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Lessons for insolvency law from the emoluments attachment order experience

by

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Abstract

Section 23(5) of the Insolvency Act poses an interesting challenge, namely vesting a portion of an insolvent's post-sequestration income in the trustee of the insolvent estate without infringing on the insolvent's constitutional rights. The income earned by the insolvent during sequestration is in general excluded from his estate and does not vest in the trustee, unless the Master determines that a portion of the insolvent's income will not be required to maintain the insolvent and his dependents. In such a case, only the portion deemed to be surplus to requirements will be included in the insolvent estate and will vest in the trustee. The question of what role the insolvent's income should play during the sequestration process, and therefore how section 23(5) should be interpreted and applied, has vexed the courts and numerous practical and constitutional issues arise. This study examines the application and shortcomings of section 23(5) during the administration phase of the sequestration process. It then explores the lessons learned during the recent constitutional scrutiny and subsequent amendment of the emoluments attachment process. Lastly, recommendations are made for possible law reform of section 23(5).

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Chapter 1: Introduction

1.1. Background to the study

It has been more than four hundred years since an interpretational difference prevented Shylock from taking his pound of flesh from Antonio's chest.[1] The challenge that Shylock faced was taking the contractually agreed upon pound of flesh without spilling any blood. Today, section 23(5) of the Insolvency Act[2] poses a similar challenge, namely vesting a portion of an insolvent's post-sequestration income in the trustee of the insolvent estate without infringing on the insolvent's constitutional rights.

Section 23(5) of the Act states that

> "[t]he trustee shall be entitled to any moneys received or to be received by the insolvent in the course of his profession, occupation or other employment which in the opinion of the Master are not or will not be necessary for the support of the insolvent and those dependent upon him, and if the trustee has notified the employer of the insolvent that the trustee is entitled, in terms of this sub-section, to any part of the insolvent's remuneration due to him at the time of such notification, or which will become due to him thereafter, the employer shall pay over that part to the trustee."

In other words, the income earned by the insolvent during sequestration is in general excluded from his[3] estate and does not vest in the trustee, *unless* the Master[4] determines that a portion of the insolvent's income will not be required to maintain the insolvent and his dependents. In such a case, only the portion deemed to be surplus to requirements will be included in the insolvent estate and will vest in the trustee.

The question of what role the insolvent's income should play during the sequestration process, and therefore how section 23(5) should be interpreted and applied, has vexed the courts and numerous practical and constitutional issues arise. This study examines

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1 Shakespeare "The Merchant of Venice" edited by William Rolfe *Forgotten Books* (2016) 117-125.
2 Act 24 of 1936 (hereafter referred to as "the Act").
3 In this study the male form (he, his, etc.) shall be used when referring to a hypothetical individual, but shall include all other forms, unless specifically indicated as otherwise.
4 The Master of the High Court of South Africa (hereinafter referred to as "the Master).

the application and shortcomings of section 23(5) during the administration phase of the sequestration process. It is therefore necessary to briefly summarise the sequestration process in order to contextualize the administration phase within the broader process.

1.2. Overview of the sequestration process

The sequestration process may be divided into three distinct phases, namely the application phase, the administration phase, and the rehabilitation phase.

During the application phase, a debtor may apply for the voluntary surrender of his estate,[5] or a creditor may apply for the compulsory sequestration of a debtor's estate.[6] A court may grant the application for voluntary surrender if it is satisfied that the applicant has complied with the formal requirements contained in section 4 of the Act; the applicant's estate is insolvent; the applicant owns realisable property of sufficient value to defray the sequestration costs; and it will be to the advantage of creditors if the surrender is accepted.[7] A court may grant a final sequestration order in an application for compulsory sequestration if it is satisfied that the applicant has established a claim against the debtor as set out in section 9(1) of the Act; the debtor has committed an act of insolvency, or is insolvent; and there is reason to believe that it will be to the advantage of creditors if the final sequestration order is granted.[8]

The granting of a sequestration order, whether provisional or final,[9] initiates the commencement of sequestration. From the commencement of sequestration the *concursus creditorum* sets in, i.e. the interests of the general body of creditors takes precedence over the interests of any individual creditor.[10] Once sequestration has commenced, the administration phase begins and the insolvent is divested of his estate. The estate vests in the Master until a trustee is appointed.[11] Once a trustee is

5 S 3(1) of the Act.
6 S 9(1) of the Act.
7 S 6(1) of the Act.
8 S 12(1) of the Act.
9 S 2 of the Act.
10 *Walker v Syfret* NO 1911 AD 146 at 152.
11 S 20(1)(a) of the Act.

appointed, the insolvent's estate vests in the trustee.[12] The insolvent estate comprises of all of the insolvent's property[13] at the date of the sequestration, including property or the proceeds of property that are in the possession of a sheriff in terms of a writ of attachment.[14] Further included is all property that the insolvent may acquire during sequestration, unless such property is excluded or exempted by the provisions of section 23 of the Act.[15] Two competing policy considerations are at play here, namely that the maximum value of assets must be recovered and included in the insolvent estate, to the advantage of creditors, and that an insolvent may keep a portion of his estate to ensure that the insolvent and his family are not deprived of their dignity and basic life necessities.[16] Evans is of the opinion that excluded property never forms part of the insolvent estate and is therefore beyond the reach of creditors, while exempted property does initially form part of the insolvent estate, until the circumstances for exemption are met.[17] It is also worth noting that there are other provisions in the Act that exclude or exempt assets from the insolvent estate. Section 82(6) determines that

> "[f]rom the sale of the movable property shall be excepted the wearing apparel and bedding of the insolvent and the whole or such part of his household furniture, and tools and other essential means of subsistence as the creditors, or if no creditor has proved a claim against the estate, as the Master may determine and the insolvent shall be allowed to retain, for his own use any property so excepted from the sale".

The insolvent's clothing and bedding, and that of his dependents, are therefore always excluded from the insolvent estate. Additionally, the creditors who have proved claims against the insolvent estate or, in the absence of such creditors, the Master, may except any furniture, tools or other means that allow the insolvent to maintain himself and his dependents. These assets are therefore included in the insolvent estate until the creditors or the Master exclude them. The trustee will take possession of all

12 *Ibid*.
13 Section 2 of the Act defines "property" as "movable or immovable property wherever situate within the Republic, and includes contingent interests in property other than the contingent interests of a *fidei commissary* heir or legatee".
14 S 20(2)(a) of the Act.
15 S 20(2)(b) of the Act.
16 Evans "Legislative exclusions or exemptions of property from the insolvent estate" 2011 *PELJ* 39 at 40.
17 *Idem* at 39.

movable property, books and documents in the insolvent estate and will furnish the Master with a valuation of such movable property.[18] The trustee will take any steps that may be necessary to recover the debts due to the insolvent estate.[19] Following the second meeting of creditors, the trustee will sell all of the property in the insolvent estate in the manner and on the conditions directed by the creditors.[20]

The trustee must submit a liquidation account, as well as a plan for the distribution of the available proceeds to creditors, within six months from the date of his appointment.[21] Alternatively, if the proceeds of all realisable property are insufficient to defray the sequestration costs, the trustee must submit a contribution plan apportioning liability for the shortfall among the creditors who are liable to contribute.[22] If no contribution is required, the trustee will apply the free residue of the estate to cover the costs of the sequestration.[23] Once the trustee's account has been confirmed by the Master, the trustee will distribute the estate to the creditors; alternatively, where a contribution is necessary, the trustee will collect the contribution from the liable creditors on a *pro rata* basis.[24]

The third and final phase of the sequestration process is rehabilitation. Sequestration ends with the rehabilitation of the insolvent[25] and the insolvent has the opportunity to make a fresh start.[26] Once rehabilitated, the insolvent's pre-sequestration debts are discharged, except where such debts arose as a result of fraud on the part of the insolvent,[27] and the restrictions placed upon the insolvent during sequestration no longer apply.[28] An insolvent is rehabilitated automatically after a period of ten years has lapsed from the date of the sequestration, provided that a court has not already rehabilitated the insolvent within that period, or granted an order that the insolvent may

18 S 69(1) of the Act.
19 S 77 of the Act.
20 S 82(1) of the Act.
21 S 91 of the Act.
22 *Ibid*.
23 S 97(1) of the Act.
24 S 113(3) of the Act.
25 S 129(1)(a) of the Act.
26 Smith et al *Hockly's Law of Insolvency* (2022) 246.
27 S 129(1)(b) of the Act.
28 S 129(1)(c) of the Act.

not be rehabilitated.[29] An insolvent may also apply for his rehabilitation within a period of ten years from the date of sequestration and section 124 of the Act determines the circumstances under which the insolvent may apply.[30] An insolvent does not have a right to be rehabilitated and it is the court's prerogative to grant the application for early rehabilitation.[31]

1.3. Research problem

In reviewing the available case law related to the income of the insolvent it is notable that there is much uncertainty surrounding the interpretation and application of section 23(5). As a result, it is difficult to see how this section can be applied consistently by trustees, the Master, or the courts. It is submitted that the insolvent's income plays a role during each of the three phases of the sequestration process; however, this study will be limited to the uncertainty surrounding the interpretation and application of section 23(5) during the *administration phase*. Four main grounds for this uncertainty, which may also be viewed as shortcomings of section 23(5), have been identified.

The first shortcoming of section 23(5) is that it *lacks guidelines* to assist the Master in determining whether the insolvent's post-sequestration income exceeds the maintenance needs of the insolvent and his dependents. The Law Reform Commission[32] identified various difficulties in this regard.[33] Usually, the process would entail that the trustee approaches the Master for a certificate confirming that a portion of the insolvent's income vests in the trustee.[34] However, the Master is often reluctant to authorise a certificate without first obtaining the insolvent's views, which usually causes a significant delay in the process.[35] Even when the insolvent's views have been provided and referred to the trustee for comment, the Master often finds it difficult to make a determination based solely on the documents provided by the trustee and the

29 S 127A(1) of the Act.
30 *Hockly's Law of Insolvency* (2022) 247.
31 *Ibid*.
32 The South African Law Reform Commission was established in terms of section 2(2) of the South African Law Reform Commission Act, 19 of 1973, and will hereinafter be referred to as the "Law Reform Commission".
33 The South Africa Law Commission Report: *Review of the Law of Insolvency* (2000) Explanatory Memorandum (vol 1) 58 para 15.11.
34 *Ibid*.
35 *Ibid*.

insolvent respectively.[36] Arranging an interrogation of the insolvent may be unreasonable where the insolvent does not reside or work close to the Master's office.[37] Having any person other than the Master issue the certificate, or interrogate the insolvent, is fraught with problems.[38] Additionally, the Master may lack the knowledge or experience to determine whether a portion of the insolvent's income exceeds the maintenance needs of the insolvent and his dependants.[39] The golden thread is that section 23(5) does not provide the Master with any guidelines to determine whether a portion of the insolvent's income is surplus to his and his dependents' maintenance needs.

The second shortcoming of section 23(5) relates to the *practical feasibility* of its application in light of the uncertainties of life. In *Ex Parte Van Dyk*[40] the applicant applied for the voluntary surrender of his estate in circumstances where the dividend available to creditors would amount to zero cents in the rand;[41] however, the applicant alleged that he would be able to afford to make a monthly payment of R2 900 to his insolvent estate in terms of section 23(5).[42] The court had to decide whether to grant the order for voluntary surrender subject to the condition that a portion of the applicant's income be made available to the trustee for the benefit of the creditors. The court highlighted the difficulties in policing an order in respect of payment of the insolvent's excess income to the trustee. These included changes in circumstances brought about by the uncertainties of life, such as the possibility that the insolvent may lose his employment,[43] or that the amount required for the maintenance of the insolvent and his dependents may increase.[44] A further practical consideration was the probable delay in the finalisation of the administration of the estate.[45] Section 23(5) does not provide any guidance on how the order is to be policed, who is liable for policing costs, how changes in circumstances are to be dealt with, etc.

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36 *Ibid.*
37 *Ibid*.
38 *Ibid*.
39 *Ibid*.
40 *Ex Parte Van Dyk* [2015] ZAGPPHC 154 (26 March 2015).
41 *Idem* at para 2.
42 *Idem* at para 4.
43 *Idem* at para 10.
44 *Idem* at para 19.
45 *Idem* at para 17.

The third shortcoming of section 23(5) is the possibility that it may be challenged on *constitutional grounds*. The court in *Ex Parte Van Dyk* pointed out that the insolvent and his dependents have certain basic rights, such as the right to food, and that

> "the Master may be required to consider whether the undertaking to make a monetary contribution to his insolvent estate overrides the applicant's rights and obligations to provide for himself and his family".[46]

The court linked these basic rights to the insolvent and his dependents' inalienable right to human dignity[47] and concluded that the insolvent's undertaking to make a contribution in terms of section 23(5) was not permissible "in view of the constitutional challenges that may arise should the applicant at any stage in the future require the amount for the basic needs of his family".[48]

The fourth shortcoming of section 23(5) also relates to a potential constitutional challenge, namely that it does not require *judicial oversight*. The wording of the section is clear and states that the trustee is entitled to the insolvent's excess income which *in the opinion of the Master* is not required for the maintenance of the insolvent and his dependents.

In *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* [49] the Constitutional Court held that, where an order allows a creditor to execute against the remuneration of a debtor, that order must be authorised by a court and not some other official, such as a clerk of the court. Failure to comply with this principle infringes upon the debtor's right of access to court in terms of section 34 of the Constitution.[50] In *Stellenbosch University* the Constitutional Court considered whether section 65J of the Magistrates' Courts Act[51] complied with constitutional values and confirmed that judicial oversight is a requirement for its constitutional

46 *Idem* at para 20.
47 *Idem* at para 19.
48 *Idem* at para 23.
49 *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services; Association of Debt Recovery Agents NPC v Clinic; Mavava Trading 279 (Pty) Ltd v Clinic* 2016 (6) SA 596 (CC).
50 *Idem* at 637 para 133.
51 Act 32 of 1944. Hereinafter referred to as the "MCA" in the footnotes.

validity.[52] The emolument attachment order[53] procedure contained in section 65J bears a striking resemblance to the procedure envisioned in section 23(5); therefore, a comparison with section 65J is apposite. A brief overview of this process is consequently provided.

An emoluments attachment order

> "must 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 must 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".[54]

"Emoluments" include the judgment debtor's salary, wages or any other form of remuneration, as well as any allowances, whether expressed in monetary terms or otherwise.[55]

Section 23(5) and section 65J both create a mechanism whereby a creditor is entitled to a portion of a debtor's income in order to extinguish an existing debt. In both cases a third party instructs the debtor's employer to deduct a portion of the debtor's income directly from the debtor's remuneration. In the case of section 23(5), it is the Master who instructs the employer and the portion deducted from the debtor's remuneration is paid directly to the trustee of the insolvent estate, who then distributes it according to a distribution account to the qualifying creditors. In case of section 65J, it is the court who instructs the employer and the portion deducted from the debtor's remuneration is paid directly to the creditor, or the creditor's legal representative. Section 23(5) establishes an administrative discretion, section 65J establishes a judicial discretion.

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52 *Stellenbosch University* at 596 para I.
53 Hereinafter referred to as "EAO".
54 S 65J(1)(b) of the MCA.
55 S 61 of the MCA.

Following the judgment in *Stellenbosch University*, the Magistrates' Courts Act was amended by the Courts of Law Amendment Act[56] to, *inter alia*, align the Magistrates' Courts Act with the Constitutional Court's judgment. The Amendment Act came into operation on 1 August 2018 and stipulates that legal proceedings which were instituted in terms of section 65J prior to the commencement of the Amendment Act, and which were not concluded before 1 August 2018, must be continued and concluded as if the Amendment Act had not been passed provided that the original EAO was obtained in accordance with the law.[57] The Amendment Act substituted section 65J of the Magistrates' Courts Act in its entirety.[58] The recent constitutional scrutiny of the emoluments attachment order process, and its subsequent amendment, may contain valuable lessons for the law of insolvency.

In summation, it is clear from the background provided above that a number of challenges exist in respect of the application of section 23(5) during the administration phase of the sequestration process. First, it *lacks guidelines* to assist the Master in determining whether the insolvent's post-sequestration income exceeds the maintenance needs of the insolvent and his dependents. The second shortcoming relates to the *practical feasibility* of its application in light of the uncertainties of life, e.g. how changes in circumstances are to be dealt with, who is responsible for policing the order, etc. Third is the possibility that it may be challenged on *constitutional grounds*, such as the insolvent and his dependents' right to food and human dignity. The fourth shortcoming also relates to a potential constitutional challenge, namely the fact that it does not require *judicial oversight*.

1.4. Research questions

Against this background, the following research questions arise:

1. What are the shortcomings of, and potential challenges to, section 23(5) in its present form?

56 Act 7 of 2017 (hereinafter referred to as "the Amendment Act").
57 S 15(1) of the Amendment Act.
58 S 9 the Amendment Act.

2. What are the similarities and the differences between section 23(5) and section 65J?
3. What are the lessons to be learnt from the recent constitutional scrutiny and subsequent amendment of section 65J?
4. Based on the findings of questions 1 to 3, how should section 23(5) be reformed?

1.5. Methodology and choice of comparative study

Desktop-based research was conducted for this study by analysing the legislative framework and case law related to the application of section 23(5) during the administration phase of the sequestration process. The role of the insolvent's income during the administration phase, the shortcomings of, and potential challenges to, section 23(5) were identified and critically analysed. *Stellenbosch University* and the subsequent amendment to the EAO procedure was then analysed. The similarities and differences between section 23(5) and section 65J were identified and discussed in a comparative manner. The lessons that may be learned from the emoluments attachment order experience were then determined and appropriate law reform proposed.

1.6. Delineation and limitation

This study focuses on the role that an insolvent's income, and therefore section 23(5) of the Insolvency Act, plays during the administration phase of the sequestration process. It is submitted that the insolvent's income, and therefore section 23(5), also plays a role during the application and rehabilitation phases of the sequestration process, but those aspects fall outside of the scope of this study. The shortcomings of section 23(5), as it is applied during the administration phase of the sequestration process, are identified. Thereafter, a comparative study is conducted with section 65J of the Magistrates' Courts Act, due to the striking similarity between the mechanism created by section 23(5) and the one created by section 65J. The lesson learned from the emoluments attachment order process contained in section 65J are then used as a basis to suggest law reform in order to address the shortcomings of section 23(5). Due to the word and time limit applicable to a mini-dissertation, the study does not

delve into the broader policy considerations that may be relevant to the application of section 23(5) during each of the three phases of the sequestration process.

1.7. Breakdown of chapters

Chapter one sets out the background to the study and explains the research problem. It presents the research questions and the methodology for the research.

Chapter two sets out the legal framework within which the insolvent's post-sequestration income is considered during the administration phase and discusses the grounds from which the challenges relating to section 23(5) arise.

Chapter three sets out the legal framework of the emolument attachment order mechanism and compares that mechanism with the section 23(5) mechanism.

Chapter four deals with the writer's conclusion and recommendations for law reform in respect of section 23(5).

Chapter 2: Legal framework for section 23(5) during the administration phase

2.1. Introduction

The legal framework in terms of which section 23(5) is applied during the administration phase of the sequestration process will now be analysed.

Sequestration commences once a sequestration order is granted. A provisional sequestration order is included in the definition of a sequestration order.[59] This means that, in case of a compulsory sequestration, the date of commencement is the date of the provisional sequestration order and in case of voluntary surrender, the date of the sequestration order is the date of commencement. From the commencement of sequestration the *concursus creditorum* sets in, which means that the interests of the general body of creditors takes precedence over the interests of any individual creditor.[60]

Once sequestration has commenced, the *administration phase* begins and the insolvent is divested of his estate. The estate vests in the Master until a trustee is appointed.[61] Once a trustee is appointed, the insolvent's estate vests in the trustee.[62] The insolvent estate comprises of all of the insolvent's property[63] at the date of the sequestration, including property or the proceeds of property that are in the possession of a sheriff in terms of a writ of attachment.[64] Further included is all property that the insolvent may acquire during sequestration, unless such property is excluded or exempted by the provisions of section 23 of the Act.[65]

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59 S 2 of the Act.
60 *Walker v Syfret* at 152.
61 S 20(1)(a) of the Act.
62 *Ibid*.
63 Section 2 of the Act defines "property" as "movable or immovable property wherever situate within the Republic, and includes contingent interests in property other than the contingent interests of a *fidei commissary* heir or legatee".
64 S 20(2)(a) of the Act.
65 S 20(2)(b) of the Act.

2.2. Legislative framework

Section 23(3) allows the insolvent to enter into any employment, profession or occupation during his sequestration, except to "carry on, or be employed in any capacity or have any direct or indirect interest in, the business of a trader who is a general dealer or a manufacturer", unless the trustee of the insolvent estate consents thereto in writing. The trustee and any creditors of the insolvent estate may appeal the trustee's decision to the Master.[66]

Section 23(9) of the Act determines that "the insolvent may recover for his own benefit, the remuneration or reward for work done or for professional services rendered by or on his behalf after the sequestration of his estate". Therefore, once the sequestration order is granted, i.e. from the commencement date, income earned by the insolvent is excluded from the insolvent estate and does not vest in the trustee.

Section 23(6) of the Act states that "no cession of his earnings after the sequestration of his estate, whether made before or after the sequestration shall be of any effect so long as his estate is under sequestration". Thus, the insolvent may utilize his post-sequestration income as he pleases, but he may not cede it and any cession, even if it pre-dates the sequestration, shall not be enforceable.

Section 23(9) is subject to section 23(5), which determines that

> "[t]he trustee shall be entitled to any moneys received or to be received by the insolvent in the course of his profession, occupation or other employment which in the opinion of the Master are not or will not be necessary for the support of the insolvent and those dependent upon him, and if the trustee has notified the employer of the insolvent that the trustee is entitled, in terms of this sub-section, to any part of the insolvent's remuneration due to him at the time of such notification, or which will become due to him thereafter, the employer shall pay over that part to the trustee."

Section 23(5) authorises the Master *mero motu*, or at the urging of a trustee, to determine what portion, if any, of the insolvent's post-sequestration income is not

66 S 23(3) of the Act.

required for the maintenance of the insolvent and his dependents. The trustee is then authorised to notify the insolvent's employer that the trustee is entitled to the surplus portion of the insolvent's income, as determined by the Master, and the employer is obligated to pay over that portion directly to the trustee. The section refers to "moneys *received* or the be received", but the Law Reform Commission pointed out that requiring the contribution of moneys that the insolvent has already received may result in inequitable consequences.[67]

Evans distinguishes between assets that are excluded from the insolvent's estate and assets that are exempted from the insolvent estate as follows

> "[t]he fundamental difference between excluded and exempted assets is that excluded assets, in the author's opinion, should never form part of an insolvent estate. They should be beyond the reach of the creditors of the insolvent estate. Exempt assets, however, initially form part of the insolvent estate, but in certain circumstances those assets, or a portion thereof, may be exempted from the estate for the benefit of the insolvent debtor".[68]

Therefore, the insolvent's post-sequestration income is excluded from the insolvent estate, until the Master determines that a portion thereof exceeds the maintenance need of the insolvent and his dependents, at which point that portion is included in the insolvent estate.

Section 23(5) makes no mention of assets purchased using post-sequestration income. The question whether such assets are protected from the trustee was addressed in *Hicks v Hicks' Trustee*.[69] In this matter the insolvent had been sequestrated in March 1904, but a trustee was only appointed in July 1909 – in the intervening years the insolvent had acquired movable assets using the income that he earned working as a gunsmith.[70] Once the trustee was appointed he attached the

67 The South Africa Law Commission Report: *Review of the Law of Insolvency* (2000) Explanatory Memorandum (vol 2) 68 para 15.8.
68 Evans 2011 *PELJ* 39.
69 *Hicks v Hicks' Trustee* 1909 TS 727.
70 *Ibid*.

movable assets and the insolvent applied to have the attachment set aside.[71] The court held that

> "[t]o say that a man is entitled, for his own benefit, to his wages and the reward of his work, means that he is entitled to use those wages in any way he may please. If he wishes to buy something with his wages, that is within the right given to him by the section;[72] and it would be rendering the section nugatory to say that if he applies them in one way, or does not apply then at all, they are his, but if he applies them in another way they cease to be his".[73]

The court therefore decided that assets purchased during the sequestration from the insolvent's income, could not be attached by the trustee.[74]

The court in *Singer v Weiss*[75] opined that the purpose of sections 23(3), 23(5) and 23(9) are to encourage the insolvent to continue to produce an income and to remain industrious despite the insolvency, thereby ensuring that the insolvent can continue to maintain himself and his dependents and not become a burden on society.[76] The court further held that the indulgences granted by the subsections could never have been intended to allow the insolvent to retain income obtained by fraud and that fraudulently obtained income therefore vests in the trustee of the insolvent estate.[77]

Section 23(4) states that

> "[t]he insolvent shall keep a detailed record of all assets received by him from whatever source, and of all disbursements made by him in the course of his profession, occupation or employment, and, if required thereto by the trustee, shall transmit to the trustee in the first week of every month a statement verified by affidavit of all assets received and of all disbursements made by him during the preceding month. The trustee may inspect such record at all reasonable times and may demand the production of reasonable vouchers in support of any item in such

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71 *Ibid*.
72 S 28 of the Insolvency Law, 13 of 1895. This section contained provisions similar to those of section 23(9) of the Act.
73 *Hicks v Hicks' Trustee* at 732.
74 *Idem* at 743.
75 *Singer NO v Weiss and Another* 1992 (4) SA 362 (T).
76 *Idem* at 367 para B.
77 *Idem* at 367 para C-D.

> accounts and of the expenditure of the insolvent for the support of himself and those dependent upon him."

The insolvent's post-sequestration income is excluded from the insolvent estate and is available for the insolvent's use;[78] however, the insolvent must keep a detailed record of his income and expenditure and, where possible, documentary proof thereof.[79] The trustee may request that the insolvent provide him with the record and documentary proof during the first week of every month and the trustee may inspect the record and supporting documentation.[80] However, from the wording of section 23(4) it appears that there is no obligation on the trustee to either request the record and supporting documentation, or to inspect such record and supporting documentation when it is provided. The implication is that there is no obligation on the trustee to determine whether the insolvent has surplus income that is not required for the maintenance of the insolvent and his dependents. This *lacuna* was addressed in *Ex Parte Jacobs*.[81]

In this matter the insolvent's preferent creditors were paid in full, but the concurrent creditors received a dividend of less than 0.14 cents in the rand.[82] During an application for rehabilitation, the applicant disclosed that he and his wife earned monthly incomes of R730 and R400 respectively.[83] They only had one child to maintain and had amassed assets to the value of R5 100 since the commencement of sequestration.[84] The Master suggested that the court suspend the issuing of a rehabilitation order until such time as the applicant makes payments to the trustee that are sufficient to ensure a higher dividend for the concurrent creditors.[85] The court pointed out that, despite a measure of blameworthiness on the side of the insolvent, neither the creditors nor the trustee took any steps to lay claim to a portion of the applicant's income in terms of section 23(5); and neither the creditors nor the trustee opposed the application for rehabilitation, or contended that the rehabilitation order

78 S 23(9) of the Act.
79 S 23(4) of the Act.
80 *Ibid*.
81 *Ex Parte Jacobs* 1977 (4) SA 155 (NC).
82 *Idem* at 156.
83 *Ibid.*
84 *Ibid*.
85 *Ibid*.

should be subject to a condition.[86] In the premises, the court did not order the applicant to pay any additional amounts to the trustee for distribution to concurrent creditors.[87]

The court pointed out that, following the distribution of his capital assets, the insolvent is under no obligation to keep the trustee informed of his income and financial position.[88] The court further noted that to expect the trustee to conduct the necessary detective work without any guarantee that even his expenses would be compensated, ignores both human nature and experience.[89] In other words, one cannot expect a trustee to obtain and investigate the necessary documentation form the insolvent, at his own cost, where there is no guarantee that surplus income will be found and that the trustee's expenses will be covered. The court opined that this *lacuna* may be eliminated by a relatively minor legislative amendment requiring the insolvent to provide the trustee with a statement of his financial affairs at least once per annum and that this should be a prerequisite for rehabilitation.[90]

The court acknowledged that creditors are held responsible for not pursuing claims in respect of the insolvent's surplus income, but that creditors probably expect the trustee to represent them in this regard following commencement of the sequestration.[91] Expecting creditors to be vigilant in protecting their own interests, i.e. to investigate the insolvent's financial position during the administration phase, may be expecting them to throw good money after bad, in other words to incur further losses in the potentially hopeless attempt of recouping previous losses.[92] Despite acknowledging the difficult position in which both trustees and creditors find themselves due to the *lacuna* in section 23(4), the court still "did not feel called upon to thrust a benefit upon them which might be unfavourably received".[93] By using these words the court seemed to imply that the failure by the creditors and/or the trustee to claim part of the insolvent's earnings was an indication that they were not interested in doing so and that the court would therefore not force it upon them against their will.

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86 *Ibid*.
87 *Idem* at 157.
88 *Idem* at 156.
89 *Ibid*.
90 *Idem* at 157.
91 *Ibid*.
92 *Ibid*.
93 *Ibid*.

2.3. Findings

Following commencement of sequestration proceedings, the insolvent is at liberty to accept almost any form of employment without the trustee's consent.[94] The exception being conducting the business of a "trader who is a general dealer or a manufacturer", in which case the trustee's consent is needed.[95] The insolvent is entitled to utilise the income generated from his employment for his own advantage as he pleases,[96] except that he may not cede his income to a third party.[97] The purpose of these provisions is to encourage the insolvent to generate an income during his sequestration to ensure that the insolvent is able to maintain himself and his dependents, which is in the public interest.[98]

However, the trustee is entitled to any portion of the insolvent's income earned during sequestration that exceeds the amount needed to maintain the insolvent and his dependents.[99] It is the Master who is authorised to make the determination on whether or not the insolvent has any surplus income.[100] The insolvent's post-sequestration income is excluded from the insolvent estate, until the Master determines that a portion thereof exceeds the maintenance need of the insolvent and his dependents, at which point that portion is included in the insolvent estate and is available for distribution to creditors.

The insolvent must keep a detailed record of his income and expenses and must be able to provide documentary proof thereof, if so requested by the trustee.[101] There does not seem to be an obligation on the trustee to either request the record and supporting documentation, or to inspect such record and supporting documentation when it is provided. There also does not seem to be an obligation on the trustee, or for that matter a creditor, to inform the Master that the insolvent has surplus income available for distribution. Neither does section 23(5) place any obligation on the Master

94 S 23(3) of the Act.
95 *Ibid*.
96 S 23(9) of the Act.
97 S 23(6) of the Act.
98 *Singer v Weiss* at 367 para B.
99 S 23(5) of the Act.
100 *Ibid*.
101 S 23(4) of the Act.

to conduct an investigation *mero motu* to determine whether the insolvent has any surplus income. Yet, the courts seem to blame the creditors and/or trustee if they fail to lay claim to the insolvent's surplus income during sequestration.[102]

Sections 23(4), 23(5), 23(6) and 23(9) are the only provisions of the Act dealing with the insolvent's income once sequestration has commenced. Therefore, these sections provide the only guidance to creditors, trustees, the Master and the courts regarding how the insolvent's income should be dealt with during the administration phase of the sequestration. It is submitted that the analysis of these sections have revealed several shortcomings. The shortcomings of section 23(5) will now be further explored.

2.4. Shortcomings of section 23(5)

The application of section 23(5) during the administration phase of the sequestration process is uncontroversial, although as pointed out above not without its shortcomings. Due to a relative paucity of case law dealing with the insolvent's income during the administration phase, some shortcomings are illustrated using case law relating to applications for sequestration or rehabilitation.

The first shortcoming of section 23(5) is that it *lacks guidelines* to assist the Master in determining whether the insolvent's post-sequestration income exceeds the maintenance needs of the insolvent and his dependents. This leads to uncertainty regarding the process that the Master needs to follow in order to make the determination. The Law Reform Commission identified various challenges in this regard.[103]

The process would usually entail that the trustee approaches the Master for a certificate confirming that a portion of the insolvent's income vests in the trustee.[104] The Master is often reluctant to authorise such a certificate without first obtaining the insolvent's views, which usually causes a significant delay in the process.[105] Even

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102 *Ex Parte Jacobs* at 157.
103 The South Africa Law Commission Report: *Review of the Law of Insolvency* (2000) Explanatory Memorandum (vol 1) 58 para 15.11.
104 *Ibid*.
105 *Ibid*.

when the insolvent's input has been received and referred to the trustee for comment, the Master often finds it difficult to make a determination based solely on the documentation provided by the trustee and the insolvent respectively.[106] Arranging an interrogation of the insolvent may be unreasonable where the insolvent does not reside or work close to the Master's office.[107] Having any person other than the Master who will eventually issue the certificate interrogate the insolvent is fraught with problems.[108]

Additionally, the Master lacks experience in determining whether a portion of the insolvent's income is surplus to the maintenance needs of the insolvent and his dependants.[109] The reason for this is that the Master deals primarily with the administration of deceased and insolvent estates, where investigations of this nature are usually not necessary. Magistrates who preside in debtors' matters, e.g. proceedings in terms of sections 65D and 65J of the Magistrates' Courts Act, are experienced in investigations of a similar nature and would be better positioned to conduct such investigations.[110] In short, section 23(5) leaves it completely to the discretion of the Master to determine which portion of the insolvent's income is required for his and his dependents' maintenance, and which portion is surplus to such requirements.

The second shortcoming of section 23(5) relates to the *practical feasibility* of its application in light of the uncertainties of life. A few of the questions that are left unanswered by the section are: what is the status of the Master's certificate; who is responsible for the policing thereof and the associated costs; and what are the consequences of non-compliance by the insolvent's employer? Then there are the uncertainties of life, such as the potential loss of employment and an increase in the needs of the insolvent and/or his dependents. The legislation does not deal with the consequences, or any potential remedial action to be taken, once the above manifests.

106 *Ibid.*
107 *Ibid*.
108 *Ibid*.
109 *Ibid*.
110 *Ibid*.

In *Ex Parte Jacobs*,[111] the court opined that section 23(4) of the Act contains a *lacuna* in that the insolvent is not obliged to report on his financial situation, unless the trustee specifically requires him to do so.[112] The court further pointed out that there is no guarantee that the trustee would be able to recoup any expenses incurred in investigating the insolvent's income and disbursements in terms of section 23(4), and that there is thus little incentive for the trustee to conduct such an investigation.[113] The court conceded that creditors may also be reproached for inaction, but that it was highly likely that the creditors *in casu* did not know of the insolvent and his wife's substantial joint income.[114]

Section 23(4) places a burden upon the trustee to request the insolvent's records of his income and expenses, and supporting documentation, and to peruse these records and documentation. If the trustee concludes that the insolvent does not have a surplus income available for distribution to creditors, the trustee may be out of pocket for the fees and expenses incurred in what may be deemed an unnecessary investigation. If the trustee concludes that the insolvent does have surplus income available, the trustee must approach the Master for a certificate. However, as highlighted by the Law Reform Commission, the Master is often hesitant to provide such a certificate.[115]

Prudent creditors will not throw good money after bad, and are unlikely to fund investigations into the insolvent's post-sequestration financial position without some guarantee that it will result in a higher dividend to them. Even if an investigation was conducted and surplus income discovered, the Master approached and a certificate issued and served on the insolvent's employer, there are numerous risks: the employer may not comply, the insolvent may at some point lose his employment, his remuneration may be reduced, or his maintenance needs may increase.[116] Section 23(5) does not provide any answers, or prescribe any courses of action, if these uncertain events were to realise.

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111 *Supra* note 81.
112 *Idem* at 156.
113 *Ibid*.
114 *Idem* at 157.
115 The South Africa Law Commission Report: *Review of the Law of Insolvency* (2000) Explanatory Memorandum (vol 1) 58 para 15.11.
116 *Ex Parte Van Dyk* at para 10.

The third shortcoming of section 23(5) is that it may be open to constitutional challenge, as articulated by the court in *Ex Parte Van Dyk*. In this case the court was concerned that an order in terms of section 23(5) may infringe on the insolvent and his dependents' basic human rights. According to the court, the Master may have to weigh up the insolvent's obligation to make payments to the benefit of his creditors in terms of section 23(5) against the insolvent and his dependant's right to food.[117] The basic rights of the insolvent and his dependents, such as the right to food, are intrinsically linked to the inalienable right to human dignity.[118]

The court referred to the decision in *Ex Parte Kroese*[119] where the court had to consider a similar question, i.e. whether an insolvent-applicant was entitled to waive the protections afforded by section 82(6) of the Act.[120] Section 82(6) reads as follows:

> "[f]rom the sale of the movable property shall be excepted the wearing apparel and bedding of the insolvent and the whole or such part of his household furniture, and tools and other essential means of subsistence as the creditors, or if no creditor has proved a claim against the estate, as the Master may determine and the insolvent shall be allowed to retain, for his own use any property so excepted from the sale".

The court in *Ex Parte Kroese* expressed the view that the purpose of the protections afforded by section 82(6) are clear, namely "to preserve the right to life and the dignity of an insolvent and his or her or their dependants and to place them in a position to rebuild their lives".[121] The benefit of these protections are therefore not merely aimed at the insolvent and his dependents, but also at the public interest.[122] The court concluded that, in light of the vital importance of the right to human dignity and the purpose of the protections in section 82(6), these protections may not be waived by the insolvent.[123] The court in *Ex Parte Van Dyk* found the insolvent-applicant's attempt to waive future income in terms of section 23(5) to be analogous to the waiver of

117 *Ex Parte Van Dyk* at para 20.
118 *Idem* at para 19.
119 *Ex Parte Kroese and Another* 2015 (1) SA 405 (NWM).
120 *Ex Parte Van Dyk* at para 19.
121 *Ex Parte Kroese* at 413 para 41.
122 *Idem* at 414 para 48.
123 *Idem* at 418 para 67.

protections in terms of section 82(6) in *Ex Parte Kroese* and aligned itself with the court's decision in that matter; therefore, the insolvent-applicant's attempted waiver was not permissible.[124]

The fourth shortcoming of section 23(5) also relates to a potential constitutional challenge, namely the fact that it does not require *judicial oversight*. In *Stellenbosch University*[125] the Constitutional Court held that, where an order allows a creditor to execute against the remuneration of a debtor, that order must be authorised by a court and not some other official, such as a clerk of the court. Failure to comply with this principle infringes upon the debtor's right of access to court in terms of section 34 of the Constitution.[126] The Constitutional Court considered whether section 65J of the Magistrates' Courts Act[127] complied with constitutional values and confirmed that judicial oversight was a requirement for its constitutional validity.[128] *Stellenbosch University* and the court's finding regarding judicial oversight are discussed in more detail in chapter 3 below.

2.5. Proposals of the Law Reform Commission in respect of section 23(5)

Having identified certain challenges in respect of section 23(5), the Law Reform Commission proposed that it be replaced by section 15(5) of the Draft Insolvency Bill, which reads as follows:

> "(5)(a) The liquidator may issue from the magistrates court of the district in which the insolvent resides, carries on business or is employed a notice calling on the insolvent to appear at a hearing before the court in chambers on a date specified in such notice to give evidence on and supply proof of the earnings received by the insolvent or his or her dependants out of the exercise of his or her profession, occupation or employment and all assets or income received by the insolvent or his or her dependants from whatever source and his or her estimated expenses for his or her own support and that of his or her dependants.

124 *Ex Parte Van Dyk* at para 20.
125 *Supra* note 49.
126 *Stellenbosch University* at 637 para 133.
127 *Supra* note 51.
128 *Stellenbosch University* at 596 para I.

The notice, substantially in the form of Form E1 of Schedule 1 to this Act, shall be drawn up by the liquidator, shall be signed by the liquidator and the clerk of the court and shall be served by the sheriff on the insolvent at least 7 days before the date specified in the notice for the hearing, in the manner prescribed by the Uniform Rules of Court for the service of process in general.

The court may at any time in the presence of the insolvent postpone the proceedings to such date as the court may determine and may order the insolvent to produce such documents as the court may specify at the hearing on the date determined by the court.

On the appearance of the insolvent before the court the court in chambers shall call upon the insolvent to give evidence under oath or affirmation on his or her earnings or estimated expenses contemplated in the first paragraph above and the court shall receive such further evidence as may be adduced either orally or by affidavit or in such other manner as the court may deem just by or on behalf of either the insolvent or the liquidator as is material to the determination of the said earnings or estimated expenses.

The court shall after the hearing issue a certificate indicating which proportion of the insolvent's future earnings, if any, is not required for such support and shall accrue to his or her insolvent estate.

(b) The liquidator may submit a copy of a certificate contemplated in paragraph (a) to the insolvent's employer whereupon the employer shall be obliged to transmit to the liquidator in accordance with the certificate the amount stated therein.

(c) Any property which the insolvent obtains after the issuing of a first liquidation order with earnings which do not in terms of a certificate contemplated in paragraph (a) accrue to his or her insolvent estate, shall not form part of the insolvent estate."

A brief analysis of draft section 15(5) follows, in order to determine whether the four shortcomings of section 23(5) are effectively addressed by the proposed amendments. The first shortcoming of section 23(5), which had been identified, is that it lacks

guidelines to assist the Master in determining whether the insolvent has income that is not required for the insolvent and his dependents' maintenance needs. The Law Reform Commission correctly pointed out that the Master may not have the experience and expertise to determine what portion of an insolvent's income is not required for the maintenance of the insolvent and his dependents and that magistrates with experience in the so-called debtors' courts are better equipped to make such a determination.[129]

Draft section 15(5) attempts to mitigate this shortcoming by removing the responsibility from the Master and placing it on a magistrate.[130] This proposal is to be welcomed and does assist in mitigating the lack of guidelines to a certain extent in that a magistrate may have appropriate experience in similar investigations, such as proceedings in terms of sections 65D and 65J of the Magistrates' Courts Act. The insolvent must give evidence and furnish proof of his and/or his dependents' earnings, all assets or income received by the insolvent and/or his dependents regardless of the source, and the estimated expenses for the maintenance of the insolvent and his dependents.[131] The presiding magistrate will therefore have access to all of the relevant information in order to make a determination on whether the insolvent has surplus income.

However, the draft section still does not provide any guidelines to assist the magistrate in determining what portion of the insolvent's income may be considered surplus, nor does it link the investigation to any other legislation, such as section 65J of the Magistrates' Courts Act, which may contain such guidelines. It is submitted that the fist shortcoming of section 23(5) is not addressed by the proposed amendment and that uncertainty regarding the determination of a surplus would remain even if the amendment were to be effected.

The second shortcoming of section 23(5) relates to the *practical feasibility* of its application in light of the uncertainties of life. The proposed amendment seems to cater for the initial investigation and authorises the trustee[132] to initiate the proceedings by

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129 The South Africa Law Commission Report: *Review of the Law of Insolvency* (2000) Explanatory Memorandum (vol 1) 58 para 15.11.
130 S 15(5)(a) of the Draft Insolvency Bill.
131 S 15(5)(a) of the Draft Insolvency Bill.
132 Referred to as "the liquidator" in the Draft Insolvency Bill.

serving a prescribed notice.[133] Unfortunately, the proposed amendment does not seem to cater for the practicalities of the process and the uncertainties of life, as pointed out in *Ex Parte Van Dyk*.[134] There is no indication of what process is to be followed where, for instance, there is a change in circumstances after the magistrate issues the certificate. What happens if the insolvent becomes unemployed, or experiences a reduction in income? What happens if the insolvent changes employers? What happens if the insolvent and/or his dependents' maintenance needs increase or decrease? The proposed amendment does not provide any guidance to the insolvent, the trustee or the magistrate on what each of them will have to do in the event that such a change of circumstances occurs. It is therefore submitted that the proposed amendment does not address the second shortcoming of section 23(5) and that uncertainty regarding the practical application, especially in light of the uncertainties of life, will remain even if the amendment were to come into force.

The third shortcoming of section 23(5) is that it may be open to constitutional challenge, such as that the insolvent and his dependents' right to food may be infringed.[135] The purpose of the proposed section 15(5) remains the same as that of section 23(5), which is to determine whether the insolvent has any income that exceeds the maintenance needs of the insolvent and his dependents and which may be made available for distribution to the creditors. The court in *Ex Parte Van Dyk* was concerned that "the Master may be required to consider whether the undertaking to make a monetary contribution to his insolvent estate overrides the applicant's rights and obligations to provide for himself and his family".[136] It is submitted that the third shortcoming of section 23(5) is not addressed by draft section 15(5).

The fourth shortcoming of section 23(5) is the fact that it does not require *judicial oversight*. This shortcoming is specifically addressed by the proposed amendment in that the Master no longer plays any role in the process. The trustee is authorised to initiate the proceedings by causing a prescribed notice to be served on the

133 S 15(5)(a) of the Draft Insolvency Bill.
134 *Supra* note 40.
135 *Ex Parte Van Dyk* at para 20.
136 *Ibid*.

insolvent.[137] The insolvent must attend a hearing where a magistrate will, after hearing all relevant evidence, make a determination on whether the insolvent has surplus income available for distribution to creditors, or not.[138] The administrative discretion of the Master in section 23(5) is effectively replaced by the judicial discretion of a magistrate in draft section 15(5). This proposed amendment is to be welcomed and it is submitted that it would effectively address the fourth shortcoming of section 23(5).

In summary, it is submitted that the first three shortcomings of section 23(5) are not addressed adequately, or at all, by the proposed amendment and that only the issue of lack of judicial oversight would be rectified by the proposed amendment.

2.6. Conclusion

In this chapter, the legislative framework in terms of which the insolvent's income is considered was reviewed in the context of the administration phase. Selected case law and the Law Reform Commission's review of the law of insolvency was analysed. Following the aforementioned review and analysis, the shortcomings of section 23(5) were articulated. Lastly, the Law Reform Commission's proposed amendments were reviewed in order to determine whether they would address the shortcoming which had been identified.

The shortcoming of section 23(5) are that:

1. Section 23(5) does not contain any guidelines to assist the Master in determining whether a portion of the insolvent's income exceeds the maintenance requirements of the insolvent and his dependents.
2. Uncertainty regarding the practical feasibility of applying section 23(5) during the administration phase, i.e. the scope of the powers and obligations of the Master and the trustee in administering an order in terms of section 23(5) and the manner in which such an order will be affected by the uncertainties of life such as loss of employment and increased maintenance needs.

137 S 15(5)(a) of the Draft Insolvency Bill.
138 *Ibid*.

3. Uncertainty whether an order in terms of section 23(5) may be challenged on constitutional grounds, i.e. that such an order infringes on the basic human rights of the insolvent and his dependants, such as the right to life, human dignity and food.
4. The fourth shortcoming of section 23(5) is that it does not require *judicial oversight*, which may not comply with constitutional principles.

The next logical step is to determine whether there is existing legislation that is similar to section 23(5) which may provide a basis for solutions to its shortcomings. In this regard, a comparison with section 65J of the Magistrates' Courts Act is apposite.

Chapter 3: Legal framework for emolument attachment orders

3.1. Introduction

An emolument attachment order[139] is a collection mechanism that provides a creditor with the opportunity to attach a portion of a debtor's remuneration and receive payment thereof before the employer pays the remaining amount to the debtor.[140] EAOs are regulated by the Magistrates' Courts Act.[141]

Section 23(5) of the Insolvency Act creates a mechanism that provides a trustee of an insolvent estate with the opportunity to claim a portion of the insolvent's remuneration from the insolvent's employer before the employer pays the remaining amount to the insolvent. The similarities between the EAO mechanism and the section 23(5) mechanism are notable.

Van der Merwe explains that Roman law regulated the essential elements of the EAO as a collection mechanism; that the mechanism was incorporated into and shaped by the Roman-Dutch law; and eventually became entrenched as common practice in South Africa through the English common law.[142] The EAO mechanism's popularity increased with the advent of constitutionalism, as certain other debt enforcement measures, such as civil imprisonment, were declared to be unconstitutional.[143] However, the EAO mechanism was by no means perfect and major legal developments have taken place in recent times.[144] It is these recent developments, along with the similarities observed between the section 23(5) and EAO procedures, that make the EAO collection mechanism a particularly attractive feature for a comparative study.

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139 Hereinafter referred to as "EAO".
140 Van der Merwe "The development of the South African emolument attachment order mechanism: a historical overview" 2022 *Fundamina* 140 at 150.
141 *Supra* note 51.
142 Van der Merwe 2022 *Fundamina* 165.
143 *Ibid*.
144 *Ibid*.

This chapter will provide an overview of the EAO procedure prior to the most recent amendment brought about by constitutional scrutiny; the Constitutional Court case that led to the amendment, as well as the amended EAO procedure. Thereafter the lessons that may be learned from the recent EAO experience, which may be relevant to the section 23(5) procedure, will be discussed.

3.2. The EAO procedure prior to its amendment

The EAO procedure is contained in section 65J of the Magistrates' Courts Act. As indicated above, this part of the chapter deals with the provisions of section 65J prior to its amendment and it is important to note that all references to the Magistrates' Courts Act in this part are to the pre-amendment version thereof.

Subsection 65J(1) authorises the judgment creditor to request the court of the district in which the judgment debtor's employer resides, carries on business or is employed, to issue an EAO.[145] Where the judgment debtor is employed by the State, the court of the district where the judgment debtor is employed shall have jurisdiction to grant the order.[146] The EAO attaches an amount from the present or future emoluments of the judgment debtor, received or to be received from his employer, that is adequate to cover both the judgment and the attachment costs.[147]

For the purposes of this chapter of the Act, "emoluments" are defined as including:

> "salary, wages or any other form of remuneration; and any allowances, whether expressed in money or not".[148]

Furthermore, for the purposes of this chapter of the Act, "debts" are defined as:

> "any income from whatever source other than emoluments".[149]

In subsection 65J the judgment debtor's employer is referred to as "the garnishee",[150] which is not to be confused with the so-called "garnishee order". The Act draws a clear

145 S 65J(1)(a) of the MCA.
146 *Ibid*.
147 S 65J(1)(b)(i) of the MCA.
148 S 61 of the MCA.
149 *Ibid*.
150 S 65J(1)(b)(i) of the MCA.

distinction between the "garnishee order", in terms of which execution is levied against a debt that is owed to the judgment debtor, and an EAO, in terms of which execution is levied against the emoluments of the judgment debtor.[151] It is to be noted that the EAO does not make the judgment creditor a creditor of the employer, i.e. a transfer or cession of the debt to the judgment creditor does not take place.[152] The EAO merely obligates the judgment debtor's employer to pay a specified portion of the judgment debtor's emoluments to the judgment creditor, or his legal representative, until the judgment debt and costs have been paid in full.[153]

Subsection 65J(2) determines that an EAO may only be issued if the judgment debtor has consented to it in writing, or the court has authorised it, whether on application or otherwise, and the court's authorisation has not been suspended in the meantime.[154] Alternatively, an EAO may also be issued if the judgment creditor, or his legal representative, sent a registered letter to the judgment debtor advising him of the outstanding amount of the judgment debt and legal costs and warning him that an EAO will be issued if the outstanding amount is not paid within ten days, calculated from the date on which that registered letter was posted.[155]

Additionally, the judgment creditor or his legal representative must file an affidavit or a certificate with the clerk of the court setting out the amount of the judgment debt at the date of the order, the legal costs which have accumulated since, the payments that have since been received, the outstanding balance, and a declaration that the registered letter was duly sent.[156] The section therefore provides for three methods of obtaining an EAO: a) with the judgment creditor's written consent; b) with the authorisation of the court; or c) by complying with certain formalities, namely service of a registered letter and filing of an affidavit with the clerk of the court. It is to be noted that only one of the three methods requires judicial oversight.

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151 Van Loggerenberg *Jones and Buckle: Civil practice of the Magistrates' Courts of South Africa* (volume I and II) (2023) at Appendix G 33.
152 Harms Civil procedure in the Magistrates' Courts (2018) at para D65J.7.
153 S 65J(1)(b)(ii) of the MCA.
154 S 65J(2)(a) of the MCA.
155 S 65J(2)(b)(i) of the MCA.
156 S 65J(2)(b)(ii) of the MCA.

Subsection 65J(3) requires the judgment creditor or his legal representative to draft the EAO, where after it must be signed by the judgment creditor or his legal representative and the clerk of the court, and served on the judgment debtor's employer by the sheriff in the manner prescribed by the rules of court.

Subsection 65J(4) determines how deductions in terms of the EAO must be made – where the judgment debtor is paid monthly, payment must be effected at the end of the month following the month in which the EAO was served on the employer; alternatively, where the judgment debtor is paid weekly, payment must be effected at the end of the second week of the month following the month in which the EAO was served on the employer.[157] All payments to the judgment creditor or his legal representative must be made on a monthly basis starting from the end of the month following the month in which the EAO was served on the employer.[158] The judgment creditor or his legal representative must, free of charge, furnish the employer or the judgment debtor with a statement setting out the payments received and outstanding balance remaining at the date that the information is requested.[159]

Section 65J(5) states that an EAO may be executed against the employer as if it were a court judgment, but the judgment debtor, the employer, or any other interested party has the right to dispute the existence or validity of the order or the correctness of the outstanding balance.

Section 65J(6) requires that, once the EAO is served on the employer, and it transpires that the judgment debtor will not have sufficient means to provide for his and his dependants' maintenance needs, the court must rescind the EAO, or amend it to affect only the portion of the judgment debtor's emoluments that exceed his and his dependants' maintenance needs.

Section 65J(7) stipulates that an EAO may be suspended, amended or rescinded by the court at any time provided that good cause is shown, and the court may impose conditions that it deems to be just and reasonable when suspending an EAO.

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157 S 65J(4)(a) of the MCA.
158 *Ibid*.
159 S 65J(4)(b) of the MCA.

Section 65J(8) determines that, whenever the judgment debtor leaves the service of an employer before the EAO has been satisfied in full, he must immediately advise the judgment creditor in writing of the name and address of his new employer; where after the judgment creditor may serve a certified copy of the EAO on the new employer, together with his affidavit or his legal representative's certificate, setting out the payments received, the legal costs incurred since the date on which the EAO was issued, and the outstanding balance.[160] A new employer who receives the certified copy of the EAO is forthwith bound thereby and is deemed to have substituted the former employer.[161] During such a substitution, the judgment debtor, new employer or any other interested party retains the right to dispute the existence or validity of the EAO and the correctness of the outstanding balance.[162]

Section 65J(9) states that, when the judgment debtor leaves the service of the employer before the EAO has been satisfied in full and becomes self-employed, or pending service of the EAO on the new employer, the judgment debtor is personally liable for payments in respect of the EAO.[163]

Section 65J(10) requires that an employer who renders services in terms of an EAO may recover a commission of up to 5 per cent of all amounts deducted from the judgment debtor's emoluments, by deducting such commission from the amount payable to the judgment creditor.

3.3. *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services*

The EAO landscape was drastically changed by the *Stellenbosch University* case.[164] In this case, the Constitutional Court confirmed that the EAO procedure was often abused by unscrupulous creditors and debt collectors, the constitutional rights of judgment debtors were frequently disregarded, and EOAs were frequently obtained

160 S 65J(8)(a) of the MCA.
161 S 65J(8)(b) of the MCA.
162 *Ibid*.
163 S 65J(9)(a) of the MCA.
164 *Supra* note 57. See also Van der Merwe "Traversing the South African emolument attachment order legal landscape post 2016: Quo Vadis?" 2019 *Stell LR* 78.

unlawfully.[165] It is important to take cognizance of the fact that *Stellenbosch University* did not challenge the constitutionality of EAOs as such, but merely addressed the abuses involved in obtaining and enforcing of EAOs.[166] The Constitutional Court framed the question before it by stating that

> "we must investigate whether the impugned provision does not provide for judicial oversight at the time [that] an emoluments attachment order is issued [and] [i]f it does not, whether the omission limits the right entrenched in [section] 34 of the Constitution".[167]

At no stage did any party in *Stellenbosch University* allege, or did the Constitutional Court investigate of its own accord, whether the mechanism of an EAO is inherently unconstitutional. The question was always whether this mechanism was being implemented in a manner that was consistent with the Constitution.

In the majority judgment, Cameron J confirmed that the jurisprudence of the Constitutional Court had repeatedly confirmed that the execution of a court order formed part of the judicial process and required judicial oversight.[168] Despite the fact that previous cases dealt with execution against debtor's residential property, it was the underlying principle that was of import, namely that "judicial oversight of the execution process against all forms of property is constitutionally indispensable".[169] Cameron J concluded that the fundamental principle flowing from section 34 of the Constitution of the Republic of South Africa, 1996,[170] namely the proscription against self-help, applied equally to the execution process.[171]

Section 34 of the Constitution states that

> "[e]veryone 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".

165 Van der Merwe 2019 *Stell LR* 96.
166 Van der Merwe 2019 *Stell LR* 91.
167 *Stellenbosch University* at 620 para 71.
168 *Stellenbosch University* at 637 para 129.
169 *Ibid*.
170 Hereinafter referred to as "the Constitution".
171 *Stellenbosch University* at 637 para 129.

Therefore, the main question that the Constitutional Court needed to determine was

> "whether the impugned portions of s 65J(2) are reasonably capable of being read to mean that emoluments attachment orders can be granted only with judicial oversight — that is, by a magistrate only, and not by the clerk of the court".[172]

In other words, if the provisions of section 65J(2) provided for the granting of an EAO by the clerk of the court, there would be no judicial oversight and the provisions of the section would not pass constitutional muster.

Cameron J went on to state that the present case provided a prime example of why judicial oversight of the execution process is indispensable.[173] Despite the fact that an EAO deals with the enforcement of a judgment debt, it in and of itself constitutes a substantive decision, namely how the debt is to be paid.[174] Even where a debt itself is not in dispute, the parties may dispute the means by which that debt is to be paid.[175] Furthermore, Cameron J pointed out that a large debt payable through lenient means may be less burdensome than a small debt payable as a lumpsum.[176] Various crucial factors must be considered at the time when the EAO is requested, including that the debtor's autonomy is limited drastically in that the debtor no longer has a choice regarding the method of paying off the debt, an EAO is inflexible and does not change along with the debtor's circumstances, and the EAO is deducted directly from the debtor's wages, which are crucial for the debtor's day-to-day survival.[177] It is also possible that the judgment debtor's circumstances may have changed between the date on which the judgment for payment of the debt in instalments was granted and the date on which the EAO is requested.[178] All of these considerations emphasize the crucial importance of judicial oversight at the time that an EAO is sought.[179]

Cameron J referred to the minority judgment of Jaftha J and confirmed that the reasoning behind the minority judgment was that the text of section 65J(2) did not

172 *Idem* at 639 para 136.
173 *Idem* at 637 para 130.
174 *Ibid*.
175 *Ibid*.
176 *Ibid*.
177 *Idem* at 638 para 131.
178 *Ibid*.
179 *Idem* at 638 para 132.

support the construction that an EAO may be issued by a clerk of the court.[180] In other words, the correct interpretation of section 65J(2) was that an EAO is issued by a magistrate and not a clerk and that the parties merely interpreted and applied the section incorrectly.[181] Cameron J disagreed with the minority judgment's interpretation of section 65J(2).[182] He acknowledged that the interpretive approach was appealing, especially in light of the doctrine established in *Hyundai*,[183] namely that

> "judges must embrace interpretations of legislation that fall within constitutional bounds over those that do not, provided that the interpretation can be reasonably ascribed to the section".[184]

Cameron J approaches the problem from the angle that it must be determined whether the wording of section 65J(2) allows for the granting of an EAO by a clerk of the court, as opposed to only a magistrate.[185] If it is found that the section does allow for the granting of an EAO by a clerk of the court, this would constitute an infringement of the debtor's right to access to court in terms of section 34 of the Constitution.[186] In such case, the appropriate remedy is to strike down the offensive provisions of section 65J.[187]

The core of Cameron J's argument centres on the wording of section 65J, starting with section 65J(1) which states that "[s]ubject 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".[188] To Cameron J the wording is clear – it is the judgment creditor who causes the EAO to be issued and it is issued not *by* the court but *from* the court.[189] The wording of the section is a harbinger of execution, in the form of an emoluments attachment order, without judicial oversight.[190]

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180 *Idem* at 639 para 137.
181 *Idem* at 627 para 89.
182 *Idem* at 639 para 134.
183 *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC).
184 *Stellenbosch University* at 639 para 135.
185 *Idem* at 639 para 136.
186 *Idem* at 638 para 133.
187 *Idem* at 643 para 149.
188 *Idem* at 641 para 143.
189 *Ibid*.
190 *Ibid*.

The requirements for the granting of an EAO are set out in subsection 65J(2), of which there are three, namely that the judgment debtor has consented in writing, or it has been authorised by a court, or the process delineated in section 65J(2)(b) has been followed.[191] Section 65J(2)(a) allowed for the issuing of an EAO under two circumstances, either the judgment debtor consented thereto in writing *or* where it has been authorised by the court.[192] It is clear from the conjunction 'or' that an EAO may be issued as long as the judgment debtor consented thereto in writing, even when the court has not authorised it.[193] The conjunction 'or' in section 65J(2) also follows from the wording used in section 65J(1), which indicates that the EAO may be issued *from* the court rather than *by* the court.[194] The analysis of the wording of sections 65J indicates that execution in the form of an EAO may be obtained without judicial oversight.[195]

This conclusion is further supported by the wording of section 65J(5) which states that

> "[a]n emoluments attachment order may be executed against the garnishee *as if it were a court judgment*, subject to the right of the judgment debtor, the garnishee or any other interested party to dispute the existence or validity of the order or the correctness of the balance claimed."

The highlighted phrase above seems to indicate that an order, which is not a court judgment, may be obtained by the written consent of the judgment creditor and may then be executed as if it were actually a court judgment.[196]

Cameron J concludes that, in light of the clear linguistic meaning of the wording of section 65J, attempting to apply the interpretive approach would go against the warning of the Constitutional Court in *De Beer NO*[197] that such an interpretation should not be unduly strained.[198]

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191 *Idem* at 642 para 144.
192 *Idem* at 642 par 145.
193 *Ibid*.
194 *Ibid*.
195 *Ibid*.
196 *Idem* at 643 para 146.
197 *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* 2002 (1) SA 429 (CC).
198 *Idem* at 643 para 147.

In conclusion, section 65J did allow for the granting of an EAO without judicial oversight, which constituted an infringement upon the judgment debtor's right to access to court, as protected by section 34 of the Constitution, and section 65J therefore could not pass constitutional muster.[199] Cameron J confirmed that hence forth an EAO could only be granted if it had been authorised by a court, in other words a magistrate and not a clerk.[200] The Constitutional Court left open the door for the legislature to determine exactly how this judicial oversight should be implemented in the context of section 65J.[201]

The Constitutional Court ultimately required certain words to be read into section 65J(2) and other words to be severed[202] and therefore ordered that section 65J(2) should read as follows (own emphasis added):

> "(2) An emoluments attachment order shall not be issued —
>
> (a) unless the judgment debtor has consented thereto in writing *and* the court has so authorised *after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate*, 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 *may* be issued if the said amount is not paid within 10 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

199 *Idem* at 644 para 153.
200 *Idem* at 645 para 154.
201 *Ibid*.
202 *Idem* at 662 para 212.

that date and the balance owing and declaring that the provisions of subpara (i) have been complied with on the date specified therein*; and*

(iii) *been granted an order of court authorising that an emoluments attachment order be issued after satisfying itself that it is just and equitable that the order be issued and that the amount is appropriate*."[203]

The effects of the Constitutional Court's amendments are threefold. First, an EAO may *only* be granted by a magistrate, regardless of whether the judgment debtor has consented to the EAO or not. Second, the magistrate may only grant the EAO if it is satisfied that it is *just and equitable* to do so. Third, the amount to be deducted in terms of the EAO must be *appropriate*.

3.4. The EAO procedure after amendment

Following *Stellenbosch University*, the Magistrates' Courts Act was amended by the Courts of Law Amendment Act[204] to, *inter alia*, align it with the Constitutional Court's judgment. There is currently a dearth of scholarship regarding the amendments to the EAO procedure; therefore, this study will briefly highlight the differences between the pre- and post-amendment section 65J.

The Amendment Act came into operation on 1 August 2018 and determined that legal proceedings which were instituted in terms of section 65J prior to the commencement of the Amendment Act, and which were not concluded by 1 August 2018, had to be continued and concluded as if the Amendment Act had not been passed on condition that the original EAO was obtained in accordance with the law.[205]

The Amendment Act substituted section 65J of the Magistrates' Courts Act in its entirety.[206] Section 65J(1) now reads as follows:

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203 *Ibid*.
204 Act 7 of 2017 (hereinafter referred to as "the Amendment Act").
205 S 15(1) of the Amendment Act.
206 S 9 of the Amendment Act.

> "(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.
>
> (b) An emoluments attachment order —
>
> (i) must 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) must 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."

The court with jurisdiction to grant an EAO is now the court of the district in which the judgment debtor resides, carries on business, or is employed, as opposed to the court of the district where the judgment debtor's employer resides, carries on business, or is employed.[207] The court envisaged by the subsection is the only magistrates' court from which an EAO may be issued.[208] No distinction is made based on whether the judgment debtor is employed by the State or not.[209] The rest of section 65J(1) remained unchanged, with the exception of the substitution of the word 'must' for the word 'shall', which does not affect the practical application of the section.[210]

Section 65J(1A) is a brand-new section which has been added and reads as follows:

> "(1A)(a) The amount of the instalment payable or the total amount of instalments payable where there is more than one emoluments

207 S 65J(1)(a) of the Amendment Act.
208 Harms Civil procedure in the Magistrates' Courts (2018) at para D65J.6.
209 *Ibid*.
210 S 65J(1)(b) of the Amendment Act.

attachment order payable by the judgment debtor, may not exceed twenty-five per cent of the judgment debtor's basic salary.

(b) For purposes of this section, "basic salary" means the annual gross salary a judgment debtor is employed on divided by 12 and excludes additional remuneration for overtime or other allowances.

(c)(i) When a court considers –

(aa) the authorisation of an emoluments attachment order; or

(bb) any other order contemplated in this section, and after having considered all submissions before the court and after having called for and considered all further available documents, the court is satisfied that other emoluments attachment orders exist against the judgment debtor, the court must postpone the further consideration of the authorisation or other order and set the matter down for hearing.

(ii) The party applying for the authorisation of an emoluments attachment order or other order contemplated in this section, must serve notice of the date of the hearing referred to in subparagraph (i) on the other creditors or their attorneys, and on the judgment debtor, if he or she was not present or represented when the consideration of the authorisation of an emoluments attachment order or other order was postponed.

(iii) The court may after hearing all parties at the ensuing hearing, make an order regarding the division of the amount available to be committed to each of the emoluments attachment orders, after satisfying itself that each order is just and equitable and the sum of the total amount of the emoluments attachment orders is appropriate and does not exceed twenty-five per cent of the judgment debtor's basic salary."

Section 65J(2) now reads as follows:

> "An emoluments attachment order may only be issued if the court has so authorised, after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate, whether on application to the court or otherwise, and such authorisation has not been suspended."

The new subsection 65J(2) incorporates the Constitutional Court's wording *verbatim* and confirms that an EAO may only be issued after it has been authorised by a court, i.e. a magistrate, and that the magistrate may only authorise the EAO once he is satisfied that it would be just and equitable to do so. The amount to be deducted in terms of the EAO must further be appropriate.

The purpose of the newly added subsection 1A is to provide the magistrate with guidance in determining whether the issuing of an EAO would be just and equitable, and whether the amount would be appropriate. The first guideline is that the amount or amounts to be deducted from the judgment debtor's emoluments, in terms of *all* EAOs obtained against the judgment debtor, may not exceed twenty-five per cent of the judgment debtor's basic salary.[211] "Basic salary" is defined as being the judgment debtor's annual gross salary, excluding any additional remuneration for overtime or allowances, divided by twelve.[212]

It is clear that, before granting any order in terms of section 65J, the court must call for, and properly consider, all relevant documents and submissions.[213] Where it transpires that there are already one or more EAOs operational against the judgment debtor, the court must set the matter down for hearing before authorising another EAO or granting any other order.[214] The person applying for the EAO must notify all interested parties of the postponement, including all other creditors and the judgment debtor, if the judgment debtor was not present or represented at the proceedings where the matter was postponed.[215]

At the subsequent hearing, the court must hear submissions from all parties and may only make an order regarding the division of the amount – which is available for deduction from the judgment debtor's salary between the various EAOs – after duly considering all submissions.[216] The court must be satisfied that each EAO was granted on a just and equitable basis.[217] It must further ensure that the total amount to be

211 S 65J(1A)(a) of the Amendment Act.
212 S 65J(1A)(b) of the Amendment Act.
213 S 65J(1A)(c)(i)(bb) of the Amendment Act.
214 *Ibid*.
215 S 65J(1A)(c)(ii) of the Amendment Act.
216 S 65J(1A)(c)(iii) of the Amendment Act.
217 *Ibid*.

deducted from the judgment debtor's remuneration is appropriate and does not exceed twenty-five per cent of the judgment debtor's basic salary.[218]

The newly added sections 65J(2A) and (2B) read as follows:

> "(2A) A judgment creditor or his or her attorney must serve, on the judgment debtor and on his or her employer, a notice, which corresponds substantially with the form prescribed in the rules, of the intention to have an emoluments attachment order issued against the judgment debtor in accordance with the authorisation of the court referred to in subsection (2).
>
> (2B) The notice referred to in subsection (2A) must inform the judgment debtor and his or her employer -
>
> (a) of the judgment creditor's intention to have an emoluments attachment order issued against the judgment debtor in accordance with the authorisation of the court referred to in subsection (2);
>
> (b) of the full amount of the capital debt, interest and costs outstanding, substantiated by a statement of account; and
>
> (c) that, unless the judgment debtor or his or her employer files a notice of intention to oppose the issuing of the emoluments attachment order within 10 days after service of the notice on them, an emoluments attachment order will be sought."

Whenever a judgment creditor intends to have an EAO issued, a notice corresponding substantially with the form[219] prescribed in the Magistrates' Court Rules[220] must be served on the judgment debtor and the judgment debtor's employer.[221] This notice must inform the judgment debtor and the judgment debtor's employer of the judgment creditor's intention to have an EAO issued against the judgment debtor.[222] The notice must further state the total amount of the capital debt, interest and costs outstanding, and must be substantiated by a statement of account.[223] Lastly, the notice must state that the court will be approached to issue an EAO unless the judgment debtor or the

218 *Ibid*.
219 Form 38A in Annexure 1.
220 Rules regulating the conduct of the proceedings of the Magistrates' Courts of South Africa.
221 S 65J(2A) of the Amendment Act.
222 S 65J(2B)(a) of the Amendment Act.
223 S 65J(2B)(b) of the Amendment Act.

judgment debtor's employer files a notice of intention to oppose the issuing of the EAO within 10 court days after the date of service of the notice upon them.[224]

The newly added sections 65J(2C) to (2E) deal with the notice of intention to oppose and determine the following:

> "(2C)(a) The notice of intention to oppose contemplated in subsection (2B)(c) must state the grounds upon which the judgment debtor or employer wishes to oppose the issuing of the emoluments attachment order.
>
> (b) The grounds which may be used to oppose the issuing of the emoluments attachment order include, but are not limited to, the following:
>
> (i) That the amounts claimed are erroneous or not in accordance with the law; or
>
> (ii) that twenty-five per cent of the judgment debtor's basic salary is already committed to other emoluments attachment orders and that the debtor will not have sufficient means left for his or her own maintenance or that of his or her dependants.
>
> (c) The notice of intention to oppose must be accompanied by -
>
> (i) a certificate by the employer of the judgment debtor setting out particulars of -
>
> (aa) all existing court orders against the judgment debtor or agreements with other creditors for payment of a debt and costs in instalments; and
>
> (bb) when reasonably attainable, the amounts needed by the debtor for necessary expenses and those of the persons dependent on him or her and for the making of periodical payments which he or she is obliged to make in terms of an agreement or otherwise in respect of his or her other commitments.
>
> (ii) the contact details of all the relevant judgment creditors or their attorneys; and
>
> (iii) the latest salary advice of the judgment debtor.

[224] S 65J(2B)(c) of the Amendment Act.

(2D) If a notice of intention to oppose is filed and the judgment creditor or his or her attorney does not accept the reasons for the opposition, he or she or his or her attorney may set the matter down for hearing in court with notice to the judgment debtor and employer and if the opposition is based on overcommitment of the judgment debtor's salary to existing court orders or agreements with other creditors for payment of a debt and costs in instalments, notice must be given to the other judgment creditors or their attorneys.

(2E) The court may, after hearing all parties and after satisfying itself that the order is just and equitable -

(a) rescind the emoluments attachment order or amend it in such a way that it will affect only the balance of the emoluments of the judgment debtor over and above the sufficient means necessary for his or her maintenance and that of his or her dependants; or

(b) make any order, including an order regarding the division of the amount available to be committed to all the emoluments attachment orders, after satisfying itself that the amount is appropriate and does not exceed twenty-five per cent of the judgment debtor's basic salary and an order as to costs."

The notice of intention to oppose the issuing of the EAO must state the grounds upon which the judgment debtor, or the judgment debtor's employer, wishes to oppose the issuing of the EAO.[225] The section introduces two potential grounds on which the issuing of the EAO may be opposed. The first ground is that the amounts claimed are incorrect, or not in accordance with the law.[226] The second ground is that twenty-five per cent of the judgment debtor's basic salary is already committed to other EAOs and the judgment debtor will not have sufficient means left to cater for his and his dependents' maintenance needs.[227] This is nevertheless not a closed list and any other *bona fide* ground for opposition may also be raised.[228]

225 S 65J(2C)(a) of the Amendment Act.
226 S 65J(2C)(b)(i) of the Amendment Act.
227 S 65J(2C)(b)(ii) of the Amendment Act.
228 S 65J(2C)(b) of the Amendment Act.

The notice of intention to oppose must be accompanied by a certificate, furnished by the judgment debtor's employer, confirming any existing court orders or agreements with other creditors in terms of which the judgment debtor is liable for the payment of a debt in instalments.[229] If the employer is able to obtain this information, the certificate should also set out the particulars of the amounts required for the debtor and his dependents' maintenance needs, as well as amounts required to make periodical payments for which the judgment debtor is liable, in terms of an agreement or otherwise, in respect of his other commitments.[230] The notice must further be accompanied by the contact details of the relevant judgment creditors, or their attorneys, and the judgment debtor's most recent salary advice.[231]

Should the judgment creditor not accept the reasons for opposition that are stated in the notice of intention to oppose, the judgment creditor, or his legal representative, may set the matter down for hearing, in which case notice of set down must be served on the judgment debtor and his employer.[232] Where the opposition is based on the allegation that the judgment debtor's salary is already overcommitted to existing court orders and/or agreements with other creditors, the notice of set down must also be served on the other creditors or their legal representatives.[233] On the date of the hearing, the court will hear all of the parties that are present and, if it is satisfied that the order is just and equitable, it may rescind the EAO or amend it so that only the emoluments over and above the sufficient means necessary for the maintenance of the judgment debtor and his dependents will be affected by the order.[234] Alternatively, the court may make any order dividing the amount available for distribution between the various EAOs, if the court is satisfied that the total amount due in terms of all the EAOs is appropriate and does not exceed twenty-five per cent of the judgment debtor's basic salary.[235]

Section 65J(3) determines the following:

229 S 65J(2C)(c)(i)(aa) of the Amendment Act.
230 S 65J(2C)(c)(i)(bb) of the Amendment Act.
231 S 65J(2C)(c)(ii) & (iii) of the Amendment Act.
232 S 65J(2D) of the Amendment Act.
233 *Ibid*.
234 S 65J(2E)(a) of the Amendment Act.
235 S 65J(2E)(b) of the Amendment Act.

> "(3)(a) Any emoluments attachment order must be prepared and signed by the judgment creditor or his or her attorney.
>
> (b) The clerk of the court must ensure that the court —
>
> (i) has authorised the emoluments attachment order; and
>
> (ii) has jurisdiction as provided for in subsection (1)(a), before issuing an emoluments attachment order authorised in terms of subsection (2) by signing it and may either ask the judgment creditor or his or her attorney for more information or refer the order to the court in the case of any uncertainty.
>
> (c) The emoluments attachment order must be served on the employer of the judgment debtor, (hereinafter called the garnishee) and if the judgment debtor was not present or represented when the emoluments attachment order was authorised, also on the judgment debtor, by the sheriff in the manner prescribed by the rules for the service of process."

An EAO must be prepared and signed by the judgment creditor, or the judgment creditor's attorney, and, before issuing the EAO, the clerk of the court must ensure that the court has in fact authorised the EAO and that it has jurisdiction to authorise the EAO.[236] The clerk may ask the judgment creditor, or the judgment creditor's attorney, for more information or refer the EAO to the court should there be any uncertainty as to whether the court authorised the EAO and/or whether it had the jurisdiction to do so.[237] Once the EAO is issued, the sheriff must serve it on the judgment debtor's employer and, where the judgment debtor was not present or represented when the EAO was authorised, on the judgment debtor as well.[238] The manners in which service may be effected are prescribed in the Magistrates' Court Rules,[239] specifically Rule 9.[240] Subsections 4 and 5 remain unchanged after the amendment.

Section 65J(6) determines as follows:

236 S 65J(3)(a) & (b) of the Amendment Act.
237 S 65J(3)(b) of the Amendment Act.
238 S 65J(3)(c) of the Amendment Act.
239 Rules regulating the conduct of the proceedings of the Magistrates' Courts of South Africa.
240 Harms Civil procedure in the Magistrates' Courts (2018) at para D65J.11.

"(6)(a) If, after the service of such an emoluments attachment order on the garnishee, the garnishee believes or becomes aware or it is otherwise shown that the —

(i) judgment debtor, after satisfaction of the emoluments attachment order, will not have sufficient means for his or her own maintenance or that of his or her dependants; or

(ii) amounts claimed are erroneous or not in accordance with the law, the garnishee, judgment debtor or any other interested party must without delay and in writing notify the judgment creditor or his or her attorney accordingly.

(b) The written notification referred to in paragraph (a) must set out the reasons for believing or knowing that the judgment debtor will not have sufficient means for his or her own maintenance or that of his or her dependants or that the amounts claimed are erroneous or not in accordance with the law.

(c) The judgment creditor or his or her attorney must, after receiving the notice contemplated in paragraph (a), without delay indicate whether he or she accepts the reasons given in that notification and if not, set the matter down for hearing in court with notice to the garnishee, judgment debtor or any other interested party referred to in paragraph (a).

(d) The court may, after hearing all parties and after satisfying itself that the order is just and equitable -

(i) rescind the emoluments attachment order or amend it in such a way that it will affect only the balance of the emoluments of the judgment debtor over and above the sufficient means necessary for his or her maintenance and that of his or her dependants; or

(ii) make any order including an order regarding the division of the amount available to be committed to all the emoluments attachment orders, after satisfying itself that the amount is appropriate and does not exceed twenty-five per cent of the judgment debtor's basic salary and an order as to costs."

Should the judgment debtor's employer realise that there will be insufficient means available for the maintenance of the judgment debtor and his dependents once the instalment in terms of the EAO is deducted, or that the amounts claimed in terms of the EAO are incorrect or not in accordance with the law, the judgment debtor, his

employer or any other interested party must, as soon as possible and in writing, notify the judgment creditor, or his legal representative, of the situation.[241]

It is interesting to note that section 65J(6)(a) may be used when the *employer* of the judgment creditor believes or becomes aware of the circumstances described in subsections (i) and (ii), but that subsection (ii) authorises any one of three parties – the employer, the judgment debtor or any other interested party – to notify the judgment creditor of this state of affairs. It is submitted that the reason for this anomaly is to be found in the fact that the judgment debtor bears the onus to prove that he will be left with insufficient means to maintain himself and his dependents, that the claim is erroneous or not in accordance with the law.[242]

In *Minter NO*[243] the court held that, during the initial application for an EAO, the onus is on the judgment creditor to satisfy the court that the judgment debtor will have sufficient means to maintain himself and his dependents following satisfaction of the monthly EAO instalment.[244] However, section 65J(6) only becomes relevant at a later stage in the process, i.e. after the EAO has been served upon the judgment debtor's employer and now the onus is on the judgment debtor to show that he will not have sufficient means available to maintain himself and his dependents.[245] The reason for this is logically that the judgment debtor is the person best placed to be aware of his personal circumstances, including any changes which may have occurred since the EAO was initially authorised, and therefore bears the onus of disclosing this information to his employer and the judgment creditor.[246]

The written notice must contain the reasons why the opinion is held that there will not be sufficient means available to the judgment debtor or that the amounts are incorrect or not in accordance with the law.[247] Following receipt of the notice, the judgment creditor, or his legal representative, must without delay indicate whether the said reasons are accepted or not and, if the reasons are not accepted, set the matter down

241 S 65J(6)(a) of the Amendment Act.
242 Harms Civil procedure in the Magistrates' Courts (2018) at para D65J.13.
243 *Minter NO v Baker and Another* 2001 (3) SA 175 (W).
244 *Idem* at 184 para G.
245 *Idem* at 183 para D.
246 *Idem* at 183 para E.
247 S 65J(6)(b) of the Amendment Act.

for hearing with notice to all concerned parties.[248] On the date set down by the judgment creditor, the court will hear all of the parties that are present and, only if it is satisfied that the order is just and equitable, may it rescind the EAO or amend it so that only the emoluments over and above the means necessary for the maintenance of the judgment debtor and his dependents will be affected.[249] Alternatively, the court may make any order, including dividing the amount available for distribution between the various EAOs, if the court is satisfied that the total amount due in terms of all the EAOs is appropriate and does not exceed twenty-five per cent of the judgment debtor's basic salary.[250] Subsections 7 to 9 have remained unchanged following the amendment.

Section 65J(10) provides:

> "(10)(a) Any garnishee may, in respect of the services rendered by him or her in terms of an emoluments attachment order, recover from the judgment creditor a commission of up to 5 per cent of all amounts deducted by him or her from the judgment debtor's emoluments by deducting such commission from the amount payable to the judgment creditor.
>
> (b) A garnishee who—
>
> (i) unreasonably fails to timeously deduct the amount of the emoluments attachment order provided for in subsection (4)(a); or
>
> (ii) unreasonably fails to timeously stop the deductions when the judgment debt and costs have been paid in full, is liable to repay to the judgment debtor any additional costs and interest which have accrued or any amount deducted from the salary of the judgment debtor after the judgment debt and costs have been paid in full as a result of such failure.
>
> (c) The Rules Board for Courts of Law must make a reference to the provisions of paragraph (b) on Form 38 of Annexure 1 to the rules, containing the emoluments attachment order."

248 S 65J(6)(c) of the Amendment Act.
249 S 65J(6)(d)(i) of the Amendment Act.
250 S 65J(6)(d)(ii) of the Amendment Act.

The judgment debtor's employer may recover a commission of up to 5 per cent of all amounts deducted from the judgment debtor's remuneration, by deducting the commission amount from the amount payable to the judgment creditor.[251] Harms points out that this provision has been heavily criticised by the attorneys' profession.[252] The employer is liable for any additional costs, interest or amounts that should not have been deducted from the judgment debtor's remuneration and which were caused by the employer's failure to timeously make deductions, or to timeously cease deductions from the judgment debtor's remuneration.[253]

The golden thread running through the amended section 65J is that an EAO may only be authorised by a court; the court may only authorise an EAO if it is satisfied that it is just and equitable to do so and that the amount is appropriate. The judgment debtor, the judgment debtor's employer, or any other party having an interest in the matter, may challenge an existing EAO based on its validity or correctness. In case of such a challenge, the court must again hear all interested parties and may then suspend, rescind or vary the EAO, or make any other order once it is satisfied that it is just and equitable to do so and that the amount is appropriate. In terms of the appropriateness of the amount, the total deductions under all EAOs against the judgment debtor is capped at twenty-five per cent of the judgment debtor's basic salary. This nevertheless constitutes the maximum amount deductible, and is not automatically an indication of appropriateness – it is plausible that, under the specific circumstances of the debtor, a much lower amount is appropriate.

Stellenbosch University did not challenge the constitutionality of EAOs as such, but merely addressed the abuses involved in obtaining and enforcing EAOs. The question was always whether this mechanism was being implemented in a manner that was consistent with the Constitution.

The Constitutional Court remedied the deficiencies in section 65J through the insertion and severance of certain words. The legislature amended the section in accordance with the wording prescribed by the Constitutional Court and also addressed other

251 S 65J(10)(a) of the Amendment Act.
252 Harms Civil procedure in the Magistrates' Courts (2018) at para D65J.14.
253 S 65J(10)(b) of the Amendment Act.

problematic areas of the section, for instance regarding which district of the court has the jurisdiction to grant an EAO. The lessons that may be learned from this process, and which may be applicable to the challenges highlighted in respect of section 23(5) above, will now be discussed.

3.5. Lessons to be learned from the EAO experience

The striking resemblance between the mechanisms contained in section 65J of the Magistrates' Courts Act and section 23(5) of the Insolvency Act has already been pointed out. An EAO in terms of section 65J is a mechanism that provides a creditor with the opportunity to attach his debtor's remuneration and obtain payment directly from the debtor's employer. Section 23(5) creates a mechanism that provides a trustee of an insolvent estate with the opportunity to claim a portion of the insolvent's remuneration from the insolvent's employer, before it is paid to the insolvent. A notable difference between the two procedures is that, in the case of section 65J, it is a magistrate who authorises the EAO; whereas, in the case of section 23(5), it is the Master who authorises the deduction from the insolvent's remuneration. As discussed above, the Constitutional Court in *Stellenbosch University* confirmed that it is indispensable that the authorisation of an EAO involve judicial discretion. In contrast, the patently similar section 23(5) merely involves the exercise of an administrative discretion.

Section 65J was recently scrutinised by the Constitutional Court and subsequently amended by the legislature. A similar examination has not been undertaken in respect of section 23(5). As such, the development of the EAO as a collection mechanism in South Africa is a useful example for section 23(5).

It is submitted that the first lesson to be taken from the EAO study is that a mechanism, which allows a person who is owed a debt to collect that debt directly from the employer of the person who owes the debt, is not inherently unconstitutional. The applicants in *Stellenbosch University* did not approach the Western Cape Division of the High Court on the basis that the EAO mechanism as such was unconstitutional. Rather, it was argued that certain sections of the Magistrates' Courts Act were unconstitutional on the basis that they allowed EAOs to be issued without judicial oversight and that EAOs were being issued in jurisdictions that were foreign to the

debtors, which is not permitted by law.[254] Similarly, when the matter came before the Constitutional Court, it summarised the main question before it as being whether section 65J provided for judicial oversight and, if that was not the case, whether that rendered the section unconstitutional.[255] At no point did any of the parties, or the Constitutional Court of its own accord, approach the matter from the perspective that the EAO mechanism inherently infringes upon the basic human rights of debtors and may therefore be inherently unconstitutional. It is therefore submitted that *Stellenbosch University* makes it clear that the EAO mechanism is not inherently unconstitutional, provided that its application complies with constitutional values. It is submitted that a similar mechanism, such as the one created by section 23(5), will also be constitutionally valid, provided that it also aligns with constitutional values when implemented.

The second lesson follows from the first, which is

> "that it was a constitutional requirement that when orders issued from a court were executed there must be judicial supervision. Execution orders were part of the judicial process, and judicial supervision of the execution process against all forms of property was constitutionally indispensable. Primarily, the debtor's [section] 34 right of access to court was breached by an execution process not sanctioned by a court".[256]

In other words, where an order allows a creditor to execute against the remuneration of a debtor, that order must be authorised by a court and not some other official, such as a clerk of the court. Failure to comply with this principle infringes upon the debtor's right of access to court in terms of section 34 of the Constitution.[257] This may have significant repercussions for the insolvency law, where section 23(5) empowers an administrative official, the Master, to authorises a similar mechanism without any judicial oversight.

254 Van der Merwe 2019 *Stell LR* 96.
255 *Stellenbosch University* at 620 para 71.
256 *Idem* at 596 para I.
257 *Idem* at 637 para 133.

The third lesson is that legislation authorising deductions directly from a debtor's remuneration should provide the court with guidelines to determine whether such an order should be granted, considering the specific circumstances of the case. In *Stellenbosch University*, the Constitutional Court determined that a magistrate may only authorise the issuing of an EAO once satisfied that it would be *just an equitable* to do so and that the *amount* to be deducted is *appropriate*.[258] The legislature expanded upon this general guideline by determining that the total amount of deductions in terms of all EAOs against a debtor may not exceed twenty-five per cent of that debtor's basic salary;[259] furthermore, the concept of a basic salary was defined as being the judgment debtor's annual gross salary, excluding additional remuneration for overtime or other allowances, divided by twelve.[260]

The fourth lesson is that legislation authorising deductions directly from a debtor's remuneration should provide guidance regarding the practical implementation of the section and the course of action in the event that the uncertainties of life eventuate. Section 65J, for instance, provides guidance on what is to happen should the debtor move from one employer to another,[261] or become self-employed.[262] It determines when the deductions are to be made from the judgment debtor's salary and when the deducted amounts are to be paid over to the judgment creditor.[263] Importantly, any EAO may be suspended, amended or rescinded by the court at any time provided that good cause is shown to do so.[264] Therefore, should the judgment debtor's circumstances change, e.g. the judgment debtor becomes unemployed, experiences a reduction in income or an increase in the maintenance required for himself or his dependents, the court may be approached to adapt the EAO accordingly.

3.6. Conclusion

There are many similarities between the EAO mechanism created in section 65J of the Magistrates' Courts Act and the mechanism created by section 23(5) of the

258 *Idem* at 661 para 212.
259 S 65J(1A)(a) of the Amendment Act.
260 S 65J(1A)(b) of the Amendment Act.
261 S 65J(8) of the Amendment Act.
262 S 65J(9) of the Amendment Act.
263 S 65J(4)(a) of the Amendment Act.
264 S 65J(7) of the Amendment Act.

Insolvency Act. Much uncertainty surrounds the application of section 23(5). Section 65J, on the other hand, has recently survived scrutiny by the Constitutional Court and was subsequently amended in order to ensure that it complies with the values of the Constitution and to ensure that its practical application is feasible. In this chapter, the recent amendments to section 65J were discussed and from the discussion the lessons that may be learned from the amendment process were delineated. In the next chapter the applicability of these lessons to the section 23(5) mechanism will be discussed and recommendations for potential law reform will be formulated.

Chapter 4: Conclusion and recommendations

4.1. Introduction

Section 23(5) of the Insolvency Act authorises the trustee of the insolvent estate to lay claim to the portion of the insolvent's post-sequestration income which, in the opinion of the Master, is not required for the maintenance of the insolvent and his dependents. Against this background, the study investigated the application of section 23(5) during the administration phase and identified its shortcomings and the challenges to its application.

The next component of the dissertation was a comparative study with section 65J of the Magistrates' Courts Act. Section 65J provides for a mechanism that is patently similar to the mechanism provided for by section 23(5). A comparative study with section 65J was apposite as its compliance with constitutional principles was tested by the Constitutional Court in 2016. Following such scrutiny by the Constitutional Court, the section was amended in 2018. It is submitted that the section 65J experience provides insight which may assist in addressing the shortcomings of section 23(5).

A brief overview and reflection of the investigation into the application of section 23(5), and the comparative study will now be provided.

4.2. Overview and reflection

The purpose of the study was to investigate the following research questions:[265]

1. What are the shortcomings of, and potential challenges to, section 23(5) in its present form?

2. What are the similarities and the differences between section 23(5) and section 65J?

265 See Chapter 1 at 9.

3. What are the lessons to be learnt from the recent constitutional scrutiny and subsequent amendment of section 65J?

4. Based on the findings of questions 1 to 3, how should section 23(5) be reformed?

The study found that it is clear from the wording of section 23(5) that the insolvent's post-sequestration income is *excluded* from the insolvent estate, until such time as the Master determines that a portion thereof is surplus to the insolvent and his dependents' maintenance needs, at which point that portion is *included* in the insolvent estate and available to the trustee for distribution to the creditors.[266] The application of section 23(5) during the administration phase is generally uncontroversial, except for the shortcomings delineated below.

Following the review of the legislative framework for the application of section 23(5) during the administration phase of the sequestration process, four shortcomings of section 23(5) were identified.[267] These are briefly set out below.

1. The first shortcoming of section 23(5) is that it *lacks guidelines* to assist the Master in determining whether the insolvent's post-sequestration income exceeds the maintenance needs of the insolvent and his dependents. This leads to uncertainty regarding the process that the Master needs to follow in order to make the determination.[268]

2. The second shortcoming of section 23(5) relates to the *practical feasibility* of its application in light of the uncertainties of life. A few of the questions that are left unanswered by the section are: what is the status of the Master's certificate; who is responsible for the policing thereof and the associated costs; and what are the consequences of non-compliance by the insolvent's employer? Then there are the uncertainties of life, such as the potential loss of employment and an increase in the needs of the insolvent and/or his dependents. The legislation does not deal

266 See Chapter 2 at 14.
267 See Chapter 2 at 19.
268 See Chapter 2 at 19.

with the consequences, or any potential remedial action to be taken, once the above mentioned uncertainties manifest.[269]

3. The third shortcoming of section 23(5) is that it may be open to constitutional challenge on the basis that the insolvent and his dependents' right to life, dignity and food are infringed, where there is an order that a portion of the insolvent's income is surplus to his and his dependents' maintenance needs and should therefore vest in the trustee in order to be distributed to the creditors.[270]

4. The fourth shortcoming of section 23(5) also relates to a potential constitutional challenge, namely the fact that it does not require *judicial oversight*.[271]

A comparative study with section 65J was then conducted.[272] Section 65J was selected for the comparative study because both sections create a mechanism whereby a creditor is entitled to a portion of a debtor's income in order to extinguish an existing debt.[273] In both instances, a third party instructs the debtor's employer to deduct a portion of the debtor's income directly from the debtor's remuneration. In the case of section 23(5), it is the Master who instructs the employer and the portion deducted from the debtor's remuneration is paid directly to the trustee of the insolvent estate, who then distributes it to the qualifying creditors. In the case of section 65J, it is the court who instructs the employer and the portion deducted from the debtor's remuneration is paid directly to the creditor, or the creditor's legal representative.[274]

Making the comparison even more apposite is the fact that the Constitutional Court conducted a comprehensive review of the emoluments attachment order mechanism, as contained in section 65J, in the *Stellenbosch University* case.[275] Following this landmark judgment, the legislature comprehensively amended section 65J in order to align it with the Constitutional Court's findings.[276] Many of the shortcomings identified

269 See Chapter 2 at 20.
270 See Chapter 2 at 21.
271 See Chapter 2 at 22.
272 See Chapter 3 at 28.
273 See Chapter 3 at 28.
274 See Chapter 3 at 51.
275 See Chapter 3 at 32.
276 See Chapter 3 at 38.

in respect of section 23(5) were also present in the pre-amended section 65J and were addressed by the Constitutional Court and the legislature. Section 65J of the Magistrates' Courts Act was therefore the perfect case study to draw insights from – which insights, it is submitted, are directly applicable to section 23(5) of the Insolvency Act.

4.3. Findings and recommendations

In *Stellenbosch University*, it was not argued that the EAO mechanism as such is unconstitutional, but rather that certain sections of the Magistrates' Courts Act were unconstitutional on the basis that EAOs could be issued without judicial oversight and that EAOs were being issued in courts that did not have jurisdiction according to law.[277] It is submitted that *Stellenbosch University* provides authority that the EAO mechanism is not inherently unconstitutional, provided that its application complies with constitutional values. It is submitted that a similar mechanism, such as the one created by section 23(5), will also be constitutionally valid, provided that it also complies with constitutional values.

Flowing from the aforementioned, it was determined

> "that it was a constitutional requirement that when orders issued from a court were executed there must be judicial supervision. Execution orders were part of the judicial process, and judicial supervision of the execution process against all forms of property was constitutionally indispensable. Primarily, the debtor's [section] 34 right of access to court was breached by an execution process not sanctioned by a court".[278]

In other words, where an order allows a creditor to execute against the remuneration of a debtor, that order must be authorised by a court and not some other official, such as a clerk of the court. Failure to comply with this principle infringes upon the debtor's right to have

277 See Chapter 3 at 33.
278 *Stellenbosch University* at 596 para I.

> "any dispute that can be resolved by the application of law decided in a fair public hearing before a court".[279]

Legislation that authorises direct deductions from a debtor's remuneration should provide the court with guidelines to determine whether such an order should be granted in the circumstances.[280] In *Stellenbosch University*, the Constitutional Court determined that a magistrate may only authorise the issuing of an EAO once satisfied that it would be *just an equitable* to do so and that the *amount* to be deducted is *appropriate*.[281] The legislature expanded upon this general guideline by determining that the total amount of deductions in terms of EAOs against a debtor may not exceed twenty-five per cent of that debtor's basic salary;[282] furthermore, the concept of a basic salary was defined as being the judgment debtor's annual gross salary, excluding additional remuneration for overtime or other allowances, divided by twelve.[283] These guidelines ensure that every court that must consider whether or not to issue an EAO will apply the same minimum standards, and that a debtor will not be placed in a position where an EAO makes it impossible for the debtor to maintain himself and his dependents.

Legislation authorising deductions directly from a debtor's remuneration should provide guidance regarding practical implementation challenges and the course of action in the event that the uncertainties of life eventuate.[284] Section 65J, for instance, provides guidance on what is to happen should the debtor move from one employer to another,[285] or become self-employed.[286] It determines when the deductions are to be made from the debtor's salary and when the deducted amounts are to be paid over to the creditor.[287] Importantly, any EAO may be suspended, amended or rescinded by the court *at any time* on good cause.[288] Therefore, should the debtor's circumstances

279 S 34 of the Constitution.
280 See Chapter 3 at 51.
281 See Chapter 3 at 41.
282 See Chapter 3 at 41.
283 See Chapter 3 at 41.
284 See Chapter 3 at 52.
285 S 65J(8) of the MCA.
286 S 65J(9) of the MCA.
287 S 65J(4)(a) of the MCA.
288 S 65J(7) of the MCA.

change, such as loss of employment, reduced income or increased maintenance needs, the court may be approached to adapt the EAO accordingly.

It is therefore submitted that section 23(5) should be amended as follows:

1. Authorising the trustee of the insolvent estate to initiate an investigation, substantially similar to that required in the emoluments attachment process, by a magistrate of the district court in which the insolvent resides, carries on business or is employed.

2. Authorising the magistrate to grant an order in terms of section 23(5) only after having considered all of the relevant circumstances and only if satisfied that it would be just and equitable to do so and that the amount of the order is appropriate.

3. The deduction in terms of a section 23(5) order shall not exceed twenty-five percent of the insolvent's basic salary and the definition of basic salary, as contained in the Magistrates' Courts Act, should be applied.

4. Section 23(5) must make provision for the suspension, variation or discharge of an order in terms of section 23(5) on application by any interested party in order to account for the uncertainties of life. The rights and obligations of each party, i.e. the insolvent, the trustee and the insolvent's employer, should be clarified to ensure viable implementation of the section 23(5) order. The aforementioned would further enhance flexibility to account for a change in circumstances such as loss of employment, change of employment, change in income level, change in maintenance needs, etc.

4.4. Conclusion

It is submitted that each of the research questions have been answered through the course of this study and that the amendments proposed by the Law Reform Commission are insufficient to address the shortcomings that were identified in respect of section 23(5). It is further submitted that the shortcomings of section 23(5) may be addressed by amendments similar to that of the current section 65J. By aligning section 23(5) with the findings of the Constitutional Court in *Stellenbosch University*,

the legislature will allay the fear that section 23(5) may be unconstitutional due to either a lack of judicial oversight or a potential infringement of the basic human rights of the insolvent and his dependents. Providing substantive guidelines to assist the court in determining an appropriate amount to be deducted from the insolvent's income, as well as procedures to be followed in the implementation of the order and in dealing with unexpected change in circumstances, will promote the successful application of the procedure in practice.

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