

SUBMISSION BY THE LAW SOCIETY OF SOUTH AFRICA ON COURTS OF LAW AMENDMENT BILL [B-2016]

1. INTRODUCTION

The Law Society of South Africa (LSSA) represents more than 24 000 practising attorneys and almost 6 000 candidate attorneys countrywide. It is the umbrella body of the attorneys' profession in South Africa and its constituent members are the Black Lawyers Association (BLA), the National Association of Democratic Lawyers (NADEL) and the four statutory provincial law societies, namely the Cape Law Society (CLS), the KwaZulu-Natal Law Society (KSNLS), the Law Society of the Northern Provinces (LSNP) and the Law Society of the Free State (LSFS).

The LSSA has considered the proposed amendments and supports the underlying objective of remedying the legal and oversight defects relating to emolument attachment orders. The LSSA is however concerned that some of the proposed amendments are overly prescriptive and will impede on the judicial oversight function of the courts.

The Bill should be reviewed in its entirety and the LSSA recommends that the Bill has to be withdrawn from the parliamentary process to allow all stakeholders sufficient time to consider the adverse implications thereof and to avoid the need for lengthy debate and/or delays in the parliamentary chambers.

2. LEGISLATIVE DEFECTS IDENTIFIED IN STELLENBOSCH JUDGMENT

The recent decision of the Western Cape High Court, commonly referred to as the Stellenbosch case¹, has no doubt been the catalyst for the Bill. A number of legislative and other defects have been identified by Judge Desai in this case, in particular the following:

- a. No limit on amount of EAO: *'There is no statutory limit on the amount which may be deducted from the earnings of a debtor in terms of an EAO.'* [Paragraph 3]
- b. No limit on number of EAOs: *'Nor is there a limit on the number of EAOs which may be granted against a particular debtor.'* [Paragraph 3]
- c. No evaluation of affordability: *'...the clerk of the court issued EAOs attaching their earnings without any evaluation of their ability to afford the deductions to be made from their salaries and without deciding whether or not the issuing of an EAO itself would be just and equitable.'* [Paragraph 5]
- d. No judicial oversight: *'The whole process of obtaining the EAOs was driven by the creditors without any judicial oversight whatsoever.'* [Paragraph 5]
- e. Forum shopping: *'...the most disturbing feature of this matter is the manner in which the respondents – the micro-lenders – forum shop for courts which would entertain the applications for judgment and the issuing of EAOs.'* [Paragraph 6]

¹ University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice And Correctional Services and Others (16703/14) [2015] ZAWCHC 99 (8 July 2015)

- f. Access to courts compromised: ‘*The debtors’ rights to access the courts and enjoy the protection of the law were clearly compromised in these instances.*’ [Paragraph 6]
- g. Involuntary and uninformed consent: ‘*...the [involuntary and uninformed] manner in which the consents to jurisdiction and the judgments themselves were obtained.*’ [Paragraph 8]
- h. No representations before granting EAOs: ‘*Workers are not given an opportunity to make representations before an EAO is issued.*’ [Paragraph 75]
- i. Ineffective review remedy: ‘*When an excessive portion of a debtor’s earnings is attached, the remedy provided by the MCA is the opportunity to review and set aside the order. However, this will not be an effective remedy if Section 45 of the [Magistrates Court Act] is interpreted such that it allows indigent debtors to consent to the jurisdiction of distant courts.*’ [Paragraph 75]

The LSSA supports changes aimed at addressing most of the above legal defects, but cautions strongly against the introduction of measures that will compromise the power of a Magistrate to provide judicial oversight.

In dealing with sales in execution, the Constitutional Court² has commented that: “*Judicial oversight permits a Magistrate to consider all the relevant circumstances of a case to determine whether there is good cause to order execution.*” [emphasis added] The Court further cautioned that: “*It would be unwise to set out all the facts that would be relevant to the exercise of judicial oversight. However, some guidance must be provided.*”

The LSSA is of the view that the same caution, as expressed by the Constitutional Court, applies to emolument attachment orders. The legislature should avoid, at all costs, to impede judicial oversight by attempting to introduce relevant facts in a prescriptive manner. Judge Desai has identified the lack of judicial oversight as a defect, which has resulted in emolument attachment orders being granted that are not just and equitable.

The Constitutional Court³ has indeed listed a number of factors that a court might consider, including: “*the circumstances in which the debt was incurred; any attempts made by the debtor to pay off the debt; the financial situation of the parties; the amount of the debt; whether the debtor is employed or has a source of income to pay off the debt and any other factor relevant to the particular facts of the case before the court.*” [emphasis added]

The LSSA is of the view that, if a Magistrate takes the above number of factors into account, it will amount to judicial oversight. As creatures of statute Magistrates do not exercise the same judicial discretion as those of Judges of the High Courts and other Superior Courts. The Bill under discussion unduly and unnecessarily fetters the discretion of the Magistrates in the manner which is elaborated below.

² Jafftha v Schoeman and Others, Van Rooyen v Stoltz and Others (CCT74/03) [2004] ZACC 25

³ Ibid at paragraph 60.

3. SECTION 57: ADMISSION OF LIABILITY AND UNDERTAKING TO PAY DEBT INSTALMENTS OR OTHERWISE

Proposed section (1A): The LSSA is of the view that the requirements listed in this section, particularly sub-sections (c) and (d), are excessively prescriptive and may lead to practical challenges for the plaintiff or his or her attorney. The defendant may, in the circumstances, not be co-operative and may refuse and/or be unwilling to provide his or her latest bank statement and documentary evidence, not more than three months old, relating to his or her expenditure.

Furthermore, the list of specific requirements will impede the court's discretion to take *all relevant circumstances* into account. The Bill is essentially aimed at identifying all the relevant facts to the exercise of judicial oversight – the Constitutional Court considered such as unwise.

The LSSA recommends that the principle of judicial oversight should be retained whilst the Rules providing some guidance to fulfil such function. The Bill should not introduce rigid requirements, which will result in a court's discretion being impeded.

Proposed section (2B)(a): The LSSA recommends that 'latest' should be replaced with 'current' or 'relevant'.

Proposed section (2A)(b): The LSSA is of the view that this proposed section is merely a duplication of what is already catered for under the National Credit Act. It is important to note, for example, that section 83(4) of the National Credit Act compels a court to consider, among other, *'the consumer's current means and ability to pay the consumer's current financial obligations that existed at the time the agreement was made'*. [emphasis added]

Proposed section (3): The LSSA recommends that this section should mirror the wording of Section 65A(2) of the Magistrates' Court Act, which reads:

"If the minutes of the proceedings do not show that the judgment debtor was present in person or represented by any person when judgment was given and if no warrant of execution pursuant to the judgment has been served on the judgment debtor personally, no notice under subsection (1) shall be issued unless the judgment creditor or his or her attorney provides proof to the satisfaction of the clerk of the court that he or she has advised the judgment debtor by registered letter of the terms of the judgment or of the expiry of the suspension ordered under section 48 (e), as the case may be, and a period of 10 days has elapsed since the date on which the said letter was posted."

The debtor should be informed prior to the proceedings, not subsequent thereto.

4. SECTION 58: CONSENT TO JUDGMENT OR TO JUDGMENT AND AN ORDER FOR PAYMENT OF JUDGMENT DEBT IN INSTALMENTS

Proposed sections (1A) to (1C): The LSSA reiterates, for reasons stated above, that the conditions listed are excessively prescriptive. The LSSA recommends that the phrase *'relevant documentary evidence'* should replace terminology such as 'documentary evidence, not more than three months old' and 'latest bank statement'. Not all debtors necessarily have bank accounts.

5. SECTION 65J: EMOLUMENT ATTACHMENT ORDERS

Proposed section (1A): The LSSA considers the proposed 25% limit as another example of impeding judicial oversight. The Bill should not include a percentage limit as this will not necessarily amount to a just and equitable outcome to proceedings.

Judge Desai, in the Stellenbosch case⁴, referred to The International Labour Organisations' Protection of Wages Convention⁵ (the Convention), which contains a number of provisions that are aimed at protecting debtors. For example, it provides that:

"Wages may be attached or assigned only in a manner and within limits prescribed by national laws or regulations.

Wages shall be protected against attachment or assignment to the extent deemed necessary for the maintenance of the worker and his family."

Judicial oversight should be aimed at ensuring that wages are protected against attachment to *the extent deemed necessary for the maintenance of the worker and his family*. The percentage limit in arbitrary will not necessarily result in this objective.

Judicial oversight, without a percentage cap, will afford both the creditor's attorney and the debtor the opportunity to test the issue of affordability (of which emolument attachment orders are only a part) under judicial supervision of a full financial enquiry. This includes, among other, the possibility of additional sources of income, expenditure committed to luxuries, essential expenditure by the debtor not necessarily subject to an emolument attachment order and, if necessary, a review of all emolument attachment orders against the debtor (similar to that provided in Section 87 of the National Credit Act).

It is respectfully submitted that using a percentage cap of the debtor's salary as a means of determining the level at which the debtor's salary is considered over committed to emolument attachment orders has its inherent dangers in that, apart from having to decide at what percentage to peg the cap, it does not take into account the wide variance of salary levels debtors may earn – the well earning debtor may still have sufficient income to survive on despite the EAOs against his salary having exceeded the percentage cap. More importantly, the proponents of the percentage cap theory envisage that the credit provider whose emolument attachment order falls after the percentage cap has been reached will have to delay the enforcement of his or her judgment (and consequently his emolument attachment order) until some of the emolument attachment orders that are being enforced against the debtor have been satisfied and the percentage of the debtor's salary again falls below the cap. The Law Society believes that this will have undesirable consequences on the manner in which credit providers

⁴ Paragraphs 67 – 70, University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice And Correctional Services and Others (16703/14) [2015] ZAWCHC 99 (8 July 2015)

⁵ The Court noted that even though South Africa is not a party to the Convention, 97 states have ratified it. The Court further commented that: "As a consequence the Convention has probably reached the status of international customary law which is binding on all states. At the very least, the Convention's provisions are highly persuasive."

will resort to collecting debts and it will ultimately adversely affect the lower income group's ability to access credit

Proposed section (2D)(6)(d): The LSSA is strongly opposed to this proposed section as it will remove the discretion of the court to grant a cost order. The implication of the proposed section is that the attorneys will inevitably have to bear the costs of the application. The rationale for such proposed section is not clear, except the ostensible intention to discourage emolument attachment orders.

Proposed section (2D)(10)(c): The LSSA is of the view that this proposed section should be deleted as it is too prescriptive. The Rules Board is equipped to develop the necessary rules in this regard.

Section (10)(a): The LSSA is of the view that this section should afford the judgment creditor the right to recuperate the 5 per cent commission, recovered by the garnishee under section 65J(10)(a), from the judgement debtor. This section should be amended to read:

“(10) (a) Any garnishee may, in respect of the services rendered by him or her in terms of an emoluments attachment order, recover from the judgment creditor a commission of up to 5 per cent of all amounts deducted by him or her from the judgment debtor's emoluments by deducting such commission from the amount payable to the judgment creditor, provided that the judgment creditor may recuperate the 5 per cent commission, actually recovered by the garnishee, from the judgment debtor.”

6. SECTION 86 OF ACT 32 OF 1944

The LSSA is of the view that the proposed section 86 should be deleted as abandonment provisions relate to appeals and not rescission provisions when debts have been paid.

7. INSERTION OF SECTION 23A OF ACT 10 OF 2013

The LSSA is of the view that this proposed section should be deleted as it is too prescriptive. The Rules Board is equipped to develop the necessary rules in this regard.

8. TRANSITIONAL PROVISIONS – PROPOSED SECTION 14(2)(F)

The LSSA is strongly opposed to the clerk or registrar of the court effectively being obligated to provide legal assistance or advice to a party wishing to provide an application pursuant to the proposed section. The proviso in this section clearly envisages the provision of 'legal advice'.

The clerk and registrar of the court are not trained or equipped to provide legal assistance or advice. Imposing an obligation on the clerk and registrar of the court, who are not legally schooled, to essentially provide legal assistance or advice may have a harmful impact on court proceedings and the parties involved.