

Welcome to the SA Payroll Association talk on:

Courts of Law Amendment Act – Act no. 7 of 2017

Gazetted 2<sup>nd</sup> August 2017

Presented on

6<sup>th</sup> September 2017

Presented by David Brown

# Overview of previous EAO Legislation - Acknowledgement of Debt *[Section 57]*

If the Defendant (the employee) doesn't pay the original debt –

1. Visited by debt collector
2. Defendant is served with a summons
3. Tricked into signing 'Acknowledgement of Debt' and offer to pay in instalments

Defendant **acknowledges the debt, plus costs, and any other amount**

When the defendant then doesn't pay according to the offer -

1. Without notice to the defendant, the plaintiff will apply for judgment
2. Accompanied by the written acknowledgement of debt and offer to pay
3. **Clerk of the Court** will enter **judgment** for the amount of the debt that the defendant has acknowledged
4. If Defendant is not present, judgment will be issued by default
5. 57(2)(ii) Judgment considered as if issued under Section 65A(1)

# Overview of EAO Legislation - Consent to Judgement

## *[Section 58]*

Section 58 of the MCA –

1. Allows for an employee to sign a 'Consent to Judgment' in favour of the creditor
2. For the amount of the debt plus the costs claimed, or for any other amount
3. Judgment is issued by the **Clerk of the Court**
4. Judgment is deemed to be an order of the court referred to in Section 65A(1)

# Overview of EAO Legislation - Offer by Judgment Debtor *[Section 65A]*

## After a court has given judgment –

- Judgment debtor makes a written offer to the judgment creditor to pay the judgment debt amount in instalments
- BEFORE the issue of the notice i.t.o. Section 65A(1)
- **Clerk of the Court** shall order the judgment debtor to pay
- This order shall be deemed to be an order of the court that is referred to in Section 65A(1)

# Overview of EAO Legislation - Notice to Judgement Debtor

## *[Section 65A(1)]*

- If payment is not made within 10 days of the Judgement or Order
- Judgement Creditor **may** issue a Notice calling on the Judgment Debtor -
  - To appear before the court on a date specified
  - To enable the court to inquire into the judgment debtor's financial position
  - To make such order as the court may deem just and equitable
- In terms of Section 65A(1), the Notice must be issued from the court of the district in which the Judgment Debtor –
  1. Resides,
  2. Carries on business, or
  3. Is employed

This process provides for judicial oversight of the Judgement Debtor's financial position - its absence of which was the gist of Judge Desai's ruling

# Judge Desai Ruling

What was brought before the Court?

## 1. EAO's were issued outside of the jurisdiction of:

*'the court of the district in which the employer of the judgment debtor resides, carries on business or is employed'*

## 2. The judgment debtors were not afforded –

The protection of Section 65(A)(1) i.e. judicial oversight, by having the Magistrate hear whether they could afford the payments they had signed for

These referred particularly to Section 58 i.e. Consent to Judgment

## 3. Western Cape High Court was requested to declare the 15 x EAO's submitted to it illegal

# Judge Desai Ruling

## What did the Court's Ruling say?

### Western Cape High Court Judge Siraj Desai –

Based on jurisdiction, declared the 15 x EAO's issued by unsecured lender Bridge:

*“unlawful, invalid and of no force and effect”, and*

*“irregularly if not unlawfully obtained”*

### Judge Desai also –

1. Declared section 58 of MCA that allows a debtor to consent to a judgement for outstanding debt to be inconsistent with the Constitution because it by-passes judicial oversight under 65A(1) during the issuing of an EAO against the debtor
2. Suggested that *“thousands if not tens of thousands”* of Flemix's other active cases – some 150 000 – are based on unlawfully obtained EAO's
3. Added that: ***“I am not at liberty to inquire into ANY, or all, of those orders”***

# Constitutional Court referred to NCA Act (Act 34 of 2005) section which states:

- Required procedures before debt enforcement
- Section 129(1) If the consumer is in default under a credit agreement, the credit provider—
  - (a) may draw the default to the notice of the consumer in writing and propose to the consumer that the credit agreement be referred to a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
  - (b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before—
    - (i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(9), as the case may be; and (ii) meeting any further requirements set out in section 130.



# Constitutional Appeal Hearing

- **Re-enforced** Section 129(1)(a) which requires a credit provider, before commencing any legal proceeding to enforce a credit agreement, to draw the default to the notice of the consumer in writing.
- It has been described as a ‘gateway’ provision, or a ‘new pre-litigation layer to the enforcement process’.
- Although section 129(1)(a) says the credit provider ‘may’ draw the consumer’s default to his or her notice, Section 129(1)(b)(i) precludes the commencement of legal proceedings unless notice is first given.
- So, in effect, the notice is compulsory

# Constitutional Court judgment

- **Section 45** used when getting judgment debtors to sign Acknowledgment of debt and Consent to Judgment
- **Re-enforced** jurisdictional issue to the effect that Section 45 of the 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.

**So..What changes have been made to the  
Magistrate's Act 32 of 1944?**

**It is called:**

**The Courts of Law**

**Amendment Act – Act no. 7 of 2017**

# Section 55 – old Act

## 55 Definition

- In this Chapter, unless the context otherwise indicates '**debt**' means any liquidated sum of money due.
- [S. 55 amended by s. 8 of Act 19 of 1963 and substituted by s. 14 of Act 53 of 1970 and by s. 1 of Act 63 of 1976 .]

## Replaced with:

**55A.** For purposes of Chapters VIII and IX of this Act, the factors a court must take into account when considering whether an order is just and equitable, include, but are not limited to—

- (a) the size of the debt;
- (b) the circumstances in which the debt arose;
- (c) the availability of alternatives to recover the debt;
- (d) the interests of the plaintiff or judgment creditor;
- (e) the rights and needs of the elderly, children, persons with disabilities and households headed by women;

# Section 55 – Amendments continued

- (f) social values and implications;
- (g) the amount and nature of the defendant's or judgment debtor's income;
- (h) 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
- (i) whether the order would, in the circumstances of the case, be grossly disproportionate.”.

## Included in Section 57 – Cont'd

- 2(b) Offer to pay the amount of the debt and costs for which he or she admits liability, in instalments or otherwise;
- (1A) The offer referred to in subsection (1)(b) must—
- (a) set out full particulars of the defendant's—
    - (i) monthly or weekly income and expenditure;
    - (ii) other court orders or agreements, if any, with other creditors for payment of a debt and costs in instalments; and
  - (b) indicate the amount of the offered instalment;
- (2) If, after having been advised by the plaintiff or his or her attorney in writing that his or her offer has been accepted, the defendant fails to carry out the terms of his or her offer, **[the clerk of]** the court **[shall]** may, upon the written request of the plaintiff or his or her attorney and subject to subsection (2A)—
- [(i)](a) enter judgment in favour of the plaintiff for the amount or the outstanding balance of the amount of the debt for which the defendant has admitted liability, with costs; and
  - [(ii)](b) order the defendant to pay the judgment debt and costs in specified instalments or otherwise in accordance with his or her offer, and such order shall be deemed to be an order of the court mentioned in section 65A(1).

# Included in Section 58, 65A, 65J(1)

- Removed the ability of the Clerk of the Court to enter judgment against the defendant but left:
  - and subject to subsection (1B)— [i](a) enter judgment in favour of the plaintiff for the amount of the debt and the costs for which the defendant has consented to judgment; but subject to:
- (1C) The court—
  - (a) **may** request any relevant information from the plaintiff or his or her attorney in order for the court to be apprised of the defendant’s financial position at the time the judgment is requested;
  - (b) **must** act in terms of the provisions of the National Credit Act and the regulations thereunder dealing with over-indebtedness, reckless credit and affordability assessment, when considering a request for judgment in terms of this section, based on a credit agreement under the National Credit Act;
  - (c) **may**, if the defendant is employed, and after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate, authorise an emoluments attachment order referred to in section 65J; and
  - (d) **may**, notwithstanding the defendant’s consent to pay any scale of costs, make a costs order as it deems fit.

# Included in Section 65J – Emolument Attachment Orders

## Section (1)

- 65J. (1) (a) Subject to the provisions of subsection (2), a judgment creditor may cause an order (hereinafter referred to as an emoluments attachment order) to be issued from the court of the district in which the **[employer of the]** judgment debtor resides, carries on business or is employed **[, or, if the judgment debtor is employed by the State, in which the judgment debtor is employed]**.
- (1A) (a) The amount of the instalment payable or the total amount of instalments payable where there is more than one emoluments attachment order payable by the judgment debtor, may not exceed 25 per cent of the judgment debtor’s basic salary.
- (b) For purposes of this section, “basic salary” means the annual gross salary a judgment debtor is employed on divided by 12 and excludes additional remuneration for overtime or other allowances.



# Included in Section 65J – Emolument Attachment Orders

## Section (2)

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

# Included in Section 65J – Emolument Attachment Orders

## Section (2) – Opposing the proposed EAO

- (2B)(c) must state the grounds upon which the judgment debtor **or employer** wishes to oppose the issuing of the emoluments attachment order.
- (b) The grounds which may be used to oppose the issuing of the emoluments attachment order include, but are not limited to, the following:
  - (i) that the amounts claimed are erroneous or not in accordance with the law; or
  - (ii) that 25 per cent of the judgment debtor’s salary is already committed to other emoluments attachment orders and that the debtor will not have sufficient means left for his or her own maintenance or that of his or her dependants.
- (c) The notice of intention to oppose must be accompanied by—
  - (i) a certificate **by the employer** of the judgment debtor setting out particulars of :
    - (aa) all existing court orders against the judgment debtor or agreements with other creditors for payment of a debt and costs in instalments;
    - (bb) when reasonably attainable, the amounts needed by the debtor for necessary expenses and those of the persons dependent on him or her and for the making of periodical payments which he or she is obliged to make in terms of an agreement or otherwise in respect of his or her other commitments.
  - (ii) the contact details of all the relevant judgment creditors or their attorneys; and
  - (iii) the **latest salary advice** of the judgment debtor.

# Included in Section 65J – Emolument Attachment Orders

## Section (3)

- (3) (a) Any emoluments attachment order [**shall**] must be prepared [**by the judgment creditor or his attorney, shall be**] and signed by the judgment creditor or his or her attorney [**and the clerk of the court, and shall be served on the garnishee by the messenger of the court in the manner prescribed by the rules for the service of process**].

### New clauses inserted

(b) The clerk of the court must ensure that the **court**—

- (i) has authorised the emoluments attachment order; and
- (ii) has jurisdiction as provided for in subsection (1)(a),

before issuing an emoluments attachment order authorised in terms of subsection (2) by signing it and may either ask the judgment creditor or his or her attorney for more information or refer the authorisation order to the court in the case of any uncertainty

4(b) The judgment creditor or his or her attorney [**shall, at the reasonable request of the garnishee or the judgment debtor,**] must furnish [**him or her**] the garnishee and the judgment debtor, free of charge with a quarterly statement containing particulars of the payments received up to the date concerned and the balance owing.

# Included in Section 65J – Emolument Attachment Orders

## Section (6)

- (6) (a) If, after the service of such an emoluments attachment order on the garnishee, **the garnishee** believes or becomes aware or it is otherwise shown that the—
  - (i) judgment debtor, after satisfaction of the emoluments attachment order, will not have sufficient means for his or her own **[and his dependants’]** maintenance**[, the court shall]** or that of his or her dependants; or
  - (ii) amounts claimed are erroneous or not in accordance with the law, **the garnishee, judgment debtor or any other interested party** must without delay and in writing notify the judgment creditor or his or her attorney accordingly.
- (b) The judgment creditor or his or her attorney must, after receiving the notice contemplated in paragraph (a), without delay set the matter down for hearing in court **with notice to the garnishee, judgment debtor or any other interested party** referred to in paragraph (a).
- (c) The court may, after hearing all parties—
  - (i) rescind the emoluments attachment order or amend it in such a way that it will affect only the balance of the emoluments of the judgment debtor over and above such sufficient means; or
  - (ii) make any order it deems fit and reasonable in the circumstances.

Unfortunately what was removed from the Bill

**(d) No cost order shall be made with regard to the proceedings**

# Included in Section 65J – Emolument Attachment Orders Section (10)

**A bad, bad, bad piece of legislation with massive consequences for all parties:**

- Section 65J(10) (b) A **garnishee (you the Employer)** who—
  - (i) **unreasonably** fails to timeously deduct the amount of the emoluments attachment order provided for in subsection (4)(a); or
  - (ii) **unreasonably** fails to timeously stop the deductions when the judgment debt and costs have been paid in full,is liable to repay to **the judgment debtor (your employee)** any additional costs and interest which have accrued or any amount deducted from the salary of the judgment debtor after the judgment debt and costs have been paid in full as a result of such failure.

# New Section 106C

## **“Offences relating to judgments, emoluments attachment orders and instalment orders**

- 106C. (1) Any person who requires the applicant to consent to a judgment or any instalment order or emoluments attachment order prior to the granting of the loan, is guilty of an offence and on conviction liable to a fine or to imprisonment not exceeding three years.
- (2) Any person who fraudulently obtains or issues a judgment, or any instalment order or emoluments attachment order in terms of this Act, is guilty of an offence and on conviction liable to a fine or to imprisonment not exceeding three years.”.

# Transitional provisions

## **Nothing changes for existing EAO's**

15. (1) All legal proceedings in terms of sections 36, 45, 57, 58, 65, 65E, 65J, 65M, 73 or 86 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), which were instituted prior to the commencement of this Act and which are not concluded before the commencement of this Act, must be continued and concluded in all respects as if this Act had not been passed: Provided that, where applicable, the original judgment, instalment order or emoluments attachment order, upon which the proceedings in question are based, was obtained and granted in accordance with the law.

## **Court can set aside existing EAO's**

- (2) (a) A judgment creditor in whose favour a default judgment has been granted and a subsequent instalment order or emoluments attachment order (hereinafter referred to as a subsequent order) made, based on that default judgment, or a judgment debtor or any other person affected by that default judgment or subsequent order based on that default judgment, who has reason to believe that that default judgment or subsequent order was not obtained and granted in accordance with the law, may apply for the review of that default judgment or subsequent order.

# FINANCIAL IMPLICATIONS FOR THE ECONOMY

## Repercussions

- Credit providers are currently reducing credit to prospective borrowers
- Large retail Employer reduced staff complement from 28 000 to 14 500 over the past two years
- Reduced credit = reduced turnover = reduced profits = reduced personnel
- Closed and rationalised stores
- Knock on effect of reduced economic activity throughout the value chain – Property rentals, importers, wholesalers – every aspect of the consumer cycle

## Causes

- Abuse of previous legislation by debt collectors
- Abuse of costs by debt collectors
- Not adhering to the National Credit Act
- Debt Review bypassing over-indebtedness, reckless lending, affordability etc

**While the changes to the Act does address some of the above—**

**You cannot make a process complex and inexpensive**



# Changes to Employment contracts

1. When advised by Judgment creditor of intention to seek EAO i.t.o. Section 65J(2A) – who assists with whether to contest or not and who is going to pay for it
2. In the case of ‘more than 25%’ the Employer HAS to contest
3. When Employee appears in Court i.t.o. Section 65J(2D) – what type of leave
4. Employer liability for costs i.t.o. Section 65J(10)(b) – how is the company going to handle liability
5. Employer liability to stop deductions – Employee also receives statements i.t.o. Section 65J(4)(b) – makes it your responsibility

# DEPARTMENTS AND PARTIES CONSULTED

4.1 A separate draft Magistrates' Courts Bill and Superior Courts Bill were published on the Department's website and submitted to interested parties in the legal fraternity. Comments were then received from—

- (a) the Council for Debt Collectors;
- (b) the Association of Debt Recovery Agents;
- (c) Attorneys De Beer and De Klerk;
- (d) Bayport Financial Services;
- (e) Attorneys Munnik Basson Dagama Incorporated;
- (f) Flemix and Associates;
- (g) Gerhard van der Merwe Attorneys;
- (h) the Law Society of South Africa (LSSA);
- (i) Old Mutual Finance;
- (j) the Magistrate, Johannesburg;
- (k) Microfinance South Africa; and
- (l) the South African National Association of Progressive Sheriffs.

# DEPARTMENTS AND PARTIES CONSULTED

- 4.2 Comments on the Superior Courts Bill were received from the Honourable Judge Binns-Ward, the Commission for Gender Equality, the LSSA, the General Council of the Bar and Standard Bank.
- 4.3 Further inputs on the later versions of the two Bills were also received from the dti and the National Treasury, the Rules Board, the Branch: Courts Services of the Department of Justice and Constitutional Development, the Limpopo Civil Court Forum and the SA Human Rights Commission.

What is missing is any Employer organisations

Thank you for attending the session on the:

## Courts of Law Amendment Act

I hope you found it interesting and a bit disturbing  
in respect of the new obligations of the garnishee  
(the Employer)