁵

⁴⁴⁶ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others*, Case No: 16703/14, Applicants' Founding Affidavit; Part 1, 35-37.

⁴⁴⁷ *Ibid.*

⁴⁴⁸ *Ibid.*

⁴⁴⁹ Section 65J (1) (a) and (b) (i) of Act 32 of 1944.

⁴⁵⁰ Section 79- 88 of Act 34 of 2005; *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others*, Case No: 16703/14, par 4.

⁴⁵¹ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Applicants' Founding Affidavit; Part 1, 37.

⁴⁵² *Ibid.*, 38.

⁴⁵³ *Ibid.*, 39.

⁴⁵⁴ *Ibid.*

⁴⁵⁵ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Applicants' Founding Affidavit; Part 1, 39.

2. A letter of demand which states amongst other things that it is important for the debtor to understand that after the deductions have been made from his salary, he must have sufficient funds remaining for the maintenance of himself and his dependents.⁴⁵⁶
3. A combined consent to judgment, offer to pay debt in installments and EAOs in which the debtor allegedly consents to the specific amount owed, costs and fees associated thereof.⁴⁵⁷ This consent to judgment is purportedly in compliance with section 58 and 65 J of the Magistrates' Court Act.⁴⁵⁸
4. A written consent to judgment to a specific Magistrates' Court.⁴⁵⁹ This form ensures that the individual consents to judgment in a specific Magistrates' Court which, in terms of section 28 of the Magistrates' Court Act, would not otherwise have jurisdiction in the matter.⁴⁶⁰ This was done despite debtors' allegations to the effect that they were not informed that they were consenting to the jurisdiction of a Magistrates' Court that was far from where they lived or worked and one which did not actually have jurisdiction in the matter.⁴⁶¹

Ultimately, the applicants' main contentions were that the NCA read with the MCA did not allow for a debtor to a credit agreement under the NCA to consent to the jurisdiction of a specific Magistrates' Court that would not otherwise have jurisdiction in terms of section 28 of the MCA,⁴⁶² that the respondents had failed to observe and adhere to the rules to the Magistrates' Court Act⁴⁶³ and that the current procedure for the granting of EAOs was unconstitutional in that it failed to provide for adequate judicial oversight.⁴⁶⁴ Each of these arguments will be discussed in detail below.

⁴⁵⁶ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Applicants' Founding Affidavit; Part 1, 39.

⁴⁵⁷ *Ibid*, 39- 40.

⁴⁵⁸ *Ibid*, 39.

⁴⁵⁹ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Applicants' Founding Affidavit; Part 1, 40.

⁴⁶⁰ *Ibid*, 40.

⁴⁶¹ *Ibid*.

⁴⁶² *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Applicants' Founding Affidavit; Part 1, 53.

⁴⁶³ *Ibid*, 41.

⁴⁶⁴ Applicants' Founding Affidavit; Part 1, 4.

7.1.1 Jurisdiction

Section 45 (1) of the Magistrates' Court Act allows a person to give consent to the jurisdiction of a Magistrates' Court which would not otherwise have jurisdiction in terms of section 28 of the Magistrates' Court Act.⁴⁶⁵ The applicants contended that a person's consent to jurisdiction of a particular court is subject to sections 90 and 91 of the NCA.⁴⁶⁶

Section 90 (1) of the NCA provides that a credit agreement must not contain an unlawful provision.⁴⁶⁷ Section 90 (2) (a) (k) (vi) (bb) of the NCA provides that a provision will be unlawful if it allows the consumer to consent to jurisdiction of a court which does not have jurisdiction in the area in which the consumer resides or is employed or where the goods in question are kept.⁴⁶⁸ Moreover, section 91 of the NCA prohibits a credit provider from requiring or inducing a consumer into entering into a supplementary agreement or signing any document containing a provision that would be unlawful if it were to be incorporated into a credit agreement.⁴⁶⁹ To this end, any conduct of a credit provider that does any of this, is unlawful and accordingly prohibited by the NCA.⁴⁷⁰

The applicants contended that in incorporating a consent to jurisdiction form (as discussed above); the respondents engaged in unlawful and prohibited conduct in terms of the NCA.⁴⁷¹ The court remarked that the respondents had attempted to bypass the courts in which the debtors' employers reside, carry on business or are employed and that the fact that they argue that this does not amount to „forum shopping“ reflects poorly on them in this regard.⁴⁷²

Moreover, in employing the principles of interpretation of law, the court came to the conclusion that in proceedings in which the claim arose out of the NCA or the Credit Agreements Act, section 45 of the MCA could not be used to allow a debtor to consent to a

⁴⁶⁵ Act 32 of 1944.

⁴⁶⁶ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Applicants' Founding Affidavit; Part 1, 4.

⁴⁶⁷ Act 34 of 2005.

⁴⁶⁸ Act 32 of 2005.

⁴⁶⁹ *Ibid.*

⁴⁷⁰ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Applicants' Founding Affidavit; Part 1, 4.

⁴⁷¹ *Ibid.*, 40.

⁴⁷² *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, par 57 and 58.

court that would not otherwise have had jurisdiction (i.e. one in which the debtor was not resident or employed).⁴⁷³

7.1.2. Judicial oversight

Rule 12 (5) of the Magistrates' Court rules provides that where judgment is to be pronounced on a claim which is founded on a cause of action that arises out of or is based on a credit agreement that is governed by the NCA or the Credit Agreements Act, the registrar or clerk of the court must refer the matter to the court.⁴⁷⁴

The applicants submitted accordingly that Rule 12 (5) applies to proceedings brought by a creditor in terms of section 58 of the MCA.⁴⁷⁵ Ultimately, the applicants argued that in proceedings where the cause of action arises out of a credit agreement as regulated by the NCA and where the creditor wishes to rely on section 58, the matter must be referred to the court and as such had not been done in this case.⁴⁷⁶

The court reasoned that an EAO is an order attaching a portion of the debtor's wages and is thus a mode of execution.⁴⁷⁷ Citing a number of Constitutional Court judgments which stated that judicial oversight was necessary when an individual's property was to be executed against, the court concluded that judicial oversight must be mandatory when an EAO is to be issued and such judicial oversight should not take place pursuant to the EAO having been granted as is the case where a debtor disputes the validity or the amount of the EAO.⁴⁷⁸ The court therefore held that sections 65J (2) (b) (i) and 65J (2) (b) (ii) of the MCA were unconstitutional for their failure to provide judicial oversight over the issuing of EAOs.⁴⁷⁹ It should be noted however, that this declaration is yet to be confirmed by the Constitutional Court.

⁴⁷³ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, 30.

⁴⁷⁴ Rules to the Magistrates' Court Act 32 of 1944.

⁴⁷⁵ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Applicants' Founding Affidavit; Part 1, 32.

⁴⁷⁶ *Ibid*, 33.

⁴⁷⁷ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, par 80.

⁴⁷⁸ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, par 76- 84.

⁴⁷⁹ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, par 85.

It is suggested that the legislature amend the above-mentioned sections to provide for a Magistrate to authorise an EAO in all circumstances and especially where the debtor has allegedly consented to judgment in writing. It is believed that if this is done, it would ensure that EAOs and particularly those granted upon the written consent of the debtor, may no longer be susceptible to fraud and duress as has been alleged.

7.1.3. Non-compliance with the Magistrates' Court Rules

7.1.3.1. Failure to file prescribed affidavit

Where a request is made for judgment to be made in terms of section 58 of the MCA, rule 4 (2) which requires a supporting affidavit containing evidence necessary to prove that all the requirements have been complied with, must be adhered to.⁴⁸⁰

In the court files from the Kimberly Magistrates' Court as supplied by the Hawks Anti-Corruption Unit, it was evident that in all the EAOs issued by the respondents in light of section 58 (save for one), no supporting affidavits had been filed.⁴⁸¹

7.1.3.2. Failure to file original credit agreement

Rule 12 (6) of the Magistrates' Court rules requires the plaintiff to file, together with their request for default judgment, the liquid document or the original of the written agreement where such action is based on such a liquid document or agreement.⁴⁸² Where such agreement or document is not filed the plaintiff is to file an affidavit setting out the reasons why the requisite documentation could not be supplied.⁴⁸³ Once again, as per court files supplied, the respondents had failed to file any original credit agreements or an affidavit as required by rule 12 (6).⁴⁸⁴

Although the court did not place emphasis on these arguments, it is suggested that due to the fact that many attorneys seemingly fail adhere to the rules of the court, the MCA or the rules should contain an additional sanction such as imposing a penalty against an attorney who fails to adhere to the rules.

⁴⁸⁰ Ibid, 42.

⁴⁸¹ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Applicants' Founding Affidavit; Part 1, 33.

⁴⁸² Ibid, 42.

⁴⁸³ Ibid.

⁴⁸⁴ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Applicants' Founding Affidavit; Part 1, 42.

7.2. Respondents' Contentions in the Stellenbosch Case

7.2.1. Judicial oversight

With regards to the applicants' constitutional challenge to EAOs for their lack of judicial oversight, the respondents contended that a number of checks and balances exist in the current system, such as the ability of a debtor to challenge an EAO before the court before and after deductions have been made.⁴⁸⁵ Moreover better regulation, such as placing a cap on the amount of the EAO, is needed and is the duty of the legislature.⁴⁸⁶ Thus the current EAO system, they contended, was not unconstitutional.⁴⁸⁷

It is respectfully submitted that this argument does not suffice as the respondents seem to disregard the fact that in most cases debtors are not even aware of the EAO against their salary until the requisite deduction is made and the EAO is reflected on the debtor's payslip. Moreover, this argument fails to recognise and acknowledge those cases where the EAO has been issued in a court which is not in the jurisdiction where the debtor resides or is employed, thus making it difficult, if not impossible on account of financial constraints, for a debtor to challenge the EAO.⁴⁸⁸ Most importantly, this argument is flawed in that it does not recognise instances where a debtor has no knowledge of the recourse that is available to them to challenge the EAO.⁴⁸⁹ The respondents submitted that the applicants had erred in holding that there is no judicial oversight in respect of EAOs in that a Magistrate (court) may, during the section 65A enquiry, authorise an EAO to be issued against the debtor's salary.⁴⁹⁰

Although this argument contains merit one cannot discard the fact that section 65A proceedings have been held to be ineffective in certain circumstances on account of debtors failing to disclose accurate information regarding their financial affairs and a lack of appropriate sanctions for the debtor's failure to satisfy the judgment or appear in court.⁴⁹¹

⁴⁸⁵ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Respondents' Answering Affidavit, Part 1, 41-42.

⁴⁸⁶ *Ibid.*

⁴⁸⁷ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Respondents' Answering Affidavit, Part 1, 6.

⁴⁸⁸ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 34.

⁴⁸⁹ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 47.

⁴⁹⁰ Respondents' Answering Affidavit, Part 1, 41.

⁴⁹¹ 1995 (4) SA 631.

7.2.2. The respondents' counter argument regarding jurisdiction

The respondents accepted that section 45 of the MCA read with section 90, 91 and 92 of the NCA does not allow a debtor to consent to a court which would, ordinarily, in terms of section 28 of the MCA, not have had jurisdiction in the matter.⁴⁹² Moreover, the respondents alleged that since July 2013, they had desisted in using section 45 of the MCA.⁴⁹³

It is interesting to note however, that the respondents argued that one could not interpret these provisions to mean that those of the NCA trump section 45 of the MCA as „the consent of a consumer to the jurisdiction of another court after the consumer has fallen into default cannot be interpreted as a supplementary agreement as contemplated in section 90 of the NCA.“⁴⁹⁴

Consequently, the respondents applied by way of a counter application for an order setting out explicitly the requirements that must be complied with before a Magistrate can grant default judgment in terms of sections 57 and 58 of the MCA.⁴⁹⁵ This is in light of the allegation that Magistrates are reluctant to grant judgment, relying on the discretion that they may have and in so doing they overlook the underlying principle that they ought to grant judgment where a valid cause of action is shown.⁴⁹⁶ This, as the respondents contended, infringes upon a plaintiff's right under section 34 of the Constitution to access the courts.⁴⁹⁷

The respondents also opposed the allegation that the EAOs issued by them on the applicants were unlawful and invalid.⁴⁹⁸ In support of this contention they argued that the main purpose of the application was for the amendment of the law regulating EAOs and that should the court accept such propositions, the relevant amendment(s) cannot operate retrospectively.⁴⁹⁹

⁴⁹² *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Respondents' Answering Affidavit, Part 1, 9.

⁴⁹³ *Ibid.*

⁴⁹⁴ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Respondents' Answering Affidavit, Part 1, 24.

⁴⁹⁵ *Ibid.*, 25.

⁴⁹⁶ *Ibid.*

⁴⁹⁷ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Respondents' Answering Affidavit, Part 1, 25.

⁴⁹⁸ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Respondents' Answering Affidavit, Part 1, 8.

⁴⁹⁹ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Respondents' Answering Affidavit, Part 1, 9-10.

7.2.3. Non-compliance with the Rules and the Constitutional Challenge

The respondents denied the applicants' averments to the effect that they had failed to comply with the court rules and that in obtaining the EAOs they had failed to comply with the requisite statutory requirements such as delivering a proper section 129 notice and properly obtaining consent to judgment from the applicants.⁵⁰⁰

What is interesting to note is that the respondents heavily rely on written warnings that were allegedly brought to the applicants' attention and place much emphasis on the applicants having to seek information on their own accord. For example, they argued in response to the applicants' contention that no indication had been made as to how the amount allegedly owed by the debtor was calculated, that the applicants could obtain this information in terms of section 65J (4).⁵⁰¹ This is concerning as many of these debtors are not particularly well educated members of society who know that there are various avenues available to them or even if they do, it is not certain whether they are in a position to exercise these avenues.⁵⁰² Moreover, it is alleged that at no point is it clearly (if at all) explained to the debtor what it is that they are signing for and the implications thereof.⁵⁰³ Admittedly many debtors may know of the contents of the documentation but out of desperation to obtain such credit, they may sign it despite this knowledge.⁵⁰⁴ In other words, there is no informed consent on the part of the debtor.⁵⁰⁵

The respondents also emphasized that the EAOs issued against the applicants were issued on the basis of their written consent and therefore there cannot be an infringement of their constitutional rights as alleged by the applicants in this regard.⁵⁰⁶ They submitted further that any constitutional infringement that stems from such consent is pursuant to the debtor giving

⁵⁰⁰ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Respondents' Answering Affidavit, Part 1, 29.

⁵⁰¹ Respondents' Answering Affidavit, Part 2, 104.

⁵⁰² University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa*“ (2008), 73; C Gardner, „The complexity of emolument attachment orders“ *HR Highway* October 2007, 21.

⁵⁰³ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Applicants' Founding Affidavit, Part 1, 37-38.

⁵⁰⁴ C Gardner, „The complexity of emolument attachment orders“ *HR Highway* October 2007, 21.

⁵⁰⁵ *Ibid.*

⁵⁰⁶ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Respondents' answering affidavit, Part 2, 115-116.

their consent and was not precipitated by the debtor's lawful and voluntary consent to judgment.⁵⁰⁷

It is respectfully submitted that this argument is erroneous as it is primarily based on the false premise that the debtor had given informed and voluntary consent which is not always the case, especially in the case of illiterate and desperate debtors who may not appreciate the legal implications of giving such consent and in cases where the consent is obtained by fraudulent means.⁵⁰⁸

8. Conclusion

Prior to and following the decision in the Stellenbosch case discussed above, there have been calls for the abolishment of EAOs altogether. However, it seems that this would be short-sighted as if this were to be done, it is estimated that there would be a loss in our GDP of between R708 million and R1.62 billion.⁵⁰⁹ Moreover, it is estimated that there could be between 5300 and 12 174 employment opportunities lost.⁵¹⁰ One should also not lose sight of the fact that debt collection mechanisms discussed in chapter two have proved to be ineffective in comparison to EAOs.

It is accepted that the legislature has attempted to rectify the situation by providing certain checks and balances, such as providing that in cases where a claim arises out of a credit agreement, a debtor is precluded from consenting to judgment of a specific Magistrates' court which would not otherwise have jurisdiction in the matter.⁵¹¹

The courts have also, through the decision in the Stellenbosch case⁵¹², indicated that there is insufficient judicial oversight in respect of the authorisation of EAOs. However, this is yet to be confirmed by the Constitutional Court.

⁵⁰⁷ Ibid, 119.

⁵⁰⁸ C Gardner, „The complexity of emolument attachment orders“ 2007 *HR Highway*, October, 21.

⁵⁰⁹ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Respondents' Answering Affidavit, Part 1, 74.

⁵¹⁰ Ibid.

⁵¹¹ Section 45 of Act 32 of 1944; Sections 90 and 91 of Act 34 of 2005; Rule 12(5) of the Rules to the Magistrates' Court Act.

⁵¹² *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99.

It is interesting to note that, following the judgment in the Stellenbosch case, the Department of Justice and Constitutional Development has released a statement stating that it is in the process of finalising the Magistrates' Court Amendment Bill which will soon be available on the department's website for further consultation before it is submitted to Parliament for consideration and enactment.⁵¹³

What is evident is that although EAOs are aimed at operating as an effective debt collection mechanism, due to the discrepancies observed in them, much like other debt collection mechanisms, they have become problematic and their utility has a limited effect. The question that therefore arises is whether South Africa may draw on the debt collection mechanisms of other jurisdictions to improve our debt collection mechanisms or extract certain methodologies to operate as alternatives to those in existence in South Africa.

Chapter Four: Debt Collection in foreign jurisdictions; a comparative analysis

1. Introduction

Effective debt collection is a challenge that many jurisdictions are faced with. As a mechanism for debt collection many jurisdictions have opted to allow for the attachment of a debtor's wages or salary in satisfaction of a judgment debt. Although South Africa also utilises this form of debt collection through its EAOs, it may be useful to consider the attachment of wages in other jurisdictions.⁵¹⁴

This chapter will briefly analyse the key features of wage attachment in other jurisdictions so as to determine whether, in light of these foreign models, South Africa can improve its current system of attachment (i.e. EAO).⁵¹⁵ This chapter will focus on both developing jurisdictions like South Africa and Botswana, as well as developed countries such as the United States of America (USA). In particular, this chapter will focus on the wage attachment system in USA, Germany, Botswana and in the United Kingdom.

⁵¹³ M Thebe, „Debt collection system to be changed“, 2015 *De Rebus*, July, 1.

⁵¹⁴ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 23.

⁵¹⁵ Ibid.

It is accepted however, that these modes may be of limited value as one has to consider them in light of South Africa's social, political, economic and cultural context.⁵¹⁶ Nevertheless, it is useful to draw from other jurisdictions in order to improve our domestic system.⁵¹⁷

2. USA

Although the USA is a developed country with high consumer rates in comparison to other countries it is nevertheless useful to distil points and factors from the USA that may be useful for the purposes of future legislative amendments in South Africa.⁵¹⁸

The Title III of the Consumer Credit Protection Act is the legislative framework that governs the garnishing of wages in the USA.⁵¹⁹ This Act limits the amount by which a person's earnings may be garnished by introducing two calculations.⁵²⁰

The first calculation provides that only 25 % of the employees' disposable earnings may be garnished.⁵²¹ Disposable income in this regard refers to the amount that remains after all deductions prescribed by law such as tax, have been effected.⁵²² The second calculation relates to the amount by which the disposable earnings are greater than the Federal minimum wage multiplied by thirty.⁵²³

Essentially what these calculations mean is that if your disposable earnings are less than \$217.50 per week no garnishment can take place whereas if your disposable earnings are more than \$217.50 (thirty times the 2011 federal minimum hourly wage of \$7.25) but less than \$290, only the amount over \$217.50 may be subject to garnishment.⁵²⁴ Consequently,

⁵¹⁶ Ibid.

⁵¹⁷ Ibid.

⁵¹⁸ K Zucchi, 'What Consumer Spending Reveals about the Economy', available at:

<http://www.investopedia.com/articles/personal-finance/040215/what-consumer-spending-reveals-about-economy.asp>, accessed on 15 December 2015.

⁵¹⁹ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 24.

⁵²⁰ Ibid.

⁵²¹ Title III of the Consumer Credit Protection Act, 15 U.S. Code § 1673 - Restriction on garnishment, (a) (1).

⁵²² Title III of the Consumer Credit Protection Act, § 302 (b).

⁵²³ Title III of the Consumer Credit Protection Act, 15 U.S. Code § 1673 - Restriction on garnishment, (a) (2).

⁵²⁴ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 25.

where you have a disposable income that exceeds \$290 25% of this amount may be garnished.⁵²⁵

The above mentioned calculations are however, subject to certain limitations.⁵²⁶ These limitations include that a larger portion of your earnings may be subject to garnishment for the purposes of bankruptcy, child support or tax payments.⁵²⁷ For example the Act allows for 50 % of your earnings to be garnished for the purposes of child support.⁵²⁸

It is interesting to note that although the Act does not explicitly prescribe the number of garnishee orders that a person's salary may be subjected to it remains that, irrespective of how many attachments there are on a person's earnings, the total amount of the garnishee orders may not exceed the limits as set out above.⁵²⁹ Thus, where there are insufficient earnings to satisfy all the garnishee orders the garnishees will rank in their order of preference commencing with tax garnishments and thereafter other commercial garnishments.⁵³⁰

Disputes over the priority of these garnishees are to be dealt with by the court that authorised the garnishees.⁵³¹ It would seem that at this stage an employee can request a garnishee order to be rescinded or amended.⁵³²

What is commendable about this system and the key factor for present purposes is that it sets a limit on the amount that may be deducted through the two calculations discussed above. However, these calculations may not be effective in South Africa as they are applied

⁵²⁵ Ibid.

⁵²⁶ Title III of the Consumer Credit Protection Act, 15 U.S. Code § 1673 - Restriction on garnishment, 15 (b) (1).

⁵²⁷ Title III of the Consumer Credit Protection Act, 15 U.S. Code § 1673 - Restriction on garnishment, 15 (b) (1) (A); University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 27.

⁵²⁸ Title III of the Consumer Credit Protection Act, 15 U.S. Code § 1673 - Restriction on garnishment, 15 (b) (2) (A); University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 27.

⁵²⁹ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 28-29; Garnishment Laws, US Wage Garnishment Limits, 1, available at: <http://www.garnishmentlaws.org/us-wage-garnishment-limits/>, accessed on 18 December 2015.

⁵³⁰ Ibid.

⁵³¹ Garnishment Laws, US Wage Garnishment Limits, 2, available at: <http://www.garnishmentlaws.org/us-wage-garnishment-limits/>, accessed on 18 December 2015.

⁵³² Ibid.

objectively and do not seem to emphasize that a debtor should have sufficient means to satisfy his and his dependents needs.

However, one must commend the preference that this system places on maintenance orders which are believed to be an essential deduction that should rank above other commercial deductions.⁵³³

The USA system of wage attachment is in direct contrast to South Africa's EAOs which impose no calculation or limit on the amount that may be deducted from a debtor's salary. Admittedly, the South African system is similar to that in USA in that South Africa also provides for maintenance orders to be preferred over any other EAOs which are to be effected by a debtor's employer.⁵³⁴ Although this preference is commendable it is insufficient and it is recommended that the legislature in South Africa consider inserting a clause in the Maintenance Act to the effect that a debtor's salary may be attached up to thirty per cent in respect of maintenance orders.

Moreover, the introduction of some form of EAO register, which should be accessible electronically in conjunction with a maximum deductible amount, following an assessment into a debtor's financial circumstances would be useful in South Africa.

3. Botswana

Botswana is an African country that seems to be on a similar economic platform as South Africa.⁵³⁵ That is to say that both countries may be categorised as developing countries.⁵³⁶ Moreover, both countries present similar political statuses (i.e. both have a flourishing multiparty constitutional democracy).⁵³⁷ It is for this reason that it is useful to consider the system of wage attachment in Botswana.

⁵³³ Title III of the Consumer Credit Protection Act, 15 U.S. Code § 1673 - Restriction on garnishment, 15 (b) (2) (A); University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 27.

⁵³⁴ Section 29(3) of the Maintenance Act 99 of 1998.

⁵³⁵ Botswana Country Overview 2013 / 14, 11, available at: <http://acap.com.au/wp-content/uploads/2013/09/BOTSWANA-COUNTRY-AND-ECONOMIC-OVERVIEW-2013.pdf>, accessed on 15 December 2015.

⁵³⁶ Ibid; University of Pretoria Research Report on ‘*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*’ (2013), 24.

⁵³⁷ Botswana Country Overview 2013 / 14, 11, available at: <http://acap.com.au/wp-content/uploads/2013/09/BOTSWANA-COUNTRY-AND-ECONOMIC-OVERVIEW-2013.pdf>, accessed on 15 December 2015.

According to the rules of the Magistrate's Court in Botswana, an application for a garnishee order is made ex parte to the court with a supporting affidavit indicating, inter alia, that judgment has been obtained against the judgment debtor in a Magistrate's Court and that such judgment remains unsatisfied.⁵³⁸ The rules of court also require that the judgment debtor be resident or employed or carry on business in the district and this should be reflected in the affidavit.⁵³⁹ More significantly, however, the affidavit supporting the application must demonstrate that the debtor will have sufficient means to maintain himself and his dependant after the order has been executed.⁵⁴⁰

Following receipt of and consideration of the contents of the above mentioned affidavit, along with any other representations that may have been made, the Magistrate may grant a rule nisi, ordering the garnishee to pay the judgment creditor the debt owed as well as costs, within the limits of the debtor's financial means as considered from the affidavit discussed above.⁵⁴¹

It is interesting to note that the order is served upon the both the debtor and the garnishee unlike in South Africa where the EAO is only served upon the debtor's employer.⁵⁴²

On the return day, the debtor may oppose the confirmation of the order on limited grounds.⁵⁴³ These include, inter alia, that there was an irregularity in the proceedings, that the judgment has been satisfied in another manner besides the garnishee or that the debt that the creditor seeks to recover is not due and payable.⁵⁴⁴ Significantly, the debtor may oppose the confirmation of the order on the basis that execution of the garnishee order will leave him with insufficient means to maintain himself and his dependents.⁵⁴⁵

⁵³⁸ Order 36, rule 1 (1) (a) and (b) of the Statutory Instrument No 13 of 2011 of the Rules of the Magistrates' Court.

⁵³⁹ Order 36, rule 1 (1) (c) of the Statutory Instrument No 13 of 2011 of the Rules of the Magistrates' Court.

⁵⁴⁰ Order 36, rule 1 (1) (e) of the Statutory Instrument No 13 of 2011 of the Rules of the Magistrates' Court.

⁵⁴¹ Order 36, rule 2 (1) of the Statutory Instrument No 13 of 2011 of the Rules of the Magistrates' Court.

⁵⁴² Order 36, rule 2 (3) of the Statutory Instrument No 13 of 2011 of the Rules of the Magistrates' Court; Section 65J (3) of Act 32 of 1944; Rule 9 of the Rules to the Magistrates' Court Act 32 of 1944; University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*”(2013), 14.

⁵⁴³ Order 36, rule 3 (1) of the Statutory Instrument No 13 of 2011 of the Rules of the Magistrates Court.

⁵⁴⁴ Order 36, rule 3 (a), (b) and (d) of the Statutory Instrument No 13 of 2011 of the Rules of the Magistrates Court.

⁵⁴⁵ Order 36, rule 3 (e) of the Statutory Instrument No 13 of 2011 of the Rules of the Magistrates Court.

One should take cognisance of the fact that the garnishee order is placed under severe scrutiny for its possible effect on the debtor's financial means to maintain his dependents and himself.⁵⁴⁶ This is done both prior to the granting of the rule nisi and once again on the return day should the debtor oppose the garnishee order on the basis of financial constraints.⁵⁴⁷

Conversely, the judgment debtor may appear on the return day and consent or cause for his written consent to be presented in court and the garnishee order may be confirmed accordingly.⁵⁴⁸

There seems to be no express limit on the amount that may be deducted from the debtor's earnings, save for the amount having to be only that which is necessary to satisfy the debt, without leaving the debtor without sufficient means for his maintenance and that of his dependents.⁵⁴⁹

The Botswana system of attachment is commendable in that it places much emphasis on the debtor having sufficient financial means for the maintenance of himself as well as his dependents. Moreover, the fact that a rule nisi is first issued prior to the final order being made and that a debtor is permitted to make representations against its confirmation ensures that the process is transparent and that the debtor is not prejudiced in this regard. The rule nisi is not available in South Africa's EAOs as there is only one application for an EAO, which may be contested by a debtor only where he seeks to rescind or amend the EAO which has already been effected against his salary.⁵⁵⁰ If South Africa were to employ the rule nisi approach it would ensure that fraud is minimised and that less abuse occurs in EAOs. It is accepted, however, that to introduce the rule nisi in South Africa would entail an increase in the costs associated with an EAO application. Nevertheless, it would be a useful tool for eliminating fraud and ensuring that debtors give informed consent to EAOs and it is for this reason that South Africa should consider introducing it along with a statutory cap on the deductible amount.

⁵⁴⁶ Order 36, rule 1 (1) (e) and 3 (e), of the Statutory Instrument No 13 of 2011 of the Rules of the Magistrates Court.

⁵⁴⁷ Ibid.

⁵⁴⁸ Order 36, rule 3 (4) of the Statutory Instrument No 13 of 2011 of the Rules of the Magistrates Court.

⁵⁴⁹ Order 36, rule 1 (1) (e) and 3 (e), of the Statutory Instrument No 13 of 2011 of the Rules of the Magistrates Court; University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 14.

⁵⁵⁰ Section 65 J (7) of Act 32 of 1944.

4. Germany

Compared to South Africa, Germany is a developed country, in fact it has been categorised as one of the major developed countries.⁵⁵¹ Despite this sharp contrast an analysis into Germany's system of wage attachment is necessary as South Africa may extract features from this system that it may wish to employ and which could prove to be successful in South Africa.

Section 850a of the Code of Civil Procedure allows for a debtor's earnings to be attached. However, it stipulates certain portions of the debtor's income that are exempted from attachment.⁵⁵² These include special allowances for persons who are blind, death benefits and student allowances to name a few.⁵⁵³

The code provides that if a debtor's earnings exceed 930 euros per month, 217.50 euros per week, or 43.50 euros per day, depending on the period of time for which it is being paid, then such earnings may be subject to attachment.⁵⁵⁴ Moreover, where a debtor is under a statutory obligation to pay maintenance to, inter alia, his current or divorced spouse; the amount which may not be subject to attachment increases to 2,060 euros per month, 478.50 euros per week, or 96.50 euros per day.⁵⁵⁵

Where the debtor's earnings exceed the amounts exempted above and depending on how many people whose maintenance the debtor is responsible for, his income that is in excess of the amounts discussed above may be partly exempted from attachment to the value of three tenths if the debtor does not pay maintenance in respect of a spouse or divorced spouse as discussed above.⁵⁵⁶

The amounts that are exempted from income are regularly (i.e. every second year) modified in light of the per cent change which may affect the debtor's earnings.⁵⁵⁷ The system is based on the premise that the more a debtor earns the more the amount that may be attached and the

⁵⁵¹ Country classification, World Economic Situation and Prospects 2014, 3, available at: http://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf, accessed on 15 December 2015.

⁵⁵² Section 850a of the Code of Civil Procedure.

⁵⁵³ Ibid.

⁵⁵⁴ Section 850c (1) and (2) of the Code of Civil Procedure.

⁵⁵⁵ Section 850a and 850c (2) of the Code of Civil Procedure.

⁵⁵⁶ Section 850c (2) of the Code of Civil Procedure.

⁵⁵⁷ Section 850c (2a) of the Code of Civil Procedure.

more people whose maintenance the debtor is responsible for the less the amount may be attached.⁵⁵⁸ Once again we see much emphasis being placed on ensuring that after execution has taken place the debtor will have sufficient means for his maintenance as well as that of his dependants.⁵⁵⁹

Although the amount which may be deducted from a debtor's salary in Germany involves a complex calculation, the underlying principle behind it (i.e. that the amount that may be deducted from a debtor's salary is to be determined by how much the debtor earns as well as how much of such earnings is to be utilised on the debtor's basic necessities and the maintenance of his dependants) is certainly something that South Africa may use in the granting of EAOs.

5. United Kingdom (England and Wales)

The UK is ranked as a developed country with a high income.⁵⁶⁰ Although South Africa and the UK are on different economic planes, it is nevertheless useful to consider the system of wage attachment in the UK as it may offer plausible features for application in the South African context.

In the UK, the Attachment of Earnings Act allows for a Magistrates' Court or the High Court to make an order attaching a portion of the debtor's earnings to satisfy a judgment debt that exceeds an amount of £15.⁵⁶¹ The Act establishes a Protected Earnings Rate (PER) which is calculated by taking into account all the expenses that a debtor incurs in order to maintain himself and his dependants and is determined by a court official exercising their own discretion.⁵⁶² The amount to be attached therefore may not exceed or be equal to this rate.⁵⁶³

⁵⁵⁸ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 26.

⁵⁵⁹ Section 850c (2) of the Code of Civil Procedure; University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 26.

⁵⁶⁰ Country classification, World Economic Situation and Prospects 2014, 6, available at: http://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf, accessed on 15 December 2015.

⁵⁶¹ Section 1, 2 and 3 of the Attachment of Earnings Act 1971; Order 27, section 7 (6) (a) and (b) of the County Rules 1981.

⁵⁶² Schedule 3, Part 1, section 4 (b) of the Attachment of Earnings Act 1971; University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 26.

⁵⁶³ Schedule 3, Part 1, section 5 (b) of the Attachment of Earnings Act 1971.

Although the idea of having a prescribed rate of earnings that are protected from attachment the fact that such a rate is determined by a court official would be problematic in South Africa. This is in light of the difficulties that the EAO system is facing for its lack of sufficient judicial oversight as discussed in Chapter three above.

As is the case in South Africa, it appears that the judgment creditor must first obtain judgment in their favour and thereafter make an application for the attachment of the debtor's earnings.⁵⁶⁴ This application is to contain a certified copy of the order (or judgment) and an affidavit verifying the mount of the order.⁵⁶⁵ A copy of this application, along with a notice to the debtor and a form of reply is served upon the debtor.⁵⁶⁶ The debtor is then given 8 days to reply to this application and it is crucial to note that proceedings where a debtor fails or refuses to comply with the order (which is an offence in terms of the Attachment of Earnings Act), cannot take place unless the documents have been personally served upon the debtor or where the court is satisfied that the debtor had sufficient time to comply with the order.⁵⁶⁷

The emphasis on involving the debtor in the proceedings by serving the debtor with notice of the application, affording him the opportunity to reply and conducting the hearing only once the debtor has been served with all documentation is a key feature that South Africa's EAO system seems to lack and crucially needs.⁵⁶⁸

Similar to other jurisdictions, the order for attachment may be amended to the value of the court's discretion.⁵⁶⁹

Where an order is made for more than one attachment of the debtor's earnings the employer is to deal with them according to the respective dates in which they were granted⁵⁷⁰ by effecting execution in respect of the first attachment order granted and thereafter in respect of the second order from the residue of the debtor's earnings.⁵⁷¹

⁵⁶⁴ Order 27, section 4 (1) (a) of the County Court Rules 1981.

⁵⁶⁵ Order 27, section 4 (1) (a) and (b) of the County Rules 1981

⁵⁶⁶ Order 27, section 5 (1) of the County Rules 1981.

⁵⁶⁷ Order 27, section 5 (2) of the County Rules 1981.

⁵⁶⁸ Order 27, section 5 (1) and (2) of the County Rules 1981; Section 65J of Act 32 of 1944.

⁵⁶⁹ Section 9 of the Attachment of Earnings Act 1971.

⁵⁷⁰ Schedule 3, Part 2, section 7 of the Attachment of Earnings Act 1971.

⁵⁷¹ Ibid.

It is interesting to note that the rules of the court provide for a register of debtors residing in the court's district which have attachments on their earnings.⁵⁷² Seemingly this is useful for the purposes of determining to what extent (if at all) a debtor's earnings have been attached.⁵⁷³ However, in practice, the system does not appear to be effective in ensuring that creditors and court officials become automatically aware of attachments currently effected against a debtor's earnings and it has thus been criticised in this regard.⁵⁷⁴

6. Conclusion

It is evident that notwithstanding the different systems of attachment, the attachment of debtor's earnings is a common practice in many jurisdictions, both developing and developed. Moreover, it has been discovered that different jurisdictions have different methods of attaching a debtor's earnings. For example, certain jurisdictions such the USA place a cap on the amount of the debtor's earnings that can be attached.⁵⁷⁵ It is also interesting to note that most jurisdictions, including South Africa, prefer maintenance deductions over other deductions.

Moreover, the general consensus amongst most jurisdictions seems to be that after all deductions have been made, a debtor must remain with sufficient financial means to satisfy his needs as well as those of his dependents.

The underlying question that therefore arises is whether, in light of the irregularities and discrepancies observed, EAOs can and should exist as an effective debt collection mechanism in South Africa. This must be considered in light of the attachment methods discussed above and whether South Africa can draw on the systems employed in other jurisdictions.

It suggested that EAOs have the potential to operate as an effective debt collection mechanism in South Africa. However, in order for their full potential to be realised better regulation is required. Such regulation may relate to a cap being placed on the amount that may be attached from a debtor's salary or ensuring that all EAO applications are heard by a Magistrate. Moreover, it is recommended that the current preferent status of maintenance

⁵⁷² Order 27, section 2 and 3 of the County Rules 1981.

⁵⁷³ Ibid; University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 27.

⁵⁷⁴ Ibid.

⁵⁷⁵ Title III of the Consumer Credit Protection Act, 15 U.S. Code § 1673 - Restriction on garnishment, (a) (1).

orders should be extended so that a greater portion of a debtor's salary can be attached for the satisfaction of a maintenance claim. These recommendations will be discussed below.

Chapter Five: Conclusion and Recommendations

Conclusion and Recommendations

1. Introduction

This dissertation critically examined the different modes of debt collection. In particular warrants of execution, the section 65A enquiry, administration orders, garnishee orders and EAOs were analysed.

All of the five debt collection mechanisms mentioned above, (with the exception of EAOs) proved to be inadequate as they involve a lengthy and costly process which is neither beneficial for the creditor nor the debtor. For example, warrants of execution are only effective where the debtor actually has property of substantial value which may be attached which seldom happens.⁵⁷⁶ Moreover, where a creditor wishes to execute against a debtor's immovable property he will have to have the property declared specially executable which is a complex and lengthy process.⁵⁷⁷

The section 65A inquiry lacks appropriate sanctions for a debtor's failure to satisfy the judgment debt⁵⁷⁸ whilst the effectiveness of the garnishee orders is wholly dependent on the debtor having a debt due to him which does not happen often, particularly amongst low income earners.⁵⁷⁹

This dissertation also considered debt relief mechanisms such as debt review and administration orders as it is believed that if a debtor is given relief in some form this will enable him to pay his or her debts more effectively. However, as with the debt collection mechanisms, the debt relief mechanisms also presented with certain difficulties or

⁵⁷⁶ C P Smith Civil Practice in Magistrates' Courts: The Practitioner's Manual, (2014), 161.

⁵⁷⁷ Ibid; Section 56A of Act 32 of 1944; section 26 (1) of the Constitution of the RSA Act 108 of 1996.

⁵⁷⁸ Pete et al Civil Procedure: A Practical Guide, (2010), 333; 1995 (10) BCLR 1382 (CC).

⁵⁷⁹ Section 72 of Act 32 of 1944.

impediments. The difficulties that were discovered include the fact that administration may run indefinitely thereby trapping the debtor in the perpetual cycle of debt.⁵⁸⁰

It was also discovered that although the legislature has attempted to curtail the costs of debt collection amongst other things through the confirmation and modification introduction of the *in duplum* rule, many debt collectors and attorneys fail to adhere to this rule thereby exploiting unknowing debtors.⁵⁸¹

EAOs thus become a more plausible and popular debt collection mechanism.⁵⁸² However, as with other modes of debt collections, EAOs also resonate with undesirable practices. These relate to consents to judgment being fraudulently obtained by debt collectors, attorneys and debt collectors charging debtors in excess of what they are permitted to charge, the issuing of EAOs from incorrect jurisdictions (and forum shopping by debt collectors and attorneys) and insufficient judicial oversight over the authorising of EAOs all of which have far reaching consequences for a debtor.⁵⁸³

As a consequence of these undesirable practices, the Law Clinic of Stellenbosch instituted proceedings against, inter alia, Flemix and Associates to, amongst other things, challenge the constitutionality of the EAO system on account of its failure to provide for sufficient judicial oversight over the granting of EAOs.⁵⁸⁴ All the discrepancies discussed above were raised in this case and the court ultimately held that sections 65J (2) (b) (i) and 65J (2) (b) (ii) of the MCA were unconstitutional in so far as they failed to provide judicial oversight in the issuing of EAOs.⁵⁸⁵ The court also held that the NCA did not allow a creditor to use section 45 of the MCA to persuade a debtor to consent to the jurisdiction of a court which would not otherwise have jurisdiction in the matter.⁵⁸⁶ However, the respondents have taken the matter on appeal to the Constitutional Court which would have to confirm the judgment in any event.⁵⁸⁷ It

⁵⁸⁰ A Boraine, „Some thoughts on the reform of administration orders and related issues“, (2003) (2) *De Jure*, 231.

⁵⁸¹ P Rafferty, „Debt collection practitioners- the biggest threat to debt collection practices“, (2013) (66) *De Rebus*, 27.

⁵⁸² Chapter two of this dissertation, at heading 9, par 2.

⁵⁸³ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013),

⁵⁸⁴ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others*, Case No: 16703/14, Applicants’ Founding Affidavit; Part 1, 6.

⁵⁸⁵ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others*, Case No: 16703/14, par 85.

⁵⁸⁶ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Applicants’ Founding Affidavit; Part 1, 4.

⁵⁸⁷ M Thebe, „Debt collection system to be changed“ 2015 *De Rebus*, July, 1.

therefore appears that these undesirable practices might continue to exist pending the outcome of this significant hearing.

In attempting to improve our current system of wage attachment (EAOs) by proposing viable solutions this dissertation reviewed the attachment of a debtor's earnings in foreign jurisdictions such as the USA, Botswana, Germany and the UK. From this analysis it was discovered that placing a cap on the amount which may be deducted from a debtor's salary is a viable solution.⁵⁸⁸ Moreover, having due regard for the debtor's basic necessities and the maintenance of his dependents is also an important feature,⁵⁸⁹ as is giving preference to maintenance claims.⁵⁹⁰ More significantly, involving the debtor fully in the proceedings by allowing him to challenge the attachment prior to it being effected against his salary is of utmost importance and is a feature that the South African EAO system lacks yet desperately needs.⁵⁹¹

In light of all the findings discussed above, it is suggested that EAOs need not be abolished as with appropriate reform they may still operate as an effective debt collection mechanism in South Africa. In this regard a comprehensive set of recommendations will be made to demonstrate that, notwithstanding the undesirable practices and discrepancies that have been observed in EAOs, this debt collection mechanism can still exist and operate effectively balancing both the debtor and the creditor's rights.

2. Recommendations

In light of the common wage attachment systems in other countries discussed above it is therefore, no surprise that the attachment of wages has become increasingly popular and effective in South Africa. Abolishing EAOs altogether, as some have suggested, would therefore be short sighted.⁵⁹² This is especially in light of the adverse impact that this would

⁵⁸⁸ Title III of the Consumer Credit Protection Act, 15 U.S. Code § 1673 - Restriction on garnishment, (a) (1) and (2).

⁵⁸⁹ Order 36, rule 1 (1) (e) and 3 (e), of the Statutory Instrument No 13 of 2011 of the Rules of the Magistrates Court.

⁵⁹⁰ Title III of the Consumer Credit Protection Act, 15 U.S. Code § 1673 - Restriction on garnishment, 15 (b) (2) (A); University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 27.

⁵⁹¹ Order 36, rule 2 (1) and 3 (1) of the Statutory Instrument No 13 of 2011 of the Rules of the Magistrates Court.

⁵⁹² C Kotze, „Debt collection: Repealing ss 57 and 58 of Magistrates' Courts Act will be short sighted“ 2010 *De Rebus, July*; C Gardner „The complexity of emolument attachment orders“ 2007 *HR Highway*, October, 22.

have on the country's GDP and economy as indicated in chapter three.⁵⁹³ It is therefore recommended that EAOs remain in force. However, the system needs to undergo extensive reform to ensure its effective operation. Moreover, if such reform is to be implemented, it should be done on an urgent basis as these undesirable practices have been in existence for far too long with little steps being taken to address them.

What follows below is a set of recommendations, which are formulated based on the legislative framework governing EAOs, research conducted by the Law Clinic of the University of Pretoria, case law (particularly the Stellenbosch case), as well as the foreign position on the attachment of wages.

2.1. Judicial Oversight

In light of the far reaching consequences that wage attachment has for a debtor and his dependents sufficient judicial oversight must be exercised in the authorisation of EAOs.⁵⁹⁴ To this end it is recommended that in all applications for the granting of EAOs against a debtor a Magistrate must hear the matter, especially in cases where a debtor has allegedly consented to judgment.⁵⁹⁵ This may be done by a Magistrate in chambers or during the section 65A enquiry.⁵⁹⁶

It is acknowledged that this may cause delays in the court system and the current court system may be overloaded with the influx of EAO applications.⁵⁹⁷ To this end it is suggested that specialised courts which will deal with these EAO applications must be established and qualified Magistrates must be employed and trained to deal with these cases. Alternatively, EAO matters could be heard on specific days and on those days the requisite court could deal solely with such EAO applications. Not only is this believed to decrease the incidents of fraudulent and irregular applications but it is also believed that it will improve the system by

⁵⁹³ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Respondents' Answering Affidavit, Part 1, 73.

⁵⁹⁴ Section 65 J (1) (b) of Act 32 of 1944; University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 16; *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, Applicants' Founding Affidavit, Part 1, 2-3; *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, par 84-85.

⁵⁹⁵ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99, 30.

⁵⁹⁶ *Ibid.*

⁵⁹⁷ *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others*, (16703/14) [2015] ZAWCHC 99, Respondents' Answering Affidavit, Part 1, 75.

ensuring that the persons who authorise these EAOs are knowledgeable about how they operate.

2.2. Delivery of the EAO to the debtor

It is understood that the rationale behind EAOs being delivered to a debtor's employer is to enable it to effect the necessary deduction against the debtor's salary.⁵⁹⁸ However, it is not clear why the same EAO or a copy thereof is not delivered to the debtor as is the case with a garnishee order.⁵⁹⁹ To this end, it is suggested that the EAO be delivered to the debtor as well and proper service on the debtor should be a prerequisite to the EAO application being heard, as is the case with a section 129 notice. This should be the case regardless of whether the debtor was able to attend the proceedings for its application or not. Where the debtor had not for whatever reason, attended the proceedings for the EAO application, the delivery of the order to him will bring the pending EAO to his attention and enable him to dispute the order if need be. Where the debtor was present at the EAO application proceedings and did not oppose the order delivery of the order will still nevertheless operate as record of the EAO for the debtor's reference.

2.3. The limit on the amount of the debtor's earnings that may be subject to attachment

Our current EAO system does not place a limit on the amount of the debtor's earnings that may be attached.⁶⁰⁰ This has been abused by unscrupulous creditors and debt collectors who have been reported to deduct more than 90 per cent of a debtor's earnings, leaving the debtor with insufficient financial means to support himself and his dependents.⁶⁰¹ Foreign jurisdictions such as Germany place a cap on the maximum amount which may be deducted from a debtor's earnings.⁶⁰² Admittedly, Germany is a developed country, and it presents with a different cultural, economic and political context to South Africa. However, South Africa may draw from the rationale behind its system of attachment of wages, namely that as a debtor's income increases so too may the deductions from his income.⁶⁰³ Moreover, with

⁵⁹⁸ Section 65J of Act 32 of 1944; *The University of Stellenbosch Legal Aid Clinic and Others v The Minister of Justice and Correctional Services and Others*, (16703/14) [2015] ZAWCHC 99, Applicants' Founding Affidavit, Part 1, 27.

⁵⁹⁹ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 10.

⁶⁰⁰ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 47.

⁶⁰¹ Ibid.

⁶⁰² Section 850c (1) and (2) of the Code of Civil Procedure.

⁶⁰³ University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 26

this system, preference is placed on child support claims with the law allowing for 50 per cent of the debtor's earnings to be attached for the purposes of child support.⁶⁰⁴

In conjunction with this system, South Africa may draw from the UK the principle behind the protected earnings rate.⁶⁰⁵ That is to say that due regard must be given to the fact that the debtor has expenses that he must incur to support himself and his dependents and these expenses must therefore also be factored into the equation.⁶⁰⁶

Thus it is suggested that legislative framework behind EAOs be amended to provide that no EAO which attaches more than 30 per cent of the debtor's earnings is permissible. This may be qualified by stating that an EAO which is sought in respect of a maintenance claim may attach up to 30 per cent of a debtor's earnings, thus having the effect of prioritising maintenance claims.

Ultimately, in all applications for EAOs, the Magistrate should consider the expenses that a debtor incurs towards his and his dependents' basic necessities. This is to be considered against the debtor's income and affordability.

2.4. Rule nisi

A further commendable feature is that which is contained in Botswana's system of wage attachment. In particular, one must consider the possibility of granting a rule nisi for the order sought and upon the return date, ensuring that the debtor and the creditor are afforded the opportunity to make representations either in favour of, or against, the confirmation of the order.⁶⁰⁷ This will ensure that a pending EAO is brought to the debtor's attention prior to it being effected against his salary. Moreover, it will ensure that the debtor has ample time to oppose the order in its entirety, challenge its veracity or the amount to be deducted as the case may be.

⁶⁰⁴ Section 850c (2) of the Code of Civil Procedure; University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 26.

⁶⁰⁵ Schedule 3, Part 1, section 4 (b) of the Attachment of Earnings Act 1971; University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 26.

⁶⁰⁶ Ibid.

⁶⁰⁷ Order 36, rule 2 (1) and 3 (1) of the Statutory Instrument No 13 of 2011 of the Rules of the Magistrates Court.

2.5. EAO Register

The system of attachment in the UK provides for a register of all the debtors in the court's jurisdiction who have attachments against their income.⁶⁰⁸ The rationale behind this is to ensure that a creditor who seeks the attachment of the debtor's earnings or the court to which such an application is made, may be notified instantly of any attachments of the debtor's income.⁶⁰⁹ It is suggested that South Africa should establish an EAO register which will capture all debtors in a court's jurisdiction that have EAOs against their salaries as well as the respective amounts of these EAOs.⁶¹⁰ This will assist a creditor who wishes to obtain an EAO against a debtor as it will indicate the prospects of him obtaining such an EAO against the debtor.

Moreover, this register will assist a Magistrate hearing an application for an EAO in considering the debtor's financial circumstances and deciding whether to authorise the EAO or not. This register should also be accessible for a fee to attorneys and perhaps debt collectors and creditors.

Moreover, when seeking an EAO against a debtor, the attorney acting on behalf of the creditor must allege in his papers that he has conducted a search on the debtor in the EAO register. This should decrease the cases of reckless lending as a creditor would be able to interrogate the debtor's financial position in so far as attachment orders against his salary are concerned.

2.6. Consent to judgment

Where a debtor consents to judgment in terms of sections 57 and 58 of the MCA and as the Magistrates' Court rules provide, an attorney or credit provider must provide an affidavit stating that all the requirements have been complied with. It is suggested that in addition to this rule the MCA must contain a provision to the effect that where an attorney or debt collector has failed to comply with the requirements as alleged in the affidavit, the Debt Collectors Council or Law Society will penalise the debt collector or attorney for this ethical breach. Moreover, it is suggested that prior to the Magistrate granting the EAO he must send out notice to the debtor to confirm that the debtor gave informed consent. That is to say that

⁶⁰⁸ Order 27, section 2 and 3 of the County Rules 1981.

⁶⁰⁹ Ibid; University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 27.

⁶¹⁰ Bentley B „Separating the baby from the bathwater“ 2013, *De Rebus*, March, 2.

the debtor understands the implications of consenting to judgment in favour of the creditor concerned.

2.7. The Law Society

It is recommended that the law society, being the regulatory body that governs attorneys throughout South Africa, together with the Debt Collectors council, must conduct an investigation or establish a body to do so such into the ethical breaches that are reported against attorneys and take appropriate action against such perpetrators. These ethical breaches range from duress and false information being used to induce debtors to consent to judgment⁶¹¹ to the failure on the part of debt collectors and attorneys who operate as such to adhere to the *in duplum* rule⁶¹² and the reckless lending provisions in the NCA⁶¹³. Appropriate sanctions could include an excessive fine, requiring the perpetrators to compensate those who have been prejudiced as a result of their conduct and striking attorneys off the roll.

One might consider having creditors investigated as well as they at times are perpetrators of these undesirable practices and discrepancies.

Finally, it is suggested that the Department of Justice establishes a working group to investigate and propose viable solutions to these undesirable practices and discrepancies.

3. Conclusion

It has been demonstrated that abolishing EAOs altogether is not plausible. Instead, it is recommended that EAOs continue to exist but with reform as discussed above.

Moreover, it is recommended that the legislature amend section 65J to provide that no more than 30 per cent of the debtor's earnings may be attached unless this is in respect of a maintenance claim. Moreover, a Magistrate hearing an EAO application must consider the debtor's financial circumstances holistically and in light of the suggested EAO register, in determining whether or not to grant the EAO against the debtor. Lastly, the Law Society and Debt Collectors' Council are encourage conducting vigorous investigations and taking

⁶¹¹ C Gardner, „The complexity of emolument attachment orders“ 2007 *HR Highway*, October, 21.

⁶¹² University of Pretoria Research Report on „*The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report*“ (2013), 54.

⁶¹³ P Rafferty, „Debt collection practitioners- the biggest threat to debt collection practices“ (2013) (66) *De Rebus*, 27.

appropriate action against their members who engage in unethical behaviour which adversely affects debtors, their profession and the entire EAO system.

It is therefore believed that if the above mentioned recommendations are implemented, the EAO system will improve in its functioning and will operate as an effective debt collection mechanism which will in turn positively impact on credit control in South Africa.

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