

OFFICE OF THE CHIEF EXECUTIVE OFFICER

9 September 2016

Via e-mail: vramaano@parliament.gov.za

Mr. V Ramaano
Committee Secretary
PC on Justice and Correctional Services

Dear Mr Ramaano

COURTS OF LAW AMENDMENT BILL

We confirm that we have attended the Parliamentary Portfolio Committee on 31 August 2016 and made representations on the Courts of Law Amendment Bill.

The Portfolio Committee indicated that it would receive and consider any further representations regarding amendments to the proposed Bill. To this end, we attach supplementary submissions. We trust that our supplementary memorandum will also address to some extent concerns raised by the Committee.

We express our appreciation to the Committee for considering the LSSA's submissions.

Yours faithfully



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The Law Society of South Africa brings together the Black Lawyers Association, the Cape Law Society, the KwaZulu-Natal Law Society, the Law Society of the Free State, the Law Society of the Northern Provinces and the National Association of Democratic Lawyers in representing the attorneys' profession in South Africa.

COURTS OF LAW AMENDMENT BILL : PROPOSED AMENDMENTS WHICH ENCROACH UPON THE JURISDICTION OF THE RULES BOARD TO MAKE PROCEDURAL COURT RULES AND MATTERS RELEVANT THERETO

I refer to the sections of the Bill when commenting thereon.

1. Ad Section 2

This section introduces a further basis for obtaining rescission of judgment in the Magistrate's Court; namely when the debt has been settled in full. The proposed amendment is to be welcomed but the procedure for the bringing of such application details in sub-paragraph (b) should be deleted. The procedure for bringing an application for rescission of judgment is adequately provided for in Rule 55 and there should be no difference in the procedure for obtaining a rescission of judgment on this ground as opposed to any other ground provided for in Section 36. There is much more scope for an opposed application on this ground than one based on consent and therefore the application should be brought before court in the usual manner and on appropriate 10 court day notice to other parties. The matter should not be heard in chambers.

2. Ad Section 4

This section amends Section 57 of the Magistrates' Courts Act which, in turn, deals with admission of liability and undertaking to pay debt in installments or otherwise. The proposed introduction of a sub-paragraph 2A and 2B encroaches on the jurisdiction of the Rules Board by prescribing the content of an application for judgment. The evidence and content of the application prescribed in the proposed amendment is impractical as this evidence falls within the knowledge and is in the possession of the judgment debtor and not the judgment creditor. The proposed amendment also has the unintended consequence of fettering a Magistrate's discretion. The evidentiary requirement impacts on judicial discretion

and is adequately covered in both the common law and the sufficiency of means as prescribed in Section 65D(1) and (4).

The proposed sub-paragraph 3 also requires the judgment creditor to notify the judgment debtor of the judgment within 10 days from the date on which the judgment was entered. This implies that the judgment creditor would acquire knowledge of the judgment immediately of the date of the default judgment whereas in practice such notice is usually received by the judgment creditor's attorney many days later through the post. No indication is given as to the consequence of the failure on the part of the judgment creditor or his attorney to advise the judgment debtor of the judgment within 10 days.

3. Ad Section 5

Section 5 of the Bill seeks to amend the procedure for obtaining judgment in terms of a consent and an order for payment of the judgment debt in installments. The requirements of the proposed sub-sections 1A(c) and (d) are impractical as it is highly unlikely that at the stage that judgment is requested in terms of Section 58, the judgment creditor will be in possession of the up to date documentation described therein. An application for judgment based on the consent would only be made once the debtor is in default and this may well occur after a period of three months by which stage the information in the judgment creditor's possession would be out of date. Furthermore, the prescribed documents may not exist; the debtor's employer may not wish to comply with a request for the information and the debtor might not necessarily have a bank account. Furthermore, documentary evidence beyond three months may also be relevant. This prescriptive legislation unnecessarily fetters the court's discretion regarding sufficiency and relevance of evidence.

4. Ad Section 6

Section 6 which purports to amend Section 65 contains the same requirements relating to supporting evidence. See in particular the proposed sub-section 2(a) and (b). The same criticism applies as set out above.

5. Ad Section 8

Section 8 purports to amend Section 65J of the Act which provides for the application for an emoluments attachment order.

The proposed sub-section 2B attempts to prescribe the manner and form of the application for an order which is adequately provided for in the procedural rules already applicable in the Magistrates Courts. This encroaches on the Rules Board's jurisdiction.

Furthermore, the proposed sub-rule 3(b)(ii) requires the Clerk of the Court to ensure that the Court has jurisdiction as provided for in sub-section 1(a). As a Magistrate will hear the application and decide on, amongst other things, the issue of jurisdiction, it is not for the Clerk of the Court to countermand a determination and order of a Magistrate.

The proposed sub-rule (4)(b) is impractical as attorneys do not have the same accounting systems as banks and credit trading companies. They are not geared to meet this requirement and to impose this obligation on them would place a huge financial burden on them. Attorneys monitor payments and accounts and provide balances from time to time on reasonable request. This is sufficient.

The proposed sub-rule 6(d) encroaches upon the jurisdiction of the Rules Board which has authority to decide on costs which are recoverable. The provision is fundamentally unfair as it cannot be expected that a judgment creditor should

bear the costs of applying to court for the rescission or amendment of an emoluments attachment order in the given circumstances. Costs are best left to the discretion of a Magistrate.

Proposed sub-rule 10(c) is unnecessarily prescriptive and encroaches on the Rules Boards jurisdiction.

6. Ad Section 11

Section 11 of the Bill purports to amend Section 86 of the Magistrates' Courts Act which deals with abandonment of judgment. The procedure therein relates to appeals and it is inappropriate as a measure for achieving the setting aside of a judgment. Abandonment affects enforcement and does not result in rescission.

7. Ad Section 13

Section 13 of the Bill purports to insert a Section 23A in the Superior Courts Act and provides for the granting of rescission of judgment based on consent or payment. This is to be welcomed but sub-section 2(b) prescribed the nature of the application which is both unnecessary and encroaches on the Rules Boards jurisdiction.

8. Ad Section 14

Similarly the application procedure in Section 14(2)(c) is unnecessary and encroaches upon the Rules Board's jurisdiction.

9. Finally, the form for the application to review default judgment and subsequent order in the annexure to the Bill has its rightful place in the rules and it is not for the Legislature to prescribe the format of such application.