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***University of Stellenbosch Legal Aid Clinic v  
Minister of Justice and Correctional Services:***  
**Proactive judicial application of principle 3 of the  
G20 High Level Principles of Financial Consumer  
Protection**

by

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Master of Laws (Banking Law)

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## **DECLARATION OF ORIGINALITY**

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## SUMMARY

Following the global financial crisis of 2008 and the role played by so-called “easy credit” in the build-up to the crisis, there has been a renewed focus globally on ensuring financial stability by *inter alia* obliging credit providers to act more responsibly in their dealings with consumers.

One of the key areas on which emphasis has been placed by the global community has been to ensure that financial consumers are treated fairly in their dealings with credit providers. Such renewed focus is clear when one looks at documents like the *G20 High-Level Principles of Financial Consumer Protection*, an agreement aimed at establishing a communal effort at promoting financial consumer protection amongst the members of the G20.

Whilst South Africa has been at the forefront of the above by promulgating numerous pieces of legislation aimed at protecting financial consumers, numerous areas of law remain open to exploitation by unscrupulous actors within the credit sphere.

The emoluments attachment order is a mechanism contained in the Magistrates’ Courts Act whereby debt may be collected by means of obliging the employer of a debtor to subtract a periodic amount from the emoluments of the debtor in order to repay the creditor. Following years of abuse of this mechanism, the matter was brought to the attention of the Constitutional Court, which issued a landmark ruling regarding the enforcement and application of this mechanism.

The aim of this dissertation is therefore to critically analyse the decision reached by the court in *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* and its impact on the issuing of emoluments attachment orders. This dissertation will also discuss principle 3 of *G20 High Level Principles of Financial Consumer Protection* and will ask whether the decision reached by the court in the *Stellenbosch* decision amounted to judicial application of this international agreement.

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# CHAPTER 1: INTRODUCTION

## 1.1 Introduction

In order to have a well-functioning, prosperous society which promotes growth in commerce and industry, it is imperative that a state has a functioning judicial system that regulates and dictates the rules by which commercial relationships are conducted. The judicial system must ensure that all contracts are complied with so that certainty is guaranteed and that individuals are free to conduct their business on a level footing. In no area of law is this function more imperative than in the providing of mechanisms by which a recognised agreement between two parties can be enforced.

Whilst the above exposition of the basics of Hobbesian social contract theory<sup>1</sup> is certainly true, the dawn of the 21<sup>st</sup> century has also brought about a growing realisation of the role that a judicial system has in protecting the vulnerable from being exploited by powerful interests which would seek to exploit the mechanisms in place to ensure contracts are complied with.

Simply put, jurists and society at large have realised the importance of ensuring not only that contracts are enforced but also the importance of questioning whether such contracts were fair to begin with. Whilst in theory, all actors within society have equal rights before the law and such equality means no party deserves undue protection by the overreaching arm of the state, it would also be naive to assume all parties have equal power when concluding an agreement.

The interplay between these two conflicting roles of the judicial system has generated much debate internationally and is set to play a more important role in all modern jurisdictions as the various systems around the world attempt to strike a balance between the harmonious discord these conflicting responsibilities bring to the table.

In the Republic of South Africa, the mechanisms for enforcing a validly concluded agreement are largely codified in the Magistrates' Courts Act 32 of 1944 (the "MCA"),

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<sup>1</sup> For an exposition of this theory see: Thomas Hobbes, *Leviathan, or, the Matter, Forme, & Power of a Common-wealth Ecclesiastical and Civil* (1651).

the Superior Courts' Act 10 of 2013 and the various rules and judgments used in order to interpret and implement the mechanisms set out in these statutes.

## 1.2 Research aim

The aim of this dissertation is to examine the strenuous relationship set out above in the South African context by examining one of the main mechanisms of enforcement set out in the MCA, namely the Emoluments Attachment Order (“EAO”). Following the above, the paper will attempt to determine whether the approach used by the Constitutional Court in dealing with a perceived abuse of this remedy amounts to a judicial application of South Africa’s international commitment to provide fair treatment to financial consumers.

## 1.3 Structure

The dissertation will start in chapter 2 by examining the structure of the EOA and charting its development. During this examination, the role of this remedy will also be investigated.

The third chapter of this dissertation will deal with the approach used by Constitutional Court in dealing with a perceived abuse of the emoluments attachment order in *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others*.<sup>2</sup> This decision will be dissected in detail and analysed in the light of South Africa’s commitment to promote the fair treatment of financial consumers and in light of the two conflicting roles of the judicial system set out above.

Following the above, a brief exposition will be given of the commitments made by South Africa to promote the fair treatment of financial consumers on an international level, when the country agreed to principle 3 of the *G20 High Level Principles of Financial Consumer Protection*.<sup>3</sup> This chapter will also investigate the relationship

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<sup>2</sup> 2016 (6) SA 596 (CC).

<sup>3</sup> Organisation for Economic Co-operation and Development (OECD) *G20 High-Level Principles on Financial Consumer Protection* (2011).



between principle 3 and the decision reached by the court in the Stellenbosch decision.

The paper will conclude by trying to establish whether the decision reached by the court amounts to a judicial application of South Africa's commitments in terms of the *G20 High Level Principles of Financial Consumer Protection*, whether such application is preferable to legislative intervention, and whether the decision offers a satisfactory solution to the conflicting interests as set out above.

# **CHAPTER 2: AN OVERVIEW OF THE DEVELOPMENT OF EMOLUMENTS ATTACHMENT ORDERS IN SOUTH AFRICA**

## **2.1 Introduction**

As previously mentioned, the EAO is a statutory mechanism designed to ensure that a judgment debt is recovered. The structure and rules relating to this mechanism, and how a judgement creditor may seek such relief are mainly contained in section 65J of the MCA. This statutory measure provides a mechanism whereby the debt owed to a creditor by a judgment debtor can be retrieved by attaching a portion of the salary of the debtor and obtaining payment of the same from his or her employer.

Special note must be made of the fact that whilst the terms “EAO” and “garnishee order” are often used interchangeably in common parlance, these two terms refer to two distinct and different remedies used to collect judgment debts. A garnishee order is a method used to attach any debt due to the judgment debtor and is an order used by both the High Courts and Magistrates’ Courts, whilst an EAO refers to the specific remedy set out above in terms of the MCA.

The aim of this chapter is to detail the mechanism set out in the above statutory provisions prior to the decision reached by the court in the Stellenbosch decision and as such no reference is made to the effect of this judgment in this chapter. Also take note that all references to the provisions of the Act are presented in the present tense here. The effect of the judgment reached by the court in the Stellenbosch decision is discussed in chapter 3 below, subsequent changes made by the legislature to this mechanism are also included in chapter 3.

## **2.2 The process of obtaining an emoluments attachment order in terms of section 65J**

### **2.2.1 Practical effects of an emoluments attachment order issued in terms of section 65J**

An EAO is a mechanism whereby the emoluments owed to a judgment debtor by his or her employer is attached by the judgment creditor and used to satisfy a judgment debt.<sup>4</sup> This essentially means that an employer (hereinafter referred to as the garnishee) is obliged in terms of this mechanism to deduct a specific amount from the salary of an employee and pay such amount to the judgement creditor prior to paying the employee.

### **2.2.2 Requirements in applying for an emoluments attachment order**

In terms of section 65J, a judgment creditor may have an emoluments order issued by the clerk of the court if the issuing of such an order has been consented to in writing by the judgment debtor or if the court has authorised the issuing of such an order.<sup>5</sup>

Furthermore, prior to applying for the order, the judgment creditor or his attorney must send a letter by registered post to the last known address of the debtor. Such letter must advise him or her of the amount of debt outstanding and warn him or her that an EAO will be issued unless the relevant debt is satisfied within ten days of the letter being posted.<sup>6</sup>

An affidavit by the judgment creditor or a certificate by his or her attorney also needs to be filed with the court prior to the granting of the order. The affidavit must set out the amount of the judgment debt as on the date when the judgment was granted. Such affidavit or certificate must also detail the specific instalments, costs accumulated, and payments received since the date of the judgment, and it must specify the balance owing in terms of the above. The affidavit furthermore needs to state that the debtor has agreed to such an EAO being issued in writing or that a court has ordered the issuing of such an order.<sup>7</sup>

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<sup>4</sup> S 65J(1)(a) of the MCA.

<sup>5</sup> S 65J(2)(a).

<sup>6</sup> S 65(2)(b)(i).

<sup>7</sup> S 65(2)(b)(ii).

### 2.2.3 Enforcement and application of the emoluments attachment order

An EAO is prepared by a judgment creditor or his or her attorney and then signed by both a clerk of the court and the judgment creditor or his or her attorney before being served on the garnishee by a clerk of the court.<sup>8</sup> The order can only be issued by a court situated in the jurisdiction in which the garnishee resides, carries on business or is employed, but if the judgment debtor is employed by the state, this requirement will vest in his person.<sup>9</sup>

Once the order is served on the garnishee, he must make the payment specified in the order to the judgement creditor on a monthly basis.<sup>10</sup> The garnishee is also entitled to deduct a 5% commission fee from the monthly payment made.<sup>11</sup>

The judgement creditor or his attorney is obliged to provide the garnishee or the judgement debtor with a statement of account detailing the amount owing and all amounts received when requested to do so. Such a statement must be provided free of charge.<sup>12</sup>

Should a garnishee fail to make payment as specified in an EAO, the judgment creditor or his or her attorney may approach the court to issue a warrant of execution against the garnishee and may proceed to attach the property of the garnishee due to the fact that such an order is deemed an order of court.<sup>13</sup>

Should it be shown to a court, after the service of an EAO, that the debtor will not have sufficient means to support himself and his or her dependants, the court shall rescind or amend such an order so that the debtor is left with sufficient means with which to support himself and his dependants.<sup>14</sup>

In terms of the Act, any interested party may at any time dispute the existence or the validity of such an order.<sup>15</sup> An EAO may furthermore be rescinded or amended at any time by a court if good cause is shown to do the same.<sup>16</sup>

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<sup>8</sup> S 65J(3).

<sup>9</sup> S 65J(1)(a).

<sup>10</sup> S 65J(4)(a).

<sup>11</sup> S 65J(10)(a).

<sup>12</sup> S 65J(4b).

<sup>13</sup> Haupt FS, Coetzee H, De Villiers D & Fouché J *The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report* (2013) para 2.10.

<sup>14</sup> S 65J(6).

<sup>15</sup> S 65J(5).

<sup>16</sup> S 65J(7).

## 2.3 A brief note on the effect of the emoluments attachment order

When one looks at the wording of the Act as outlined above, it is clear that the EAO was designed as a remedy with which a judgment creditor who is owed an amount of money by a debtor could reliably collect a judgment debt owed to him or her. By enabling a judgment creditor to attach the monthly salary of a judgment debtor directly and by obliging an employer to comply with the same, the remedy outlined in section 65J provides a very reliable method for satisfying a judgment debt.

By allowing a judgment creditor to draft such an order and by merely permitting a clerk of the court to issue the order, the remedy also saves legal costs for both the debtor and creditor. The remedy also ensures that judgment debts are paid and is a powerful tool to ensure that the sanctity of a contract is respected.

By granting the ability to obtain the repayment of debt directly from the employer of a debtor, the provisions of the Act allow a credit provider to consider debt, which is otherwise by all accounts unsecured, as a debt that is in effect secured by the salary of the debtor. It is arguable that this has led to an increase of unsecured lending on the assumption that the relevant creditor would be able to rely on an EAO to secure payment.<sup>17</sup>

Conversely and despite the benefits associated with the EAO, many of the reasons for the remedy being so effective also render this remedy very onerous for a judgment debtor. Because the order removes a portion of the primary income of the debtor, it could mean that a debtor is placed in an especially precarious position, the reason being that the discretion of the debtor to use his funds as he wishes is removed.

As the vast majority of judgment debtors are individuals with a limited grasp of the impact of short-term financial decisions, particularly cash loans, and very little means to dispute the impact of such arrangements once they are enforced, the fact that an EAO is obtained without additional judicial scrutiny is particularly detrimental to the interests of a judgment debtor. This also became clear with the *Stellenbosch Legal Aid Clinic* case, as discussed in chapter 3 below.

By placing the onus on the debtor to prove that the imposition of an EAO will leave him or her destitute, the provisions of the Act have the effect of leaving the party

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<sup>17</sup> G Buchner "The debt collection scandal" (2015 May) De Rebus 32

with historically the least resources and knowledge of the law with the task of challenging an action taken without his or her knowledge. Indeed, the fact that an EAO need only be served on a garnishee, means that a debtor is only aware that the same has been put in force once he receives his periodic wages.<sup>18</sup>

The wide-reaching effect that the EAO can have on a debtor, coupled with the fact that these can be granted without additional judicial scrutiny following the initial judgment means that the provision could also infringe on a debtors right to access to courts in terms of the section 34 of the Constitution. Whilst the remedy outlined in section 65J was clearly imagined as a means with which the process of collecting judgment debt is simplified, the omission of any form of judicial supervision in obtaining said order also means that it was ripe for abuse from its inception.

The imposition of a further 5% commission by the garnishee moreover highlights the length to which the Act goes to ensure that a garnishee complies with an EAO. This in turn illustrates a further possible disregard for the position of the debtor.

The Act also does not set a cap on how many EAO's may be in force against one individual at any given time, meaning the remedy has no clearly defined limit in terms of the amount which may be deducted or the number of EAOs which can be issued.<sup>19</sup>

The above contradictions in the remedy set out in section 65J precipitated a challenge as to the constitutionality of the section itself, which cumulated in the decision reached by the court in the *Stellenbosch* decision. The practical application and abuse of the Act, which led to this challenge and the decision itself will be discussed in chapter 3 below.

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<sup>18</sup> Haupt FS, Coetzee H, De Villiers D & Fouché J *The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report* (2013) para 4.4.

<sup>19</sup> *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2015 (5) SA 221 (WCC).

# CHAPTER 3: A CRITICAL ANALYSIS OF THE DECISION REACHED BY THE COURT IN UNIVERSITY OF STELLENBOSCH LEGAL AID CLINIC V MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

## 3.1 Introduction

The *Stellenbosch* decision has had a significant impact on the application of the EAO as outlined above and has been hailed as a landmark decision in consumer credit law.<sup>20</sup> As has been illustrated above, the provisions of the Act as it read prior to the intervention of the court in the *Stellenbosch* decision, meant that the issuing of such orders could have very detrimental consequences for debtors. Whilst the procedure for obtaining an EAO in terms of section 65J was detailed above, the perceived abuse of this remedy by the various actors that precipitated the decision reached by the court in the *Stellenbosch* decision will be discussed in this chapter.

The aim of this chapter is therefore to provide a brief summary of the use of EAOs prior to the *Stellenbosch* decision, specifically with reference to the facts put before both the Constitutional Court and the Western Cape Division of the High Court.<sup>21</sup> The decision reached by the Western Cape Division (the court *a quo*) will also be briefly summarised in order to provide a background exposition of the Constitutional Court's judgment in the *Stellenbosch* case.

The decision reached by the Constitutional Court will then be analysed in detail by considering the approach used by the court and by investigating both the majority and minority opinions handed down by the court. The impact of the decision will also be discussed.

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<sup>20</sup> AA Swana *Emoluments attachment orders: In light of the widespread fraudulent and undesirable practices in emoluments attachment orders should this debt collection mechanism continue to exist?* (2015) LLM dissertation, University of Kwazulu-Natal 66.

<sup>21</sup> *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2015 (5) SA 221 (WCC).

## **3.2 A brief background to the implementation of emolument attachment orders leading up to the decision reached by the Constitutional Court**

### **3.2.1 The prevalence of emoluments attachment orders**

As previously discussed, the EAO is designed to be an effective means by which to secure the payment of an otherwise unsecured debt. Due to the various factors already mentioned, the EAO had become a very popular by the time the Western Cape Division of the High Court handed down its decision.

Media reports in the years preceding the *Stellenbosch* decision estimated that between 10% and 15% of the South African workforce in 2012 had active EAOs in force against their salaries.<sup>22</sup> It has even been suggested that EAOs were a contributing factor to the Marikana massacre.<sup>23</sup>

An independent research report estimated that 435084 employees in the private sector and 240034 employees in the public sector had EAOs in force against them in June of 2013.<sup>24</sup> The same report estimated that 12.9% of the workforce in the mining industry had EAOs in force, which links to the above assumption regarding the role that EAOs might have played in the Marikana scenario.<sup>25</sup>

Whilst precise data is difficult to obtain, the above illustrates clearly enough that EAOs had become a very popular method of debt recovery by the time that the *Stellenbosch* matter came before the courts.

### **3.2.2 Abuse of the emoluments attachment order**

As mentioned above, the structure of the EAO in terms of the MCA lends itself to a great degree of abuse by unscrupulous actors within both the credit industry and the legal fraternity. In practice, this has indeed been shown to be true in many instances. In addition to using all of the practices detailed above relating to EAOs in a manner

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<sup>22</sup> G Buchner & CJ Hartzenberg "Cashing in on collections" (2013 Jul) *De Rebus* 30.

<sup>23</sup> G Buchner "The debt collection scandal" (2015 May) *De Rebus* 32

<sup>24</sup> Haupt FS, Coetzee H, De Villiers D & Fouché J *The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report* (2013) para 5.1.5.

<sup>25</sup> Para 5.1.5.



that maximised profits for creditors and debt collection practitioners, the above actors also often utilised many additional tactics in order to utilise the system in place.

In terms of section 57 of the MCA, a debtor can admit his own liability in writing and agree to pay of his debt in instalments whilst section 58 empowers a debtor to consent to judgment and to an order to pay the judgment debt in regular instalments. Clerks of the court were empowered to issue judgments if the requirements set out in these provisions were met.<sup>26</sup>

The above provisions, along with section 65J meant that debt collectors and attorneys could take judgment and have EAOs issued without any judicial oversight having been exercised at any point. This could all be done by ostensibly legal means as unsophisticated and often economically disadvantaged debtors were sometimes forced or manipulated into signing forms admitting to liability and consenting to both judgment and the issuing of an EAO.<sup>27</sup>

### **3.2.3 Forum shopping and a conflict in the Magistrates' Court Act**

In addition to the above abuses of the EOA system, the issue brought to the forefront by the *Stellenbosch* decision was the use by attorneys and debt collectors of section 45 of the MCA to circumvent the requirements set out in section 65J.

As has already been mentioned, section 65J(1)(a) of the Act specifies that an EOA can only be issued by a court situation in the region in which the garnishee resides, carries on business or is employed. However, if the judgment debtor is employed by the state, this requirement will vest in his person.

A practice had come into being in terms of which, when a debtor admits his liability in terms of section 57 and/or consents to judgment as well as to the EAO in terms of section 58, a clause is included specifying that the debtor consents to the jurisdiction of a specific court as allowed by section 45 of the Act. This practice persisted despite the fact that such consent to jurisdiction was contrary to the provisions of section 65J(1)(a). The result is that EAOs were often issued in a court that is many kilometres from the home and work of both the debtor and the garnishee.

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<sup>26</sup> S 58(b)(2) of the MCA.

<sup>27</sup> G Buchner "The debt collection scandal" (2015 May) De Rebus 32.

Dis made the process of challenging these orders near impossible once they are issued.

The result of incorporating a consent to jurisdiction clause in consents under sections 57 or 58, also meant that debt collectors and attorneys could engage in a practice known as “forum shopping”. This practice meant that these actors would typically have the debtor consent to the jurisdiction of a court that is the most amenable to granting EAOs. The situation was worsened by the fact that different individual Magistrates’ Courts had different interpretations of the provisions of the Act.<sup>28</sup>

### **3.2.4 The facts leading to the *Stellenbosch* decision**

The facts which led to the *Stellenbosch* decision confirm many of the issues regarding EAOs highlighted above and can be seen as the perfect summary of what was wrong with the mechanism at the time the decision was reached.

The application in the decision was brought by the University of Stellenbosch Law Clinic on behalf of and together with numerous applicants. The respondents were the Minister of Justice and Correctional Services and Flemix and Associates Inc, a law firm situated in Pretoria which represented numerous micro lenders who were also individually cited in both the High Court application and the Constitutional Court application. The Association of Debt Recovery Agents NPC was also joined as an applicant in both applications.<sup>29</sup>

The individual applicants were general workers who resided in the Boland area of the Western Cape. All of the applicants had applied for cash loans through a company called SA Multiloan and were subsequently granted these loans.<sup>30</sup> The loans were granted despite the fact that little or no effort was made to establish the actual means and obligations of the applicants and all of the loans were unsecured.<sup>31</sup>

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<sup>28</sup> Haupt FS, Coetzee H, De Villiers D & Fouché J *The incidence of and the undesirable practices relating to garnishee orders in South Africa- A follow up report* (2013) para 4.4.2.

<sup>29</sup> *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2016 (6) SA 596 (CC) para 5.

<sup>30</sup> Para 3.

<sup>31</sup> *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2015 (5) SA 221 (WCC) para 30.

The individuals were all low-income workers whose salaries ranged from R1 200 to R8 000 per month.<sup>32</sup> In most of these cases, the individuals were charged extremely exorbitant interest rates, sometimes as high as 60% per year. The EAOs which were issued often also deducted more than 50% of the individuals' already small salaries prior to them being paid.<sup>33</sup>

When these individuals fell into arrears, the credit provider demanded that they sign additional documents. These documents were in all cases admissions in terms of section 57 and section 58 of the MCA combined with notices of default in terms of section 129 of the National Credit Act 34 of 2005 (the "NCA"). These documents also incorporated clauses whereby the individuals consented to the jurisdiction of a court located far from these their places of work and residence.<sup>34</sup> The credit provider subsequently obtained default judgement and EAO's against the individuals.<sup>35</sup>

These individual applicants only became aware of the proceedings instituted by the credit provider once these deductions were made from their wages by their individual employers.<sup>36</sup> These deductions were in most cases extremely high and left the individuals with too little income to sustain their families.<sup>37</sup>

In many of the individual cases, the individuals averred that their signatures were also falsified, and in all the cases, an exorbitant amount of interest was charged.<sup>38</sup> It is also trite that many of the agreements did not comply with the provisions of the NCA but default judgments and EAOs were issued in each case nonetheless.

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<sup>32</sup> Para 41.

<sup>33</sup> Para 33.

<sup>34</sup> *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2016 (6) SA 596 (CC) paras 50-54.

<sup>35</sup> Para 42.

<sup>36</sup> Para 43.

<sup>37</sup> Para 43.

<sup>38</sup> *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2015 (5) SA 221 (WCC) para 30.

### **3.3 A summary of the decision reached by the Western Cape High Court**

#### **3.3.1 Relief applied for by the applicants**

The above-mentioned applicants approached the Western Cape Division of the High Court in order to have the EAOs issued against them declared invalid, since they did not comply with the relevant legislation. The applicants also applied to the court to have section 65J(2)(a) and section 65(2)(b)(1) of the MCA declared unconstitutional to the extent that they failed to provide judicial oversight in the issuing of EAOs.<sup>39</sup>

#### **3.3.2 Validity of the EAOs issued against the applicants**

The high court found that in many of the individual cases considered, it was probable that the signatures of the individuals concerned were forged on the consent to judgment form used to obtain judgment against them.<sup>40</sup>

Furthermore, the court found that it was difficult to believe that any of the defendants had willingly signed the consent to judgement documents purportedly authorised by them. The court also held that it was very likely that the debtors were pressured by the agents of the debt collectors into signing these documents in light of the commission practices employed by the debt collecting industry.<sup>41</sup> The court therefore concluded that all of these consent to judgements were signed neither on an informed nor on a voluntary basis.<sup>42</sup>

Having reviewed many of the more outrageous aspects of the facts above, including the rates of interest charged and the meagre income of the individuals involved, the court moreover held that all of the initial credit agreements amounted to reckless credit in terms of the NCA. This was because no reasonable steps were taken to assess the debtors' relative means and obligations and because affordability assessments were either not done or were merely perfunctory in nature.<sup>43</sup>

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<sup>39</sup> Para 20.

<sup>40</sup> Para 29.

<sup>41</sup> Paras 25-28.

<sup>42</sup> Para 32.

<sup>43</sup> Para 33.

The court also looked at the contention that the consent to jurisdiction clauses incorporated in the documents signed by the individual applicants were invalid due to the fact that they were contrary to the provisions of section 65J(1)(a) of the Act. This section stipulates that an EOA can only be issued by a court in which the garnishee resides, carries on business in or is employed, unless the judgement debtor is employed by the state.

The court held that the conflict which exists between section 45 and section 65J(1)(a) of the Act can be resolved by defaulting to the position in section 65(J)(1)(a), as it is a well-established principle in law that where two provisions are contradictory, the more specific provision will trump the more general one.<sup>44</sup> Furthermore, the court held that the provisions of section 90 and section 91 of the NCA also prohibit a credit provider from entering into an agreement or supplementary agreement, which expresses on behalf of a consumer the consent to a jurisdiction outside the one where he or she lives and works.<sup>45</sup> Since all of the agreements in question fell within the ambit of the NCA, the consent to jurisdiction was invalid due to S 45 being trumped by the two provisions of the NCA.<sup>46</sup> The court went to great lengths to emphasise that the conduct of Flemix and Associates, amounted to “forum-shopping” and that this conduct was inexcusable.<sup>47</sup>

In light of the above, the court consequently found that all of the EAOs issued were invalid, unlawful and of no force or effect.<sup>48</sup>

### **3.3.3 Constitutionality of the relevant sections of the Magistrates’ Courts Act**

Having established that the orders obtained against the applicants were unlawful, the court went on to evaluate many of the contradictory and troublesome provisions of the MCA relating to EAOs. In particular, the court investigated the fact that no cap is stipulated in the MCA with regard to the amount of the EAOs which can be in force against a debtor, or the amount which may be deducted.<sup>49</sup> The court also looked at

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<sup>44</sup> Para 90.

<sup>45</sup> Para 87.

<sup>46</sup> Para 62.

<sup>47</sup> Para 57.

<sup>48</sup> Para 94.

<sup>49</sup> Para 3.

the fact that the section 65J of the MCA does not make provision for judicial oversight in issuing an EAO.<sup>50</sup>

After extensively investigated the law applied by five different foreign jurisdictions with regard to the issuing of EAOs, the high court found that in each of these jurisdictions, either a cap on the maximum amount which may be deducted or provisions requiring judicial oversight were in place.<sup>51</sup> In investigating these provisions, the court found that judicial oversight would be the only viable way for the EAO to exist without having the potential to unjustifiably violate the rights of the poor.<sup>52</sup> The court furthermore considered various international conventions and found that the omission of judicial oversight in the MCA means that South Africa had failed to comply with international customary law<sup>53</sup>

Most importantly, the court looked at the principles established by the Constitution Court relating to the right to judicial oversight. The court cited with approval the principle established in the case of *Chief Lesapo v The North West Agricultural Bank and Another*,<sup>54</sup> that “any constraint upon a person or property shall be exercised by another only after recourse to a court of law”.<sup>55</sup> The court also referred to the case of *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*,<sup>56</sup> where the Constitutional Court declared section 66(1)(a) of the MCA unconstitutional to the extent that there was a lack of judicial oversight in the execution process.<sup>57</sup> Mention was also made to *Gundwana v Steko Development CC and Others*,<sup>58</sup> where the constitutional requirement of judicial oversight in matters pertaining to the execution of an individual’s property was reiterated.<sup>59</sup>

Therefore, the court found that the requirement of judicial oversight, which was established in the above three cases, should also apply to the issuing of EAOs.<sup>60</sup> In

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<sup>50</sup> Para 5.

<sup>51</sup> Para 49.

<sup>52</sup> Para 50.

<sup>53</sup> Para 74.

<sup>54</sup> 2000 (1) SA 409 (CC).

<sup>55</sup> *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2015 (5) SA 221 (WCC) para 77.

<sup>56</sup> 2005 (2) SA 140 (CC).

<sup>57</sup> *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2015 (5) SA 221 (WCC) para 78.

<sup>58</sup> 2011 (3) SA 608 (CC).

<sup>59</sup> *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2015 (5) SA 221 (WCC) para 79.

<sup>60</sup> Para 81.

light of this, the court declared that the words “the judgement debtor has consented thereto in writing”, contained in section 65J(2)(b)(ii) of the MCA, as well as the entirety of section 65J(2)(b)(i) and section 65J(2)(b)(ii) of the MCA, were unconstitutional and invalid for failing to provide for judicial oversight in the issuing of EAOs.<sup>61</sup>

### **3.4 An analysis of the decision reached by the Constitutional Court**

#### **3.4.1 Introduction**

Following the decision reached by the Western Cape Division of the High Court, the applicants in the initial case applied to the Constitutional Court for confirmation of the High Court’s declaration of invalidity regarding the relevant sections of the MCA. The Association of Debt Recovery agents and the collection of respondents represented, including Flemix and Associates Inc, all appealed this part of the finding of the High Court.

As the facts of the case are identical to those presented to the High Court, it is unnecessary to summarise them again. An analysis of the decision reached by the Constitutional court will instead focus on both the majority and minority judgements and an analysis of arguments presented by the different judges.

A minority judgement was written by Jafta J while two separate concurring majority judgments were written by Cameron J and Zondo J respectively. The rest of the bench concurred with either of these two concurring judgments.

#### **3.4.2 Minority judgment**

Jafta J commenced his judgment with a brief summary of the parties to the case followed by a brief overview of the procedure in terms of section 57 and section 58 of the MCA, as summarised above.<sup>62</sup> The judgement then went on to summarise the provisions of section 129 and section 130 of the NCA and particularly the interplay between these sections and the relevant provisions of the MCA. In this regard Jafta J drew attention to the fact that a credit provider is precluded from instituting legal

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<sup>61</sup> Para 94.

<sup>62</sup> *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2016 (6) SA 596 (CC) paras 10-15.

proceedings if the provisions of section 129 and section 130 are not complied with first.<sup>63</sup>

The judge then argued that by allowing a clerk of the court to issue the relevant order without a court having had evaluated the facts, section 57 and section 58 of the MCA are in conflict with section 129 and section 130 of the NCA. Jafta J reasoned that, in the event of such a conflict, section 172 of the NCA stipulates that the provisions of the NCA will apply.<sup>64</sup>

In light of the above, Jafta J contend that the procedure in the cases in question prior to EAOs being issued was incorrectly followed, as a clerk of the court is not empowered to issue a judgment in terms section 57 and section 58 of the MCA due to the above conflict with the NCA. He moreover suggested that the provisions of section 57 and section 58 of the MCA are in conflict with section 34 of the Constitution. However, he did not pursue that point further due to the fact that no challenge to these provisions were brought in this case.<sup>65</sup>

Jafta J then went on to interpret section 65J of the MCA in order to determine whether this section fails to provide for judicial oversight and is as such unconstitutional. In this respect the judge reiterated the principle that judicial oversight is a constitutional requirement and referred to the decisions reached by the court in *Gundwana*,<sup>66</sup> *Jafta*<sup>67</sup> and *Chief Lesapo*.<sup>68</sup>

According to Jafta J, the words “a judgement creditor may cause an emoluments attachment order to be issued from the court of the district” are central to determining whether a clerk of the court may issue an EAO in terms of section 65J.<sup>69</sup> In interpreting section 65J, Jafta J reiterated the established principle that where a legislative provision is capable of more than one interpretation, a court must favour the interpretation that avoids constitutional invalidity.<sup>70</sup>

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<sup>63</sup> Paras 22-25.

<sup>64</sup> Para 28.

<sup>65</sup> Para 32.

<sup>66</sup> *Gundwana v Steko Development CC and Others* 2011 (3) SA 608 (CC).

<sup>67</sup> *Jafta v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC).

<sup>68</sup> *Chief Lesapo v The North West Agricultural Bank and Another* 2000 (1) SA 409 (CC).

<sup>69</sup> *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2016 (6) SA 596 (CC) para 83.

<sup>70</sup> *De Beer NO v North Central Local Council and South Central Local Council and others (Umhlatuzana Civic Association Intervening)* 2002 (1) SA 429 (CC).



In using the above principle to interpret the wording of section 65J, Jafta J concluded that one can correctly interpret section 65J to mean that an EAO needs to be issued by a court and not merely by a clerk of the court. The judge reasoned that when one looks at the various other provisions of section 65J, it is clear that the section intends for judicial supervision in various functions, and thus he posited that the same should be true for the issuing of EAOs.<sup>71</sup>

In further support of this interpretation, Jafta J highlighted the wording of form 38, which is the template form that a judgment creditor must complete to apply for an EAO.<sup>72</sup> The wording of form 38 is as follows:

“Whereas it has been made to appear to the abovementioned court that emoluments are at present accruing to the judgment debtor from the garnishee and that after satisfaction of the following order sufficient means will be left to the judgment debtor to maintain him or herself and those depended on him or her”.

Jafta J held that the wording above clearly illustrates the principle that an EAO must be issued by a court.<sup>73</sup>

Jafta J furthermore delved into the issue of jurisdiction and the section that allegedly allowed for so-called “forum shopping” to take place in all of the cases brought before the court. In this regard the judge considered the wording of section 90 and section 92 of the NCA to determine whether these provisions conflicted with section 45 of the MCA. His answer was that these provisions indeed prohibit a judgment debtor from agreeing to a jurisdiction other than outlined by the NCA if the relevant credit agreement falls within the ambit of the Act.<sup>74</sup>

Having regard to the above, Jafta J was therefore of the opinion that the declaration of constitutional invalidity should be set aside, since a proper constitutional reading of the provisions of the MCA does indeed make provision for judicial supervision.

Jafta J further stated that, if one reads the relevant parts of section 45 of the MCA together, it is clear that a pre-emptive consent to jurisdiction would not be allowed. The reason for this is that the wording of these provisions state that proceedings need to

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<sup>71</sup> Para 94.

<sup>72</sup> Para 88.

<sup>73</sup> Para 89.

<sup>74</sup> Para 125.

imminent in order for a judgment debtor to give consent.<sup>75</sup> Jafta J does not elaborate on when proceedings would be considered “imminent” but is clearly of the opinion that jurisdiction cannot be consented to at the time an agreement is reached in terms of S45.

Jafta J consequently concluded that he would have set aside the judgment of the High Court and would have substituted it with an order stating that only a court had the power to issue an EAO in terms of the MCA.<sup>76</sup>

### **3.4.3 Comment on the minority judgment**

It should be noted that the principle applied by Jafta J in interpreting the provisions of the MCA in a manner that is constitutional, is laudable. Correctly applied, the principle is one that ensures that all legislation is viewed through a constitutional lens. The solution applied by Jafta J also has the advantage of not uprooting years of established law and instead using the law available in order to bring about equitable results in line with the Constitution. It is however impossible not to notice the extreme lengths to which one must go in order to read the words of section 65J to mean that an EAO must be issued by a court.

The interpretation whereby an EAO is issued without judicial supervision after a default judgment in terms of section 57 and section 58 of the MCA is one that has been applied in practice for at least four decades without challenge. The solution offered by Jafta J would seem to suggest that, whilst EAOs have been issued without judicial supervision for decades, the reason for this is not due to the law being unjust but rather due to an incorrect interpretation of the law. In interpreting the purpose of the legislature, one must also consider the fact that the same legislature that passed section 65J also passed a provision in the MCA that provided for the imprisonment of debtors.<sup>77</sup>

When one takes into account that a judicial interpretation as suggested by Jafta J requires one to perform fairly extensive intellectual gymnastics, it is clear that, whilst the principle used is sound, it is one which goes to too great a length in this case to

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<sup>75</sup> Para 112.

<sup>76</sup> Para 127.

<sup>77</sup> *Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth Prison and Others* 1995 (4) SA 631 (CC).

save a provision which probably cannot be saved. For this reason, the judgment of the majority of the court is probably preferable.

#### **3.4.4 Majority judgment**

The majority of the Constitutional Court in the *Stellenbosch* decision delivered two concurring judgments that largely came to the same conclusion as well as granted the same remedy. These opinions were both concurred with by the entirety of the bench, save for Jafta J.

Cameron J started his judgment by explaining in detail the principle that judicial oversight is a constitutional requirement. He cited the same cases that were used in both the minority judgment and the High Court judgment.<sup>78</sup> Cameron J also highlighted the differences between his judgment with the minority judgment. Whilst Cameron J concedes that the principle of judicial interpretation used by Jafta J is an attractive one, he did not share the view that such a remedy was appropriate in the circumstances of the case at hand.

Instead, Cameron J was of the opinion that the various provisions of section 65 of the MCA could not be read in such a way as to link them in a collective. In his opinion, it is clear that these provisions were meant to constitute separate remedies in their own right, and as such, section 65J needs to be read as a provision that stands on its own.<sup>79</sup>

In light of this, Cameron J found that when one reads the plain wording of section 65J, no provision is made for judicial oversight in issuing an EAO. For example, from section 65J(2) the issuing of extra-judicial orders was clear, especially when one considered the words “a judgement creditor may cause an order to be issued from the court”.<sup>80</sup>

Furthermore, Cameron J pointed to section 65J(2)(a), where the Act authorised the issuing of an EAO where a debtor had consented thereto in writing or where a

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<sup>78</sup> *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2016 (6) SA 596 (CC) paras 130-133.

<sup>79</sup> Para 142.

<sup>80</sup> Para 143.

court had authorised the same. Cameron J reasoned that if judicial supervision were intended by the Act, a distinction like this would not have been required.<sup>81</sup>

In light of the above Cameron J therefore found that the judicial interpretation used by Jafta J went too far to construe the wording of section 65J in a manner that would provide for judicial supervision. Instead, the wording of the Act was too overt to be saved by such an interpretation.<sup>82</sup>

Cameron J concluded that the order of constitutional invalidity made by the High Court was correct because section 65J clearly provided for the issuing of extra-judicial EAOs. The conclusions made by the High Court and in the minority judgement that section 45 of the MCA does not provide for consent to judgment in the issuing of EAOs, was also confirmed.<sup>83</sup>

In his concurring judgment, Zondo J reached all of the same conclusions as Cameron J but delved deeper into the interpretation of the words used in section 65J.

The order granted by the court affirmed the constitutional invalidity of the wording of section 65J made by the High Court. Zondo J however found that ordering a change via the principle of “reading-in” specific wording into the section would be a more appropriate remedy than merely that severing the parts of the Act are invalid.<sup>84</sup> Zondo J explained the above remedy by referring to the application of a similar principle by the court in *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others*.<sup>85</sup>

In light of the above, the Constitutional Court dismissed the appeal with costs and set aside the declaration of constitutional invalidity made by the High Court. The court replaced the declaration of constitutional invalidity with an order declaring that section 65J should henceforth read as follows:<sup>86</sup>

- “(2) An emoluments attachment order shall not be issued -
  - (a) unless the judgment debtor has consented thereto in writing and the court has so authorized after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount

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<sup>81</sup> Para 145.

<sup>82</sup> Para 147.

<sup>83</sup> Para 155.

<sup>84</sup> Para 206.

<sup>85</sup> 2000 (2) SA (1) (CC).

<sup>86</sup> *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2016 (6) SA 596 (CC) para 212.

- 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 ten days of the date on which that registered letter was posted; and
    - (ii) filed with the clerk of the court an affidavit or an affirmation by the judgment creditor or a certificate by his or her attorney setting forth the amount of the judgment debt at the date of the order laying down the specific instalments, the costs, if any, which have accumulated since that date, the payments received since that date and the balance owing and declaring that the provisions of subparagraph (i) have been complied with on the date specified therein.; 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.”

After considering the issue of retrospectivity, the court also held that the order above should only be prospective in nature. The two main reasons provided were the uncertainty that retrospectivity would involve for the credit industry as well as the fact that there was legislation pending to address the issuing of EAOs.<sup>87</sup>

### **3.4.5 Comment on the majority judgments and the decision reached by the court**

As mentioned above, the solution suggested in minority judgment in the *Stellenbosch* decision is an attractive and established one. However, when reading the wording of the Act, one is struck by how extensively one must stretch its meaning in order to have it provide for judicial supervision in the issuing of an EAO. In holding that the wording of section 65J does not make provision for judicial supervision, the majority of the court therefore correctly held that the wording of section 65J is unconstitutional to such extent.

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<sup>87</sup> Para 158.

By deciding that the reading in of new wording into various parts of section 65J would provide the most just and effective solution to the question of judicial supervision, it is submitted that the court reached a satisfactory conclusion. Instead of removing certain impugned provisions, as was done by the High Court, the majority of the Constitutional Court agreed to amend the provisions in question to provide explicitly for judicial supervision in the issuing of EAOs.

The above solution means that there is now less uncertainty for legal professionals and the public at large. By reading certain word into section 65J, the court maintained the status quo in all regards save for the extra-judicial issuing of such orders. The solution offered by the majority of the Constitutional Court is thus preferable to that of the High Court in that it rectifies the provisions of section 65J deemed unconstitutional whilst at the same time providing for legal certainty and practical continuity.

The solution offered by majority is also more beneficial than the one offered by the minority. Whilst the solution offered by the minority would argue that the provisions should be interpreted in a certain way, the solution of the majority provides a direct means through which such interpretation will be reached. It is also submitted that by allowing the provisions to remain unchanged, the solution in the minority judgment would also have left section 65J open to misuse in the future in much the same way that the minority argues that misinterpretation led to the abuse in question in the case at hand.

By holding that the order made by the court would only apply prospectively, the court also showed appreciation for wanting to change the system in place positively whilst still having regard for stability within the economic system.

### **3.5 The impact of the decision reached by the court in the Stellenbosch decision**

#### **3.5.1 Direct implications of the *Stellenbosch* decision.**

The decision reached by the court in the *Stellenbosch decision* both an immediate and long-term impact on the issuing of EOA's and on the way debt is collected in the Republic as a whole.

The main immediate effects of the order made by the court are the following:

- All EAOs issued prior to 13 September 2016 remain enforceable unless challenged.
- An EAO may only be issued in a jurisdiction that complies with the requirements of section 65J(1)(a) of the MCA, meaning that any agreement which purports to provide consent by a judgment debtor to a court not within such jurisdiction is invalid.
- An individual can still challenge an EAO if the order is non-compliant with the provisions of either the MCA or the NCA.
- The expedited process for recovering debts in terms of the MCA remains in effect, save for the changes made to section 65J by the court.

As mentioned above, EAO's are extremely prevalent in South Africa, with the result that the decision of the Constitutional Court could have a significant impact on the collection of debt and on the lives of numerous persons who were vulnerable to the exploitation to which the court decisively put a stop. By deciding to issue a prospective order and thus by keeping much of the debt collection processes in terms of the MCA intact, the court also ensured that the legal system would not be unduly reshaped, and that legal certainty would be safeguarded. The results seems like a reasonable balance between the various interests involved.

### **3.5.2 The effects of subsequent intervention by the legislature on EOAs following Stellenbosch decision**

Following the decision of the court in the *Stellenbosch* decision, the legislature amended numerous provisions of the MCA which were under the scrutiny of the court in the *Stellenbosch* decision.

The Court of Law Amendment Act 7 of 2017 was assented to on 27 July 2018 and came into full effect on 1 August 2018. The Act makes several major changes to the MCA. The changes most relevant to the *Stellenbosch* decision and the issuing of EOAs are those made to section 45 and section 65J of the MCA.

Section 45 was amended in the following ways:

- The wording of section 45(1) was changed and its meaning made clearer and simpler.
- Section 45(3) was added to the Act and stipulates that any consent given in terms of section 57,58,65 or 65J of the Act to a court which does not have jurisdiction over a debtor in terms of the ordinary provisions of the Act, will be of no force or effect.

Section 65J was significantly altered by the legislature, with the following changes being particularly relevant:

- Section 65J(1)(a) was amended and the wording changed so that the jurisdiction for issuing an EOA is dependent on where the debtor (and not the employer) resides, carries on business or is employed.
- Section 65J(1A) was added to the Act. In terms of this provision, the aggregate total of all EOAs in force against a single debtor may never exceed 25% of his or her gross basic salary. This added section also obliges a court to set a matter down for hearing when considering the issuing of an EOA if the debtor already has one or more EOAs in force against his or her salary. A party applying for an EOA is obliged to serve a notice of the above date of hearing on both the debtor and the other creditor(s) of the debtor.
- The wording of section 65(2) of the MCA was changed so that provision was no longer made for the issuing of an EOA by consent of the debtor. The issuing of an EOA must now be strictly authorised by a court after satisfying itself that such an order is just and equitable and the amount appropriate. The previous administrative provisions of this subsection relating to the issuing of EOAs have been removed entirely.
- To compensate for the removal of the administrative provisions in section 65(2), sections 65(2A) ,65(2B) and 65(2C) were added to the MCA. In terms of these three subsections, the administrative process for obtaining an EAO has been outlined in great detail. This process entails inter alia that a creditor must serve a notice of intention to apply for an EAO on the debtor and his or her employer in the prescribed form.
- Section 65J(3)(b) and section 65(3)(c) were also added to the MCA. These new provisions set out the new obligations of a clerk of the court to ensure that a court has authorised the issuing of an EAO and that such court had the



requisite jurisdiction to do the same before issuing an order. The clerk must also ensure that the order is served on the garnishee and the judgement debtor if he or she was not present for the hearing in which the EAO was issued.

- An amendment was moreover made to section 65(4)(b) of the MCA, mandating the furnishing of a free quarterly report to a debtor by the creditor.
- Section 65J(6)(a) was also added to the MCA. This addition makes it mandatory for a garnishee, debtor or other interested party to send a notice to the creditor or his or her attorney if it is shown that the EAO was wrongly issued or executed; or if the judgment debtor is unable to support himself or his family after the deductions in terms of the EAO are made. Should a creditor not accept the assertions made in such a notice, the creditor or his or her attorney must set the matter down for hearing.
- Finally, section 65J(10)(b) was added to the MCA, and makes a garnishee who fails to comply with a validly issued and executed EAO liable to compensate the creditor for any additional costs incurred as a result of such failure.

In light of the issues that existed with the EAO as a mechanism prior to the *Stellenbosch* decision highlighted earlier, the intervention made by the legislature is both welcome and long overdue. Whilst the legislature might argue that such changes were in the process of being developed for some time, the chain of causation between the decision reached by the court in the *Stellenbosch* decision and the subsequent intervention by the legislature seems a very strong one.

The intervention by the legislature also has the effect of providing more legal certainty around the issuing of EAOs by prescribing administrative provisions in greater detail and by applying the spirit of the *Stellenbosch* decision in a clear and concise manner.

# **CHAPTER 4:**

## **SOUTH AFRICA’S COMMITMENT TO FINANCIAL CONSUMER PROTECTION IN TERMS OF THE G20 HIGH- LEVEL PRINCIPLES OF CONSUMER PROTECTION**

### **4.1 Introduction**

The *G20 high-level principles on financial consumer protection* (“the principles”) are a set of principles developed by the Task force on Financial Consumer Protection of the Organisation for Economic Co-operation and Development’s (OECD) Committee on Financial Markets. These principles were endorsed by the finance ministers and central bank governors of the G20 countries at their meeting on 14 and 15 October 2011.<sup>88</sup>

These principles were designed to assist G20 countries to enhance financial consumer protection and to form a framework that can be used to construct a system whereby financial consumer protection is advanced.<sup>89</sup> Whilst 10 principles were established by the G20, this paper will focus solely on principle 3 because it relates to the subject matter that was discussed in the *Stellenbosch* decision.

This chapter will begin by considering principle 3 and expounding on its meaning and interpretation. Following this, a summary of South Africa’s obligation to comply with the high-level principles and other international agreements will be given. The aim is to assist in determining the relationship between principle 3 and the decision reached in the *Stellenbosch* decision.

### **4.2 Analysing principle 3 of the G20 high-level principles on financial consumer protection**

Principle 3 states as follows:

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<sup>88</sup> Organisation for Economic Co-operation and Development (OECD) *G20 High-Level Principles on Financial Consumer Protection* (2011) Pg 3

<sup>89</sup> Pag 4

“All financial consumers should be treated equitably, honestly and fairly at all stages of their relationship with financial service providers. Treating consumers fairly should be an integral part of the good governance and corporate culture of all financial services providers and authorised agents. Special attention should be dedicated to the needs of vulnerable groups.”<sup>90</sup>

Whilst the principle on its own is aspirational, it is not helpful in determining how it would be applied in various jurisdictions. Fortunately, the OECD Taskforce on Financial Consumer Protection published a document titled *The effective approaches to support the implementation of the remaining G20/OECD high-level principles on financial consumer protection*<sup>91</sup> (“the approaches document”) on 9 September 2014. The aim of this document was to guide member states in the implementation of the various principles.

In terms of the approaches document, courts have an important role to play in ensuring that there is a clear and shared understanding within a jurisdiction of how consumers should be treated equitably and fairly.<sup>92</sup> Court decisions and judicial application are also two of the channels by which a common understanding of the term “just and equitable” can be reached.<sup>93</sup>

Courts also have a duty to ensure that a breach of the duty to treat consumers equitably and fairly results in remedial action.<sup>94</sup> The approaches document moreover suggests that courts should set standards on how financial consumers should be treated.<sup>95</sup>

It thus clear that the intention of the Task Force on Financial Consumer Protection was that the judiciary in each member jurisdiction would play a key role in both implementing and sustaining principle 3.

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<sup>90</sup> Page 5

<sup>91</sup> Organisation for Economic Co-operation and Development (OECD) *The effective approaches to support the implementation of the remaining G20/OECD high-level principles on financial consumer protection* (2014).

<sup>92</sup> Para 136.

<sup>93</sup> Para 138.

<sup>94</sup> Para 139.

<sup>95</sup> Para 150.

### 4.3 South Africa's responsibility to comply with the G20 high-level principles on financial consumer protection

The *G20 high-level principles on financial consumer protection* form part of an international agreement of an organisation to which South Africa is a member. Whilst the recommendations made in the principles are not automatically part of South African municipal law,<sup>96</sup> they do form an important part of South African law nonetheless.

In terms of section 233 of the Constitution, every court must prefer any reasonable interpretation of any legislation that is consistent with international law to an interpretation that is not consistent.<sup>97</sup> When interpreting the Bill of rights, a South African court is also obliged to consider international law when doing so.<sup>98</sup> As the matter in front of the court in the *Stellenbosch* decision related inter alia to an individual's right to access a court in terms of section 34 of the Constitution, the above provision is particularly relevant.

It could also be persuasively argued that the principles have become customary international law meaning they do indeed form part of South African municipal law.<sup>99</sup> This argument has however not been raised in South African law and is in any event moot for the purposes of discussing the *Stellenbosch* decision.

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<sup>96</sup> *Welkom Municipality v Masureik and Herman t/a Lotus Corporation and another* [1997] 2 All SA 144 (A).

<sup>97</sup> S 233 of the Constitution of the Republic of South Africa, 1996.

<sup>98</sup> S 39(1)(b).

<sup>99</sup> S 132.

## CHAPTER 5: CONCLUSION

As stated in chapter 1, the aim of this dissertation was to examine the relationship between consumer protection and economic expediency by looking at the EOA as a mechanism of enforcement and its interpretation in the *Stellenbosch* decision. By also looking at principle 3 of the *G20 high-level principles of financial consumer protection*, the dissertation aimed to determine whether the decision by the court in the *Stellenbosch* decision amounted to judicial application of this principle. The dissertation also aimed to answer whether such application amounts to a satisfactory solution to the complex relationship set out above and whether it is preferable to legislative intervention.

Chapter 2 detailed the way in which the issuing of an EAO is structured in the MCA. The analysis showed that the EAO in section 65J of the MCA was a very effective means by which to collect a judgment debt. The investigation further revealed that many of the provisions in section 65J had the potential to cause great hardship to judgment creditors and, in fact, that an application of many of the provisions had the effect of limiting the constitutional rights of judgment debtors.

Chapter 3 commenced by investigating the prevalence of the issuing of EAOs in South Africa. Upon investigation, it was clear that by the time the *Stellenbosch* matter came before the court, the use of this form of execution had become extremely widespread. The various ways in which this method of execution was abused was also examined as a background to the decision reached by the court in the *Stellenbosch* case. The examination concluded that many of the abuses of this mechanism were both widespread and extremely detrimental to the rights of judgment debtors.

By considering the facts before the court in the *Stellenbosch* decision, chapter 2 also illustrated that these facts provided a clear and extreme example of how widespread and serious the abuses of EAOs had become. An exposition of the decision reached by the Western Cape Division of the High Court showed that the court drew many of the same conclusions concerning the abuse of EAOs highlighted

above, and acted by expunging the provisions in section 65J of the MCA that were deemed unconstitutional.

Chapter 3 then analysed both the minority and majority judgments in the *Stellenbosch* decision. Whilst the minority was praised for trying to apply the principle of constitutional interpretation, it was ultimately found that this approach was simply unfeasible in trying to rectify the provisions of section 65J of the MCA that failed to provide for judicial oversight. The majority judgment was praised for having brought an end to the extra-judicial issuing of EAOs in a manner that provided for economic and legal certainty, whilst still protecting the rights of financial consumers. The impact of the order issued by the court in the *Stellenbosch* decision was also summarised by looking at both the direct implications of the decision and the subsequent amendment to the MCA.

In Chapter 4 the *G20 high-level principles of financial consumer protection* were examined. Particular focus was given to principle 3 and the suggested implementation of this principle by the Task force on Financial Consumer Protection. An analysis was also done to determine the effect that these principles have on South African municipal law in terms of the Constitution.

By examining principle 3 of the *G20 high-level principles of financial consumer protection*, and the suggested implementation of these principles, it is clear that courts have an important role to play in implementing this principle.

The court in the *Stellenbosch* decision placed a large emphasis on the constitutional principles underlying any interaction within the Republic. The court went on to explain the function of an EAO and how this mechanism works in practice. Following such explanation, the court made an order amending the wording of section 65J of the MCA to provide for judicial supervision in issuing EAOs. By providing clarity to the public on how these orders would function, the court clearly complied with the requirement of providing a clear and shared understanding within a jurisdiction of how consumers should be treated equitably and fairly, as stated in the suggested approaches by the Task Force on Financial Consumer Protection.<sup>100</sup>

In terms of the suggested approaches by the Task Force on Financial Consumer Protection Court, decisions and judicial application are also two of the channels by

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<sup>100</sup> Para 136.

which a common understanding of the term “just and equitable” can be reached.<sup>101</sup> The *Stellenbosch* decision clearly provides for just and equitable treatment of financial consumers by amending a process that had become outdated and that had violated the rights and dignity of financial consumers.

By providing a standard of how judgement debtors should be treated and how the process for implementing an EAO should be conducted, the court also complied with the suggestion by Task Force on Financial Consumer Protection that courts should set a standard on how financial consumers should be treated.<sup>102</sup>

In light of the above, it is clear that whilst the court never referred to principle 3, the decision reached by the court in the *Stellenbosch* case amounted to judicial application of principle 3 all the same. By amending the wording of section 65J of the MCA, the court in the *Stellenbosch* decision provided immediate and direct relief to consumers who suffered because of an unjust provision in the law. The effects of this intervention were both immediate and substantial, and legal certainty was provided for by the manner in which this intervention was delivered.

Whilst legislative intervention is an effective tool with which to change unjust laws, it is submitted that judicial intervention is often more effective in delivering immediate equitable results, as the *Stellenbosch* decision illustrated very clearly.

As the widespread abuse of EAOs showed, actors within a jurisdiction will often use unclear provisions or lacunas within existing legislation to achieve the most expeditious results. It is also important to note that the widespread abuse of EAOs had been in effect for years following the passing by parliament of the NCA and the Consumer Protection Act 68 of 2008. These two pieces of legislation were promulgated with the explicit intent of protecting vulnerable consumers, but as the misuse of EAOs shows, these legislative interventions are only as effective as the system used to interpret and implement them. Whilst both of these pieces of legislation (especially the NCA) aimed to protect financial consumers, the extra-judicial issuing of EAOs proceeded unabated until the intervention of the court because this widespread and well-documented issue was not directly addressed by the legislature.

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<sup>101</sup> Para 138.

<sup>102</sup> Para 150.

Another point that can be made is that parliamentary process are often slow, which means that legislation usually takes a very long time to be promulgated and implemented before becoming effective. Due to the above reasons and in light of the impact of the *Stellenbosch* decision, it is clear that the judiciary often provides a more direct and clear way with which to protect the rights of financial consumers.

In conclusion, it is clear that legislation will always remain the primary source of law, and by implication the primary means of protecting financial consumers. It is however equally clear that intervention by the judiciary often provides the most direct and decisive results in achieving the goal of consumer protection within the financial scheme. It is also suggested that the *Stellenbosch* decision should serve as an example for future judicial intervention, and should be emulated whenever possible in order to bring about decisive change to unjust laws when needed.

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