# Emoluments Attachment Orders in the South African Law

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# Summary of dissertation

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Being a credit active consumer in South Africa requires a lot of responsibility. Credit providers offer loans to debtors and often employ unjust methods in an attempt to recover the outstanding debt. The mechanism applicable in this research, which credit providers use to recover the debt, is in fact the emoluments attachment order.

It is my finding that legislation needs to be amended to abolish the abuse in the sense that:

- The order must be obtained in a court where the debtor resides or works.
- The court should have a discretion to grant the emoluments attachment order. It will make provision for judicial oversight and that the order be queried at the application stage of such an order, and not only once the order has already been granted.
- A cap should be placed upon the amount deductible, which will ensure that the number of emoluments attachment orders against the debtor's salary is appropriate to the extent that the debtor will still have sufficient means to maintain himself and the dependants.

The implication of these amendments would ensure that the abuse of the process of emoluments attachment orders are abolished. It is also important to note that debtors still need to act in a responsible manner. These amendments would also ensure that creditors are protected to the extent that they follow the correct procedures in order to collect the debt owed to them. It is my submission that amendments by the legislature is the only way to ensure that the abuse is curbed and to establish a balance between the rights of the creditor and the rights of the debtor.

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# Chapter 1: Introduction

Debt can be described as liability on a claim or a specific sum of money due by agreement or otherwise.[1] In my research the various issues concerning over-indebtedness will be addressed, and more specifically, a form of debt collecting namely the "emoluments attachment order." In order to discuss this topic thoroughly, it is essential to establish its source. In this case, the source derives from consumers having too much debt and no means of repaying their debt.

The procedure used to collect a debt owed by a debtor can be found in section 65 of the Magistrates' Courts Act.[2] Section 65 provides for the recovery of debt after judgment has been granted against the debtor; this procedure is only available to Magistrates' Courts.[3] The debt collection procedure in terms of section 65 provides for emoluments attachment orders, administration orders, and recovery of debt in terms of sections 57 (admit liability and pay in instalments) and 58 (unconditionally consent to judgment and pay in instalments). Section 65 applies in the instances where judgment (against a debtor) has been granted by a court to pay an amount of money, or where the court has ordered the debtor to pay in instalments and where the judgment or order has not been complied with.[4] The specific debt collection procedure that this research will focus on is the emoluments attachment order.

An emoluments attachment order falls within the scope of the Magistrates' Courts Act. The Act defines "emoluments" as a salary, wage, or any other form of remuneration, whether monetary or not.[5] The applicable section that deals with emoluments attachment orders is section 65J. This section states that an emoluments attachment order will be issued against the employer (the garnishee) to attach the emoluments of a judgment debtor, whether at present or in future owing or accruing, to the amount that is necessary to cover the

[1] Garner BA (2004) *Black's Law Dictionary* 8th ed United States of America: Thomson West 432.
[2] Magistrates' Courts Act 32 of 1944. Herein after referred to as the Magistrates' Courts Act.
[3] A High Court judgment can be transferred in terms of section 65M of the Magistrates' Courts Act 32 of 1944.
[4] Boraine A, Theophilopolos C & Van Heerden C (2015) *Fundamental Principles of Civil Procedure* 3rd ed Durban: Lexis Nexis p431.
[5] Section 61 of Act 32 of 1944.

judgment debt and the costs of attachment.[6] The employer will then be responsible to pay the judgment creditor (or his attorney) from time to time in agreement with the court order until the judgment debt is paid in full.[7] The effect of an emoluments attachment order on the employer does not result in a cession of the debt, but rather an obligation to the judgment creditor to deduct the specified amount which will serve as discharge of the employers obligation.[8]

In practice, it is a general inaccuracy to refer to an emoluments attachment order as a garnishee order. The term "garnishee" in relation to the emoluments attachment order refers to the employer of the debt-owing employee. Typically, the employer would have been court ordered to make deductions from the employee's salary or wage to the creditor and his attorneys. A garnishee order refers to the execution of a debt that is owed to the judgment debtor by a third party; the third party in this instance is the garnishee.[9] The confusion arises because the employer in an emoluments attachment order is called a garnishee.

Research has been done to establish the percentage of emoluments attachment orders against employees' salaries; this research has been done on a data set with different sectors such as the private and public sectors, and a sample size of all the specific sectors has been used. In June 2013, the private sector showed a number of 320 019 employees with emoluments attachment orders against their salaries; in the same period, the public sector showed a number of 240 034 employees.[10]

Vast numbers of consumers are over-indebted in South Africa. Creditors make use of emoluments attachment orders to collect debts owed to them; unfortunately, this procedure frequently leaves the debtors with little to zero take-home pay. In this research, various issues concerning the emoluments attachment order will be addressed. In addition,

[6] Section 65J(1)(b) of Act 32 of 1944.
[7] *Ibid.*
[8] Van Loggerenberg DE (2015) *Jones & Buckle: The Civil Practice of the Magistrates' Courts in South Africa (Volume I)* 10th ed Claremont: Juta Act 442.
[9] Joubert WA (2013) *'Civil Procedure: Lower Courts' The Law of South Africa* 3rd ed Durban: Lexis Nexis para 303.
[10] Van Sittert C (2013) University of Pretoria Law Clinic on The Incidence of and Undesirable Practices Relating to 'Garnishee Orders' – A Follow up Report" 78.

the emoluments attachment order process is open to several types of abuse. Ultimately, it is necessary to find a balance between the rights of the creditor and the rights of the debtor.

A brief overview of the provisions that applied to emoluments attachment orders before the introduction of the South African Constitution will also be given.[11]

There are four categories regarding the abuse of the emoluments attachment order. The first category of abuse occurs in the instance when the emoluments attachment order gives credit providers a means of securing repayment. The second category pertains to the excessive interest collected on debts by means of emoluments attachment orders. The third category involves attorneys or debt collectors charging excessive amounts, and finally yet importantly, abuse of jurisdiction often takes place.[12]

Concerning jurisdiction, uncertainties arise about whether a debtor can consent to a different jurisdiction to where the employer works or resides. This uncertainty stems from a lack of uniformity among courts; for instance, some Magistrate's Courts will grant an emoluments attachment order based on consent to jurisdiction in terms of section 45 while some courts will refuse applications where there is no jurisdictional link in terms of section 65J(1)(a). Debt-collection practitioners often make use of section 45 to obtain consent for the issuing of an emoluments attachment order from a court which lacks jurisdiction in terms of section 65J(1)(a).[13]

The Law Society of South Africa has also recognised the abuse of emoluments attachment orders and has stated that factors contributory thereto include reckless credit granting and unjust methods to secure signatures. Debt-recovery practitioners often adopt unjust means to secure signatures to written consents, which result in the granting of emoluments attachment orders; this, evidently, leave debtors with little to no income.[14]

In South Africa, adequate judicial oversight is another important aspect that will be discussed. Judicial oversight would require a magistrate to execute supervision over the portion deductible. This aspect is one of the very important matters attended to in the

[11] Constitution of the Republic of South Africa Act 108 of 1996.
[12] Bentley B "Separating the baby and the bath water" (2013) 41 De Rebus 23.
[13] Van Sittert (2013) *UP Law Clinic* 34.
[14] Whittle B "LSSA condemns unscrupulous garnishee practices" (2013) 529 De Rebus 13.

*University of Stellenbosch's Legal Aid Clinic*[15] case. In this case, the court considered all the evidence presented by the underlying parties in order to reach a decision. The University of Stellenbosch's Legal Aid Clinic challenged the judicial oversight of a matter where the clerk of the court had the authority to grant an emoluments attachment order.[16] Evidently, the clerk of the court plays an equally important role in the emoluments attachment orders process, because that role encompasses the granting of emoluments attachment orders as well as consideration to access to justice.[17]

The South African Human Rights Commission (SAHRC) seeks to promote and protect human rights. In this country, consumers are often abused because they are ignorant of the rights to which they are legally entitled. In order to fight this specific abuse, the SAHRC pursues its goal by investigating the abuse of emoluments attachment orders and releasing media statements to voice its concerns.

One of its concerns relates to statutory caps. An SAHRC representative, advocate Brickhill, argued that a red flag should be raised when an emoluments attachment order exceeds 30 percent of a debtor's salary.[18] Statutory caps are therefore an important aspect to take into consideration; as a result, an analysis of the mechanisms that apply beyond the South African context have to be included in this research seeing that South Africa has no such notion. The most effective way to do this is to start by identifying what processes other legal systems (other than South Africa) use to collect debt. International legal systems of countries such as the United States of America has wage garnishment, and England has attachment of earnings, which are similar mechanisms of debt recovery. South Africa has no statutory caps for ordinary workers, and so there is no limit to the number of emoluments attachment orders that may be granted against an individual.[19]

The Department of Justice and Constitutional Development published draft legislation to address these issues and allowed for comments on the draft amendments. The Law Society

[15] *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* (2015) 3 ALL SA 644 (WCC). Facts discussed in chapter 4.
[16] *Ibid.*
[17] *Ibid.*
[18] ANON (2015) "Red flags should be raised at salary deductions of 30%" 19 February 2015 *Moneyweb*.
[19] Rees M & Volker D (2013) "Garnishees 'exploit all South Africans' – Webber Wentzel" 15 August 2013 *Moneyweb*.

of South Africa, however, condemned the unscrupulous garnishee practices and submitted that it is the responsibility of the legislature to review the credit industry.[20]

Action needs to be taken against the abuse of emoluments attachment orders; subsequently, recognising the abuse of these orders is a positive start. This abuse is causing severe irregularities within this process, and there should be an investigation as to why this abuse is taking place and what provisions can be amended or implemented to abolish this abuse. Evidently, the purpose of this research is to identify a constitutionally suitable emoluments attachment order procedure which would entail amendments to section 65J(1) and (2) of the Magistrates' Court Act.[21]

Clearly, there is tension between the rights of creditors and the rights of debtors. The emoluments attachment order is a good, even a necessary, weapon for the creditor; often, the emoluments attachment order is the only weapon the creditor has, and it mostly serves as a last resort. On the other hand, the abuse of the process has an immense, often devastating impact on the debtor. If the rights of these opposite, particular parties were put on a scale, it would be clear that both parties' rights are important; therefore, a balance is needed to ensure both parties' rights are protected.

[20] Whittle B (2013) 529 De Rebus 13.
[21] Magistrates' Courts Act 32 of 1944.

# Chapter 2: History

## 2.1 Introduction

In this chapter, a brief discussion of the previous South African position concerning the emoluments attachment order will take place and will include a short discussion of the way it had been introduced and applied previously in the South African Law. The emoluments attachment order has been part of the South African Law for many years, and as such, the procedure the way it was followed before amendments to the Magistrates' Courts Act,[22] and before the introduction of our Constitution in 1996[23] will be discussed. The previously applied emoluments attachment order provides for some modern-day controversial provisions; it also refers to a time when debtors faced possible imprisonment for not being able to repay a debt.

## 2.2 Previous position concerning the emoluments attachment order

An emoluments attachment order was used in the debt collection procedure to collect debt from a judgment debtor that was owed to the judgment creditor. The judgment debtor's employer was ordered by a court to make monthly deductions from the judgment debtor's salary and to pay it to the judgment creditor.[24]

A judgment creditor could obtain an emoluments attachment order against a judgment debtor in the following circumstances:

1) If the court suspended an order or warrant of arrest in terms of section 65F(2), pending payment by the judgment debtor of the judgment debt and costs in particular instalments as stipulated in the suspension order;[25] or
2) If the court ordered repayment of the judgment debt and costs in particular instalments as stipulated in the order;[26] or

[22] Magistrates' Courts Act 32 of 1944.
[23] Constitution of the Republic of South Africa Act 108 of 1996.
[24] Eckard C.F (1984) *Grondtrekke van die Siviele Prosesreg in die Landdroshowe* 1e Uitg Kaapstad: Juta 362.
[25] Section 65J(1)(a) of Act 32 of 1944.
[26] Section 65J(1)(b) of Act 32 of 1944.

3) If the judgment debtor failed to pay in accordance with the court order, and the judgment debtor had served his/her term in prison or periodic imprisonment due to his failure to pay, the judgment debt remained unpaid;[27] or
4) If the judgment debtor agreed thereto in writing;[28]
5) If a court had given authorisation thereto.[29]

It is stated that in practice it would have been much more advantageous for the judgment creditor to get the judgment debtor to agree to an emoluments attachment order as soon as he made an offer to pay in instalments.[30] If the judgement creditor could not obtain consent, he would have had to follow the subsequent procedure, which entailed many requirements. The judgment creditor would need to send a registered letter to the judgment debtor's last known address. This registered letter would need to inform the judgment debtor of the amount of judgment debt and costs owed by the judgment debtor, and needed to include a warning that an emoluments attachment order would be obtained if the mentioned amount were not paid within 7 days of the date that the registered letter was sent.[31]

If the judgment debtor still failed to pay the judgment debt, an affidavit or a confirmation from the judgment creditor or a certificate by the lawyer were submitted to the clerk of the court who stipulated the following:

- The amount of the judgment debt and the pre-determined instalments as indicated on the date of the order;
- Any costs incurred since that date;
- The balance due;
- An affidavit that served as confirmation that the abovementioned registered letter had been sent, which also included the date the registered letter had been sent;
- If applicable, the clerk of the court had to state that the judgment debtor had served the imposed term of imprisonment or periodic imprisonment by the court.[32]

[27] Section 65J(1)(c) of Act 32 of 1944.
[28] Section 65J(1)(d) of Act 32 of 1944.
[29] Section 65J(1)(e) of Act 32 of 1944.
[30] Eckard C.F (1984) 363.
[31] Section 65J(2)(a) of Act 32 of 1944.
[32] Section 65J(2)(b)(i) and (ii) of Act 32 of 1944.

If the judgment creditor issued an emoluments attachment order from any other court than the court where the sentence or the order had been issued, the judgment creditor had to attach a certified copy of the sentence or the order obtained against the judgment debtor to the affidavit, the confirmation, or the certificate as indicated above.[33]

It is also stated that upon proof thereof—if the judgement debtor did not have sufficient resources to maintain himself and his/her dependants after the emoluments attachment order had been met—the court could withdraw the emoluments attachment order or amend it in such a way that only the balance of the emolument of the judgment debtor was met, over and above his or her available resources.[34]

If good cause was shown, the court could in any case suspend, withdraw, or amend the emoluments attachment order on such conditions as the court deemed fair.[35]

If a judgment debtor left the employment of his or her employer before the judgment debt had been settled in full, the judgment debtor was obliged yet again to meet the order of the court in terms of section 65J(1)(a), or (b) that stated that the judgement debt and cost had to be paid in the determined instalments as it appeared in the order, pending service of the emoluments attachment order in his or her new employer. In the event that the judgment debtor failed to comply with the order of the court, he could have been imprisoned, subject to the provisions of section 65G due to contempt of court by not fulfilling the order.[36]

## 2.3 Conclusion

It is evident that the previous position concerning the emoluments attachment order has similarities with the emoluments attachment order as it is being applied today. However, the Constitutional Court has given judgment about the issue of imprisonment when not repaying a debt. The court[37] stated that a judgment creditor could no longer rely on the

[33] Rule 46(1) of the Magistrates' Courts Rules.
[34] Section 65J(6) of Act 32 of 1944.
[35] Section 65J(7) of Act 32 of 1944.
[36] Section 65J(9)(b) of Act 32 of 1944.
[37] *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison* 1995 (4) SA 631 (CC). In this case, the court had to decide on the constitutional validity of provisions relating to the imprisonment of a judgment debtor in section 65A to 65M of the Magistrates' Courts Act 32 of 1944. The court held that it is a reasonable objective to enforce a judgment debt, but it is not reasonable to imprison a debtor to achieve that goal. The court also stated that the result of the defects of the provisions are that debtors who can't pay, are swept up with debtors who can pay, but simply refuses to do so. The court also stated that severing the provisions that create the infringements would ensure a balance of the remaining

section 65 procedure to imprison the judgment debtor if he or she fails to pay. The court stated that imprisonment in this context constitutes an infringement of a person's right to freedom as explained in section 12 of the Constitution.[38] The result of this decision is that a person can no longer be imprisoned if the person has an emoluments attachment order against his or her salary, should the person fail to pay.

system to stay in force. The court made the order that the infringing provisions are inconsistent with the Constitution of the Republic of South Africa and declared it invalid.

[38] Interim Constitution of the Republic of South Africa Act 200 of 1993.

# Chapter 3: Current South African Position

## 3.1 Introduction

In this chapter, the current South African position concerning the emoluments attachment order will be discussed. The current position is codified in the Magistrates' Courts Act, and can be found in section 65J which reads as follow:

> "(1) *(a)* Subject to the provisions of subsection (2), a judgment creditor may cause an order (hereinafter referred to as an emoluments attachment order) 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.
>
> *(b)* An emoluments attachment order-
>
> (i) shall attach the emoluments at present or in future owing or accruing to the judgment debtor by or from his or her employer (in this section called the garnishee), to the amount necessary to cover the judgment and the costs of the attachment, whether that judgment was obtained in the court concerned or in any other court; and
>
> (ii) shall oblige the garnishee to pay from time to time to the judgment creditor or his or her attorney specific amounts out of the emoluments of the judgment debtor in accordance with the order of court laying down the specific instalments payable by the judgment debtor, until the relevant judgment debt and costs have been paid in full.
>
> (2) An emoluments attachment order shall not be issued-
>
> *(a)* unless the judgment debtor has consented thereto in writing or the court has so authorised, whether on application to the court or otherwise, and such authorisation has not been suspended; or
>
> *(b)* unless the judgment creditor or his or her attorney has first-
>
> (i) sent a registered letter to the judgment debtor at his or her last known address advising him or her of the amount of the judgment debt and costs as yet unpaid and warning him or her that an emoluments attachment order will be issued if the said amount is not paid within ten days of the date on which that registered letter was posted; and
>
> (ii) filed with the clerk of the court an affidavit or an affirmation by the judgment creditor or a certificate by his or her attorney setting forth the amount of the judgment debt at the date of the order laying down the specific instalments, the costs, if any, which have accumulated since that date, the payments received since that date and the balance owing and declaring

> that the provisions of subparagraph (i) have been complied with on the date specified therein."[39]

In this chapter, the underlying problems with the emoluments attachment order as it currently exists in South Africa will be addressed. My discussion will include problems that arise from jurisdiction in terms of section 45 of the Magistrates' Courts Act, as well as section 65J(1)(a), and will be followed by a discussion of the problems with regard to consent to judgment in terms of section 57 and 58 of the Magistrates' Courts Act. The problems with regard to section 65J(2)(b) of the Magistrates' Courts Act will also be discussed, due to the magnitude of its importance. The application of the National Credit Act[40] will also be noted, followed by a discussion concerning abuse in this area. Furthermore, aspects that pertain to the constitutionality of the emoluments attachment order as well as that of capping will be discussed.

## 3.2 Consent to Jurisdiction

### 3.2.1 Section 45

In normal circumstances, section 45 would be used to consent to jurisdiction in any other Magistrate's Court other than the one where the judgment debtor resides or works. The debtor consents to jurisdiction before proceedings commence, for example, when the transaction is concluded. If section 45 were to be used for lawful purposes, there would be no underlying problem; unfortunately, this is not always the case when it comes to the emoluments attachment order. To regularly and routinely have judgments and emoluments attachment orders granted in distant courts where the judgment debtor neither resides nor works, results in abuse of the process. Credit providers often abuse this process and unfortunately, this step results in judgment debtors not being able to oppose the granting of the emoluments attachment order mainly due to financial vulnerability and strain.[41]

Therefore, the core argument against the granting of jurisdiction in terms of section 45 of the Magistrates' Courts Act lies in the fact that judgment debtors do not have the financial

[39] Section 65J(1)(a) and (b); Section 65J(2)(a) and 65J(2)(b)(i) and (ii) of Act 32 of 1944.
[40] National Credit Act 34 of 2005. Herein after referred to as the National Credit Act.
[41] Law Society of South Africa *"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"* http://www.lssa.org.za/upload/LSSA%20Comments%20on%20Magistrates%20Courts%20Amendment%20Bill.pdf (last accessed 17.02.2015).

means to query the validity of the order or to rescind the order, especially if the court that has granted the order is situated in a jurisdiction different to the judgment debtor's employer. This situation clearly suggests that some sort of jurisdictional link is crucial to prevent such injustices. Courts conferring emoluments attachment orders without a jurisdictional link has led to forum shopping[42] amongst debt collectors; as a result, the process has been obstructed to such an extent that this process will no longer be a feasible option for debt collection.[43]

A practical example of forum shopping (as mentioned previously) would be the alleged illegal activities at the Palm Ridge Magistrate's Court in Alberton. It has been reported that several employees of this Magistrate's Court have been accused of issuing fraudulent court orders, including emoluments attachment orders. With court documents in its possession, *Times Live* reported on this issue and proved that workers had been accounted for as being "at court" while the court orders were being granted (as per prerequisite through law that workers attend court for the order to be granted); in reality, these workers were still clocked in at work. The employer of these workers confirmed that the workers were at work at the time the orders were being granted, and was therefore helping the workers to get the orders rescinded.[44] It has also been reported that the court order indicated the presence of the workers in court for the granting of the order; it also showed their signatures on the applications in support of the orders. The lawyer for the workers stated that their addresses had been changed on the application, "presumably" to be able to fall within the jurisdiction of the aforementioned court.[45]

3.2.2 Section 65J(1)(a)

Inherent to this aspect of consent, consent to jurisdiction in terms of section 65J(1)(a) is significant as well. Generally, section 65J(1)(a) of the Magistrates' Courts Act deals with jurisdiction, which states:

> "Subject to the provisions of subsection (2), a judgment creditor may cause an order (hereinafter referred to as an emoluments attachment order) to be issued from the court of the district in which

[42] Forum shopping occurs when a party institute's legal action in a court he or she believes will give a favourable judgment.
[43] Van Sittert (2013) *UP Law Clinic* 35.
[44] Bornman J (2013) "Court Officers on dock" 6 August 2013 *TIMES Live.*
[45] *Ibid.*

> 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."

It is clear that the order should be issued from the court of the district where the employer of the judgment debtor resides or works, however, the reason for this specific wording is unclear. It has been suggested that the wording is formulated in such a manner as to create convenience for the employer if he/she wishes to dispute the validity of the order.[46]

In certain instances, section 65J(1)(a) will not regulate the jurisdiction of a court, but section 45 of the Magistrates' Courts Act will. Section 45, as indicated above, states that consent to the jurisdiction of a specific Magistrates Court can in certain instances be obtained.[47]

In *MBD Securitisation v Booi*[48] the court dealt with a similar situation with regard to consent to jurisdiction of a specific court. The court stated that a serious abuse of process occurred and that summons should have been issued where the respondent works and resides – which is in East London; or where the whole cause of action had arisen – which is unclear. The court stated the probability that unjust favours are granted by someone in the distant court (Henneman Magistrates Court) to the appellant and/or his legal representative. The court held that the respondent was deceived into consenting to the jurisdiction of a distant court and that such consent was not adequately covered by section 45 of the Magistrates' Courts Act.

The crux of the matter stems from the uncertainty of whether a debtor can consent to a different jurisdiction to where he or she works or resides, as in terms of section 65, or whether this jurisdiction can be obtained conveniently via section 45. As a result, debt-collection practitioners often make use of section 45 to obtain consent for the issuing of an emoluments attachment order from a court which lacks jurisdiction in terms of section

[46] Van Loggerenberg DE (2015) *Jones & Buckle: The Civil Practice of the Magistrates' Courts in South Africa (Volume I)* 10th ed Claremont: Juta Act 441.
[47] Van Sittert (2013) *UP Law Clinic* 13.
[48] *MBD Securitisation (Pty) Ltd v Booi* 2015 (5) SA 450 (FB). This appeal deals with an appellant (plaintiff) which is a company situated in Johannesburg and a respondent (defendant) that resides and works in East London. The appellant's attorney which is situated in Nelspruit, instituted action in Henneman in the Freestate. The Henneman Magistrates Court therefore dealt with and granted the emoluments attachment order against the respondent. The respondent then obtained an order for rescission. The appellant appealed against the decision of the court *a quo* to set aside the emoluments attachment order. The Freestate High Court dismissed the appeal.

65J(1)(a).[49] There is no uniformity among courts, as some Magistrates' Courts will grant an emoluments attachment order based on consent to jurisdiction in terms of section 45, while some courts refuse applications where there is no jurisdictional link. It is therefore common cause that credit providers often obtain emoluments attachment orders in distant courts where the debtor neither resides nor works, effectively resulting in these debtors not being able to oppose the granting of emoluments attachment orders.

## 3.3 Consent to judgment

In practice, most emoluments attachment orders are obtained through the debtor signing a section 57 or 58 consent to judgment. This consent to judgment incorporates consent to an emoluments attachment order that stipulates the settlement of the owed debt in specific instalments.[50] Sections 57 and 58 gives the clerk of the court the power to grant judgment against the debtor.[51]

### 3.3.1 Section 57

Section 57(1) provides that a debtor may admit liability for the amount that is owed by him or her and offer to pay the outstanding amount and costs if the debtor receives a letter of demand, or if he or she has been served a summons. Section 57 also states that a debtor undertakes to pay any instalments in terms of the debtor's offer. The debtor agrees that should he or she fail to meet the terms of the offer, the plaintiff may apply—without any notice for judgment against the debtor—for the unsettled debt.[52] Section 57(2) states that if a debtor fails to comply with the terms of his or her offer, judgment may be granted against the debtor if certain conditions are met. To obtain consent under section 57 will constitute a conditional consent to judgment, which means that the consumer will be able to avert judgment if he or she pays in accordance with his or her offer. Only when the consumers fail to pay in accordance with their offers will judgment be applied for.

Section 57 primarily consists out of a cost effective and time efficient debt collecting procedure, however, the fact that the clerk of the court can grant judgment in terms of this

[49] Van Sittert (2013) *UP Law Clinic* 34.
[50] Bentley (2014) *Separating the Baby and the Bathwater - Garnishee Orders* (The original version of Brett Bentley cover article appearing in the March 2013 De Rebus, the official SA Attorneys journal http://www.bentleylaw.co.za/news-a-articles.html (last accessed 10/02/2015)).
[51] *Ibid.*
[52] Buchner G and Hartzenberg CJ "Cashing in on Collections" (2013) 532 De Rebus 31.

section often results in abuse. It is stated that once the plaintiff requires a judgment to be granted against the debtor to enforce a debt, it is desired that such judgment be an order of court. This proposed amendment to have instalment orders made an order of court effectively excludes the clerk of the court to grant judgment.[53]

In practice, collection attorneys rely predominantly on section 58 consents, and section 57 is not used often.[54]

3.3.2 Section 58

Section 58 states that upon receipt of demand, summons, or service on the debtor, consent to judgment in favour of the plaintiff for the amount payable can be given.[55]

The concerns with regard to section 57 accordingly applies to section 58. The abovementioned amendment to have the order made an order of court applies to section 58 as well. It is also suggested that obtaining consent to judgment preceding default,[56] should be criminalised.[57]

In *African Bank Limited v Additional Magistrate Myambo,*[58] the court held that the section 58 procedure is cost-effective and speedy. The court further held that the advantages of speedy and cost-effective debt collection are self-evident. The court stated that this would only be possible if the provisions of section 58 and those of the National Credit Act are complied with in a proper manner and with great consideration to the rights of the parties, the interests of the credit providers, and the interests and rights of the consumers.

[53] Department of Justice "Working document: Magistrates' Courts Amendment Bill" http://www.northernlaw.co.za/Documents/magistrate_court/Working%20document%20Magistrates%27%20Courts%20Amendment%20Bill%2021Feb13.pdf (last accessed on 14.05.2015) 8.
[54] Buchner and Hartzenberg (2013) 532 *De Rebus* 31.
[55] *Ibid.*
[56] Consent to judgment is often obtained when the debtor applies for credit.
[57] Department of Justice "Working document: Magistrates' Courts Amendment Bill" 9.
[58] *African Bank Limited v Additional Magistrate Myambo* 2010 (6) SA 298 (GNP). In this case, the court dealt with the scenario of whether a consumer who owes a debt under a credit agreement that is governed by the National Credit Act can lawfully consent to judgment in terms of section 58 of the Magistrates' Courts Act. The court was also asked to rule about what effect the National Credit Act will have on the procedure prescribed by section 58. The court came to the conclusion that when a plaintiff seeks judgment by consent in terms of section 58 and where it is alleged that the defendant is over-indebted, clerks of the court must refer the application to the court. In such a case, magistrates are entitled to interrogate the application for judgment.

A section 58(1) unconditional consent was also discussed in *Russels v Manyashe*[59] where it was held that judgment needed already be granted before consent to an emoluments attachment order could legally be acceptable. On appeal, the court held that the Magistrates' Courts Act did not prohibit the debtor from consenting to an order for the payment of a future judgment debt in instalments before judgment, or to the issuing of an emoluments attachment order in terms of section 65J.[60] It has been suggested that these sections should be amended to ensure a jurisdictional link. The proposed amendment would provide that only the courts in which a debtor resides or works in could have jurisdiction.[61]

It is evident that in the legal collection process, abuse of jurisdiction often takes place. As previously mentioned, the debtor often struggles to oppose or rescind the emoluments attachment orders due to orders being granted in other jurisdictions than where the debtor resides or works.[62] Fraudulent and illegal consent to judgment and consent to the emoluments attachment orders are also associated with the legal collection process in the sense that signatures on a appropriated section 58 consent have been forged in some instances; furthermore, the signing of consent to judgment, even before the debtor owes any debt, is also an illegal practice.[63]

## 3.4 The National Credit Act

The National Credit Act strives to promote consistency concerning consumer credit and the enforcement thereof. Consequently, it is meticulously incorporated with the debt collection process, as creditors may only grant credit if the prerequisites of the National Credit Act are complied with. Regrettably, the process of debt recovery is open to tremendous exploitation. In many instances, the creditor cedes the claims to the debt collector to

[59] *Russels (Ceres) v Manyashe* 2005 (4) SA 380 (C). In this case, the magistrate refused to issue an emoluments attachment order. The magistrate held that judgment could only validly be entered into if the debtor's written consent had been granted prior to judgment. The appellant appealed against the magistrates finding. On appeal the court stated that section 65J of the Magistrates' Courts Act read together with section 58 of the Magistrates' Courts Act, clearly indicates that the first respondent was entitled to consent to the issuing of an emoluments attachment order. The Magistrates' Courts Act does in fact not prohibit consent to an order to pay a future debt before judgment. The magistrate therefore should have granted the emoluments attachment order.

[60] Van Sittert (2013) *UP Law Clinic* 12.

[61] Bentley (2014) *Separating the Baby and the Bathwater – Garnishee* (The original version of Brett Bentley cover article appearing in the March 2013 De Rebus, the official SA Attorneys journal http://www.bentleylaw.co.za/news-a-articles.html (last accessed 19/02/2015)).

[62] Bentley (2013) 41 *De Rebus* 23.

[63] *Ibid.*

capitalize on recovery. This means that the debt collection entity often recovers the debt in its own name and for its own benefit.[64]

Abuse concerning credit granting is also a reality. With credit granting, there are a few contributory aspects, and one of these include illegal lending, which in turn incurs ridiculous lending rates. The emoluments attachment order gives reckless credit providers a means of securing repayment, but it has been alleged that this is not the core problem.[65] The core problem is the fact that the National Credit Act has poorly drafted provisions, and this situation is aggravated by the failure of the National Credit Regulator, debtors, and debt counsellors to react against this abuse.[66]

Other issues regarding abuse refer to interest rates and the capping of interest. A major complaint in this category is that lavish amounts of interest are collected on debts by means of emoluments attachment orders. In *Nedbank Limited v The National Credit Regulator,*[67] the Supreme Court of Appeal gave guidance regarding the interpretation of sections 101 to 105 of the National Credit Act, which relate to the capping of interest. It is contended that it was a failed attempt due to the vagueness of the provisions.[68]

Sections 57 and 58 of the Magistrates' Courts Act come into conflict with another rule, namely rule 12(5) of the Magistrates' Courts Rules. The former indicates that the clerk of the court is empowered to grant judgment against the debtor if certain requirements have been met.[69] The latter indicates that the registrar or clerk of the court is not empowered to grant judgment but has to refer the request for judgment against the debtor to the court, if the request for judgment is based or founded on an agreement that is regulated by the National Credit Act or the Credit Agreements Act.[70]

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[64] Buchner and Hartzenberg (2013) 532 *De Rebus* 31.
[65] Bentley (2013) 41 *De Rebus* 23.
[66] *Ibid.*
[67] *Nedbank Ltd and Others v The National Credit Regulator and Another* 2011(3) SA 581 (SCA). In this case, the court held that an application for debt review might not be made by a credit provider if that credit provider had already proceeded to take steps in terms of section 129 of the National Credit Act to enforce a credit agreement. The court stated that the common law "…limits the interest recoverable by preventing interest from accruing further once it reaches the unpaid capital amount." The court also stated that payment is allocated to interest first, and then to capital.
[68] Bentley (2013) 41 *De Rebus* 23.
[69] Buchner and Hartzenberg (2013) 532 *De Rebus* 32.
[70] Credit Agreements Act 75 of 1980.

Despite these shortcomings and irregularities concerning section 57 and 58 of Magistrates' Courts Act, its entrenchment in our law, specifically concerning the collection of debt through legal proceedings, is assured. These provisions often provide a fundamental platform for businesses to maximise their returns made by the debt collection process. It is, however, not the optimal situation for the debtor, as the debtor will most likely be exposed to over-recovery of costs, debt collectors' fees and attorneys' commission. It has therefore been submitted that the legislature should have repealed sections 57 and 58 of Magistrates' Courts Act entirely.[71]

It is my viewpoint that the latter opinion to repeal sections 57 and 58 of has led to an interesting spark of disagreement. It is Kotzé's opinion that it would be short-sighted to repeal sections 57 and 58. He is of the opinion that the said sections contribute great value to attorneys and debt collectors, and even more so to creditors who have taken enormous strain due to new consumer legislation in South Africa.[72] Exploitation has become a solution to unscrupulous attorneys, because of a lack of safeguards to protect or limit the exploitation of debtors. Introducing safeguards seems to be a preferred alternative to repeal effective legislation. It is Kotzé's suggestion that a notice be incorporated in the emoluments attachment order to designate the involvement of the National Credit Act, specifically concerning the amount that is deductible from the debtor's salary and the direction to receive suitable advice on the legality of the order and the applicable fees.[73] It is my belief that amendments to sections 57 and 58 need not be a hindrance to creditors, but rather a compromise to ensure effective debt recovery and protection for debtors.

## 3.5 Section 65J(2)(b)

Section 65J, in general, has come up for debate several times. However, section 65J(2)(b), more specifically, has numerous issues. It is a very important pillar of the emoluments attachment order, but it has demonstrated challenges as to what the exact interpretation is of the procedure that needs to be followed. It states that an emoluments attachment order shall not be issued:

> "(b) unless the judgment creditor or his or her attorney has first-

[71] Buchner and Hartzenberg (2013) 532 *De Rebus* 32.
[72] Kotzé C "Repealing ss 57 and 58 of the Magistrates' Courts Act will be shortsighted" (2013) 534 De Rebus 52.
[73] *Ibid.*

> (i) sent a registered letter to the judgment debtor at his or her last known address advising him or her of the amount of the judgment debt and costs as yet unpaid and warning him or her that an emoluments attachment order will be issued if the said amount is not paid within ten days of the date on which that registered letter was posted; and
>
> (ii) filed with the clerk of the court an affidavit or an affirmation by the judgment creditor or a certificate by his or her attorney setting forth the amount of the judgment debt at the date of the order laying down the specific instalments, the costs, if any, which have accumulated since that date, the payments received since that date and the balance owing and declaring that the provisions of subparagraph (i) have been complied with on the date specified therein.[74]"

It has been indicated that this section is vague and uncertain concerning the court application route and it needs to include personal service of the application on the debtor and his or her employer with the right to oppose the application.[75] Hence, the challenge is that some magistrates allow the direct application to oppose the emoluments attachment order or the amount of the monthly deduction, but that the onus to oppose it lies solely with the debtor.[76] This was the situation in *University of Natal, Pietermaritzburg v Ziqubu*.[77] Other magistrates follow the approach of *Minter v Baker*[78] where the court stated that section 65A should be used. Section 65A is construed of a financial enquiry followed by the application of an emoluments attachment order. The latter case was seen to be the preferred approach due to better reasoning and consideration of amendments to section 65; however, it was the opinion of Bentley that it is impractical.[79] The reason for its impracticality is that debts remain unpaid because a large majority of the debtors do not appear in court for the granting of an emoluments attachment order. It is my submission

[74] Section 65J(2)(b) of Act 32 of 1944.
[75] Bentley (2014) 41 *De Rebus* 24.
[76] *Ibid.*
[77] *University of Natal, Pietermaritzburg v Ziqubu* 1999 (2) SA 128 (N). In this case, the court stated that there are no requirements placed upon a creditor before an emoluments attachment order is issued to show that the debtor is financially able to support him/herself. The court held that the provisions of section 65J of the Magistrates' Courts Act clearly point toward an onus placed on the debtor (in this case the respondent) to show that she cannot maintain herself.
[78] *Minter NO v Baker* 2001 (3) SA 175 (W). In this case, the appellant filed with the clerk of court and stated that judgment had already been granted against the first respondent. No financial enquiry of the first respondent had been made. The court stated that section 46(f) of the Magistrates' Courts Act empowers the court to grant an order for the payment of an amount of money in instalments (including an order in terms of section 65J), but that the court would not make such an order without the consent of the debtor or after an enquiry into his financial position has been made. The court also stated that a creditor is not permitted to evade the requirements of the Magistrates' Courts Act by simply filing a certificate with the clerk of the court.
[79] Bentley (2014) *Separating the Baby and the Bathwater – Garnishee* (The original version of Brett Bentley cover article appearing in the March 2013 De Rebus, the official SA Attorneys journal http://www.bentleylaw.co.za/news-a-articles.html (last accessed 19/02/2015)).

that the issue becomes imminent, either the debtors do not show up to appear in court, or some attorneys acquire emoluments attachment orders by fraudulent actions. Certainly, there could be an alternative to find a balance.

## 3.6 Conclusion

In this chapter, the shortcomings and irregularities concerning the emoluments attachment order was discussed. To conclude, the most significant aspects of the emoluments attachment orders process will briefly be mentioned. Primarily, the consumer or debtor must give consent to the judgment that will be applied for. The order that needs to be obtained, either via written consent, court order in chambers, or a direct request from the clerk of the court needs to be issued from the court of the district in which the employer of the debtor resides or works. The court that granted the order should be indicated on the order, as well as the amount owing by the debtor, the interest rate of 9% per annum, and the legal costs. The debtor should be informed of the reason for the issuing by the Sheriff of the Court or the debtor's employer, and the debtor is entitled to a copy of the order, which should be delivered by a *bona fide* Sherriff and not an agent. Lastly, the employer must deduct the amount owed by the consumer, the amount that will be indicated on the order.[80] These core requirements to obtain a legal emoluments attachment order are not being followed and gross exploitation of the process is the result.

The Law Society of South Africa (LLSA) has also recognised that the abuse of emoluments attachment orders has a severe impact, and has pointed out some contributing factors to this problem. Some of these factors include reckless credit granting and unjust methods that some debt recovery practitioners adopt in securing signatures to written consents, which then result in the granting of emoluments attachment orders for amounts that leave little to no income.[81]

It is submitted that a number of abuses regarding emoluments attachment orders rather relate to other aspects of the unsecured lending process, particularly the National Credit Act and its implementation. The abuse regarding credit granting is an example of the abovementioned and could be a result of the vagueness of the National Credit Act and its

[80] *What is an Emoluments Attachment Order?* Garnishee Audit Services (Pty) Ltd http://www.garnisheeaudit services.wozaonline.co.za/ (last accessed 01/09/2014).
[81] Whittle (2013) 529 *De Rebus* 13.

provisions relating to reckless credit granting. The failure of the National Credit Regulator, consumers, and debt counsellors to take action against these abuses compound the problem.[82] Therefore, it is my submission that the abuse of emoluments attachment orders are causing severe irregularities, and there should be an investigation as to why this abuse is taking place and what provisions can be amended or implemented to abolish this abuse.

[82] Bentley (2013) 41 *De Rebus* 23.

# Chapter 4: Constitutionality

## 4.1 Introduction

It is evident that a discussion of the various problems relating to the emoluments attachment order has followed until now, and the preceding discussion of these problems are important to provide a foundation for the issues concerning constitutionality.

## 4.2 Judicial Oversight

It is apparent that the process of emoluments attachment orders does not always make provision for judicial oversight. Judicial oversight could provide effective and lawful emoluments attachment orders. Hence, judicial oversight is key in creating a balance between the tension that exists between the rights of the creditor and the debtor. In order to ensure adequate judicial oversight, it would require a magistrate to execute supervision over the whole process. Judicial oversight would therefore be appropriate in circumstances where the court would have to decide if there has been abuse of jurisdiction or whether correct process was followed.

The aspect of judicial oversight was also applicable in the cases of *Jaftha v Schoeman*[83] and *Gundwana v Steko Development*.[84] In the *Jaftha* case, the court had to decide whether a law, specifically section 66(1)(a) and section 67 of the Magistrates' Courts Act 32 of 1944, which permits the sale in execution of a person's homes to settle an outstanding debt, violates the person's right to have access to adequate housing (a right protected in terms of section 26 of the Constitution). The court ordered that failure to provide judicial oversight in matters of execution against immovable property of a debtor is unconstitutional and invalid. Consideration of all the relevant circumstances therefore needs to be taken into account.[85]

In the *Gundwana* case, the issue before the court was whether a High Court registrar in the course of ordering default judgment may grant an order declaring mortgaged property—that is a person's home—especially executable. The court concluded that it is

[83] *Jaftha v Schoeman* 2005 (2) SA 140 (CC). Facts discussed in the text.
[84] *Gundwana v Steko Development CC* 2011 (3) SA 608 (CC). Facts discussed in the text.
[85] *Jaftha v Schoeman* 2005 (2) SA 140 (CC).

unconstitutional for a registrar to declare immovable property "especially executable" when it permits the sale in execution against the home of a person.[86]

The principles that the Constitutional Court reiterates in these cases relate to sales in execution of property in order to satisfy a judgment debt. This is similar to the emoluments attachment order, because such an order amounts to the execution of a debtor's salary to satisfy a judgment debt as well. In both cases, *Jaftha's* and *Gundwana's*, the lack of judicial oversight accompanied with its consequences infringed on constitutional rights such as dignity, access to healthcare, education, food and housing.[87] The crux of the matter is that debtors' basic human rights are infringed upon.

Emoluments attachment orders that are granted without judicial oversight will similarly result in an infringement of the debtor's constitutional rights. A debtor has the right to human dignity.[88] When a debtor has an emoluments attachment order against his salary—that negatively affects his livelihood—it infringes upon his constitutional right to dignity. The constitutional right to dignity was also discussed in *Minister of Home Affairs v Watchenuka*.[89] The court held that human dignity is a fundamental constitutional value. The court stated that the freedom to engage in productive work is an important component in human dignity due to humankind's desire for meaningful association.[90] A debtor has the right to housing.[91] After servicing his debts, a debtor has the right to be afforded a place of residence. A debtor has the right of access to healthcare, food, water, and social security.[92] If a debtor is left with little income, he would not be able to have sufficient means for food

[86] *Gundwana v Steko Development CC* 2011 (3) SA 608 (CC).
[87] *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* (2015) 3 ALL SA 644 (WCC).
[88] Section 10, Chapter 2 Bill of Rights, Constitution of the Republic of South Africa Act 108 of 1996. Everyone has inherent dignity and the right to have their dignity respected and protected.
[89] *Minister of Home Affairs v Watchenuka 2004 (4) SA 326 (SCA).* In this case the court had to consider to what extent asylum seekers could be prohibited from being employed and studying while awaiting recognition as refugees. The court considered constitutional rights such as human dignity and stated that human dignity has no nationality. The court held that in certain circumstances it would be unlawful to prohibit asylum seekers to work or study while awaiting recognition.
[90] *Ibid.*
[91] Section 26, Chapter 2 Bill of Rights, Constitution of the Republic of South Africa Act 108 of 1996. Everyone has the right to have access to adequate housing.
[92] Section 27, Chapter 2 Bill of Rights, Constitution of the Republic of South Africa Act 108 of 1996. 1.Everyone has the right to have access to -
1. health care services, including reproductive health care;
2. sufficient food and water; and
3. social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

and evidently, insufficient means to maintain himself and his dependants. Finally, a debtor the right to access to the courts.[93] When an emoluments attachment order is granted in other jurisdictions than where he works or resides, it is often the case that the debtor has no means of opposing the order. This clearly affects his right to access to courts.

Section 25 of the Constitution[94] constitutes another basic right that should be afforded some consideration. Section 25 states that "no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property." It is evident that the purpose of the property clause is to protect a formulation of the right to property. A claim to property is considered as a moral right that all people are entitled to. This moral right includes property that is sufficient in order for them to survive or to lead a dignified existence.[95] The issuing of an emoluments attachment order on a debtor's salary directly affects his/ her ability to afford property, which certainly infringes on this moral right. The infringement of this basic right also reflects why section 65J is unconstitutional.

This infringement is a result of the abuse that occurs in the emoluments attachment order process and that will be avoided by ensuring judicial oversight. For instance, a magistrate could ensure that in the process of issuing an emoluments attachment order, an evaluation of the amount that can be deducted from the debtor's salary or wage has been done properly. A magistrate can also ensure that the deductible amount is compared with and weighed to the amount that the debtor needs to provide for his or her family. It is imperative that this evaluation should take place when the execution is issued and not only when the debtor attempts to set the order aside.[96]

The Congress of South African Trade Unions[97] has also provided for an interesting viewpoint. In a recent press release, COSATU stated that a lack of collateral could be one of the main problems leaving workers with almost zero income to take home. If people could have the

[93] Section 34, Chapter 2 Bill of Rights, Constitution of the Republic of South Africa Act 108 of 1996. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.
[94] Section 25, Chapter 2 Bill of Rights, Constitution of the Republic of South Africa Act 108 of 1996.
[95] Currie I & De Waal J (2013) *The Bill of Rights Handbook* 6th ed Cape Town: Juta 533.
[96] University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others (2015) 3 ALL SA 644 (WCC).
[97] Herein after referred to as COSATU.

deeds to their homes or other assets, such as cars not bought by means of an unsecured loan, citizens could have another form of collateral for their loans other than their payslips.[98] Instead, these people only have their payslips as guarantee for loans—loans with interest rates that could be as high as 40 percent, more than five times the country's average lending rate. As a result, people end up with emoluments attachment orders against their salaries, which leave them with little financial means to live on. COSATU agrees with Wendy Appelbaum, owner of DeMorgenzon Wine Estate in Stellenbosch, that some of her workers have lost their civil and constitutional rights after they had learned they had almost 80 percent of their salaries attached. COSATU wishes for the federation to continue its battle against loan sharks and reckless lending practices.[99]

The South African Human Rights Commission[100] recently released a media statement to voice its concerns regarding the constitutionality and impact of the provisions of the emoluments attachment order, as entrenched in the Magistrates' Courts Act.

It is submitted that the SAHRC has done research in the field of the emoluments attachment order, especially concerning the aspect of judicial oversight. The emoluments attachment order entails that the salary of a debtor can be attached to pay outstanding debts, but the issue the SAHRC identified is that the clerk of the court can authorise the attachment order without judicial oversight. The SAHRC's research indicated that debtors do not have the courtesy of having the implications of orders explained to them.[101] The SAHRC, with assistance of the Legal Resources Centre, has joined this battle concerning the emoluments attachment order as *amicus curiae* (as a friend of the court), since some of the provisions of the Magistrates' Courts Act are inconsistent with the Constitution.[102] [103]The SAHRC is concerned that the lack of judicial oversight by magistrates in the issuing of emoluments

[98] Congress of South African Trade Unions *"COSATU backs court action against loan sharks"* http://www.cosatu.org.za/show.php?ID=10058 (last accessed on 21.04.2015).
[99] *Ibid.*
[100] Herein after referred to as the SAHRC.
[101] South African Human Rights Commission *"SAHRC challenges the powers and human rights violations in micro-lending"* http://www.sahrc.org.za/home/index.php?ipkMenuID=91&ipkArticleID=322 (last accessed on 15.04.2015).
[102] *Ibid.*
[103] Constitution of the Republic of South Africa Act 108 of 1996.

attachment orders is pushing the vulnerable into poverty traps and so breach their human rights.[104]

## 4.3 Clerks of the Court

Interrelated with the aspect of judicial oversight is the role of the clerk of the court. It has been established that the clerk of the court plays an equally important role in the emoluments attachment order process, whether this role encompasses the granting of emoluments attachment orders or the mere consideration of access to justice. This aspect of access to justice allows for an even more extensive view concerning the clerk of the court. [105]The reported media statement by the SAHRC identified that access to justice is crucial for the vulnerable, the poor, and the marginalised because it enables them to access their rights, and more specifically, their socio-economic rights. This statement by the SAHRC was enticed by a non-governmental organisation claiming that they had been refused to lodge a case in the Magistrates Court but were told to rather lodge a case at the Constitutional Court in Braamfontein.[106] Mohamed Ameeria, for the SAHRC, said, "If court clerks behave like this, it is bound to discourage the public from pursuing justice." He further held that the commission is hosting workshops to ensure that all the applicable representatives including the state, civil society, related sectors of the legal community, and higher institutes of learning seek to increase access to justice for the public.[107]

It is clear that the clerk of the court plays an important role in the emoluments attachment order process. However, placing such an enormous responsibility on the clerks of the court could be unfavourable for many reasons. Clerks of the court often have such big workloads, or sometimes even have too few resources to their disposal to deal effectively with the immense responsibility that the granting of an emoluments attachment order entails. Another unfavourable possibility is that clerks of the court could be bribed into granting an emoluments attachment order, or simply that a specific clerk does not have the necessary expertise to make an informed decision about such an important order. It is conceivable

[104] South African Human Rights Commission "SAHRC challenges the powers and human rights violations in micro-lending" http://www.sahrc.org.za/home/index.php?ipkMenuID=91&ipkArticleID=322 (last accessed on 15.04.2015).
[105] *Ibid.*
[106] Benjamin C (2015) "Justice is so much more than justice" 27 March 2015 *Mail & Guardian.*
[107] *Ibid.*

that various forms of abuse can take place when such responsibilities, such as the granting of emoluments attachment orders and whether access to a court (access to justice) could and should be granted, are placed on a clerk of the court.

## 4.4 *University of Stellenbosch Legal Aid Clinic* case

The continual abuse of the emoluments attachment order has finally reached the attention of the High Court as per Desai's J judgment on 8 July 2015.[108] The University of Stellenbosch's Legal Aid Clinic had brought an application in November 2014 to address the situation of abuse of the emoluments attachment order that had affected a number of underprivileged citizens.

Amplats CEO Chris Griffith stated that this exploitation of over-indebtedness might take place because of a lack of clarity in statutes governing the roles of debt collectors, coupled with lax regulation of their activities.[109] The deputy ombudsman at the Credit Ombud maintained a position of fairness. The deputy ombudsman is of the opinion that it is unjust to taint the reputation of all credit providers and their collection agents due to the inappropriate behaviour of only a few agents who mismanage the process and who abuse their roles.[110]

The University of Stellenbosch's Legal Aid Clinic brought the abovementioned application to the High Court for several reasons, inter alia:

1. Declaring the words *"the judgment debtor has consented thereto in writing"* as well as section 65J(2)(b)(i) and section 65J(2)(b)(ii) of the Magistrates' Courts Act as being inconsistent and invalid with the Constitution of The Republic of South Africa,[111] as it also fails to provide judicial oversight for the issuing of an emoluments attachment order; and

[108] *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* (2015) 3 ALL SA 644 (WCC).The facts of this case pertain to the debt-collection procedure used by the micro-lending industry. Several applicants had emoluments attachment orders instituted against them but contested, among other things, the legality of these orders. The court heard the underlying parties' arguments and declared these emoluments attachment orders unlawful and invalid. The court also considered the respective sections of the Magistrates' Courts Act and the National Credit Act, which contributed to the abuse where emoluments attachment orders had been issued.
[109] Seccombe (2015) "Amplats takes debt collectors to court" 9 January 2015 *Business Day LIVE.*
[110] *Ibid.*
[111] Constitution of the Republic of South Africa Act 108 of 1996.

2. When a judgment creditor applies for an order for the enforcement of a credit agreement to which the National Credit Act applies, section 45 of the Magistrates' Courts Act does not permit the judgment debtor to consent to the jurisdiction of any other Magistrate's Court other than the jurisdiction where the judgment debtor is employed or resides; and
3. For an order to declare the emoluments attachment orders invalid, unlawful, and with no further effect.[112]

In order to reach a decision, the court considered all the evidence presented by the underlying parties. First, the court highlighted some of the important issues that relate to the emoluments attachment order, and then a description of the parties and their defences followed. The court also gave an overview of comparative law, which was followed by some international viewpoints on this situation that had a high convincing rate; in fact, these viewpoints were so convincing that the court applied some of the abovementioned views to the South African position before the court made a ruling.

The main issues the court identified will briefly be mentioned. The court indicated that judicial oversight is a crucial part of the process to grant emoluments attachment orders, otherwise no affordability calculations and no considerations as to whether the issuing of an emoluments attachment order would be just and equitable can be made.[113]

It is common cause that numerous amounts of the orders were obtained in other jurisdictions than the jurisdiction where the employer of the debtor resides or works. The court agreed with counsel for the applicants, "…that 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 emoluments attachment orders."[114] By recognising this issues, the court identified a very serious issue–debtors have a right to access the courts and enjoy the protection of the law. The court also stated that the issue of consent warrants immediate attention. This consent includes the manner in which consent to jurisdiction and consent to judgments were obtained. The court

[112] Geldenhuys *"Legal Aid Clinic brings application in respect of emoluments attachment orders"* http://blogs.sun.ac.za/law/legal-aid-clinic-brings-application-in-respect-of-emoluments-attachment-orders/) (last accessed 16.02.2015).
[113] *Ibid.*
[114] *Ibid.*

concluded that the consents attained were not given voluntarily, nor in an informed manner. It is clear that the issue that comes forward in this instance is the processes employed by micro-lenders to secure repayment of loans. The court therefore needed to ascertain whether the abovementioned conduct falls within the legislative framework and the law, relating to such matters.[115]

Desai J stated, "There is no sufficient reason for the unrestricted deprivation of debtors' earnings and means of support." The court also acknowledged that attachment of a debtor's salary to secure payment of a debt would be tantamount to the attachment of property. The rationalisation being that once a debtor's salary has been depleted due to attachment, loss of other property such as houses or movable assets become imminent. These underprivileged citizens' salaries are their only assets and means of survival. The loss of this asset is a loss of human dignity. Humiliation and degradation are therefore self-explanatory.[116]

The court furthermore deemed it necessary to refer to the International Labour Organisations' Protection of Wages Convention.[117] Although South Africa is not a party to this Convention, it has been ratified by 97 countries, which according to Desai J, would give it the status of international customary law and consequently, binding it on all states. The court indicated that even if the latter statement is not correct, the Convention contributes at the very least to be extremely persuasive.

The Convention has several provisions that implore the protection of debtors. A specific example that is applicable in this scenario can be found in article 10 of this Convention, which states the following:

> "1. Wages may be attached or assigned only in a manner and within the limits prescribed by national laws or regulations.
>
> 2. Wages shall be protected against attachment or assignment to the extent deemed necessary for the maintenance of the worker and his family."

[115] *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* (2015) 3 ALL SA 644 (WCC).
[116] *Ibid.*
[117] International Labour Organisations' Protection of Wages Convention 1949. (Herein after referred to as the Convention).

The Convention also provides adequate penalties and remedies for instances where the provisions of the Convention have been violated. This can be found in article 15 of the Convention.

The Convention, and specifically the contents of article 10, promotes the protection of debtors by limiting the attachment of wages to fit within the framework of the judicial prerequisites. It is for that reason that the court's decision in the *Stellenbosch's Legal Aid Clinic* case is of such importance; the court applied the law and provided legal certainty through its meticulous management of the dispute.

The United Nations[118] and the Human Rights Council[119] have a similar viewpoint about the Convention. The UN supports the principle to curb abuse by placing a duty upon the state to ensure that the appropriate procedures are in place to prevent the abuse of human rights by third parties such as business enterprises. This duty is accompanied with an obligation to prevent, investigate, and address such abuse through proper functioning of the applicable policies, legislation, and adjudication.[120] The HRC expresses concern pertaining to the barriers individuals may face when remedies are required for business-related human rights abuses. These practical and legal barriers may leave affected individuals without a remedy.[121] It is evident that the abuse against human rights is not acceptable and the prevention thereof is pivotal indeed.

Although these international principles are not binding, the duty to protect one's citizens against this abuse is a duty that cannot be taken lightly or ignored. After considering these principles, the court identified a few shortcomings in our emoluments attachment order system. These shortcomings persist because of failure to provide judicial oversight in instances where the clerk of the court may issue an emoluments attachment order, and where no provision is made for workers to oppose or make representations on behalf of their cases before the emoluments attachment orders are issued. The shortcomings are

[118] Herein after referred to as the UN.
[119] Herein after referred to the HRC.
[120] United Nations Guiding Principles on Business and Human Rights 2011 (Geneva and New York).
[121] Human Rights Council Resolution 26/22 of 15 July 2015.

compounded by the consent to jurisdiction in terms of section 45 that allows for consent in distant courts.[122]

It is self-evident that section 65J(2)(b)(i) and 65J(2)(b)(ii) of the Magistrates' Courts Act are constitutionally invalid in the instance it provides for the clerk of the court to issue an emoluments attachment order and no judicial oversight. The court confirmed this by stating that international law as well as current jurisprudence of the Constitutional Court have the same regard for it.[123]

The court also attended to the situation of consent, whether it is consent via section 45 or section 65J of the Magistrates' Courts Act. The court stated that the narrow provision of section 65J(1)(a) cannot be reconciled with the broad provision of section 45. The court referred to a well-established principle in law stating that if two provisions were contradictory to one another, the narrow or more specific provision would triumph. It is clear that section 65(J)(1)(a) therefore trumps section 45.[124]

Concerning the National Credit Act, the applicable sections are section 90(2)(a)(k)(vi)(bb)[125] and section 91.[126] The court stated that section 45 undermines sections 90 and 91 due to a broad approach to jurisdiction. The court stated that sections 90 and 91 strive to protect consumers whereas section 45 does not share the same rationale. The court therefore concluded that the previous sections trump the latter.[127]

The court thus heard the *University of Stellenbosch's Legal Aid Clinic* case and declared the emoluments attachment orders against most of the applicants unlawful, invalid, and of no force and effect. The court declared the words "the judgment debtor has consented thereto in writing" in section 65J(2)(a) as well as section 65J(2)(b)(i) and section 65J(2)(b)(ii) of the

[122] *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* (2015) 3 ALL SA 644 (WCC).
[123] *Ibid.*
[124] *Ibid.*
[125] Section 90(2)(a)(k)(vi)(bb) of the National Credit Act 34 of 2005 states: "A provision of a credit agreement is unlawful if its general purpose or effect is to express, on behalf of the consumer a consent to the jurisdiction of any court seated outside the area of jurisdiction of a court having concurrent jurisdiction and in which the consumer resides or works or where the goods in question (if any) are ordinarily kept".
[126] Section 91 of The National Credit Act 34 of 2005 states: "A credit provider must not directly or indirectly require or induce a consumer to enter into a supplementary agreement or sign any document that contains a provision that would be unlawful if it were included in a credit agreement".
[127] *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* (2015) 3 ALL SA 644 (WCC).

Magistrates' Courts Act inconsistent and invalid with the Constitution of The Republic of South Africa.[128] In fact, the court saw offending sections to the extent that they fail to provide judicial oversight for the issuing of an emoluments attachment order. The court declared that any proceeding where the National Credit Act is applicable, section 45 of the Magistrates' Courts Act does not allow a debtor to consent to any other jurisdiction than the jurisdiction where the debtor resides or works. The court also implored the Minister of Justice and Correctional Services, the Minister of Trade and Industry, the National Credit Regulator, the Human Rights Commission, the Law Society, and the Advice Offices to alert debtors of their rights in terms of this court's judgment.[129] It is clear that the court has addressed the necessary issues relating to the emoluments attachment order and that the awareness of basic human rights will be promoted and the unscrupulous practices of certain debt collectors will deteriorate.

## 4.5 Capping

The *University of Stellenbosch's Legal Aid Clinic* case briefly mentioned the situation of capping. The court emphasised its concern about the fact that there is no statutory limit on the amount that may be deducted monthly from a debtor's salary and the fact that there are no limits on the quantity of emoluments attachment orders that may be granted against an individual debtor.[130]

The SAHRC acknowledged the issue of statutory caps as well. A representative for the SAHRC, advocate Jason Brickhill, argued that a red flag should be raised when an emoluments attachment order exceeds 30 percent of a debtor's salary.[131] A respondent in the *University of Stellenbosch's Legal Aid Clinic* case stated that the idea of a cap is definitely recommended by their firm, but in reality, it would not be very effective if a national register of emoluments attachment order were not implemented. Currently in South Africa, no such register exists.[132]

[128] Constitution of the Republic of South Africa Act 108 of 1996.
[129] *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* (2015) 3 ALL SA 644 (WCC).
[130] *Ibid.*
[131] ANON (2015) "Red flags should be raised at salary deductions of 30%" 19 February 2015 *Moneyweb.*
[132] *Ibid.*

The lack of a statutory cap in the current South African position requires a discussion of those mechanisms that apply beyond the South African context. By comparing international jurisdictions to our own, it can be established whether there can be any prospects of law reform to contribute to a better system. South Africa uses emoluments attachment orders as a way to collect debt; international legal systems in countries such as the United States of America (USA) and England also have similar mechanisms of debt recovery. The processes used in foreign jurisdictions will briefly be identified, followed by a comparison of the different procedures to our own.

Notwithstanding the differences between these non-identical jurisdictions, the South African procedural law partially derives from the American and English law. The South African common law denotes the English legal tradition and constitutes a mixed legal system.[133] In the development of the South African law, focus can be drawn towards the influences of the Roman-Dutch law by English law.[134] Further examination proved that American reports and text writers played a substantial role in this development, which enhanced value because of similarities between America and South Africa.[135] It is evident that international resources helped to improve and mould the South African law in a crucial period of its history.[136] Any amendments to section 65J[137] that descends from the English and American law is therefore adequate.

### 4.5.1 Wage Garnishment

In the United States of America, wage garnishment is a legal procedure utilised when an employee is in default with payments to a third party. A portion of the employee's earnings will then be withheld in order to pay the owing debt to the third party.[138] The Consumer Credit Protection Act[139] therefore defines garnishment as "any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any

[133] Thomas PJ, Van Der Merwe CG, Stoop BC (2000) *Historical Foundations of the South African Private Law* 2nd ed Durban: Lexis Nexis 7.
[134] Spiller P "The Role of American authorities in the early development of South African law" (1985) 18 Comparative and International Law Journal of Southern Africa (CILSA) 206.
[135] Spiller P (1985) CILSA 207.
[136] Spiller P (1985) CILSA 214.
[137] Magistrates' Courts Act 32 of 1944.
[138] United States Federal Wage Garnishment Law (Title III of the Consumer Credit Protection Act) §302.
[139] United States Code, Title 15 (Commerce and Trade), Chapter 41 (Consumer Credit Protection), Subchapter II. §1672(c).

debt." However, federal law imposes limits on the amount that can be deducted from the employee's salary after tax to a weekly percentage of 25 percent.[140] The court in *American Acceptance v Willis*[141] held that the amount that can be garnished from a single workweek is limited to 25 percent of the disposable earnings. The court stated that disposable earnings are defined as "that part of the earnings of an individual including wages, commissions, income, rents, or profits remaining after the deduction from those earnings of amounts required by law to be withheld."[142] It is evident that the United States of America constitutes a jurisdiction that enforces a similar debt collecting procedure as South Africa in the form of wage garnishment. It is only similar to the extent that it makes provisions for a statutory cap to be imposed on the amount that can be deducted from a debtor's earnings. South Africa has no such cap, which often results in creditors abusing this process and debtors with several orders instituted against them. This ripple effect can therefore result in debtors going home with almost zero take-home pay.

### 4.5.2 Attachment of Earnings

England and Wales both use a debt recovery process that is called attachment of earnings. An attachment of earnings order is one that is directed at a specific person (usually the employer), forcing him to make periodic deductions from a debtor's (the employee) earnings.[143] In the attachment of earnings process, a court or a court official is responsible for calculating a Protected Earnings Rate (PER) using his/her own discretion. The court in *Billington v Billington*[144] held that the court has a discretion which has to be exercised concerning the PER of every individual. The circumstances of the situation should therefore be taken into account. The aim of this PER is to calculate what amount should be deducted

[140] *Idem* §1673.
[141] *American Acceptance Co., LLC, as Assignee of Washington Mutual Finance, Appellant-Plaintiff, v Melissa Willis, Apellee-Defendant.* No 42A04-1208-CC-466. 14 February 2013. In this case, American Acceptance filed a complaint against Willis alleging that she owed money for goods and/or services. The court entered default judgment against Willis. The court then went further and denied American Acceptances' motion for a garnishment order due to Willis not having substantial income. The court also referred to Indiana Code Section 24-4.5-5-105(2) that limits the amount that can be garnished.
[142] Indiana Code Section 24-4.5-5-105(1)(a).
[143] Lord Mackay of Clashfern, James Peter Hymers, Baron (2013) *Halsbury's Laws of England* 5th ed London: LexisNexis 527.
[144] *Billington v Billington* (1974) 2 W.L.R 53. In this case the court made an order for attachment of earnings, making periodical deductions from the former husband's earnings, from which a complaint was made. The court stated that "a wives maintenance order should not have the effect of depressing a husband below subsistence level." The court held that a discretion should be exercised by the court of every individual man or women. The court also held that local circumstances need to be taken into account.

from the net earnings of the debtor in order to pay his outstanding debt.[145] The debtor needs to owe the creditor an amount that exceeds £50, and the debtor must be above the PER in order for a creditor to rationalise the attachment of earnings order.[146] This deduction will thus only take place if the debtor's earnings exceed the estimated PER and the debt amounts to a total of more than £50.

In comparison with the USA and England, no limitation on the amount that may be deducted from the employee's salary[147] clearly indicates why South African workers are often left with little or zero income. South Africa's lack off statutory caps for ordinary workers and no limit on the number of emoluments attachment orders that can be granted against an individual should definitely be addressed.[148] Perhaps some of these international practices could be adopted by South Africa in order to improve our own process of emoluments attachment orders.

## 4.6 Conclusion

In this chapter, the research the SAHRC has done in the field of the emoluments attachment orders have been discussed. The SAHRC's research indicated the attachment of a debtor's salary to pay outstanding debts is problematic in the sense that the clerk of the court can authorise the attachment order without judicial oversight. The research has also shown that there is an enormous lack of explaining to debtors what the implications of such an order might have. The SAHRC suggested the implementation of statutory caps on the amount that can be deducted from the debtor's salary or wage. It was also suggested that judicial oversight take place in order to ensure that the emoluments attachment order process progresses efficiently. The SAHRC also established that with regard to the aspect of judicial oversight, the clerk of the court plays an equally important role in the emoluments attachment order process. This role of the clerk of the court encompasses the granting of emoluments attachment orders as well as the consideration of access to justice. The SAHRC stated that access to justice is crucial for the vulnerable, the poor, and the marginalised

[145] Van Sittert (2013) *UP Law Clinic* 26.
[146] *Creditor takes money from your wages* Advice Guide Bureau http://www.adviceguide.org.uk (last accessed 15/05/2014).
[147] Van Sittert (2013) *UP Law Clinic* 25.
[148] Rees M & Volker D (2015) "Garnishees 'exploit all South Africans' – Webber Wentzel" 15 August 2013 *Moneyweb*.

because it enables them to access their rights and more specifically, their socio-economic rights.[149]

The Department of Justice, following the judgment by Desai J in the *University of Stellenbosch's Legal Aid Clinic* case, released a media statement to announce the finalisation of a Magistrate's Court Amendment Bill to curb the abuses concerning the emoluments attachment order. The announcement was made after the Western Cape High Court had ruled that the existing system of emoluments attachment order is unlawful, invalid, and inconsistent with the Constitution, due to the lack of judicial oversight.[150] The court was also asked to address the situation where a debtor can give consent in terms of section 45 to the jurisdiction of a court other than that jurisdiction where the debtor resides or works. The court declared that any proceeding where the National Credit Act is applicable, section 45 of the Magistrates' Courts Act does not allow a debtor to consent to any other jurisdiction than the jurisdiction where the debtor resides or works. Until confirmation by the Constitutional Court takes place, the Department of Justice urges creditors and attorneys to be mindful of the sentiments expressed by the High Court and to ensure that their respective emoluments attachment orders have been obtained accordingly. [151]

[149] South African Human Rights Commission *"SAHRC challenges the powers and human rights violations in micro-lending"* http://www.sahrc.org.za/home/index.php?ipkMenuID=91&ipkArticleID=322 (last accessed on 15.04.2015).
[150] Department of Justice and Constitutional Development "Justice Department finalising its Magistrate Courts Bill to curb debt abuse" 20 July 2015 http://www.justice.gov.za/mstatements/2015/20150720-DebtAbuse.html (last accessed 06/08/2015) p1.
[151] *Ibid.*

# Chapter 5: New Developments

## 5.1 Introduction

In this chapter, the various propositions that are made in order to make constructive changes pertaining to the negative issues concerning the emoluments attachment order will be discussed. This will include examining the working document of the Magistrates' Courts Amendment Bill.[152] This working document has a very important purpose; namely to elicit comments on any destructive issues concerning civil debt and consumers. It is evident that this document is construed mostly out of proposed amendments.

## 5.2 Working document: The Magistrates' Courts Amendment Bill

The Magistrates' Courts Amendment Bill is a draft bill that deals with three fundamental arguments. It undertakes to establish a basis for commentaries on proposed amendments to the Magistrates' Courts Act.

In the first instance, the predominant abuse of the emoluments attachment order has captured the attention of the media and other respective sources resulting in the Department of Justice and Constitutional Development to consider possible amendments to the provisions dealing with emoluments attachment orders in the Magistrates' Courts Act. In the second instance, rule 12(5) of Magistrates' Courts Rules are not in line with section 58 of the Magistrates' Courts Act; in fact, these two are in conflict with each other. In the last instance, rescission or abandonment of judgments are discussed, but this topic is not applicable to this research.[153]

As research has shown, reports of abuse of the emoluments attachment order has led to borrowers not being able to receive a loan unless the borrower sign copious amounts of documents beforehand. These documents signed beforehand often include consent to judgment and instalment orders.[154] The implication of this on the borrower is that the

[152] Department of Justice "Working document: Magistrates' Courts Amendment Bill" http://www.northernlaw.co.za/Documents/magistrate_court/Working%20document%20Magistrates%27%20Courts%20Amendment%20Bill%2021Feb13.pdf (last accessed on 14.05.2015).
[153] Department of Justice "Working document: Magistrates' Courts Amendment Bill" 1.
[154] *Ibid.*

borrower will be legally bound by this order against him, even though he unwillingly agreed to sign something to that effect. Hence, the emoluments attachment order is issued by means of obtaining judgment in terms of section 58 of the Magistrates' Courts Act through the clerk of the court. It has been stated that the emoluments attachment order is an effective way of debt recovery, but when the advantages and the disadvantages are put on the scale, the advantages of the creditors over the disadvantages of the debtors force one to reconsider.[155]

Proposed solutions to this problem have been made, but it still encompasses some challenges. The first option entails that relevant legislation be amended by removing all references to pay in instalment orders, and suggesting that only a court may grant the authorisation for an instalment order (which includes the emoluments attachment order) after an enquiry into the financial position of the debtor has been completed. The second option involves the emoluments attachment order individually. This proposal submits that only the emoluments attachment order should be granted by a court after a financial enquiry into the debtors financial position has been completed, implying that all other provisions, which allow for the clerk of the court to grant instalment orders by itself to remain intact.[156] The consequences of these proposals are self-explanatory in the sense of the enormous workload that would be placed on courts and civil magistrates. In one of the suggestions, the National Credit Act is taken into account in terms of conducting a debt review before an emoluments attachment order is issued. This would ensure magistrates' sound knowledge into the financial situation of the debtor. However, emoluments attachment orders are issued regardless, if the action falls within the scope of the National Credit Act.[157]

The working document of the Magistrates' Courts Amendment Bill[158] also highlights an interesting section of the Magistrates' Courts Act before amendments in 1976. Section 72, dealt with attachment of debts, including emoluments owing or accruing to a judgment debtor by any other person. It seems that it is being suggested that this provision be reinstated because it provides consumer protection. Section 72(2), reads as follows:

[155] Department of Justice "Working document: Magistrates' Courts Amendment Bill" 2.
[156] *Ibid.*
[157] *Ibid.*
[158] Herein after referred to as the working document.

> '…no garnishee order in respect of any emoluments shall be granted upon the consent alone of the judgment debtor, but the court shall satisfy itself by examination of the judgment debtor or upon other sworn information that sufficient means will, after satisfaction of such order, be left to the judgment debtor to maintain himself and those dependent on him.'[159]

It is my submission that the reintroduction of this provision is preferred, as it seems to entail all the necessary steps in order to ensure fair and lawful emoluments attachment orders.

The working document also refers to the issue of rule 12(5) of the Magistrates' Courts Rules that are in conflict with section 58 of the Magistrates' Courts Act. A brief overview of these two provisions will show that section 58 of the Magistrates' Courts Act empowers the clerk of the court to issue an emoluments attachment order if all the prerequisites have been met. However, rule 12 states that the clerk or registrar of the court shall refer to the court any request for judgment if the claim is founded on a cause of action that is based on or derives from an agreement that is governed by the National Credit Act.[160] It is conspicuous that section 72(2) concurs with rule 12 as opposed to section 58, because the former provides judicial oversight.

In the case of *Mason Motors (Edms) Bpk v Van Niekerk,*[161] the court held that the clerk of the court has the duty to ensure that his obligations are fulfilled; these duties are bestowed upon him in terms of legislation in order to affect consent to judgment. In other words, the clerk of the court is empowered to grant judgments by consent in terms of section 58. In the case of *Laduma Financial Services v De la Bat*[162] the court held that a magistrate could only

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[159] Department of Justice "Working document: Magistrates' Courts Amendment Bill" 2.
[160] *Ibid.*
[161] *Mason Motors (Edms) Bpk v Van Niekerk* 1983 (4) SA 406 (T). The appellant (plaintiff) applied for judgment against the respondents (defendant) in the court *a quo,* based on a written consent to judgment signed by the defendant. The application for judgment was made in terms of a notice of motion. The court stated that the said application was not made in accordance with the procedure set out in the Court Rules. The respondents contested the application and the court *a quo* dismissed the application. Judge Kirk-Cohen heard the appeal and agreed with the decision of the court *a quo*. He also quoted a piece, stating that it is not his intention to discuss the cases (which can be found in Jones & Buckle *The Civil Practice of the Magistrate's Courts in South Africa* 7th ed 30 *et seq*) that emphasises these procedures and rules, because he has nothing extra to add to what writers have already done so well, except to quote the following:

> "The Magistrates Court is a creature of statute and has no jurisdiction beyond that granted by the statute creating it. It has no jurisdiction as is possessed by the Superior Courts and can claim no authority which cannot be found within the four corners of the constituent act."

[162] *Laduma Financial Services v De la Bat* 999 (4) SA 1283 (O). The facts of this case will briefly be discussed. An emoluments attachment order was granted against the debtor (third respondent). The local magistrate, the first respondent, rescinded the judgment where after the applicant applied for review and setting aside of the rescission. The court in Laduma stated that only the clerk of the court was empowered to "correct" any 'patent error' in the judgment and that the first respondent simply did not have the jurisdiction to do so.

perform actions that are prescribed to him/her by legislation. The court also stated that if a legislative prescript empowers the clerk of the court to perform certain actions, a magistrate acting without such legislative prescript would render such action invalid. According to the working document, the situation in practice differs because some courts refuse to abide by rule 12(5) and arguments that section 58 overrules rule 12(5).[163]

In *African Bank Limited v Myambo,*[164] the court issued a declaratory order that applies to cases related to the National Credit Act. The court stated that clerks of the court may refer the request for judgment in terms of section 58 to the court. It is my submission that it is an interesting wordplay concerning the word "may." It is clear that in some instances the clerk of the court must refer the case to the court, especially in instances where uncertainty arises in order to ensure the consumer receives every available protective measure provided for in the National Credit Act. The minority judgment in *African Bank* expressed concern towards the clerk of the court being the only deciding factor of whether or not a magistrate would be able to intervene, seeing as it is the clerk of the court who decides what may be referred to the court. The minority judgment also stated that clerks of the court are pivotal in this process, and they need to appreciate the significance of their roles because that will ensure fairness and protection of the debtor.

The working document states that most requests for judgment in terms of section 58 are loan agreements that falls within the scope of the National Credit Act. It seems that in order to protect consumers, magistrates should be able to grant judgments in terms of section 58, which is typically accompanied by instalment orders. According to the working document, the amendment of section 58 would clear up any legal uncertainty and differences pertaining to the clerk of the court to grant judgment or not.[165] The aim is therefore to clear up any contradictions.

## 5.3 Conclusion

The working document stated that the predominant abuse of the emoluments attachment order has demanded attention of the media and other respective sources. This resulted in the Department of Justice and Constitutional Development to consider possible

[163] Department of Justice "Working document: Magistrates' Courts Amendment Bill" 3.
[164] *African Bank Limited v Additional Magistrate Myambo* 2010 (6) SA 298 (GNP). Facts discussed in chapter 3.
[165] Department of Justice "Working document: Magistrates' Courts Amendment Bill" 3.

amendments to the provisions dealing with emoluments attachment orders.[166] A distinct issue identified by the Department refers to the instance where borrowers sign copious amounts of documents before a loan is granted, and which often includes consent to judgment or instalment orders. The borrower will be legally bound by this order against him even though he unwillingly wanted to sign something to that effect. Hence, the emoluments attachment order is issued by means of obtaining judgment in terms of section 58 of the Magistrates' Courts Act through the clerk of the court.[167] Proposed solutions entail that relevant legislation be amended to state that an emoluments attachment order can only be granted after the court has completed a financial enquiry into the debtor's financial position, implying that all other provisions which allow the clerk of the court to grant instalment orders by itself remain intact.[168]

[166] Department of Justice "Working document: Magistrates' Courts Amendment Bill" http://www.northernlaw.co.za/Documents/magistrate_court/Working%20document%20Magistrates%27%20Courts%20Amendment%20Bill%2021Feb13.pdf (last accessed on 14.05.2015).
[167] Department of Justice "Working document: Magistrates' Courts Amendment Bill" 2.
[168] *Ibid.*

# Chapter 6: Conclusion

Being a credit active consumer in South Africa requires a lot of responsibility. Unfortunately, many credit providers have not acted in the same responsible manner. Credit providers offer loans to debtors and often employ unjust methods in an attempt to recover the outstanding debt. The mechanism applicable in this research, which credit providers use to recover the debt, is in fact the emoluments attachment order.

The core requirements to obtain a legal emoluments attachment order therefore encompass a multi-fold process. This process requires the consumer or debtor to give consent to the judgment that will be applied for. This consent given by the debtor must be a written consent given in chambers or via the clerk of the court in the appropriate jurisdiction. The court that granted the order should be indicated on the order, as well as the amount owing by the debtor, the interest rate per annum, and the legal costs. The debtor should be informed of the reason for the issuing of this order by the Sheriff or the debtor's employer. The debtor is also entitled to a copy of the order.[169] Credit providers need to abide by these basic requirements in order to prevent exploitation of the process. Abuse then occurs when this process is not properly adhered to.

The main instances where the abuse occurs are instances where the clerk of the court issues the order on the basis that the debtor has consented to the order and no judicial oversight has taken place. Judicial oversight requires evaluation into the debtor's financial situation in order to determine whether he or she can afford the deductible amount.[170] The South African Human Rights Commission also suggested the implementation of statutory caps on the amount that can be deducted from the debtor's salary or wage. Their research has also shown that there is an enormous lack of explaining to debtors what the implication of such an order will have. The South African Human Rights Commission stated that access to justice

[169] *What is an Emoluments Attachment Order?* Garnishee Audit Services (Pty) Ltd http://www.garnisheeaudit services. wozaonline.co.za/ (last accessed 01/09/2014).
[170] DLA Cliffe Dekker Hofmeyr Emoluments Attachment Orders: No more 'rubber-stamping' by Clerks 10 July 2015 www.cliffedekkerhofmeyr.com/en/news/publications/2015/employment/employment-alert-10-july-emoluments-attachment-orders-no-more-rubber-stamping-by-clerks.html (last accessed 19/08/2015).

is crucial for the vulnerable, the poor, and the marginalised because it enables them to access their rights and more specifically, their socio-economic rights.[171]

Regarding the issue of statutory caps, it may be sensible to consider a few international viewpoints. The United States of America, England and Wales all enforce a similar debt collecting procedure in the form of wage garnishment and attachment of earnings. It is only similar to the extent that it makes provision for a statutory cap to be imposed on the amount that can be deducted from a debtor's earnings. South Africa has no such cap, which often results in creditors abusing this process and debtors ending up with several orders instituted against them. This ripple affect can thus amount to debtor's going home with little to zero take-home pay.

The Law Society of South Africa stated that abusing the emoluments attachment order process has serious implications and condemns unscrupulous and mal-administered practices.[172] The Department of Justice and Constitutional Development are considering possible amendments to the provisions that deal with emoluments attachment orders.[173]

The Department of Justice, following the judgment by Desai J in the *University of Stellenbosch's Legal Aid Clinic* case, released a media statement to announce the finalisation of a Magistrates' Courts Amendment Bill to curb the abuses relating to the emoluments attachment order. The announcement was made after the Western Cape High Court had ruled that the existing system of emoluments attachment orders is unlawful, invalid, and inconsistent with the Constitution,[174] due to the lack of judicial oversight.[175] The court was also asked to address the situation where a debtor can give consent in terms of section 45 to the jurisdiction of a court other than that jurisdiction where the debtor resides or works. The court declared that any proceeding where the National Credit Act is applicable, section 45 of the Magistrates' Courts Act does not allow a debtor to consent to any other

[171] South African Human Rights Commission *"SAHRC challenges the powers and human rights violations in micro-lending"* http://www.sahrc.org.za/home/index.php?ipkMenuID=91&ipkArticleID=322 (last accessed on 15.04.2015).
[172] Whittle (2013) 529 *De Rebus* 13.
[173] Department of Justice "Working document: Magistrates' Courts Amendment Bill" http://www.northernlaw.co.za/Documents/magistrate_court/Working%20document%20Magistrates%27%20Courts%20Amendment%20Bill%2021Feb13.pdf (last accessed on 14.05.2015).
[174] Constitution of the Republic of South Africa Act 108 of 1996.
[175] Department of Justice and Constitutional Development "Justice Department finalising its Magistrate Courts Bill to curb debt abuse" 20 July 2015 p1.

jurisdiction than the jurisdiction where the debtor resides or works. Until confirmation by the Constitutional Court takes place, the Department of Justice urged creditors and attorneys to be mindful of the sentiments expressed by the High Court and to ensure that their respective emoluments attachment orders have been obtained accordingly. [176]

In other words, the judgment made by the court does not declare all emoluments attachment orders unlawful, and it does not affect the outstanding debt to the extent that the debt is undisputed and valid. By implication, credit providers and debt collectors may still use the emoluments attachment order to collect debt owed. However, the emoluments attachment order can be declared invalid in instances where the order was made outside of the Magistrate's Court district where the debtor resides or works, or in instances where the clerk of the court has issued such an order without any judicial oversight.[177] It is my submission that it is in the best interest of debtors to be mindful of the implications of debt. Debtors have a duty to act responsibly. Credit providers should keep in mind that it is also in their best interest to receive a constant repayment of debt rather than expect unrealistic payments that would most probably result in the debt becoming irrecoverable.

The abuse of emoluments attachment orders is causing severe irregularities, and provisions should be amended or implemented to abolish this abuse. The shortcomings and irregularities of the emoluments attachment order are of a serious nature. Perhaps some of the practices used by international legal systems could be adopted by South Africa in order to improve our own process of emoluments attachment orders. The legislature must intervene to eliminate all the problem areas and to ensure legal certainty.

Legislation should be amended to include judicial oversight and to place a cap on the amount and the number of emoluments attachment orders that can be granted against a single individual's salary. In my opinion, the clerk of the court should not be able to grant an emoluments attachment order, and that this order should only be granted in the jurisdiction where the debtor resides or works to ensure fair access to courts. Legislation needs to be amended to include the abovementioned suggestions. Therefore, legislation should be amended as follows:

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[176] *Ibid.*

[177] Webber Wentzel "Practical application of emoluments attachment order judgment for employers" http://www.polity.org.za/article/practicalapplicationofemolumentsattachmentorderjudgmentforemployers20150724 (last accessed on 18.08.2015).

(1) *(a)* Subject to the provisions of subsection (2), a judgment creditor may cause an order (hereinafter referred to as an emoluments attachment order) to be issued from the court of the district in which the judgment debtor resides, carries on business, or is employed; or, if the judgment debtor is employed by the State, the district in which the judgment debtor resides or works.

*(b)* An emoluments attachment order-

(i) shall attach the emoluments at present or in future, owing or accruing to the judgment debtor by or from his or her employer (in this section called the garnishee), to the amount necessary to cover the judgment and the costs of the attachment where that judgment was obtained in the court where the judgment debtor resides or is employed; and

(ii) shall oblige the garnishee to pay from time to time to the judgment creditor or his or her attorney specific amounts out of the emoluments of the judgment debtor in accordance with the order of court, laying down the specific instalments payable by the judgment debtor until the relevant judgment debt and costs have been paid in full.

(2) An emoluments attachment order shall not be issued-

*(a)* Unless the court in the district where the debtor resides or works grants the emoluments attachment order; and

*(b)* Unless the court exercised its discretion and has satisfied itself by examination of the judgment debtor, or upon sworn information, that sufficient means will, after satisfaction of such order, be left to the judgment debtor to maintain himself and his dependents upon application of an emoluments attachment order;[178] and

*(c)* Unless the court has satisfied itself with the amount deducted (whether it be a statutory cap imposed by the legislature or whatever amount the court deems fit, whichever is the lowest) from the debtor's salary and with the number of emoluments attachment orders against the debtor's salary or upon sworn information thereof. Also, this order shall not be issued the court has satisfied itself

[178] Insert of previous section 72 of the Magistrates' Courts Act before amendments in 1976 - "No garnishee order in respect of any emoluments shall be granted upon the consent alone of the judgment debtor, but the court shall satisfy itself by examination of the judgment debtor or upon other sworn information that sufficient means will, after satisfaction of such order, be left to the judgment debtor to maintain himself and those dependent on him."

that the debtor will have sufficient means to maintain himself and his dependants; and

*(d)* Unless the court is satisfied that the emoluments against the debtors salary have been granted by the applicable court and not by a clerk of the court.

The abovementioned amendments will ensure the following:

- That the order has been obtained in the court and district where the debtor resides or where the debtor is employed.
- That the court has a discretion to grant the emoluments attachment order which provides for judicial oversight; it will also make provision for the order to be queried at the application stage of such an order, and not only once the order has already been granted.
- That a cap is placed upon the amount deductible, and it will ensure that the number of emoluments attachment orders against the debtor's salary are appropriate to the extent that the debtor will still have sufficient means to maintain himself and the dependants.
- It will guarantee that the order has been granted by a court and not granted by the clerk of the court.

The implication of these amendments would ensure that the abuse of the process of emoluments attachment orders are abolished. It is also important to note that debtors still need to be responsible about their income. These amendments would also ensure that creditors are protected to the extent that they follow the correct procedures in order to collect the debt owed to them. It is my submission that amendments by the legislature is the only way to ensure that the abuse is curbed and to establish a balance between the rights of the creditor and the rights of the debtor.

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