

SUBMISSION BY THE LAW SOCIETY OF SOUTH AFRICA ON COURTS OF LAW AMENDMENT BILL

We appreciate the opportunity of submitting the following comments on the most recent version of the Courts of Law Amendment Bill. We note, with appreciation, the amendments that were made as a result of the LSSA's comments to the earlier version of the Bill. This submission is focused on three specific issues and we appreciate your consideration of these critical comments.

ACTING IN TERMS OF THE PROVISIONS OF THE NATIONAL CREDIT ACT

1. By virtue of the provisions of sections 57 & 58 of the Magistrates Court Act, when considering a request for judgment based on a credit agreement under the National Credit Act, a court will be required to comply with the provisions of the National Credit Act and the regulations thereunder dealing with over-indebtedness, reckless credit and affordability assessment.
2. The above proposed amendment will place the court in an invidious position as it will be unable to consider the circumstances of the judgment debtor at the time the credit agreement was entered into, for purposes of an application for judgment in terms of sections 57 or 58.
3. The court will be empowered under the proposed amendment to request any relevant information to be apprised of the defendant's financial position at the time the judgment is requested. The court is not in a position to effectively consider issues pertaining over-indebtedness, reckless credit and affordability assessment at the time the credit agreement was concluded. The credit agreement may, for example, have been entered into two years before the current application serves before the court.
4. We recommend that the proposed sections 57(2B)(b) and 58 (1C) (c) be deleted.

RECOVERING BY GARNISHEE OF FIVE PER CENT COMMISSION

Section 65J (10)(a)

5. The LSSA is steadfast in its view that this section should afford the judgment creditor the right to recover the 5 per cent commission charged by the garnishee under section 65J(10)(a) from the judgement debtor.
6. The judgment creditor should not bear the burden of the 5 per cent commission payable to the garnishee and it should be in a position to recover this from the judgment debtor. This section should accordingly be amended to read:

"65J (10) (a) Any garnishee may, in respect of the services rendered by him or her in terms of an emoluments attachment order, recover from the judgment creditor 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 recover the 5 per cent commission, charged by the garnishee, from the judgment debtor."

7. Alternatively, the garnishee should be in a position to recover the 5 per cent commission from the judgment debtor as opposed to the judgment creditor. A further alternative is for the garnishee to

make such deductions without commission payable, in the same manner as other statutory deductions, as recommended by Jones and Buckle.

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

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

THE PROPOSED 25 PER CENT CAP

9. The LSSA remains concerned that the retention of the proposed 25% cap is inherently flawed and unconstitutional within the South African context.
10. The LSSA re-affirms its position that the proposed 25% cap will:
 - 10.1 Impede on the judicial oversight function of the courts; and
 - 10.2 Lead to unfair outcomes for creditors in situations where affluent debtors can afford payments in excess of the 25% cap.

Impeding Judicial Oversight

11. As previously submitted, 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.
12. 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).

Defining Judicial Oversight:

13. Jafta J, in the minority Constitutional Court judgement¹ correctly remarked that:

*"The phrase 'judicial oversight' was defined in *Jaftha*² by this Court as denoting a decision by a court, following a consideration of relevant facts. In that case the Court observed: 'Judicial oversight permits a magistrate to consider all the relevant circumstances of a case to determine whether there is good cause to order execution . . . Even if the process of execution results from*

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

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

a default judgment the court will need to oversee execution against immovables. This has the effect of preventing the potentially unjustifiable sale in execution of the homes of people who, because of their lack of knowledge of the legal process, are ill-equipped to avail themselves of the remedies currently provided in the Act.” [emphasis added]

Judicial Oversight – relevant circumstances:

14. The Constitutional Court³ has indeed listed a number of factors that a court might consider, including:
 - 14.1 the circumstances in which the debt was incurred;
 - 14.2 Any attempts made by the debtor to pay off the debt;
 - 14.3 the financial situation of the parties;
 - 14.4 the amount of the debt;
 - 14.5 whether the debtor is employed or has a source of income to pay off the debt; and
 - 14.6 any other factor relevant to the particular facts of the case before the court.

15. The Court further cautioned that:

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

Judicial Oversight – a constitutional necessity:

16. Cameron J, in the majority judgment⁴, comments that: *“All this accentuates the importance of the High Court’s encompassing approach to execution against property and the constitutional necessity for judicial supervision over it.” [emphasis added]*
17. Judicial oversight, as defined by the Constitutional Court, is a constitutional necessity. The legislature should therefore avoid, at all costs, impeding on the constitutional necessity for judicial oversight in an unconstitutional manner by introducing the 25% cap.
18. The LSSA is of the view that the same caution, as expressed by the Constitutional Court above, applies to emolument attachment orders.
19. We submit that the introduction of the 25% cap will effectively prevent a court from considering all relevant circumstances. Some relevant circumstances will effectively become irrelevant once the 25% cap is reached.

Unfair outcomes

20. The LSSA is of the view that the proposed 25% cap does not take into account the wide variance of salary levels debtors may earn – the well earning debtor may still have sufficient income to survive on despite the EAOs against his or her salary having exceeded the percentage cap.
21. Moreover, a court is prohibited from taking the financial situation of the debtor into consideration, if the proposed 25% cap is introduced.
22. This will effectively defeat the purpose of judicial oversight in this context. The minority judgment emphasised that: *“A court to which an application is made must do so after taking into account*

³ Ibid, *Jaftha v Schoeman*, para 56

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

factors set out here. This will provide the poor and vulnerable debtors with immediate protection.⁵ [emphasis added]

23. In a similar vein, the majority judgment commented that:

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

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

Conclusion

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

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

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

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