COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA (LSSA) ON THE WORKING DOCUMENT: MAGISTRATES' COURTS AMENDMENT BILL RELATING TO AMENDMENTS TO SECTIONS 36, 57, 58, 65, 65J AND 86

The Law Society of South Africa (LSSA) has considered the Working document on the Magistrates' Courts Amendment Bill and comments as follows:

PART A – Amendment of Sections of the Magistrates' Courts Act dealing with Section 57 and 58 judgments and instalment orders as well as emoluments attachment orders (EAO's)

1. The following areas were identified as focal points where there has been abuse of the EAO's, alternatively abuse was facilitated:

1.1 Consents

Credit providers who, in contravention of the National Credit Act No. 34 of 2005 (NCA), insist on the debtor signing a variety of papers before the loan is granted i.e. at the time the transaction is concluded. In a few instances, it was reported that some credit providers had forged signatures on these documents by using sophisticated techniques involving the scanning of a genuine signature on to these documents and then submitting them to the Courts with a "lost document" affidavit. These documents include:

1.1.1 Consent by the debtor to the jurisdiction of a Magistrate's Court which would not otherwise have jurisdiction in terms of Sections 28, 29 or 45;

1.1.2 Consent to judgment; and

1.1.3 Consent to an order to pay such judgment by way of instalments.

It is common cause that credit providers and their attorneys, through these consents, routinely have the judgments and EAOs granted in distant Courts where the debtor neither resides nor is employed, making it expensive for the debtors to oppose the granting of the EAO.

<u>Recommended solution</u>

a. *The ambiguity of Section 45 of the Magistrates' Courts Act and its apparent conflict with Section 28 have facilitated the abuse of getting a debtor to consent to the jurisdiction of a Court which has no jurisdiction in a matter either in terms of Section 28 or 29. It is suggested that the following amendments (in bold) be made:*

   i. *Section 45 be amended as follows:*

      "Subject to the provisions of Section 46, the Courts shall have jurisdiction to determine any action or proceedings otherwise beyond its jurisdiction ***in terms of Section 29*** *(or, as an alternative,* ***"in terms of Section 29(1)(g)"****), if the parties consent in writing thereto: Provided that no Court other than a Court having jurisdiction under Section 28 shall, except where such consent is given specifically with reference to particular proceedings already instituted* ~~***or about to be instituted in such Courts***~~*, have jurisdiction in any such matter."*

   ii. *The consent to jurisdiction where the procedure in Sections 57, 58 and 65J is utilised should be limited to the Court where the debtor is employed or resides. This will ensure that judgment is granted and the EAO issued in that jurisdiction. This is in line with what the legislature envisaged in terms of Sections 90(2)(k)(vi)(bb) and 91(a) of the NCA. This will require some surgery to the provisions of Sections 28, 29, 45 and 65J.*

b. *The EAO should only be confirmed after the debtor and/or his employer have been given an opportunity to oppose the granting thereof – a right which appears to already exist in Section 65J(5) and Rule 12(7)(b) of the Magistrates' Courts Act. In this regard, it is suggested that the credit provider's attorney be required to serve a notice (hereinafter referred to as the "pre-EAO Notice"), together with copies of ALL supporting documents, on the debtor and his employer in which:*

i. They are informed of the credit provider's intention to seek an EAO in accordance with the debtor's consent;

ii. The full amount of the capital debt (substantiated by a statement of account by the credit provider) as well as interest and costs are quantified and set out;

iii. They are informed that, unless they serve and file on the Court and on the credit provider's attorney a notice of intention to oppose the granting of the EAO within, for example, 15 (fifteen) Court days from date of service of the notice, the EAO (in its amended format referred to below) will be granted on an unopposed basis and issued, in accordance with the debtor's consent, either by the Clerk of the Court or the Magistrate (depending on whether or not the debt falls within the ambit of the NCA); and

iv. The debtor and/or his employer are provided guidelines upon which the granting of an EAO can be opposed.

c. The aforementioned notice of intention to oppose must state the grounds upon which the debtor and/or his employer wish to oppose the granting of the EAO – preferably in affidavit format. As the debtor's consent to an EAO is prima facie proof of its contents, the grounds upon which the application for EAO may be opposed will be limited to where:

i. The consents referred to in Paragraph 1.1 were obtained under duress or by fraud; or

ii. The amounts claimed in the notice (capital, interest and costs) are erroneous or not in accordance with law; or

iii. A large portion of the debtor's salary is already committed to EAOs and the debtor will be left with very little to survive on. In this regard:

- *The Law Society is of the opinion that the decision to utilise this ground as a basis for opposing the proposed EAO should be left in the discretion of the debtor and/or his employer rather than relying on a percentage cap being placed on the debtor's salary in determining the level at which the debtor's salary may be considered to be over committed to EAOs.*

- *There are distinct advantages to the Law Society's school of thought as it affords both the creditor's attorney and the debtor the opportunity to test the issue of affordability (of which EAOs are only a part) under judicial supervision of a full financial enquiry. This includes, inter alia, the possibility of additional sources of income, expenditure committed to luxuries, essential expenditure by the debtor not necessarily subject to an EAO and, if necessary, a review of all EAOs against the debtor (similar to that provided in Section 87 of the NCA).*

- *It is envisaged that the debtor's employer will play a significant role in the event of the basis of opposition being that a large portion of the debtor's salary is already committed to EAOs. The integral part of the employer's role will be the submission of an affidavit with the notice of opposition setting out full details of all existing EAOs against the debtor, including contact details of the attorneys dealing with such other EAOs, and attaching a copy of the debtor's payslip in proof thereof. The ultimate intention is that, in this instance, the Courts, after considering all the facts before it, will have the discretion to order an enquiry (similar to a debt review) where not only the proposed EAO is considered but also <u>all</u> existing EAOs are reviewed (similar to the provisions of Section 87 of the NCA).*

- *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 EAOs 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 EAO falls after the percentage cap has been reached will have to delay the enforcement of his judgment (and consequently his EAO) until some of the EAOs 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 will resort to collecting debts and it will ultimately adversely affect the lower income group's ability to access credit.

d. *In the event of a notice of opposition being filed by the debtor and/or his employer, it will be then incumbent on the credit provider's attorney to set the application for the EAO down for hearing in open Court, requiring service of the set down on the debtor and, if the opposition is based on over-commitment of the debtor's salary to EAOs, on all the attorneys representing the credit providers of such EAOs – it is submitted that the presence of the employer at the hearing is not required in the light of his affidavit referred to in sub-paragraph iii of paragraph c. above. This will provide the necessary judicial oversight only where the circumstances warrant it and will not unnecessarily overburden the magistracy.*

e. *In the event that the debtor and/or his employer does not oppose the application for an EAO or in the event of the Court granting the EAO or reviewing all the debtor's EAOs at the Court hearing referred to in sub-paragraph d. above, the credit provider's attorney/s will be required to serve the EAO on the debtor and his employer, which EAO will have to set out the capital amount, the interest and costs (both calculated and quantified, including disbursements), the monthly payment amount, the day of the month by which the monthly payment must be effected and the date of the last payment.*

f. The practice of obtaining the aforementioned consents before the transaction is completed should be criminalised and such consents, as well as any consents found to be forged, should be declared unenforceable.

1.2 High Interest Rates on Micro loans

1.2.1 The lower income consumer will usually not have any assets to secure a loan nor is he likely to have a credit history and repayment track record to acquire an unsecured loan at an attractive interest rate. This means that the only type of credit that he can access is a micro loan, especially if he needs credit urgently.

1.2.2 Microloans fall into the category of what the NCA defines as "a short-term credit transaction" – namely, one where the amount does not exceed R8, 000.00 and is payable within a maximum of six months.

1.2.3 For this type of loan the debtor can be charged interest of no more than five percent a month or 30 percent over six months – or 60 percent a year, if he continually borrows against the loan.

1.2.4 The NCA stipulates that interest rates on these particular loans must be disclosed as a monthly interest rate, but not whether the interest rate is nominal or effective. It does however state that "the interest rate must not exceed the maximum prescribed interest rate applicable to the category of credit agreement concerned" and provides formulas for how interest must be calculated.

1.2.5 Some credit providers offering short-term loans extend to the debtor additional credit (up to his original loan amount) as soon as he has made his first or second instalment. In doing so, they are effectively giving the debtor revolving credit which allows him to keep borrowing up to a limit and he can end up paying interest of 60 percent per annum, or more if the interest is compounded.

1.2.6 In the end, the most financially vulnerable consumers (which are the very people that the NCA seeks to protect) still pay the most for credit because these extremely expensive micro loans are the only credit they can access.

Recommended solution

a. *The National Credit Regulator, together with the Department of Trade and Industry must come to the rescue of these consumers and reduce the rates.*

b. *Despite the fact that the NCA came into operation some years ago, consumers are still not yet fully informed about the various credit agreements available to them and the maximum interest rates that apply to each. They become more vulnerable, especially if they need credit urgently and do not necessarily choose the most cost effective credit*.

1.3 Reckless lending on the part of credit providers

It was noted that, in many instances, the debtor could not afford the debt in the first place with total deductions (including EAOs) on his / her salary already excessive and leaving the debtor with very little salary to survive on. The reality is that the vulnerable impecunious debtor would rarely have the financial ability to pursue this avenue.

Recommended solution

a. *The Consumer Protection Act No. 68 of 2008 "CPA) and the NCA (particularly Part D of Chapter 4) provide excellent protection for the consumer. The enforcement of the provisions of the CPA and NCA are, however, problematic.*

b. *For example, Debt Counsellors are, by and large, poorly trained in respect of the following:*

i. *little financial training;*
ii. *little ability to negotiate at high level with major credit providers such as the banks; and*

iii. *little knowledge on aspects of the law and the drafting of documents to be lodged at Courts.*

This causes unnecessary delays and the statutory provisions should be amended to ensure the appointment of properly qualified counsellors.

c. *Furthermore, the applicant in the Debt Review should be the debtor and not the Debt Counsellor for, inter alia, the following reasons:*

i. *The Debt Counsellor is often in a different jurisdiction to that of the debtor;*
ii. *The creditor's right to test the debtor's personal circumstances under cross-examination is severely hampered as the Debt Counsellor is not always in a position to respond to such questioning. This results in unnecessary postponements and unnecessary costs being incurred to the detriment of the debtor.*

d. *Whilst the NCA has created forums outside of the Courts for debtors to approach, these forums were only created in the main urban areas which are not always easily accessible to the rural consumer.*

e. *Whilst Section 81(1) of the NCA places an obligation on the consumer to fully and truthfully answer any requests for information made by the credit provider in order for the latter to make the assessment required in terms of Section 80 of the NCA, it imposes no sanction on the consumer if he fails to do so and, at best, the credit agreement will be enforceable as against the consumer. The enforceability thereof will be severely hampered if the consumer's salary is already substantially committed to EAOs. As a deterrent to reckless borrowing, consideration should therefore perhaps be given to imposing a statutory obligation on a consumer, when incurring further debt, to disclose that his salary is already subject to EAOs (and possibly criminalising it in a fashion similar to Section 74 S of the Magistrates' Courts Act). This will enable the credit provider to make a proper assessment in terms of Section 80 of the NCA.*

1.4 Misrepresentation by some credit providers or their agents (alleged "tracers") who seek, under the pretext of being traced, to get the debtor to sign incomplete or blank forms containing the consents referred to in paragraph 1.1.

Recommended solution

Same as that referred to in Paragraph 1.1 above.

1.5 Lack of perusal or explanation

The failure by the debtor to properly peruse the documents that he or she is being requested to sign, or the failure by the credit provider or its agent to properly explain these documents to the debtor. It has, for example, been reported that some credit providers charge for insurance that does not exist or that is far in excess of the actual charge by the insurer. Furthermore, the consent to an EAO by the debtor is often lacking in detail and not always signed under oath.

Recommended solution

a. *The debtor's consent to an EAO form (wherever it may appear in the Magistrates' Courts Act) should make it obligatory for the debtor to set out full details of his income and expenditure (including his monthly commitments to creditors under Court's order, EAO or agreement) as well as details of all his assets and liabilities. These details should be supported by documentary evidence wherever possible. This detailed consent to the EAO must be signed by the debtor under oath. This document becomes important for the Courts (whether it be the Clerk of the Court or a Magistrates) to ensure that, after satisfaction of the EAO, the Court is satisfied that the judgment debtor will still have sufficient means to maintain himself and those dependent on him [as specifically required by Section 65J(6) and Form 38 of the Magistrates' Courts Act].*

b. *An educational program for ALL stakeholders (Credit Providers, Debtors, Employers, Clerks / Registrars of the Courts, Sheriffs and Attorneys) is*

necessary. This must include an explanation of the nature and processing of the EAO. In this regard it is suggested that:

i. The pre-EAO Notice and the EAO itself should go to some lengths in explaining the rights and obligations imposed on the debtor and his employer; and

ii. Sheriffs of the Courts can greatly assist and, perhaps for an additional fee, explain the nature of the pre-EAO Notice to the debtor and employer as well as the nature of the EAO when effecting service thereof.

1.6 Lack of knowledge by Clerks / Registrars of the Courts in the proper application of the provisions of the Magistrates' Courts Act relating to the jurisdiction of the Courts either when the matter is initiated [in particular Sections 28 and 45] and/or when the EAO is authorised and issued [in particular Section 65J(1)(a)].

Recommended solution

a. The education program referred to at Paragraph 1.5 above.

b. The recommendations referred to in Paragraph 1.1 together with judicial supervision where the matter is opposed on the happening of any of the events referred to in sub-paragraph c thereunder.

c. The specific amendment to Section 65J(1)(a) which only allows the issue of an EAO in the jurisdiction where the debtor resides or is employed. This is in line with what the legislature envisaged in terms of Sections 90(2)(k)(vi)(bb) and 91(a) of the NCA.

d. The assistance of the Sheriffs of the Courts who, as officers of the Courts, are entitled, if not obliged, to return to the Court / attorney EAOs which, ex facie the document, have been issued out of the wrong Court.

1.7 The attorney's costs which, although in some instances are correctly charged in terms of the Magistrates' Courts Act / Rules, are immorally high vis-à-vis the usually small initial

capital amount required to be recovered. The problem appears to lie with the attorney's costs after the EAO has been authorised. The attorney's costs prior to the authorisation of the EAO should present no problem as the Clerk of the Court or Magistrate, when authorising the EAO, would not authorise any costs to which the attorney is not entitled either in terms of the Magistrates' Courts tariff or the recommended tariff of the relevant provincial law society.

Recommended solution

a. *It must be noted that the work required to be done by an attorney in implementing an EAO is the same regardless of the quantum of the capital.*

b. *The fees that an attorney is entitled to recover from the debtor is governed by Part 1 of Table B to Annexure 2 of the Magistrates' Courts Rules and rules of the various provincial law societies (if the debtor has agreed to be liable for costs on the attorney and client scale). This is so regardless of the fee arrangement that the attorney may have with his client (including where the attorney is acting on a contingency basis).*

c. *The proposed pre-EAO Notice and particularly the current EAO form used in the Magistrates' Courts should be amended so as to reflect the capital amount, the interest and costs (both calculated and quantified, including disbursements), the monthly payment amount, the day of the month by which the monthly payment must be effected and the date of the last payment. In this way, the EAO will not be granted if the attorney seeks to recover any costs which are not in accordance with Part 1 of Table B to Annexure 2 of the Magistrates' Courts Rules and the rules of the law societies.*

d. *In so far as the attorney may want to recover any additional fees and disbursements from the debtor post the granting of the EAO, it is recommended that:*

i. *Necessary disbursements (e.g. the Sheriff's fees for service of the EAO) should be recoverable merely on presentation of proof thereof to the debtor and employer; and*

ii. *Additional fees post EAO should only be recoverable if authorised by the Court either by way of a further application [perhaps under Section 65J(7)] on notice to the debtor and employer or where the Court has had to review all existing EAOs against the debtor (as referred to in sub-paragraph c of paragraph 1.1 above.*

e. *The debtor should similarly be able to approach the Court under Section 65J(7) for a rescission of the EAO where the attorney seeks to recover excessive amounts not reflected on the EAO or not subsequently authorised by the Court. Consideration should perhaps be given to creating a Magistrates' Courts Rule to facilitate a cheap and simple procedure for the debtor to approach the Court. There appears no reason why debtors with existing EAOs cannot already approach the Court for a variation or rescission of the EAO if excessive amounts are being claimed from them. In so far as it is believed that this may cause a deluge of applications under this section, it is suggested that, as an interim measure, Commissioners in the Small Claims Courts be authorised to hear such applications where the amount of the EAO in dispute falls within the jurisdiction of such Courts.*

f. *In so far as the issue of disciplinary action against the attorney is concerned, it is re-iterated that:*

i. *The disciplinary powers of the provincial law societies are limited to the imposition of a fine on the transgressing attorney for unprofessional conduct and, in transgressions of a more serious nature, an application to Court for the suspension or striking off of the transgressing attorney from the roll of attorneys. It is not empowered to order the transgressing attorney to refund the judgment debtor any amount that may have been overcharged – this must be done through a Court of law; and*

ii. *The law societies can only react to complaints which have been lodged before them or where the particular transgression comes to their notice. In this regard, it should be noted that the Magistrate dealing with the debtor's application for rescission of the EAO under circumstances referred to in sub-paragraph e above does have the right to bring this transgression to a law society's notice.*

1.8 *In duplum* rule

The lack of knowledge regarding the implementation of the common law *in duplum* rule and statutory *in duplum* rule as expounded by the Supreme Court of Appeal in the matter of *Nedbank v National Credit Regulator [2011] ZASCA 35*. In this regard:

1.8.1 It is important to note that the common law *in duplum* rule still applies to those transactions that are not subject to the NCA. In terms of the common law *in duplum* rule:

1.8.1.1 Firstly, where the total amount of arrear and *unpaid* interest has accrued to an amount equal to the outstanding capital sum, interest ceases to run, but any payment made by the debtor thereafter will lead to the amount of interest decreasing after which interest again starts to accrue to an amount equal to the outstanding capital amount; and

1.8.1.2 The *in duplum* rule is suspended *pendente lite*, and the *lis* is said to commence upon service of the initial process, whereafter interest runs again.

1.8.2 The statutory *in duplum* rule is set out in Section 103(5) of the NCA which states that "the 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 on the principal debt under that credit agreement as at the time that the default occurs". Section 101(1)(b) to (g), refers to the following: (b) an initiation fee; (c) a service fee; (d) interest; (e) cost of any credit insurance; (f) default administration charges; (g) collection costs. There

appears to be uncertainty as to whether the "collection costs" referred to in Section 101(1)(g) of the NCA includes the litigation costs incurred by the credit provider's attorney.

Recommended solution

a. *A declarator by the Courts to get full clarity on the statutory in duplum rule, particularly with regard to Section 101(1)(g) of the NCA, is required. It is respectfully submitted that the "collection costs" referred to in that section can only mean the collection costs incurred by the credit provider prior to the launching of litigation by its attorneys. It could not have been the legislature's intention that it should include the "litigation costs" as to do so will create a dangerous precedent for the simple reason that it may force the credit providers to look to other methods other than the Courts in recovering its claims. Just as the credit provider has the right to seek the Court's assistance to recover its debts, so has the debtor the right to seek the Court's assistance in defending such claims and it is common cause that litigation costs can be quite substantial, especially in defended actions; and*

b. *The education program referred to at Paragraph 1.5 above.*

1.9 Lack of judicial oversight in the granting of the EAO

The necessity for judicial oversight in the granting of an EAO is apparent from what has hereinbefore been mentioned, not only because of the abuses that occur in obtaining the consents from the debtor, but also to ensure that, after satisfaction of the EAO, the Court is satisfied that the judgment debtor will still have sufficient means to maintain himself and those dependent on him [as specifically required by Section 65J(6) and Form 38 of the Magistrates' Courts Act].

Recommended solution

It is recognised that the magistracy would probably not be able to cope with all applications for an EAO being heard in open Court. In order to minimize this problem,

the pre-EAO Notice procedure recommended at sub-paragraphs b, c and d of Paragraph 1.1 above is suggested.

1.10 The service of EAOs by email / post / persons other than the Sheriffs of the Courts.

Recommended solution

The Magistrates' Courts Act and its Rules should make provision that the pre-EAO Notice recommended above as well as the EAO will have no force and effect unless served by the Sheriff of the Court whose duty it is to explain the nature of the document to the debtor and employer when effecting service, as well as their rights and obligations thereunder.

1.11 Add-ons

In many instances different items and further obligations to the debtor are added on both pre and post the EAO without proper consultation with the parties or without authority from the Courts.

Recommended solution

It is recommended that the pre-EAO Notice (referred to in sub-paragraph b of paragraph 1.1) should set out the full amount of the capital debt (substantiated by a statement of account by the credit provider) as well as quantify interest and costs to the date of such notice. It is further recommended that the whole EAO form itself be amended so as to reflect the date on which the payments are to commence, the date on which the monthly payments are to be made, the date of the last payment and the amount of each instalment as well as the total amount payable in terms of the EAO over the payment period – in other words, it must set out the judgment debt, the interest quantified over the payment period, the costs quantified to the date of the EAO and the collection commission that will fall due on payments to be made over the payment period. Provision must also be made on the EAO form for the Sheriff to insert his charges for service of the EAO. If the attorney wishes to recover any further fees incurred after the EAO has been granted, it will be necessary for him to make

application to the Court, on notice to the employer and debtor in terms of Section 65J(7) of the Magistrates' Courts Act.

1.12 Allocation of payments

In most instances, the debtor's payments are first allocated towards costs and interest which, if minimal, hardly reduces the principal debt.

Recommended solution

Barring any agreement to the contrary, common law dictates that a debtor's payments should first be appropriated towards the debt that is most onerous to the debtor. It follows that where interest accrues on the capital amount of a debt, payments are credited first to discharge interest and then only to capital. Legal costs should follow interest and capital to ensure that the consumer's interest is looked after.

1.13 Delays

Unnecessary delays on the part of employers (particularly the State and parastatal entities) in putting the EAOs into operation, usually due to the red-tape administrative requirements of the employer.

Recommended solution

Section 65J(4)(a) of the Magistrates' Courts Act requires the employer to effect payment in terms of the EAO at the end of the month following the month in which the EAO was served on the employer. The employer is, in terms of Section 65J(10), awarded 5% commission for facilitating the EAO on the employee's salary. He should therefore have a greater obligation to control the EAO, particularly its implementation and its termination. This is particularly important in determining whether the debtor's salary is already overcommitted to EAOs as the employer is probably the best person to bring this to the Court's notice when the pre-EAO Notice is served on him. If the employer delays in implementing the EAO beyond the period referred to in Section 65J(4)(a), the

interest that may have accrued on the judgment debt as a result of such delay ought to be paid by the employer out of the 5% commission earned by the employer.

1.14 Termination of the EAO

It appeared that, in many instances, the employer effected payments beyond what was required of him in terms of the EAO and the EAO was never terminated.

Recommended solution

The amended form referred to in paragraph 1.11 which specifically sets out the date of the last payment should resolve this issue.

2. The necessity for an effective debt collecting process

2.1 The granting of credit is the astonishingly simple truth of money creation in a free market economy. It is therefore important to emphasize that in a credit market, there must be an effective debt collecting process. This is recognised by the Legislature and one only needs to refer to the provisions of Section 3 of the NCA which deals with the purpose of the Act. Section 3(i) provides that one of the aims of the NCA is to provide for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.

2.2 The generally accepted methods of collecting a judgment debt are as follows:

2.2.1 A warrant of execution against the judgment debtor's movable assets. This is perhaps the most severe form of debt recovery. Sales in execution of the debtor's movable property are forced sales and the proceeds realised at these sales often do not even cover the judgment debt. The costs attached to these sales are substantial and sometimes surpass the amounts realised at the sale, thereby adding to the financial burden of the judgment debtor.

2.2.2 A financial hearing into the debtor's financial affairs under Section 65 of the Magistrates' Courts Act. It is generally accepted that this is a procedure "without teeth" for the following reasons:

2.2.2.1 The procedure is entirely dependent on the judgment debtor appearing at the enquiry. If the debtor does not appear, the Court will authorise a warrant for his arrest based on the contempt of Court rationale, the purpose of the warrant being for the Sheriff of the Court to bring the debtor to Court to explain his absence at the hearing and to thereafter conduct the originally intended financial enquiry. However, the Courts will generally not authorise such warrant unless there has been personal service of the Section 65A(1) notice on the debtor. It is a relatively easy task for the skilful debtor who is reluctant to appear in Court for the enquiry to avoid personal service of the notice. This causes unnecessary delays and costs and the judiciary should perhaps give consideration to relaxing the requirement of personal service of the notice to the limited extent that a warrant of arrest will be authorised if the debtor fails to appear at the hearing, even if the notice is served on a family member at the debtor's residence or on a work colleague at the debtor's place of employment. Part of the objective of the warrant of arrest is after all to ensure the debtor's presence at the financial enquiry to develop a structured repayment plan.

2.2.2.2 Even if the Court does order the judgment debtor to repay the judgment debt in specified instalments at such hearing, the section does not provide any form of sanction if the debtor fails to adhere to the Court's order. Additional costs are therefore incurred in having the debtor recalled to Court who, at best, will receive a "slap on the wrist".

2.2.2.3 Even if the judgment debtor is present at Court for the hearing and the Court orders him to repay the judgment debt in specified instalments, the Court is usually reluctant to simultaneously

authorise an EAO until such time as the judgment debtor has been afforded the opportunity to comply with the repayment order on his own. Again, on default, it creates unnecessary delays and extra costs in having to recall the debtor to Court. It is accordingly respectfully suggested that the judiciary should reconsider its attitude in granting an EAO under such circumstances.

2.2.3 The EAO – This is perhaps the most effective manner in which a judgment debt is collected and, provided it is implemented in a proper and structured manner, will ensure that the consumers obligations are met, which is after all one of objectives of the NCA. To get rid of this procedure altogether, as has been suggested in some circles, will have dangerous repercussions including, *inter alia*, creditors resorting to more drastic and expensive methods of debt recovery (e.g. sales in execution of movable property), the resurgence in extreme cases of unlawful methods of debt collection and making it costly, if not impossible, for historically disadvantaged consumers to access credit.

2.3 The provisions of Sections 57 and 58 of the Magistrates' Courts Act (which were reasonably new to the Act), coupled with the EAO procedure, were introduced to create a cheap and quick process to assist both credit providers and consumers. Unfortunately, the abuses of the process hereinbefore mentioned have created the necessity for a revision of the provisions regarding the jurisdiction of the Courts and required <u>some</u> judicial oversight over the whole process. It is submitted that complete judicial oversight of the whole judgment process under Sections 57 and 58 as well as the EAO procedure is unnecessary and costly and will create an unnecessary burden on the judiciary.

2.4 It is respectfully submitted that the recommended suggestions hereinbefore mentioned will collectively go a long way in ensuring that the procedure is not abused by any of the stakeholders in the process. These recommendations will, *inter alia*, require drastic surgery to the provisions of Sections 57, 58 and 65 of the Magistrates' Courts Act and, to a lesser extent, to the provisions of Sections 28, 29 and 45 thereof. A substantial part of the recommendations hereinbefore set out do not form part of the proposed amendments contained in the Magistrates' Courts Amendment Bill as set out in the

working document. The LSSA would therefore like the opportunity to consult with the Department of Justice and Constitutional Development in the drafting of any amendment to the relevant sections in order to give effect to its recommendations.

Part B – The apparent conflict between the provisions of Rule 12(5) and Sections 57 and 58 of the Magistrates' Courts Act

1. Sections 57(2) and 58(1) currently provide that the clerk of the Court shall enter judgment in favour of the Plaintiff upon compliance of the requirements mentioned therein. This has created the legal interpretation that only clerks of the Court may grant judgments in terms of this section. Rule 12(5), on the other hand, provides that the clerk of the Court shall refer to the Court any request for judgment on a claim based on an agreement governed by the NCA.

2. The Law Society has taken note of the judgments referred to at paragraph 3 of the working document, particularly the concerns raised in the minority judgment in the matter of *African Bank Ltd vs. Myambo N.O.* [2010(6) SA 298(GNP)] and is of the opinion that any legal uncertainty will be cleared if the word "shall" is deleted in both Section 57(2) and Section 58(1) and substituted with the words "may, subject to the provisions of Rule 12(5) of these rules" immediately after the words "clerk of the Court".

Part C – Rescissions and abandonments of judgment as provided for in Sections 36 and 86 of the Magistrates' Courts Act respectively.

1. Section 36 – Rescission of judgment

    1.1 Careful consideration must be given to the effect of the proposed amendment as its purpose is predominantly to facilitate the "cleansing" of the debtor's credit bureau profile so that the debtor can once again enter the credit market. This will impact on a credit provider's right to utilise the credit bureau information in assessing whether a consumer presents a credit risk where such consumer seeks new credit.

1.2 Having said that and having considered the discussion and the case law cited at paragraph 4 of the working document, the Law Society is, in principle, in favour of the proposed amendment to Section 36 subject to the following:

1.2.1 The first option to Section 36(2)(b) is preferred.

1.2.2 Section 36(2)(d) must make provision for the rescission or variation to be effected by way of application on notice to the judgment creditor for hearing in an open Court. There may be good reason why the judgment creditor is uncooperative in consenting to the rescission of the judgment despite the full settlement of the judgment debt and the judgment creditor should be given the opportunity to air his opposition thereto in an open Court.

2. Section 86 – Abandonment of judgment

The LSSA is not in favour of any amendment to this section for the following reasons:

2.1 Section 86 falls within the Chapter of the Magistrates' Courts Act dealing with appeals and reviews in civil matters where the provisions of Section 86(1),(2) and (3) may be specifically necessary.

2.2 The purpose behind the proposed amendments to Section 86 as set out in the working document is identical to the proposed amendment to Section 36 (as set out at paragraph 1 of Part C above), namely to facilitate the "cleansing" of the debtor's credit bureau profile once he has paid the judgment debt, interest and costs so that he can once again enter the credit market.

2.3 There is absolutely no necessity for the amendment to Section 86 as the debtor can utilise the provisions of Section 36. The provisions must remain as is for the purpose for which it was originally intended – namely in appeals in civil matters.