TRAVERSING THE SOUTH AFRICAN EMOLUMENT ATTACHMENT ORDER LEGAL LANDSCAPE POST 2016: *QUO VADIS*?

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1 Introduction

South Africa is one of the most naturally beautiful and ethnically diverse countries in the world. It is this beauty and the multicultural diversity[1] of its society that has garnished it the title "the rainbow nation".[2] One could argue that diversity has become the norm in South Africa.[3] South African society is further characterised by a stark disparity in the social and economic classes of its residents. It has been reported that Oxfam's 2017 inequality report measured the total net wealth of just three billionaires in South Africa as equivalent to that of the bottom 50% of the country's population, making South Africa one of the most unequal countries in the world.[4] Millions of people live in poverty,[5] and while the wealthy have many options to enforce the laws safeguarding their rights, the indigent are hard-pressed for opportunities for legal recourse in their so-called "poverty law" matters.[6] Hence, there are those citizens of the rainbow nation who urgently require the services of legal professionals and organisations who specialise in these poverty law areas. These organisations serve as crucial enforcers of the rights of those who are unable to afford private legal representation. Legal aid providers, like the Stellenbosch University Law Clinic ("the Clinic"), have accordingly taken up the responsibility to represent the interests of the vulnerable.

1 Google lists 34 ethnic groups who call South Africa their home. See, <https://www.google.co.za/search?q=What+are+the+ethnicities+in+South+Africa%3F&sa=X&ved=0ahUKEwis6f3BkO7YAhVEVhQKHUBfA2oQzmcIbw&biw=1920&bih=963> (accessed 13-03-2018).

2 A term which was reportedly coined by Archbishop Desmond Tutu to describe South African society post-Apartheid. See, eg, S Kellerman "The Rainbow Nation" (23-07-2014) Dreams to Reality <http://www.dreamstoreality.co.za/the-rainbow-nation/> (accessed 13-03-2018) and Our Africa "Welcome to South Africa" (undated) *Our Africa* <http://www.our-africa.org/south-africa> (accessed 13-03-2018).

3 A Versi "South Africa: A Treasure Trove of Diversity" (11-05-2017) *New African* <http://newafricanmagazine.com/south-africa-treasure-trove-diversity/> (accessed 13-03-2018).

4 G Quintal "SA's Rich-Poor Gap is Far Worse than Feared, Says Oxfam Inequality Report" (16-01-2017) <https://www.businesslive.co.za/bd/national/2017-01-16-sas-rich-poor-gap-is-far-worse-than-feared-says-oxfam-inequality-report/> (accessed 13-03-2018).

5 Statistics South Africa "Poverty Trends in South Africa: An Examination of Absolute Poverty Between 2006 & 2015" (08-2017) Stats SA <http://www.statssa.gov.za/?p=10341> (accessed 13-03-2018). 55,5% (30,4 million) of the South African population lived in poverty in 2015. "The number of persons living in extreme poverty (i.e. persons living below the 2015 Food Poverty Line of R441 per person per month) in South Africa increased … to 13,8 million in 2015."

6 S van der Merwe "Failure to discharge. A discussion of the insufficient legal recourse afforded to judgment debtors in the South African context" (2008) *JJS* 71 72.

In this context, poverty law thus refers to the practice of those matters where the rights of financially distressed citizens are at issue, for example those being evicted, or dismissed. Another area of poverty law lies in assisting the often-indigent judgment debtor when the judgment debt is enforced through improper or illegal collection methods. In practice, this is quite frequently done through the legal mechanism of emolument attachment orders ("EAOs"),[7] sometimes also referred to as garnishee orders.[8] Some of the cruelties, which have been committed against the South African people by unscrupulous moneylenders and collection agents who abuse the tenuous EAO legal system, have been well exposed in recent years.[9]

On 13 September 2016, the South African Constitutional Court delivered its landmark judgment in *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* (*"University of Stellenbosch"*).[10] This judgment has changed the legal landscape with regard to EAOs. In the wake of this now well-known and well-publicised judgment, the Clinic has continued to receive considerable numbers of requests for related legal aid, having assisted numerous clients to oppose illegal EAOs in the last decade or more.

In my capacity as senior attorney at the Clinic, I have extensive experience representing debtors in rescission of judgment and EAO cases and my practice and research in this regard assisted in framing the Applicant's case in *University of Stellenbosch*. I also previously published on the insufficient legal recourse available to judgment debtors in South Africa,[11] which publication in many respects served as a precursor to the issues that were before the court in *University of Stellenbosch*. It is this direct personal and professional involvement in the matter at hand, which brings a unique perspective to this discourse on the work of the Clinic (or Legal Aid Clinic as it was known at the time of the case).[12]

This article will accordingly investigate and discuss the current South African legal landscape pertaining to the use of EAOs post *University of Stellenbosch*. This will be done by considering the factual background and

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7 The definition of emoluments attachment orders is apparent from their function, which is explained in section 65J of the Magistrates' Court Act 32 of 1944:

"(1)(b) An emoluments attachment order–

(i) shall attach the emoluments at present or in future owing or accruing to the judgment debtor by or from his or her employer (in this section called the garnishee), to the amount necessary to cover the judgment and the costs of the attachment … and

(ii) shall oblige the garnishee to pay from time to time to the judgment creditor or his or her attorney specific amounts out of the emoluments of the judgment debtor …"

8 There is a slight, but important difference between garnishee orders, a term used to describe an order that empowers the creditor to attach any debt owed to the debtor by any third party, and EAOs, which are specific forms of garnishee orders applicable to the employer-employee relationship.

9 See, eg, Van der Merwe (2008) *JJS*; C Gardner "The complexity of emolument attachment orders" (2007) 1 *HR Highway* 21; D James "Deductions and counter-deductions in South Africa" (2017) 7 *HAU* 281.

10 2016 6 SA 596 (CC).

11 Van der Merwe (2008) *JJS*.

12 Through the years, many diligent members of the Clinic's staff contributed to the work and success of the impact litigation regarding EAOs. I would however be remiss not to single out Ms Mathilda Rosslee, Clinic paralegal at the time of the case, who became the face of the Clinic to many of the effected clients with whom she consulted on the matter.

events leading up to the initial Cape High Court[13] and later Constitutional Court cases, followed by a short summation of the most important sections of the judgments. The article will then consider the impact and significance of the two cases before identifying the issues that remained unresolved.

2 Factual background

It is common knowledge that bad debt affects the lives of millions of people in South Africa. Billions of rands are at issue,[14] and where such enormous amounts of money are at stake, there will always be an industry looking to cash in on the spoils. In any industry there are, unfortunately, likely to be an element of participants who look to do so in unscrupulous ways. One could argue that the proportion of this opportunistically dishonest element, and the influence which they are able to wield, is amplified with increased enticement in the form of large sums of money and a fragile legislative framework.[15] In years past, these opportunities for substantial dishonest gains, by manipulating the questionable legal system, have been abundant in the South African credit industry.

At the Clinic, we became aware of the epidemic proportion of these abuses, which were perpetrated by creditors in the small cash loan industry, through our representation of debtors who were struggling to make ends meet after their modest salaries had been garnished through EAOs. Since 2001, the Clinic has brought dozens of applications to rescind or reduce illegal or unjustified EAOs.[16] In some of these cases, clients were granted loans that were practically impossible to repay due to the lending agent withholding information from the debtors or relocating their offices without informing the debtor accordingly.[17] In many cases laypersons and debtors who were unschooled and barely literate were required to sign blank documents, which were occasionally found to be abused to enter more than one judgment and resulting EAO based on the same cause of action.[18] Consents to judgments and EAOs, which were frequently signed on a fraudulent basis, were particularly disposed to abuse. These judgments and resulting EAOs were often entered against debtors from magistrates' courts thousands of kilometres away from their residence and place of employment in order to frustrate the debtor's

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13 *University of Stellenbosch Legal Aid Clinic v Minister of Justice* 2015 5 SA 221 (WCC).

14 During the Western Cape High Court case of *University of Stellenbosch Legal Aid Clinic v Minister of Justice* 2015 5 SA 221 (WCC), affidavits were filed on behalf of the seventeenth respondent, Flemix & Associates, which disclosed that they represent (only) 45 credit providers with 150 000 active cases, totalling a book value of R1 597 585 832 (over one and a half billion rand). In his minority judgment (para 6) in *University of Stellenbosch*, Jafta J referred to evidence on affidavit stating that the credit industry "supported 20 million credit consumers out of a population of 52 million. At the time the total debtors' book was estimated at R1.47 trillion, of which R168 billion comprised unsecured debts."

15 See, eg, the 1 March 2013 press release of the Law Society of South Africa where the society states, with regard to EAOs, that "[t]he system is open to abuse because the law is weak". B Whittle "Law Society Condemns Abuse of Garnishee System" (01-03-2013) *Law Society of South Africa* <http://www.lssa.org.za/upload/documents/LSSA%20Press%20garnishees%20%2001_%2003_13.pdf.> (accessed 13-03-2018).

16 See, eg, specific cases described in Van der Merwe (2008) JJS 74–75.

17 74–75.

18 74.

attempts to combat them.[19] A further recurring issue was that the applicable legislation[20] allowed these orders to be granted by clerks of the court who merely rubberstamped the creditor's version and biddings, without proper judicial oversight.[21] Even in those cases where the underlying merit and the process in obtaining the judgment was sound, we found that the size of the monthly instalments were completely disproportionate to the debtor's monthly salary.[22] Arguably, the biggest concern however was the total lack of transparency and discharge when the debtor's salary had been garnished to the point where the judgment debt, along with fair interest and costs, had already been collected. We assisted clients whose salaries had already been garnished by ten times the initial loan amount, while the creditors were adamant that the debtor then still owed seven times the initial loan amount before the account could be finalised.[23]

During this time, the Clinic was not the only organisation actively raising awareness of the wide-scale abuses in the EAO system. Reports started filtering in from the public media sector that supported the findings of the Clinic,[24] and there was even some academic attention directed at the matter.[25] Other service providers entered the fray and conducted their own audits of the situation, yielding yet more disturbing findings.[26] These investigations confirmed that debtors were often found to be victims of fraudulent misrepresentations with regard to the scope and content of loan agreements and that multiple EAOs were issued based on one judgment. They found regular instances of illegal collection costs, which were unilaterally charged to accounts, and instances of credit balances being transferred to "unclaimed balances" accounts before being written off.[27]

For a while there was hope that all this attention would spark a dramatic intervention by the powers that be. Additionally, one may have assumed that the creditors who were guilty of these abuses would, by their own volition, initiate remedial action. However, as time passed, it became clear that neither was forthcoming. It seemed that the entire matter would simply peter out as the proverbial storm in a teacup, leaving legal aid organisations fighting a lone battle on a case-by-case basis.

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19 74–75.

20 Section 65J of the MCA.

21 Van der Merwe (2008) *JJS* 76-77.

22 74–75.

23 74.

24 See Van der Merwe (2008) *JJS* 75, where reference is made to articles in *Die Kaapse Son* and television broadcasts on Carte Blanche.

25 A conference paper on the topic was delivered by S van der Merwe during the 5th International Journal of Clinical Legal Education Conference, held in Johannesburg from 9 to 11 July 20017; van der Merwe (2008) *JJS*; F Haupt, H Coetzee, D de Villiers & J Fouché *The incidence of and the undesirable practices relating to garnishee orders in South Africa* (2008) University of Pretoria Law Clinic Published Report.

26 See Van der Merwe (2008) *JJS* 76:

> "Mr Clark Gardner of Summit Financial Partners audited 70 000 of the 1,75 million garnishee orders that have been set in motion by South African Courts. According to him the system is riddled with abuse. 'If we had to extrapolate our audit findings there must be over a billion rand being over-deducted from already distressed borrowers and going into the pockets of unscrupulous lenders and collectors alike.'" [footnotes omitted].

27 75-76.

Then, on 16 August 2012, something tragic happened which put the spotlight squarely and (one would think) irrevocably on the abuses of the EAO collection system: the Marikana massacre. South African police forces shot and killed 34 striking mineworkers outside the Lonmin platinum mine in the North West province. The strike and ensuing violence was a direct result of the miners' desperation to have their economic needs, and that of their families, properly considered.[28] They were adamant that their salaries were insufficient to cater to their basic needs, and in the investigations that followed, it became clear that there were, in fact, strong linkages to reckless lending:

> "Many of these miners are left with scarcely enough money to cover their basic living expenses, after their monthly instalments have been deducted from their accounts. In fact, miner indebtedness has been quoted as one of the key causal factors of the notoriously violent Marikana strikes in 2012."[29]

If anything positive could be said to come from such a devastating tragedy, at least it seemed that some influential role-players were now starting to appreciate the seriousness of the issue. Soon after the tragedy, the then Minister of Finance and the chairperson of the Banking Association of South Africa ("BASA") issued a joint statement stating, *inter alia*, that: "BASA members commit not to use garnishee orders against credit defaulters, as they believe the use of such orders for credit is inappropriate".[30] This victory for the debtor was short lived, as it soon emerged that the sentiment expressed in this statement after Marikana was disingenuous: the banks continued using EAOs pending the availability of "alternative tools".[31] During 2013 the then Minister of Finance, Pravin Gordhan, stated that "[w]e are concerned by the abuse of emolument attachment orders that has left many workers without money to live on after they have serviced their debts every month".[32] In the same year an Emolument Attachment Order Task Team met under the guidance of the Credit Ombud, and reported that it "submitted a well-rounded document to National Treasury" with the view of establishing a code of conduct for the industry.[33] Treasury responded by issuing a media statement entitled "Government moves to protect consumers and assist over-indebted households", in which it listed "preventative steps to minimise the risk of over-indebtedness" and also listed ways in which Government was "considering" assisting households ensnared by debt. The statement ends by informing the reader that "[t]he Ministers of

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[28] South African History Online "Marikana Massacre 16 August 2012" (16-08-2017) *South African History Online* <http://www.sahistory.org.za/article/marikana-massacre-16-august-2012> (accessed 13-03-2018).

[29] Reckless Lending "NCR Accuses Ubank of Reckless Lending" (22-05-2015) *Reckless Lending* <http://reckless-lending.co.za/ncr-accuses-ubank-of-reckless-lending/> (accessed 13-03-2018).

[30] Joint statement by the Minister of Finance and the chairperson of the Banking Association of South Africa "Ensuring Responsible Market Conduct for Bank Lending" (01-11-2012) *National Treasury* <http://www.treasury.gov.za/comm_media/press/2012/2012110101.pdf> (accessed 13-03-2018). The statement, which was signed on behalf of the six major banks in South Africa, was "a consequence of a meeting that took place between the above-mentioned parties on 19 October 2012, which built on commitments that were made during a previous consultation between the Finance Minister and major retail bank chief executives and chairperson on 27 August 2012."

[31] M Rees & J Clark "Banks backpedal on garnishees" (03-12-2012) *Moneyweb* <https://www.moneyweb.co.za/archive/banks-backpedal-on-garnishees/> (accessed 13-03-2018).

[32] Minister of Finance P Gordhan "2013 Budget speech" (27-02-2013) *National Treasury* <http://www.treasury.gov.za/documents/national budget/2013/speech/speech.pdf> (accessed 13-03-2018).

[33] M van Schalkwyk "Note from the Ombud" (04-09-2013) *Credit Ombud* <http://www.creditombud.org.za/note-from-the-ombud-volume-5/> (accessed 13-03-2018).

Finance and Trade and Industry will develop a more detailed implementation framework next year".[34] There is however no indication that either the Credit Ombud Task Team report, nor the Treasury statement and promised implementation framework, came to any fruition.[35] Proposed amendments to the Magistrates' Court Act 32 of 1944 ("MCA") to curb the abuses associated with EAOs have been in the pipeline since 2013,[36] but at the time of writing, these still have to be finalised by the Department of Justice and Constitutional Development ("DJCD").[37] During March 2014, the DJCD sent a circular to all its offices in which it referred to the then recent media reports regarding illegal EAOs and reported that it had confirmed the existence of many of these abuses during an assessment conducted at Ermelo Magistrates' Court on 19 February 2014. In terms of the circular, "it was found that thousands of consents … did not comply with the … act" and that certain provisions were "being acutely and severely abused by most micro lenders".[38]

From the above brief exposition, it is clear that during the last decade a lot has been said, planned, and debated regarding the abuse-prone EAO legal framework; even more so in reaction to the Marikana tragedy. In addressing criticism levied against it, the Law Society of South Africa ("LSSA") in its 1 March 2013 press release expressed the view many seemed to hold. It recognised "the severe impact of the abuse of emolument attachment orders", but blamed the legislature and the courts for the problem.[39] I argued before that one must question the political will to effect real change when there is limited means available in these poverty law issues.[40] This argument is strengthened when all the attention to the EAO problem prior to 2015 yielded very little genuine impact. This was still the case when the Clinic decided to issue its application in the High Court of the Western Cape during September 2014.

3 The High Court and Constitutional Court cases

On 8 July 2015, Desai J delivered judgment on case 16703/2014 in the Western Cape Division of the High Court of South Africa.[41] The applicants had been the University of Stellenbosch Legal Aid Clinic (as it was known then), in its own as well as the public interest,[42] and fifteen clients of the Clinic who brought the application to protect their own rights and interests.

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[34] Minister of Finance, Trade and Industry "MEDIA STATEMENT: Government moves to protect consumers and assist over-indebted households" (12-12-2013) *National Treasury* <http://www.treasury.gov.za/comm_media/press/2013/20131212%20-%20Household%20overindebtedness.pdf> (accessed 13-03-2018).

[35] S Ameermia "Garnishee Orders: A concerted effort required to tackle abuse of emolument attachment orders" (06-08-2015) *The South African Human Rights Commission* <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/381-garnishee-orders> (accessed 13-03-2018).

[36] B Whittle "Law Society Condemns Abuse of Garnishee System" (01-03-2013) *Law Society of South Africa*.

[37] See the text to part 4 below.

[38] Department of Justice and Constitutional Development Circular 30 of 2014. Copy on file with author.

[39] B Whittle "Law Society Condemns Abuse of Garnishee System" (01-03-2013) *Law Society of South Africa*.

[40] Van der Merwe (2008) JJS 72-73.

[41] *University of Stellenbosch Legal Aid Clinic v Minister of Justice* 2015 5 SA 221 (WCC).

[42] In terms of ss 38(1)(a) and 38(1)(d) of the Constitution.

The respondents were the State,[43] a number of credit providers and collection agents and the Association of Debt Recovery Agents ("ADRA"). The South African Human Rights Commission ("HRC") was admitted as *amicus curiae*.

In light of the history of unregulated EAO abuses, the applicants sought legal relief in the form of declaratory orders to, firstly, declare certain sections[44] of the MCA unconstitutional on the basis that they "fail to provide for judicial oversight over the issuing of an EAO against a judgment debtor".[45] Secondly, the applicants sought an order to confirm that EAOs could not be issued "in jurisdictions alien to them on the basis that it was not permitted by legislation".[46] The applicants also averred that the EAOs issued against second to sixteenth applicants should be set aside based on this illegality.[47]

In his written judgment, Desai J emphasised the "[p]ivotal" role of written consents to judgment which were obtained from debtors.[48] The severely and detrimentally wide ambit of these documents, which had supposedly been signed by the debtors themselves after having been fully informed of the content and consequences, exceeded reasonable expectations.[49] It rather supported the applicants' version that these consents were obtained on fraudulent grounds.[50] The judge agreed that the signing circumstances of these documents were suspicious,[51] and that the debt collecting agents, who worked on a "no trace no fee" basis, had a "vested interest" in the matters,[52] supporting the veracity of allegations regarding their unlawful practices. The judge concluded that it seemed that these consents "were signed neither voluntarily nor on an informed basis. Their validity was accordingly open to serious doubt".[53] The court also considered the validity of the initial loan agreements, which regularly included interest at 60% per annum and were concluded completely absent of, alternatively after severely defective, affordability assessments.[54] These transactions were conducted in breach of section 81 of the National Credit Act 34 of 2005 ("NCA"), and therefore constituted reckless credit.[55]

The court found "no sufficient reason" to justify the "unrestricted deprivation of a debtor's earnings and means of support" due to a lack of any prescribed limit to the number of EAOs granted against debtors, and the

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43 The Minister of Justice and Correctional Services, the Minister of Trade and Industry and the National Credit Regulator.

44 Sections 65J(2)(a), 65J(2)(b)(1) and 65J(ii) of the MCA.

45 *University of Stellenbosch Legal Aid Clinic v Minister of Justice* 2015 5 SA 221 (WCC) para 20.

46 Para 21. Applicants specifically sought a declaration that in proceedings brought by a judgment creditor for the enforcement of any credit agreement in which the National Credit Act 34 of 2005 applies, section 45 of the MCA does not permit a judgment debtor to consent in writing to the jurisdiction of a magistrates' court other than that in which the judgment debtor resides or is employed.

47 Para 22.

48 Para 23.

49 See paras 24, 31: "The suggestion that a debtor would willingly agree to an EAO in terms of which almost half his salary is deducted monthly, is far-fetched and simply incapable of fair minded support."

50 Para 25.

51 Para 29.

52 Para 28.

53 Para 32.

54 Para 33.

55 Paras 34-38.

amount(s) payable in terms of these.[56] In reaching this conclusion, the court considered foreign law[57] and international conventions like the International Labour Organisation's Protection of Wages Convention and the United Nations Guiding Principles on Business and Human Rights, which highlighted the shortcomings in the South African system.[58] Desai J also stressed the Constitutional Court's emphasis on judicial oversight as "general principle" in cases where a person's property is attached with the view of seizing it from them.[59] He cited the judgments in the eminent cases of *Chief Lesapo v The North West Agricultural Bank* (*"Lesapo"*),[60] *Jaftha v Schoeman* (*"Jaftha"*)[61] and *Gundwana v Steko Development CC* (*"Gundwana"*),[62] which all confirmed that a lack of judicial supervision in these circumstances infringes on the debtor's constitutional rights. The court concluded that "[i]n the light of the obvious similarities, the arguments for judicial oversight in *Lesapo*, *Jaftha* and *Gundwana* apply with equal force to the issuance of EAOs".[63]

The judge therefore opined that the consequences of EAOs have a "direct impact" on several constitutionally enshrined rights, like the right to shelter and human dignity.[64] The court is obviously very protective of every citizen's right of access to courts,[65] and heavily criticised the respondents' *modus operandi* of "forum shopping" and "navigating around" jurisdictions of courts, which are accessible to the debtor and their employer, in favour of courts that have no jurisdiction and are far removed from the debtor's influence.[66] The judge noted that when pressed on the issue, respondents conceded that the relevant EAOs, which were granted by irregular courts, were in fact unlawful.[67]

In consideration of the above, the court ordered that the EAOs issued against the second to sixteenth applicants "are declared to be unlawful, invalid and of no force and effect".[68] The court granted the applicants' requested relief in so far as that section 65J(2) of the MCA was declared unconstitutional to the extent that it allowed for the issuing of EAOs without judicial oversight.[69] The court also agreed that, in matters falling under the auspices of the NCA, consent to the jurisdiction of courts alien to the debtor was not permitted.[70] In addition, the court took proactive steps in ordering the first to third respondents, the HRC, the LSSA and the advice offices, to take steps to ensure

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56 Para 39.
57 See paras 42-49. The court considered five jurisdictions; the United States of America, Germany, Australia, Rwanda and England and Whales, who all impose some limit or cap to the legally attachable amount of a debtor's monthly salary.
58 Paras 67-74.
59 Para 76.
60 2000 1 SA 409 (CC).
61 2005 2 SA 140 (CC).
62 2011 3 SA 608 (CC).
63 *University of Stellenbosch Legal Aid Clinic v Minister of Justice* 2015 5 SA 221 (WCC) para 81.
64 Paras 40-41.
65 In para 51 Desai J states that this right "is fundamental to the rule of law in a constitutional state".
66 Paras 51-64.
67 Para 63.
68 Order 1.
69 Order 2.
70 Order 3.

that debtors are informed of their rights, and it ordered the Law Society of the Northern Province to investigate the conduct of the seventeenth respondent[71] for unethical behaviour.[72]

Because it ruled on the constitutional validity of the relevant legislation in its judgment, the Constitutional Court had to confirm the order made by the High Court of South Africa before it had any force.[73] After having heard the matter on 3 March 2016, the Constitutional Court delivered its judgment in *University of Stellenbosch* on 13 September 2016.[74]

In his 127 paragraph minority judgment,[75] Jafta J presented a thorough exposition of the state of the credit industry in South Africa, as well as the historic development of the current legislative framework which regulates it.[76] In doing so, he made a considerable effort to juxtapose sections 129 and 130 of the NCA with sections 57 and 58 of the MCA in arguing (*obiter*) that the latter sections run afoul of the NCA and, importantly, of section 34 of the Constitution of the Republic of South Africa, 1996 ("Constitution"),[77] in denying debtors judicial oversight before granting judgment against them.[78] Jafta J also specifically surveyed the legal framework that underpins the execution and collection process.[79] He referred to *Lesapo* in considering "the relationship between a judicial process and execution",[80] and was firm in his conclusion that "[t]here can be no execution without a judicial process as a prelude".[81] The judge then discussed the undisputed facts of the case of just one of the applicants,[82] identified the issues and summarised the litigation and High Court order which led to the current matter.[83]

Jafta J then engaged with the first question before him, namely whether the declaration of invalidity of section 65J(2) of the MCA should be confirmed.[84] In investigating the issue, he opined that the court should enquire whether the order was "properly made" (in so far as "the impugned provision unjustifiably limits rights entrenched in the Bill of Rights"),[85] and not just concern itself with the fervour of the respondents' objection thereto.[86] The succinct question was whether the disputed sections failed to provide for judicial oversight in granting the EAOs, and if so, whether that failure constituted a

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71 Flemix & Associates Incorporated.
72 Orders 4 and 8.
73 Sections 167(5) and 172(2) of the Constitution.
74 *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic; Mavava Trading 279 (Pty) Ltd v University of Stellenbosch Legal Aid Clinic* 2016 6 SA 596 (CC).
75 Paras 1-127.
76 Paras 6-40.
77 The right of access to courts.
78 Paras 15-32.
79 Paras 33-40.
80 Para 33.
81 Para 34.
82 Second applicant's case is discussed in paras 42-57.
83 Paras 58-68.
84 Paras 69-109.
85 Para 70.
86 Paras 69 and 72. Jafta J notes that the parties agreed on the issue of invalidity of the relevant provisions, but maintained that such a concession would not hinder the court's duty to determine unconstitutionality.

breach of section 34 of the Constitution.[87] After defining the phrase "judicial oversight",[88] the judge sought to interpret the relevant section in line with the principle that supports an interpretation granting provisions "a meaning that preserves its validity".[89] Applying this method, the learned judge reasoned that a correct interpretation and application of section 65J of the MCA in fact required judicial oversight, which left no room for clerks of the court to issue EAOs.[90] Any different interpretation, as was accepted by the High Court and is followed in the majority judgment in *University of Stellenbosch*, resulted from a "widespread incorrect application" of this section, which necessitated the court to make a declaration that only a court can issue EAOs.[91] In the premise, the judge refused to uphold the High Court's order of invalidity.[92]

In turning to the second question, Jafta J then considered the respondents' appeal against the High Court's order

> "that in proceedings brought by a creditor for the enforcement of any credit agreement to which the National Credit Act 34 of 2005 . . . applies, section 45 of the Magistrates' Courts Act does not permit a debtor to consent in writing to the jurisdiction of a magistrates' court other than that in which that debtor resides or is employed."[93]

The judge dismissed the respondents' "clever argument",[94] which was designed to dismantle the prohibition that NCA sections 90 and 91 place on the extension of jurisdiction to alien courts, as allowed by MCA section 45, finding that the latter is in fact "limit[ed]" by the relevant provisions of the NCA.[95] The judge also dismissed the respondents' argument that this prohibition breached the party's section 34 right of access to courts, finding this argument unfairly stacked in favour of the creditor to the detriment of the debtor.[96]

In delivering the concise majority judgment[97] Cameron J disagreed with Jafta J's broad approach, and affirmed the High Court's credence that judicial oversight should also apply to the execution process.[98] The judge agreed with Desai J that a lack of judicial oversight posed a threat to constitutional guarantees like the right of access to courts as well as "the livelihood and dignity of low-income earners".[99] Cameron J rejected the argument that the abuse of section 65J could be attributed solely to a "widespread incorrect practical application of the provision"[100] as it failed to provide for orders granted by the clerk of the court. Instead, the judge argued that in circumstances where the EAO was

87 Para 71.
88 In para 74: "'judicial oversight' was defined in *Jaftha* by this Court as denoting a decision by a court, following a consideration of relevant facts".
89 See para 76 and authority quoted therein.
90 Paras 77-109.
91 Para 93.
92 Paras 94 and 127.
93 Para 110.
94 Para 115.
95 Para 118.
96 Paras 122-126.
97 Paras 128-161.
98 Paras 129-133.
99 Para 132.
100 Para 134.

based on the debtor's consent, the MCA provided for exactly this mechanism (in other words "judicially unsanctioned execution").[101] In his concurring judgment, Zondo J elaborated on the appropriate remedy that the court should award under the circumstances.[102] He opined that although the imputed MCA section was in essence invalid, the High Court's "order of notional severance" was inappropriate. The judge's view was that the problem was rather one of "omission", in as much as "[w]hat is constitutionally offensive is the absence in section 65J(2)(a) of words requiring judicial oversight before the issuing of an emoluments attachment order when the judgment debtor has consented thereto in writing".[103] The appropriate remedy was therefore "reading-in",[104] and the court accordingly avoided confirming the High Court's order of constitutional invalidity, but rather ordered a change in the wording of section 65J of the MCA to make it consistent with section 34 of the Constitution. In dismissing the appeals from the High Court, the Constitutional Court also upheld the High Court's order that, for the purposes of issuing EAOs, section 45 of the MCA did not permit a debtor to consent in writing to the jurisdiction of a magistrates' court other than where they reside and/or work.

In reaching its decision, it is important to note that the Constitutional Court also grappled with the question of whether the order should apply retrospectively, or only prospectively. Cameron J indicated that affected debtors would receive the benefit of the High Court's order immediately, from the date of that order.[105] The judge listed the arguments of both applicants and respondents,[106] and was swayed by the latter's insistence that the matter was one of "considerable complexity, best regulated by the Legislature".[107] Zondo J agreed.[108] As a result, the court in *University of Stellenbosch* issued a prospective order only.

4 Significance of the judgments

The Desai judgment in the Western Cape High Court had an immediate impact on the credit industry and the EAO environment. Shortly after its release, the DJCD issued a short media statement[109] in which the Department referred to the judgment and warned creditors to abide by the "sentiments" expressed therein. Practically, this meant ensuring that future EAOs were obtained legally and that any that had been effected illegally in the past, were rescinded. Significantly, the DJCD encouraged employers to get involved in their employees' financial wellbeing. They advised employers to "approach the clerks of the courts *where the EAOs originated* to ensure that judgment has been granted lawfully, check how much of a debtor's salary is committed

[101] Paras 134-148.
[102] Paras 162-211.
[103] Para 204.
[104] Para 206.
[105] Para 154.
[106] Paras 156-158.
[107] Para 159.
[108] Para 211.
[109] On 20 July 2015.

to EAOs and whether he or she can afford another deduction".[110] The statement also indicated that the department was "finalizing a Magistrates' Courts Amendment Bill in an attempt to curb the abuses of the debt recovery procedure system".[111] As a result, the Courts Of Law Amendment Bill[112] was introduced to the National Assembly on 11 May 2016.[113]

After 13 September 2016, efforts to enact legislation to address EAO abuses were certainly bolstered by the Constitutional Court's directive to change the wording of the relevant provisions of the MCA. In his judgment, Cameron J noted that the DJCD in fact indicated that "legislation is pending to address the abuse of emoluments attachment orders", and that this Bill had already been circulating in its second draft.[114] Consequently, the President signed and assented to the Courts of Law Amendment Act 7 of 2017 ("CLA") on 31 July 2017, which Act came into operation on 2 August 2018. It is envisaged that the CLA will have a significant impact on the EAO legal landscape as its stated purpose clearly indicates its goal to amend all the most important provisions applicable to the debt collection process, including those relevant to EAOs.[115]

I am delighted with the CLA's addition to the MCA in the form of the new section 36(3),[116] as this will now allow for the discharge of judgments in circumstances where the debt, legal interest and costs have been paid in full.[117] As previously argued,[118] the existing framework under the MCA affords insufficient legal recourse to judgment debtors who are in this position. It creates an untenable diversity in discretion in the judgments of magistrates whose subjective legal findings have far-reaching consequences for already distressed borrowers. This situation could ultimately only be alleviated by

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[110] [Own emphasis]. Ministry of Justice and Correctional Services "Justice Department Finalising its Magistrate Courts Bill to Curb Debt Abuse" (20-07-2015) *Department: Justice and Constitutional Development* <http://www.justice.gov.za/m_statements/2015/20150720-DebtAbuse.html> (accessed 14-03-2018).

[111] Ministry of Justice and Correctional Services "Justice Department Finalising its Magistrate Courts Bill to Curb Debt Abuse" *Department: Justice and Constitutional Development.*

[112] [B8 – 2016].

[113] Parliamentary Monitoring Group "Courts of Law Amendment Bill (B6-2016)" (2017) *Parliamentary Monitoring Group* <https://pmg.org.za/bill/643/> (accessed 14-03-2018).

[114] *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) para 158.

[115] The purpose of the Act will be

> "[t]o amend the Magistrates' Courts Act, 1944, so as to insert definitions; to regulate the rescission of judgments where the judgment debt has been paid; to further regulate jurisdiction by consent of parties; to regulate the factors a court must take into consideration to make a just and equitable order; to further regulate the payment of debts in instalments or otherwise; to further regulate consent to judgments and orders for the payment of judgment debts in instalments; to further regulate offers by judgment debtors after judgment; to further regulate the issuing of emoluments attachment orders; to further regulate debt collection proceedings pursuant to judgments granted by a court for a regional division; to further regulate the suspension of execution of a debt; to further regulate the abandonment of judgments; and to provide for certain offences and penalties relating to judgments, emoluments attachment orders and instalment orders; to amend the Superior Courts Act, 2013, so as to provide for the rescission of judgments by consent and the rescission of judgments where the judgment debt has been paid; and to provide for matters connected therewith."

[116] Section 2 of the CLA.

[117] The judgment may be rescinded on application (which may be heard by the magistrate in chambers) in the prescribed form by the debtor or any affected person.

[118] Van der Merwe (2008) *JJS*.

legislative amendment.[119] The insertion will therefore fill a serious lacuna in the South African legal system, and bring about legal certainty in an area where it is most needed.[120] A further welcome addition engineered by the CLA is that of MCA section 45(3),[121] which will, in accordance with the orders of court discussed above,[122] explicitly outlaw relevant consents to extend jurisdictions to courts who have no section 28 jurisdiction over the debtor.[123] The CLA also adds additional safeguards, *inter alia* with regard to the NCA, that have to be in place for debtors to enter admissions of liability and consent to judgments in terms of MCA sections 57 and 58.[124]

The CLA inserts[125] a new section 55A, applicable to the provisions of chapters 8[126] and 9[127] of the MCA. This section radically extends the scope of factors which the court has to take into consideration in awarding EAOs. In terms of current legislation the court's enquiry is limited to the "nature" of the debtor's income and the amount of, firstly, "necessary expenses" to maintain themselves and their dependents and, secondly, required to pay other obligations "in terms of an order of court".[128] Under the CLA, the court would also have to consider various other factors to determine whether such an order would be "just and equitable".[129] These factors include a wide range of considerations including the size and history of the debt, the debtor's personal circumstances, as well as broad social justice concerns.[130]

It is likely in the application of this new section 55A within the ambit of section 65, which deals with offers by judgment debtors post judgment, where the CLA's impact will be most profound.[131] Akin, as is the case with sections 57 and 58, orders in terms of section 65 will also be more cumbersome for creditors to come by. The provisions of the CLA leave no doubt that a magistrate, and not a clerk, will in future only issue an EAO after considering a debtor's circumstances and determining the monthly deductions to be

[119] 84.
[120] 77-82.
[121] Section 3 of the CLA.
[122] See the text to part 3 above.
[123] In terms of s 28(1)(a) of the MCA this includes, *inter alia*, "[a]ny person who resides, carries on business or is employed within the district or regional division".
[124] Sections 5-6 of the CLA.
[125] Section 4.
[126] Chapter VIII – Recovery of debts (ss 55-60).
[127] Chapter IX – Execution (ss 61-79).
[128] MCA s 65D(4)(a).
[129] Section 4 of the CLA.
[130] The relevant factors are listed as
> "the size of the debt; the circumstances in which the debt arose; the availability of alternatives to recover the debt; the interests of the plaintiff or judgment creditor; the rights and needs of the elderly, children, persons with disabilities and households headed by women; social values and implications; the amount and nature of the defendant's or judgment debtor's income; the amounts needed by the defendant or judgment 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 order of court, agreement or otherwise in respect of his or her other commitments; and whether the order would, in the circumstances of the case, be grossly disproportionate.''

[131] Sections 7-9 of the CLA.

"appropriate" and the order to be "just and equitable".[132] Importantly, the CLA inserts a new section,[133] which will limit the total instalment amount that can be deducted in terms of one or more EAOs to 25% of the debtor's basic gross monthly salary.[134] This is also a significant development in an environment where allegations are rife that creditors currently abuse EAOs to deduct 50% or more from some unfortunate debtors' salaries.[135]

The above legislative improvements are essential. They will give effect to the most important orders of court and will improve the plight of future debtors who run afoul of unscrupulous creditors and collection agencies. But, to quote Desai J, "[t]hat, however, is not the end of this matter".[136] There are undoubtedly tens of thousands, if not hundreds of thousands, maybe even millions, of debtors who are victims of existing dubious EAOs. This was exactly Desai J's concern when he expanded his order to require compliance from more than just the legislative authority. Noting the seventeenth respondent's statement that they manage more than 150 000 active cases, and on the "safe" assumption that many more debtors are being abused, Desai J ordered pro-active steps since one "cannot in good conscience ignore their plight".[137] The hope is that the investigations and interventions required from the first to the third respondents, the HRC, the LSSA and the advice offices, would serve to secure the interests of the public at large.[138]

The overall significance and influence of these two judgments are tremendous, specifically with regard to the implication of the judicial oversight and access to justice (through access to approachable courts) which is required in terms thereof. These measures have served to bring the relevant provisions of the MCA in line with our constitutional dispensation and to combat the exploitation of poor people. It is therefore not far-fetched to argue that it has reduced the risk of more tragedies such as Marikana occurring in the future. It undoubtedly softened the negative social and economic impact of unlawful collections.[139] One could also argue that the influence of the judgments has already filtered down to the man on the street, and has played a pivotal role in the marked decrease in judgments regarding debt matters.[140] Whether the judgments have however succeeded in causing a complete turnaround in the bad debt and credit industry, is a question that is still up for debate.

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[132] The CLA confirms repeatedly that enquiries should be made in order to only award EAOs "after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate". See ss 7-9.

[133] Section 65J(1A) of the MCA.

[134] Section 9 of the CLA.

[135] See, eg, para 33 of the judgment of Desai J in *University of Stellenbosch Legal Aid Clinic v Minister of Justice* 2015 5 SA 221 (WCC).

[136] Para 65.

[137] Para 66.

[138] See orders 4 and 8.

[139] As discussed in, *inter alia*, Van der Merwe (2008) *JJS* 84-85.

[140] Statistics South Africa "Indebted South Africans Showing Resilience?" (21-04-2016) *Statistics South Africa* <http://www.statssa.gov.za/?p=6437.> (accessed 15-03-2018).

5 Evaluation and unresolved issues

This article endeavoured to describe the background and run-up to the recent prominent EAO High Court and Constitutional Court cases involving the Stellenbosch University Legal Aid Clinic (as it then was). It also discussed the respective judgments and considered the significance of each. In conclusion, it is sensible to evaluate the efficacy of the judgments in considering the current EAO legal landscape. In the process, certain as yet unresolved issues will be identified and contemplated.

I have previously asserted[141] that one of the main problems with our EAO system is the fraudulent acquisition of judgments and resulting EAOs, which are often based on illegal consents and a blatant abuse of process. Clerks, without any judicial oversight, issued EAOs from incorrect jurisdictions. The abuse extended to the period after the EAOs were awarded, when it transpired that creditors made unilateral amendments to increase repayments due to illegal autonomously charged costs and interest. As a result, exorbitant amounts were charged which were completely disproportionate to the debtor's income.[142] Reviewing and rescinding these EAOs proved highly problematic due to a system that seemed to be geared to benefit the creditor exclusively, to the severe detriment of the debtor.[143] This abuse was possible due to a lack of numeracy-, literacy- and legal skills on the part of unqualified clerks of the court. A frail legislative framework fuelled a manipulable general process and placed undue reliance on the creditor's *bona fides*, both before and after judgment. This, along with creditors' unscrupulous attitudes and questionable political will to bring about real change, must be factored in as causes for this situation.[144] I made suggestions elsewhere to address these issues.[145]

One must keep in mind that *University of Stellenbosch* did not attempt to outlaw the use of EAOs, simply because of their abuse. As long as they are enforced in a legally responsible manner, EAOs undeniably have an important role to play in the country's debt recovery system. The judgment also does not affect the validity of the underlying judgment debt. Debtors should, of course, be expected to pay what is legally due, also by means of collection through legal EAOs. In determining the amount of this indebtedness as well as the extent of the collection method, one should however abide by the prevailing legislation, including the provisions of the NCA with regard to sanctions on creditors due to the granting of reckless credit.[146] It is in this regard that the impact of the two EAO judgments will be most profound: they have manufactured a dramatic legislative amendment. In terms of the CLA, Magistrates' Courts are bound to the precedent of the High Court and Constitutional Court in their application of EAO processes. As a result, creditors will find it even more difficult to repeat the abuses of the past as discussed above.

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[141] See Van der Merwe (2008) JJS.
[142] 73-76.
[143] 77-82.
[144] 76-77.
[145] 82-84.
[146] See Part D for regulations concerning over-indebtedness and reckless credit.

That is all good and well for EAO matters after 8 July 2015, but what about the countless number of EAOs that have been pursued illegally prior to this date? The Constitutional Court clearly indicated that the judicial oversight and jurisdictional prudence demanded in terms of the High Court's order are only effective from the date of issue thereof.[147] The amendments to the legislation, which give effect to the judgments, will only be valid prospectively.[148] Cameron J acknowledged the difficulty of this finding in his judgment, stating that "the grievous effect of this [issuing a prospective order only] is that past emoluments attachment orders, unscrupulously procured or issued, will continue to be operative, unless individually challenged".[149] The difficulties inherent to righting the wrongs of the past in these individual challenges have already been mentioned earlier in this article, and the situation is exasperated by the reality that orders awarded by practically inaccessible courts are not rescinded *mero motu*. The 20 July 2015 media statement by the DJCD confirmed as much, when employers are told to refer EAOs to the clerks of the courts "where the EAOs originated" to verify their validity.[150] The CLA does not seem to contain any provision that will address this specific concern either.[151]

A further unresolved issue is the result of the investigation that the Law Society of the Northern Province was ordered to conduct into the affairs of the seventeenth respondent in the High Court matter.[152] Although a copy of the proceedings, along with a letter requesting compliance with the order, was forwarded to the Law Society of the Northern Provinces on 16 July 2015,[153] no satisfactory answer has been forthcoming, and it seems that the particular collection agents are still conducting business as usual.[154] The same concern presents itself with regard to the second order of Desai J that was aimed at mobilising the legal fraternity to alert debtors to their rights in terms of the judgment. Very little seems to have been done in this regard, and the Clinic has recently addressed correspondence to the various organisations listed in the order to enquire as to their efforts during the more than two year period since the judgment was delivered.[155]

A further important unresolved issue requires attention. Due to the collections processes facilitated by unlawful EAOs, it has been estimated that

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147 Some have argued that the 28 July 2014 amendment of the Magistrates' Court Act Rules have outlawed EAOs granted without judicial oversight after that date. See, eg, Bregman Moodley Attorneys Inc. "When an Emolument Attachment Order (or Garnishee) Order is Invalid" *Bregman Moodley Attorneys Inc.* <https://www.bregmans.co.za/when-an-emolument-attachment-or-garnishee-order-is-invalid/> (accessed 15-03-2018). It is unclear what specific rule amendment(s) are relied on to substantiate this argument, and it is even less convincing in light of Cameron J's assertion in para 154 of *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).

148 Paras 159 and 211.

149 Para 159.

150 See the text to part 4 above.

151 Para 9 of the CLA still requires the court that issued the EAO, to adjudicate on its continued validity in terms of the amended s 65J(6) and (7) of the MCA.

152 Order 4 in *University of Stellenbosch Legal Aid Clinic v Minister of Justice* 2015 5 SA 221 (WCC).

153 Correspondence on file with author.

154 Flemix and Associates Incorporated <https://www.flemixinc.co.za/> (accessed 15-03-2018).

155 Correspondence on file with author.

"there must be over a billion rand" illegally deducted from employee salaries and paid to dishonest creditors and their collection agents.[156] How will these debtors be assisted and empowered to recover these amounts? There is no clear indication in the two judgments, and there does not appear to be any relevant precedent in our law. Debtors who are desirous to take action in this regard are further hamstrung by several practical considerations. Most notably, how will they establish and then prove the quantum of their claim? In my experience, when pressed about the extent of deductions by manner of EAOs, attorneys for the creditors typically produce several pages of bills of costs detailing dozens to hundreds of cost items and interest amounts, calculated in various indeterminate ways. The debtor is then left having to sort through volumes of information requiring some complicated analysis[157] to attempt to separate the lawful from the unlawful. Often the debtor will not have the requisite skill and knowledge available to do this. This concern is exasperated by the legal uncertainty with regard to exactly what costs and interest rates are allowed to be included in these matters. One case study is presented to illustrate the problem.

During April 2016, one Mr C,[158] who had purchased food on credit for R1 404 during 2008, approached the Clinic. In 2009, an EAO was issued against Mr C as a result of an acknowledgement of debt which he had allegedly signed during 2008. When Mr C enquired about the balance of his debt in April 2016, the creditor's attorney promptly informed his employer to cancel the order as the debt had been paid in full. At that time, even on the creditor's version of events (which is disputed), an amount of R7 030 had already been collected from the debtor, more than five times the original debt.[159] One shudders to think how much more would have been collected had the enquiry not been made at that stage. When the relevant collection attorney was requested to provide a detailed breakdown of the transaction, it forwarded a four-page statement stipulating cost items like correspondence, telephone calls and attendances, which had been added to the capital amount in justifying the amount collected. The costs indicated in the statement, almost R6 000, failed to add up to the totals reflected therein. Some of these costs were incurred prior to the judgment and EAO, but most thereafter. There was also no indication of the amount or rate of interest that had been charged against the debtor. Should unverified, unilaterally charged legal costs be allowed to be added to the debtor's burden? What amount should, legally, be recoverable from the debtor in circumstances like this?

The NCA normally applies to the types of transactions under discussion in this article.[160] When this is the case, section 101 of the Act defines the items that can be charged as cost of credit, in other words the principal debt, interest and various fees and costs, which the credit provider can recover from the

[156] See Van der Merwe (2008) *JJS* 76 n 19.
[157] For example, keeping track of interest rates and calculations.
[158] Acronym used for a Law Clinic client, file on record with author.
[159] The debtor alleges that more than R7800 has been paid to the creditor in this case.
[160] See s 4 of the NCA. A full discussion of the application of the relevant Act falls outside the scope of this article.

consumer in terms of an EAO.[161] These items include "default administration charges" and "collection costs".[162] Section 1 of the NCA defines "collection costs" as "an amount that may be charged by a credit provider in respect of enforcement of a consumer's monetary obligations under a credit agreement". In addition, section 103(5) of the NCA provides as follows:

> "Despite any provision of the common law or a credit agreement to the contrary, the amounts contemplated in section 101(1)*(b)* to *(g)* that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the default occurs."

There still seems to be a divergence about the accurate interpretation of section 103(5) of the NCA, despite the judgment of Du Plessis J in *National Credit Regulator v Nedbank Limited*.[163] In this case, the court issued a declaratory order in respect of section 103(5),[164] which clearly vindicates the application of what has been called the "statutory *in duplum* rule".[165] On a strict interpretation of the NCA and the Du Plessis J judgment, the creditor would only be able to collect a total amount of R2 808 in Mr C's case, including interest and legal costs.[166] The amount collected in addition to this amount should thus be repaid to the debtor. The opposing argument, as generally advanced on behalf of creditors, is that the costs, which are limited by the operation of sections 101 and 103 of the NCA, only include the "in-house soft collection costs" incurred to collect the debt.[167] They argue that it does not include the "collateral procedural costs of judgment" in terms of taxed bills of costs awarded after judgment.[168] On this interpretation, creditors and their attorneys would be able to supplement the debtor's liability in terms of section 101 and 103 of the NCA with the legal costs incurred through the rendering of professional legal services.

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[161] Section 101.

[162] Section 101(1)(f) and (g).

[163] 2009 6 SA 295 (GNP). The declaratory order was later confirmed on appeal in *Nedbank Ltd v The National Credit Regulator* 2011 3 SA 581 (SCA).

[164] The order reads as follows:

> "On a proper interpretation of section 103(5) read with section 101 (1)(b) to (g) of the National Credit Act, 2005:
>
> 1. the amounts contemplated in sections 101(1)(b) to (g) which accrue while the consumer is in default may not exceed, in aggregate, the unpaid balance of the principal debt when the default occurred;
> 2. once the total charges referred to in section 101(1)(b) to (g) equal the amount of the unpaid balance, no further charges may be levied;
>
> once the total charges referred to in sections 101 (1)(b) to (g) equal the amount of the unpaid balance, payments made by a consumer thereafter during a period of default do not have the effect of permitting the credit provider to charge further interest while such default persists."

[165] See, eg, M Kelly-Louw "Better Consumer Protection under the Statutory in duplum Rule" (2007) 19 *SA Merc LJ* 337.

[166] 340.

[167] This argument has been put forward in the Opposing Affidavit of the seventeenth respondent in the sub judice case of *Lonmin Ltd v CG Steyn Inc T/A Steyn Attorneys* NWHC case no M619/2016 of 26 April 2018. See para 8.52.1 available at <https://www.adraonline.co.za/file/58c91eb475c96/law-society-of-the-northen-province-opposing-affidavit.pdf> (accessed 16-03-2018).

[168] Para 8.53.

In January 2015, The National Credit Regulator introduced proposed guidelines for the interpretation of section 103(5) of the NCA.[169] In this circular, the Regulator avers that the definition of collection costs in terms of the NCA is wide enough to cover legal fees incurred in collecting the debt, which should then fall under the ambit of the section 103(5) limitation.[170] The Regulator is however of the opinion that once judgment is granted against the debtor, interest starts running anew on the judgment amount at the interest rate ordered by court.[171] Noticeably, no mention is made of whether this guideline applies *mutatis mutandis* to legal costs. One could argue that the failure of the Regulator to specify that legal costs also revive when judgment is awarded, is indicative of its opinion that, in fact, it does not.

Some clarity on this issue could come from an intriguing avenue in the near future. During November 2016, the North West High Court issued an application by Lonmin Ltd, Anglo American Platinum Ltd, the Minister of Finance and Q-Link (Pty) Ltd in the *sub judice* case of *Lonmin Ltd v CG Steyn Inc t/a Steyn Attorneys*.[172] In this case, the applicants have approached the court seeking, for the sake of the "wellbeing" of their employees,[173] a declaratory order to confirm that

> "[c]ollection cost, as referred to in Section 101(1)(g), as defined in Section 1 and as applied in Section 103(5) of the National Credit Act 34 of 2005 ("the NCA"), includes all legal fees incurred by the credit provider to enforce the credit agreement and specifically includes fees for attorneys and advocates (where used) charged before as well as during litigation."[174]

The applicants also want the court to declare that section 103(5) of the NCA is applicable from the date of default to date of final settlement of the debt, regardless of whether or not a judgment was awarded.[175] In addition, the court is requested to order extra judicial oversight in the EAO process, specifically aimed at the veracity of costs and fees levied on the matter.[176] The respondents have opposed the matter and arguments for both parties were presented during March 2018. At the time of writing of this article, judgment is pending in the matter.[177]

Mr C's case is only one of several similar cases that the Clinic deals with on a regular basis. Many indigent members of society rely on organisations like the Clinic to recover money illegally misappropriated from them, and

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[169] National Credit Regulator "Circular no. 03 of 2015 – Proposed guidelines for the interpretation and application of section 103(5) of the National Credit Act 34 of 2005" (01-2015) *The National Credit Regulator* <https://www.ncr.org.za/documents/pages/circulars/jan2015/Circular%203%20of%202015%20-%20Section%20103(5)%20-%20Proposed%20Guidelines.pdf.> (accessed 16-03-2018).

[170] Paras 4.4 and 4.5.

[171] Para 4.6.

[172] NWHC case no M619/2016 of 26 April 2018. For copies of the applicant's pleadings, see Notice of Motion available at <http://www.adraonline.co.za/file/583695c27f294/1-notice-of-motion.pdf> (accessed 16-03-2018); Found Affidavit part 1 available at <http://www.adraonline.co.za/file/5836964d06f27/2-founding-affidavit-part-1.pdf> (accessed 16-03-2018); and Founding Affidavit part 2 available at <http://www.adraonline.co.za/file/583696e8f1970/3-founding-affidavit-part-2.pdf> (accessed 16-3-2018).

[173] *Lonmin Ltd v CG Steyn Inc T/A Steyn Attorneys* NWHC case no M619/2016 of 26 April 2018 para 92 of the applicant's Founding Affidavit.

[174] See prayer 4.1 of applicant's Notice of Motion.

[175] See prayer 4.2 of applicant's Notice of Motion.

[176] See prayer 4.3 of applicant's Notice of Motion.

[177] Update: The judgment was since handed down and appealed, which appeal was dismissed with costs.

this is also the case when they are victimised by unscrupulous lenders. It remains to be seen what the full impact of the amendments in store for the MCA will be. The important role-players in the EAO legal landscape will be tasked with interpreting and applying these within the existing legislative framework. One should be hopeful that the judicial and legislative influence of the past few years will contribute to dismantling the negative image of exploitation associated with the South African credit industry,[178] and bring about reasonable and fair opportunities for all concerned.

SUMMARY

The South African Constitutional Court delivered a landmark judgment in relation to emolument attachment orders ("EAOs") in its 2016 ruling of *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*. The court confirmed that EAOs were frequently obtained unlawfully and in circumstances where debtors' constitutional rights and freedoms were completely disregarded. The judgment followed on decades of legal disputes between creditors, abetted by their collection agents, and debtors, represented by organisations like the University of Stellenbosch Law Clinic. Following this judgment, legislation has been enacted to address some of the more pertinent frailties in the Magistrates' Courts Act 32 of 1944 ("MCA") in order to provide for more robust judicial oversight in the granting of EAOs. This article offers a unique perspective on the background that merited this significant judicial and legislative intervention. It then considers the significance and impact of the judgment and impending law reform, and evaluates whether the enactment of the Courts of Law Amendment Act 7 of 2017 ("CLA") addresses all the relevant concerns. It is suggested that uncertainty still remains regarding EAOs granted before the judgment, as well as with regard to the recovery of illegally deducted amounts.

[178] See, eg, H Coetzee & M Roestoff "Consumer debt relief in South-Africa – Should the insolvency system provide for NINA debtors? Lessons from New Zealand" (2013) 22 3 *Int Insol Rev* 188 where the authors state that "despite international trends to accommodate overburdened debtors, South Africa has yet to provide adequate relief to debtors and the law remains largely creditor orientated."