CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 127/15

In the matter between:

UNIVERSITY OF STELLENBOSCH LEGAL AID CLINIC	First Applicant
VUSUMZI GEORGE XEKETHWANA	Second Applicant
MONIA LYDIA ADAMS	Third Applicant
ANGELINE ARRISON	Fourth Applicant
LISINDIA DORELL BAILEY	Fifth Applicant
FUNDISWA VIRGINIA BIKITSHA	Sixth Applicant
MERLE BRUINTJIES	Seventh Applicant
JOHANNES PETRUS DE KLERK	Eighth Applicant
SHIRLY FORTUIN	Ninth Applicant
JEFFREY HAARHOFF	Tenth Applicant
JOHANNES HENDRICKS	Eleventh Applicant
DOREEN ELAINE JONKER	Twelfth Applicant
BULELANI MEHLOMAKHULU	Thirteenth Applicant
SIPHOKAZI SIWAYI	Fourteenth Applicant
NTOMBOZUKO TONYELA	Fifteenth Applicant
DAWID VAN WYK	Sixteenth Applicant

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	First Respondent
MINISTER OF TRADE AND INDUSTRY	Second Respondent
NATIONAL CREDIT REGULATOR	Third Respondent
MAVAVA TRADING 279 (PTY) LIMITED	Fourth Respondent
ONECOR (PTY) LIMITED	Fifth Respondent
AMPLISOL (PTY) LIMITED	Sixth Respondent
TRIPLE ADVANCED INVESTMENTS 40 (PTY) LIMITED	Seventh Respondent
BRIDGE DEBT (PTY) LIMITED	Eighth Respondent
LAS MANOS INVESTMENTS 174 (PTY) LIMITED	Ninth Respondent
POLKADOTS PROPERTIES 172 (PTY) LIMITED	Tenth Respondent
MONEY BOX INVESTMENTS 232 (PTY) LIMITED	Eleventh Respondent
MARAVEDI CREDIT SOLUTIONS (PTY) LIMITED	Twelfth Respondent
ICOM (PTY) LIMITED	Thirteenth Respondent
VILLA DES ROSES 168 (PTY) LIMITED	Fourteenth Respondent
MONEY BOX INVESTMENTS 251 (PTY) LIMITED	Fifteenth Respondent
TRIPLE ADVANCE INVESTMENTS 99 (PTY) LIMITED	Sixteenth Respondent
FLEMIX & ASSOCIATES INCORPORATED ATTORNEYS	Seventeenth Respondent
ASSOCIATION OF DEBT RECOVERY AGENTS NPC	Eighteenth Respondent
SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Amicus Curiae

And in the matter between:

ASSOCIATION OF DEBT RECOVERY AGENTS NPC	Applicant
and	
UNIVERSITY OF STELLENBOSCH LEGAL AID CLINIC	First Respondent
VUSUMZI GEORGE XEKETHWANA	Second Respondent
MONIA LYDIA ADAMS	Third Respondent
ANGELINE ARRISON	Fourth Respondent
LISINDA DORRELL BAILEY	Fifth Respondent
FUNDISWA VIRGINIA BIKITSHA	Sixth Respondent
MERLE BRUINTJIES	Seventh Respondent
JOHANNES PETRUS DE KLERK	Eighth Respondent
SHIRLY FORTUIN	Ninth Respondent
JEFFREY HAARHOFF	Tenth Respondent
JOHANNES HENDRICKS	Eleventh Respondent
DOREEN ELAINE JONKER	Twelfth Respondent
BULELANI MEHLOMAKHULU	Thirteenth Respondent
SIPHOKAZI SIWAYI	Fourteenth Respondent
NTOMBOZUKO TONYELA	Fifteenth Respondent
DAWID VAN WYK	Sixteenth Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Seventeenth Respondent
MINISTER OF TRADE AND INDUSTRY	Eighteenth Respondent
NATIONAL CREDIT REGULATOR	Nineteenth Respondent

MAVAVA TRADING 279 (PTY) LIMITED	Twentieth Respondent
ONECOR (PTY) LIMITED	Twenty-first Respondent
AMPLISOL (PTY) LIMITED	Twenty-second Respondent
TRIPLE ADVANCED INVESTMENTS 40 (PTY) LIMITED	Twenty-third Respondent
BRIDGE DEBT (PTY) LIMITED	Twenty-fourth Respondent
LAS MANOS INVESTMENTS 174 (PTY) LIMITED	Twenty-fifth Respondent
POLKADOTS PROPERTIES 172 (PTY) LIMITED	Twenty-sixth Respondent
MONEY BOX INVESTMENTS 232 (PTY) LIMITED	Twenty-seventh Respondent
MARAVEDI CREDIT SOLUTIONS (PTY) LIMITED	Twenty-eighth Respondent
ICOM (PTY) LTD	Twenty-ninth Respondent
VILLA DES ROSES 168 (PTY) LIMITED	Thirtieth Respondent
MONEY BOX INVESTMENTS 251 (PTY) LIMITED	Thirty-first Respondent
TRIPLE ADVANCED INVESTMENTS 99 (PTY) LIMITED	Thirty-second Respondent
FLEMIX & ASSOCIATES INCORPORATED ATTORNEYS	Thirty-third Respondent

And in the matter between:

MAVAVA TRADING 279 (PTY) LIMITED	First Applicant
ONECOR (PTY) LIMITED	Second Applicant
AMPLISOL (PTY) LIMITED	Third Applicant

TRIPLE ADVANCED INVESTMENTS 40 (PTY) LIMITED	Fourth Applicant
BRIDGE DEBT (PTY) LIMITED	Fifth Applicant
LAS MANOS INVESTMENTS 174 (PTY) LIMITED	Sixth Applicant
POLKADOTS PROPERTIES 172 (PTY) LIMITED	Seventh Applicant
MONEY BOX INVESTMENTS 232 (PTY) LIMITED	Eighth Applicant
ICOM (PTY) LIMITED	Ninth Applicant
VILLA DES ROSES 168 (PTY) LIMITED	Tenth Applicant
MONEY BOX INVESTMENTS 251 (PTY) LIMITED	Eleventh Applicant
TRIPLE ADVANCED INVESTMENTS 99 (PTY) LIMITED	Twelfth Applicant
FLEMIX & ASSOCIATES INCORPORATED ATTORNEYS	Thirteenth Applicant

and

UNIVERSITY OF STELLENBOSCH LEGAL AID CLINIC	First Respondent
VUSUMZI GEORGE XEKETHWANA	Second Respondent
MONIA LYDIA ADAMS	Third Respondent
ANGELINE ARRISON	Fourth Respondent
LISINDA DORRELL BAILEY	Fifth Respondent
FUNDISWA VIRGINIA BIKITSHA	Sixth Respondent
MERLE BRUINTJIES	Seventh Respondent
JOHANNES PETRUS DE KLERK	Eighth Respondent

SHIRLY FORTUIN	Ninth Respondent
JEFFREY HAARHOFF	Tenth Respondent
JOHANNES HENDRICKS	Eleventh Respondent
DOREEN ELAINE JONKER	Twelfth Respondent
BULELANI MEHLOMAKHULU	Thirteenth Respondent
SIPHOKAZI SIWAYI	Fourteenth Respondent
NTOMBOZUKO TONYELA	Fifteenth Respondent
DAWID VAN WYK	Sixteenth Respondent
MARAVEDI CREDIT SOLUTIONS (PTY) LIMITED	Seventeenth Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Eighteenth Respondent
MINISTER OF TRADE AND INDUSTRY	Nineteenth Respondent
NATIONAL CREDIT REGULATOR	Twentieth Respondent
ASSOCIATION OF DEBT RECOVERY AGENTS NPC	Twenty-first Respondent

Neutral citation: *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* [2016] ZACC 32

Coram: Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J

Judgments: Jafta J (first judgment - minority): [1] to [127]
Cameron J (second judgment - majority): [128] to [161]
Zondo J (third judgment - majority): [162] to [213]

Heard on: 3 March 2016

Decided on: 13 September 2016

Summary: Magistrates' Courts Act, 1944 — constitutionality of section 65J(2)(a) and (b) — section unconstitutional — emoluments attachment orders — failure to provide judicial oversight — issue of emoluments attachment orders without court authorisation inconsistent with the Constitution — reading-in — notional severance — appropriate remedy

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ORDER

On appeal from the Western Cape Division of the High Court, and, on application for confirmation of the order of constitutional invalidity granted by the Western Cape Division of the High Court:

1. The appeals are dismissed with costs.
2. The order of constitutional invalidity made by the Western Cape Division of the High Court is not confirmed.
3. The use of the word "or" after the word "writing" and the omission of the word "and" in the place of the word "or", and the omission of the words "after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate" after the word "authorised" in section 65J(2)(a) of the Magistrates' Courts Act, 1944 are inconsistent with the Constitution and invalid.
4. The use of the word "will" after the words "an emoluments attachment order" and the omission of the word "may" in the place of the word "will" in section 65J(2)(a) of the Magistrates' Courts Act, 1944 are inconsistent with the Constitution and invalid.

5. The omission of:

(a) a semi-colon in the place of the full-stop at the end of section 65J(2)(b)(ii) of the Magistrates' Courts Act, 1944;

(b) the word "and" at the end of section 65J(2)(b)(ii) of the Magistrates' Courts Act, 1944; and

(c) sub-paragraph (iii) under section 65J(2)(b) of the Magistrates' Courts Act, 1944 reading:

> "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."

is inconsistent with the Constitution and invalid.

6. Section 65J(2) of the Magistrates' Courts Act, 1944 shall be read as though:

(a) the word "or" after the word "writing" in paragraph (a) is replaced with the word "and";

(b) the words: "after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate." appear after the word "authorised" in paragraph (a);

(c) the word "will" after the words "an emoluments attachment order" in paragraph (b)(i) is replaced with the word "may";

(d) the full-stop at the end of paragraph (b)(ii) is replaced with a semi-colon and the word "and" appears after the semi-colon;

(e) the provision:

> "(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."

appears as paragraph (b)(iii) after paragraph (b)(ii).

7. The orders in 2, 3, 4, 5, 6 and 8 operate with effect from the handing down of this judgment.

8. It is declared that section 65J(2)(a) and (b) of the Magistrates' Courts Act, 1944 reads as follows:

"**65J. Emoluments attachment orders**

. . .

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

(a) unless the judgment debtor has consented thereto in writing ~~or~~ and the court has so authorised after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate, whether on application to the court or otherwise, and such authorisation has not been suspended; or

(b) unless the judgment creditor or his or her attorney has first—

(i) sent a registered letter to the judgment debtor at his or her last known address advising him or her of the amount of the judgment debt and costs as yet unpaid and warning him or her that an emoluments attachment order ~~will~~ 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."

9. The respondents who opposed confirmation of the order of constitutional invalidity made by the Western Cape Division of the High Court are ordered to pay the applicants' costs jointly and severally, the one paying the other to be absolved, including the costs of three counsel.

JUDGMENT

JAFTA J:

[1] This matter involves an application for confirmation of an order of invalidity made by the Western Cape Division of the High Court and an appeal against certain parts of that order. The High Court declared that certain specified words in section 65J(2) of the Magistrates' Courts Act[1] (Act) were inconsistent with the Constitution and invalid to the extent that they fail to provide for judicial oversight over the issuing of an emoluments attachment order against a judgment debtor. A further declaration was granted 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.

[2] The declaration of invalidity was submitted to this Court for confirmation as required by the Constitution and relevant legislation.[2] Section 172(2) of the

[1] 32 of 1944.

[2] Apart from section 172 of the Constitution, section 15 of the Superior Courts Act 10 of 2013 and the Rules of the Constitutional Court regulate confirmation proceedings.

Constitution stipulates that an order of constitutional invalidity of an Act of Parliament made by the High Court has no force and effect unless it is confirmed by this Court. Furthermore, the section also authorises a party with a sufficient interest to appeal against such order. In other cases, an appeal to this Court may be pursued only with its leave.

Parties

[3] The first applicant is the University of Stellenbosch Legal Aid Clinic (Law Clinic), a law clinic established by the University of Stellenbosch and registered with the Cape Law Society, in terms of the Attorney's Act.[3] The Law Clinic provides free legal services to indigent persons. Its clients are mainly labourers on farms in the Cape Winelands area and low wage earners in Stellenbosch and Paarl. Its areas of interest are debt relief, farm evictions and family matters. Recently the Law Clinic has expended a significant portion of its resources on cases involving debt relief and exploitative lending practices. Currently the Law Clinic assists more than 200 people a month with advice in respect of orders issued to attach their wages to pay judgment debts, obtained by credit providers.

[4] The second to sixteenth applicants are individual clients of the Law Clinic. Twelve of them reside in Stellenbosch, two in Paarl and one in Macassar. They all had emoluments attachment orders issued against them by clerks of the court employed in various Magistrates' offices, many of which are located far away from where the applicants reside and work.

[5] The respondents who participated in these proceedings are first, the Minister of Justice and Correctional Services who is charged with the responsibility of administering the impugned Act. The other respondents are Flemix and Associates Incorporated Attorneys that represent a number of small credit providers. These credit providers were cited individually in the High Court. I will refer to them collectively

[3] 53 of 1979.

as the Flemix respondents. The Association of Debt Recovery Agents NPC (Association) was joined as a respondent in the High Court. The Association represents debt collectors and contributes no less than three directors to the Board of Directors of the Council for Debt Collectors. It is a member of the Credit Industry Forum which advises the Minister of Trade and Industry on certain matters relating to the debt collection industry. It also advances members' interests at relevant statutory and non-statutory bodies and actively participates in the process of drafting legislation that impacts on the interests of the members. Its members vary from debt collectors, law firms specialising in debt recovery, credit providers and other service providers in debt collection industry.

Legislative Background

[6] For a better understanding of the issues, it is necessary first to set out the statutory framework and its background. Like in many developing countries, the commercial credit industry in South Africa is huge. The affidavit filed by the Flemix respondents shows that as at June 2013, this 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.

[7] However, during the apartheid era, commercial credit was mainly available to the white minority. Credit provision and debt collection were taken as purely commercial legal matters subject to the sanctity of contracts with the corollary that a failure to repay a loan constituted a breach of contract. This breach entitled the credit provider to enforce the contract through litigation. An order obtained from that litigation would authorise the credit provider coercively to attach and sell the debtor's assets to satisfy the judgment debt.

[8] Then, advancing credit to debtors was dependent mainly on the whims of the credit provider who could impose whatever conditions it wished for within the bounds

of the statute.[4] But the relevant statutes did not govern the court process in terms of which credit agreements were enforced. These matters were regulated by ordinary rules of procedure. The number of cases relating to debt collection grew in the seventies and exceeded the capacity of the courts to adjudicate them in the normal way. This was compounded by the fact that litigation was expensive and credit providers passed the risk to debtors by including in the agreement a term that imposed liability on the debtor to pay the creditor's costs on the highest permissible scale.[5]

[9] In the majority of the cases that reached the courts, debtors had no legal defences to the creditors' claims. Financial hard times would be the reason for their default in repaying their loans. The bulk of these matters went through courts undefended but at a huge cost to the debtor.

[10] In an amendment that came into force in January 1979, Parliament amended the Magistrates' Courts Act to provide for an expedient method of debt collection. Debtors were empowered to consent to judgment and pay in instalments.[6] Of the five sections of the chapter introduced by the amendment, only three are important for present purposes. The first is section 55, which defines "debt" as a liquidated sum of money. This definition notably delineates the scope of debts to be enforced in terms of the chapter which is devoted to debt recovery.

[11] The second provision is section 57. This section provides for the first type of procedure for the payments of debt in instalments without the involvement of the courts. The section empowers debtors to admit liability in writing at the time they receive a letter of demand from the creditors. The admission must be accompanied by an offer to pay the debt in instalments, together with costs and collection fees. The

[4] Both the Usury Act 73 of 1968 and the Credit Agreement Act 75 of 1980 regulated the financial credit market list. The latter Act replaced the Hire-Purchase Act 36 of 1942.

[5] This was the scale of attorney and own client.

[6] The Magistrates' Courts Amendment Act 63 of 1976 introduced Chapter VIII comprising sections 55-60.

debtor must also agree that in the event of her failure to pay, the creditor shall without notice to her, be entitled to apply for judgment in respect of the balance.

[12] If the creditor accepts the offer, it must notify the debtor in writing. For as long as the debtor pays the agreed instalment, no litigation would ensue. In the event of breach, the creditor may submit a written request for judgment to the clerk of the court who shall enter judgment in favour of the creditor and order the debtor to pay the judgment debt in specified instalments. The creditor must then notify the debtor about the judgment which is treated as a default judgment.

[13] The other important provision is section 58. It mandates the debtor to consent to judgment and an order for payment of the judgment debt in instalments. Upon receipt of a letter of demand or summons, the debtor may consent in writing to judgment in favour of the creditor and also agree to an order of court for payment in specified instalments. On the written request of the creditor, the clerk of the court shall enter judgment in favour of the creditor and order the debtor to pay the judgment debt in instalments. In both instances, judgment is granted by the clerk of the court.

[14] If the debtor in either procedure pays the instalments diligently, after the order by the clerk of the court, the matter is put to rest. But if the debtor defaults, execution of judgment at the instance of the creditor becomes necessary. It is however convenient first to outline the relevant provisions of the National Credit Act[7] and examine the impact on the procedure set out above, before considering provisions on execution.

National Credit Act

[15] The democratic dispensation rendered legislation that governed the credit markets ill-suited to the economy and open to the entire population. The black population was afforded the opportunity to participate in the financial credit market,

[7] 34 of 2005.

both as creditors and consumers of credit. The democratic government realised that the credit market was the lifeblood of economic development. This is because credit enabled consumers to acquire assets like houses, cars and furniture which they could not afford without credit finance. Many over-extended themselves in debt they could not repay. Unscrupulous and reckless credit providers also entered the market and offered small loans without any form of security, in contrast to banks. In return they charged exorbitant interest which raised the amount owing rapidly within a short span of time, with disastrous consequences for debtors who perpetually remain in the hole of debt.

[16] Parliament intervened by passing the National Credit Act and by so doing overhauled the previous credit legislation. This legislation came into effect in three phases. The objects of the National Credit Act are to—

> "promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers."[8]

[17] The National Credit Act seeks to protect consumers by a number of means including the promotion of responsible borrowing that avoids over-indebtedness; prevention of reckless credit granting by credit providers; encouragement of consumers to fulfil their financial obligations; and provision of a consistent and accessible system of consensual resolution of disputes arising from credit agreements.

[18] But the National Credit Act does not only protect and advance the interests of debtors. It also promotes the interests of credit providers. For it may only achieve the goal of a "fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market", if the Act strikes the right balance in advancing the rights of consumers on the one hand and credit providers' interests, on the other.

[8] Section 3 of the National Credit Act.

[19] The National Credit Act has introduced a reformed framework that regulates the credit market from the moment money is lent up to the point of initiating legal proceedings to enforce the terms of the credit agreement. The institution of litigation is governed by Part C of Chapter 6. Where a debtor has defaulted in repaying a debt, Part C obliges the credit provider first to pursue a consensual resolution of the dispute before instituting legal proceedings. Section 129(1) demands that notice be given to the consumer, drawing her attention to the default and proposing that if the consumer so wishes, she may refer the matter to a debt counsellor with the intent that the parties may resolve the dispute and agree on a plan to bring payments up to date.[9]

[20] A major reform introduced by Part C is to freeze the credit provider's contractual and common law rights. At common law the credit provider is entitled to approach the courts immediately upon the debtor's default. In effect Part C suspends the exercise of the right of access to courts by the credit provider until the consensual resolution process has run its course or the debtor fails to take part in that process.

[21] In *Sebola*, this Court affirmed the suspension of the rights to approach courts in these terms:

> "Section 129(1)(a) requires a credit provider, before commencing any legal proceedings 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,

[9] Section 129(1) provides:

> "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 that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or 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(10), as the case may be; and
>
> (ii) meeting any further requirements set out in section 130."

> section 129(1)(b)(i) precludes the commencement of legal proceedings unless notice is first given. So, in effect, the notice is compulsory."[10]

[22] Both sections 129(1)(b) and 130(1) preclude the credit provider from instituting litigation before satisfying their requirements. The National Credit Act considers compliance with those requirements to be so pivotal to debt collection that it even suspends the exercise of judicial power by the courts to adjudicate disputes arising from credit agreements. In this regard section 130(3)(a) provides:

> "Despite any provision of law or contract to the contrary, any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter *only if the court is satisfied that*—
>
> (a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with."

[23] What emerges from the text of this section is the fact that it supersedes "any provision of law or contract to the contrary" and obliges a court to adjudicate a dispute arising from a credit agreement "only if the court is satisfied" that the procedures required by sections 127, 129 and 131 have been complied with. If not, the power to adjudicate remains suspended until there is compliance with the steps set out in the court order that adjourns the proceedings.

[24] Section 130(4) governs the situation where a credit provider has instituted the proceedings without complying with the procedure in section 129. Again in peremptory language this section mandates the court to adjourn the hearing before it and "make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed".[11]

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[10] *Sebola and Another v Standard Bank of South Africa Ltd and Another* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) (*Sebola*) at para 45.

[11] Section 130(4) provides:

> "In any proceedings contemplated in this section, if the court determines that—
>
> (a) the credit agreement was reckless as described in section 80, the court must make an order contemplated in section 83;

[25] The scheme that emerges from a close examination of section 130(3) and (4) is that in all proceedings to which the National Credit Act applies, the court is required first at the commencement of the hearing to enquire into whether there was compliance with section 129. For it may adjudicate the case only if so satisfied. Notably it must be the court and the court alone that is satisfied that there was compliance. Furthermore, it must only be the court that determines the case and grants judgment. The court's satisfaction that there was compliance constitutes a jurisdictional fact which must exist before the court may continue with the hearing. For the court to be satisfied, the relevant section requires facts which show that there was compliance to be placed before the court.

[26] In the eyes of the National Credit Act, the existence of this jurisdictional fact is a prelude to the continuation of the hearing and determination of the matter by the court. Absent the jurisdictional fact, the court must adjourn the proceedings and direct

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(b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3)(u), or has approached the court in circumstances contemplated in subsection (3)(c) the court must—

(i) adjourn the matter before it; and

(ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed;

(c) the credit agreement is subject to a pending debt review in terms of Part D of Chapter 4, the court may—

(i) adjourn the matter, pending a final determination of the debt review proceedings;

(ii) order the debt counsellor to report directly to the court, and thereafter make an order contemplated in section 85(b); or

(iii) if the credit agreement is the only credit agreement to which the consumer is a party, order the debt counsellor to discontinue the debt review proceedings, and make an order contemplated in section 85(b);

(d) there is a matter pending before the Tribunal, as contemplated in subsection (3)(b), the court may—

(i) adjourn the matter before it, pending a determination of the proceedings before the Tribunal; or

(ii) order the Tribunal to adjourn the proceedings before it, and refer the matter to the court for determination; or

(e) the credit agreement is either suspended or subject to a debt re-arrangement order or agreement, and the consumer has complied with that order or agreement, the court must dismiss the matter."

that certain steps be followed. The section leaves it to the discretion of the court to determine steps that are appropriate to a particular case. Once the matter is adjourned, the hearing may only resume if the credit provider has taken all steps specified in the court order.

[27] Of relevance to the present matter is the impact of sections 129 and 130 of the National Credit Act on the procedures set out in sections 57 and 58 of the Magistrates' Courts Act. The latter sections empower a clerk of the court to adjudicate and grant judgment in favour of the credit provider in certain defined circumstances. This is inconsistent with section 129 read with section 130. In terms of sections 129 read with 130 it is only the courts which decide a matter to which the National Credit Act applies. This conflict must be resolved with reference to section 172 of the National Credit Act.[12]

[28] Section 172 states that if there is a conflict between section 57 and 58 on the one hand and section 129 of the National Credit Act on the other hand, the provisions of section 129 shall prevail to the extent of the conflict. Although section 130 is not listed on the schedule referred to in section 172, it is incorporated by reference in section 129. Indeed in *Sebola* this Court held that the two sections must be read together. There Cameron J said:

> "First, it is impossible to establish what a credit provider is obliged and permitted to do without reading both provisions. Thus, while section 129(1)(b) appears to prohibit the commencement of legal proceedings altogether ('may not commence'), section 130 makes it clear that where action is instituted without prior notice, the action is not void. Far from it. The proceedings have life, but a court 'must' adjourn the matter, and make an appropriate order requiring the credit provider to complete specified steps before resuming the matter. The bar on proceedings is thus not absolute, but only dilatory. The absence of notice leads to a pause, not to nullity. But

[12] Section 172(1) provides:

> "If there is a conflict between a provision of this Act mentioned in the first column of the table set out in Schedule 1, and a provision of another Act set out in the second column of that table, the conflict must be resolved in accordance with the rule set out in the third column of that table."

> to deduce this, it is necessary to read section 129 in the light of section 130. Section 129 prescribes *what* a credit provider must prove (notice as contemplated) before judgment can be obtained, while section 130 sets out *how* this can be proved (by delivery)."[13]

[29] Bearing in mind that the scope of both sections 57 and 58 of the Magistrates' Courts Act is restricted to enforcing payment of debts, it follows that these sections do not apply to debts covered by the National Credit Act in respect of which payment may only be enforced in terms of section 129 and 130. Therefore the High Court in *Myambo*[14] erred in holding that section 58 of the Magistrates' Courts Act continues to apply to matters falling within the ambit of the National Credit Act.

[30] Moreover, the procedure set out in sections 57 and 58 is incompatible with the litigation requirements of sections 129 and 130 of the National Credit Act. By obliging the creditor and consumer first to engage in pre-litigation solutions and suspending the court's power to adjudicate disputes until there is compliance with legislative requirements, these provisions reinforce the protection of the consumers. At the same time they deprive the creditor of its contractual and common law rights to enforce the agreement by means of litigation, until certain steps have been taken.

[31] In contrast sections 57 and 58 are part of the pre-Constitution legislation that afforded less protection to debtors. To hold that these sections continue to apply to matters that fall within the purview of the National Credit Act would destroy the edifice carefully constructed by sections 129 and 130 to protect consumers. This is because they sanction a different procedure, free of the strictures imposed by sections 129 and 130. The clerk of the court would be at liberty to determine matters, regardless of whether there has been compliance with these two sections.

[13] *Sebola* above n 10 at para 53.

[14] *African Bank Ltd v Myambo NO and Others* [2010] ZAGPPHC 60; 2010 (6) SA 298 (GNP) (*Myambo*).

[32] In light of section 34 of the Constitution,[15] it is doubtful that sections 57 and 58 are constitutionally compliant. The Constitution guarantees everyone the right of a fair hearing and resolution of disputes by application of law. This might be exercised before a court, or an independent and impartial tribunal or forum. A clerk of the court whom these provisions empower to decide cases is neither a court or independent tribunal or forum. However, in these proceedings, there is no challenge directed at sections 57 and 58. Their relevance arises in the context of executing orders granted by the clerk of the court through a procedure of attaching the debtor's salary. This brings us to the outline of the law on execution.

Execution

[33] In *Chief Lesapo*, this Court defined the relationship between a judicial process and execution. Mokgoro J declared:

> "An important purpose of section 34 is to guarantee the protection of the judicial process to persons who have disputes that can be resolved by law. Execution is a means of enforcing a judgment or order of court and is incidental to the judicial process. It is regulated by statute and the Rules of Court and is subject to the supervision of the court which has an inherent jurisdiction to stay the execution if the interests of justice so require."[16]

[34] While there is a connection between the judicial process and execution, these are separate processes, which occur consecutively. There can be no execution without a judicial process as a prelude. The judicial process ends with a delivery of judgment or the granting of an order defining the parties' rights. Execution may only commence after the judicial process has ended. For execution is a process of

[15] Section 34 provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[16] *Chief Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at para 13.

enforcing a court order. Depending on the nature of the order granted, execution may be against the person or the property of the judgment debtor.

[35] Here we are concerned with execution against property consequently this outline will be limited to that form of execution. This form of execution applies where a judgment sounding in money is granted, that is an order that requires the judgment debtor to pay a sum of money. Execution against property may further be divided into the general and the special forms. But both are undertaken only if the judgment debtor fails to pay the debt after the granting of the order. In that event for a general form to occur, three steps must be taken. First, a writ of execution must be issued. The writ constitutes authority for the messenger of the court to enforce the court order. Second, the attachment of the debtor's property by the messenger. Third, the sale of the attached property by public auction and payments of the proceeds to the judgment creditor.

[36] However, the messengers of the court must first proceed against the debtor's movable property.[17] But if the debtor has no movables, then with leave from the court execution against immovable property may be effected.[18] In the event of the debtor who has no movable and immovable assets, a special kind of execution becomes necessary. This special execution must be authorised by the court.

[37] The special execution includes an order that the judgment debt be paid in instalments. This form of execution may be ordered at the instance of the judgment debtor.[19] But the order for payment of the judgment debt in instalments may be made only with the consent of the judgment creditor. This kind of order may also be issued at the instance of the creditor. If a judgment for the payment of money remained unsatisfied for a period of 10 days, the judgment creditor may issue notice calling

[17] Section 66(1) of the Magistrates Courts Act.

[18] *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC).

[19] Section 73 of Magistrates' Courts Act.

upon the judgment debtor to appear before the court for an inquiry into her financial position.[20] At the inquiry, the debtor is permitted to lead evidence on her financial position and ability to pay the judgment debt.[21] In determining the debtor's ability to pay the judgment debt in instalments the court must take into consideration a number of factors. These include the nature of her income, the amount she needs for her essential expenses and those of her dependants, and her financial commitments under existing contracts.[22]

[38] If at the inquiry the court is satisfied that the debtor is able to pay the judgment debt in instalments, it may order her to pay specified instalments.[23] In addition if the debtor is employed by a person who resides or carries on a business within the court's area of jurisdiction, the court may also authorise the issuing of an emoluments attachment order in terms of section 65J(1).[24]

[39] An emoluments attachment order issued in terms of section 65J obliges the debtor's employer to pay from time to time specified emoluments out of the debtor's salary, to the judgment creditor.[25] The employer must make the periodical payments until the relevant judgment debt and costs are paid in full.

[40] This case concerns the constitutional validity of section 65J(2) of the Magistrates' Courts Act and the scope of section 45. These issues must be assessed in the context of the legal framework outlined here. The validity of the impugned provisions must be tested against the right guaranteed by section 34 of the Constitution.

[20] Section 65A(1) of the Magistrates' Courts Act.

[21] Section 65D(1) of the Magistrates' Courts Act.

[22] Section 65D(4) of the Magistrates' Courts Act.

[23] Section 65E(1) of the Magistrates' Courts Act.

[24] Id.

[25] Section 65J(1) of the Magistrates' Courts Act.

[41] It is now convenient to set out the facts. But before doing so it is proper to make an observation that the record shows that the law regulating the granting of emoluments attachment orders was misapplied and abused by the credit providers. This caused enormous hardship to individuals against whom those orders were issued.

Facts

[42] The individual applicants are general workers who earn low wages and reside in Stellenbosch, Paarl and Macassar in the Western Cape. They approached a company known as SA Multiloan in Stellenbosch for small loans. Having signed forms at the company's offices, they obtained the loans they asked for. Later when they fell into arrears the credit provider through its representatives, demanded that they sign further documents which resulted in default judgments and emoluments attachment orders being obtained by credit providers, from clerks of magistrates' courts, located far away from where the applicants live and work. In some instances, their signatures that enabled the credit provider to obtain orders were forged.

[43] In most cases it was only when deductions were effected from their wages by their employers that the applicants became aware of the legal route taken by the credit provider. The monthly deductions from their wages were too high, leaving the applicants with little to support or maintain themselves and their families. Consequently, the individual applicants who could not afford legal representation owing to their low income, sought legal assistance from the Law Clinic which instituted these proceedings to vindicate their rights. But before setting out the litigation process in the High Court, it is necessary to refer to details of what took place. In this regard, a sample reference to only one individual applicant would suffice.

[44] That applicant is Mr Vusumzi George Xekethwana, a farm worker who works and lives in Stellenbosch. He earns R2 420 per month from which deductions of R1 194 are made, leaving him with the net pay of R1 263. The deductions include a

garnishee of R600. He is the sole breadwinner in his family, comprising his wife, five children and one grandchild.

[45] In 2011 he needed a loan when he came across a pamphlet that advertised that SA Multiloan offered micro loans. He went to its offices in Stellenbosch where he applied for a loan. He was served by a woman called Bridget who asked him to furnish her with a payslip and three months' bank statements. She completed a form and the loan amount was later deposited into his bank account. It turned out later the form completed by Bridget reflected wrongly that Mr Xekethwana had a single expense. The form said he spent R50 per month on food. This form was purportedly completed as an assessment in terms of section 81(2) of the National Credit Act.[26] He was not given a copy of the loan agreement.

[46] As he wanted to buy a cellphone he again approached SA Multiloan for credit. He was again helped by Bridget who completed the application form. This application too was successful and he purchased a Blackberry smartphone. For a few months payment for the two loans was deducted from his bank account. At some point the Blackberry was stolen and he reported the theft to SA Multiloan, requesting a replacement phone. SA Multiloan declined his request unfairly in his own view. Dissatisfied, he closed the bank account and opened a new account at Capitec Bank. This meant that payment for the loans could not be made.

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[26] Section 81(2) provides:

> "A credit provider must not enter into a credit agreement without first taking reasonable steps to assess—
>
> (a) the proposed consumer's—
>
> (i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;
>
> (ii) debt re-payment history as a consumer under credit agreements;
>
> (iii) existing financial means, prospects and obligations; and
>
> (b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement."

[47] During 2012, an unknown man arrived at his place of work and demanded that he should sign some document. When he refused the man became angry and left. It turned out later that his signature was forged on documents which the credit provider had used to obtain default judgments and an emoluments attachment order against Mr Xekethwana. This came to light when his employer demanded documents pertaining to the emoluments attachment orders from Flemix Attorneys who sought to enforce the orders. It was gleaned from the documents that the credit providers were Mavava Trading 279 (Pty) Ltd and Quecos (Pty) Ltd, and not SA Multiloan with which Mr Xekethwana had dealt. Instead the documents showed that SA Multiloan was a loan originator whose business was to facilitate loans for a fee between consumers and credit providers.

[48] It appeared that SA Multiloan did not only fail to comply with section 81(2) of the National Credit Act but also furnished misleading information to the credit providers who themselves failed to conduct a financial assessment before concluding credit agreements with Mr Xekethwana. Section 81 prohibits credit providers from entering into credit agreements without first undertaking a financial assessment on existing financial means and obligations of a prospective consumer. The assessment must also include a check on the credit history of the consumer and a determination of the consumer's understanding of his rights, risks and costs involved in the proposed credit agreement.

[49] The failure to conduct an assessment results in the credit agreement being reckless and unenforceable. If, in any proceedings, it appears to a court that a credit agreement being considered is reckless, the court is obliged to declare that it was a reckless agreement and suspend the agreement's force and effect.[27] Here this did not

[27] Section 83 provides:

> "(1) Despite any provision of law or agreement to the contrary, in any court or Tribunal proceedings in which a credit agreement is being considered, the court or Tribunal, as the case may be, may declare that the credit agreement is reckless, as determined in accordance with this Part.

happen, owing to fraudulent documents that were submitted to the clerks of the court, for purposes of granting a default judgment purportedly by consent and an emoluments attachment order, purportedly by consent.

[50] The first of the fraudulent documents used against Mr Xekethwana is a document titled "Demand in terms of the Provisions of Section 58 of the Act 32 of 1944".[28] It is a letter dated 21 August 2012, addressed to Mr Xekethwana by Coombe

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(2) If a court or Tribunal declares that a credit agreement is reckless in terms of section 80 (1)(a) or 80 (1)(b)(i), the court or Tribunal, as the case may be, may make an order—

(a) setting aside all or part of the consumer's rights and obligations under that agreement, as the court determines just and reasonable in the circumstances; or

(b) suspending the force and effect of that credit agreement in accordance with subsection (3)(b)(i).

(3) If a court or Tribunal, as the case may be, declares that a credit agreement is reckless in terms of section 80(1)(b)(ii), the court or Tribunal, as the case may be—

(a) must further consider whether the consumer is over-indebted at the time of those proceedings; and

(b) if the court or Tribunal, as the case may be, concludes that the consumer is over-indebted, the said court or Tribunal may make an order—

(i) suspending the force and effect of that credit agreement until a date determined by the Court when making the order of suspension; and

(ii) restructuring the consumer's obligations under any other credit agreements, in accordance with section 87.

(4) Before making an order in terms of subsection (3), the court or Tribunal, as the case may be, must consider—

(a) the consumer's current means and ability to pay the consumer's current financial obligations that existed at the time the agreement was made; and

(b) the expected date when any such obligation under a credit agreement will be fully satisfied, assuming the consumer makes all required payments in accordance with any proposed order."

[28] Section 58 provides:

"(1) If any person (in this section called the defendant), upon receipt of a letter of demand or service upon him of a summons demanding payment of debt, consents in writing to judgment in favour of the creditor (in this section called the plaintiff) for the amount of the debt and the costs claimed in the letter of demand or summons, or for any other amount, the clerk of the court shall, on the written request of the plaintiff or his attorney accompanied by—

(a) if no summons has been issued, a copy of the letter of demand; and

(b) the defendant's written consent to judgment,

(i) enter judgment in favour of the plaintiff for the amount of the debt and the costs for which the defendant has consented to judgment; and

& Associates, representing Mavava Trading 279 (Pty) Ltd. It records that Mr Xekethwana was in arrears and that notice in terms of section 129 of the National Credit Act had been given to him and that the balance owing in terms of the agreement was R4 623.58. The letter also purports to confirm that a financial assessment was conducted in terms of section 81(2) before the agreement was concluded and that the agreement was not reckless as contemplated in section 80(1) of the Act.

[51] The letter continues to advise Mr Xekethwana that he should pay the outstanding amount with interest at the rate of 60% per year from the date of the letter. Should he fail to pay, it proceeds, summons would be issued against him in a magistrate's court. The litigation process, it continues, could be shortened if he acknowledged the indebtedness and undertook to pay it in instalments and that that undertaking would be made an order of court. If he defaults, the credit provider would seek a default judgment against him without notice, except the one required by section 129 of the National Credit Act. In that event, the credit provider will obtain an emoluments attachment order against his salary for monthly payments of the debt in instalments until the debt has been settled in full. The letter further states that the credit provider is required, for his consent, to deliver it to him personally before he could consent. Indeed the letter purportedly shows that it was hand delivered and that Mr Xekethwana signed for it.

[52] The second document consists of a notice in terms of section 129 of the National Credit Act.[29] It is from the same firm of attorneys and is addressed to

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(ii) if it appears from the defendant's written consent to judgment that he has also consented to an order of court for payment in specified instalments or otherwise of the amount of the debt and costs in respect of which he has consented to judgment, order the defendant to pay the judgment debt and costs in specified instalments or otherwise in accordance with this consent, and such order shall be deemed to be an order of the court mentioned in section 65A(1).

(2) The provisions of section 57(3) and (4) shall apply in respect of the judgment and court order referred to in subsection (1) of this section."

[29]The notice reads:

"Dear Sir/Madam

IN RE: DEMAND IN TERMS OF THE PROVISIONS OF SECTION 58 OF ACT 32 OF 1944

1. We, the undersigned, Coombe & Associates Inc., are a firm of attorneys. We address this letter to yourself on behalf of our client.

2. Our client is Mavava Trading 279. Our client is a money lender and our client was registered with the Micro Finance Regulatory Council and is now registered with the National Credit Regulator.

3. You borrowed money from our client in terms of a written agreement. We confirm that you are in default and have been in default for at least 20 (twenty) business days as required by Section 129 of Act 34 of 2005.

4. A Letter of Demand as required in terms of Section 129 of Act 34 of 2005 was sent to you after the expiry of the 20 (twenty) business days in which you were in default.

5 We confirm that we will not take any further legal action before 10 (ten) business days have elapsed from date of this letter.

6. In terms of the agreement you had to make repayments of the loan amount together with interest and certain other amounts to our client.

7. You failed to make all the repayments as required in the agreement.

8. The total balance outstanding in terms of the agreement today is the amount of R4623.58 (Four Six Two Three Rand and Five Eight Cents).

9. We confirm that a credit assessment as required by section 81(2) of the NCA was conducted by our client before the said credit agreement was entered into and also that the said credit agreement was not reckless as provided for in section 80(1) of the NCA

10. We confirm the following in terms of section 130(3) of the NCA—

    10.1 that there is no matter under the credit agreement, and pending before the Tribunal, that could result in an order affecting the issues to be determined by the court;

    10.2 that the credit provider has not approached the court during the time the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction; or

    10.3 despite the consumer having surrendered property to the credit provider, and before that property has been sold, agreed to a proposal made in terms of section 129(1)(a) and acted in good faith in fulfilment of that agreement;

    10.4 complied with an agreed plan as contemplated in section 129(1)(a); or

    10.5 brought the payments under the credit agreement up to date, as contemplated in section 129(1)(a).

11. In terms of the agreement the amount mentioned in the previous paragraph is payable after 10 (ten) business days and it attracts interest from the date of this letter at the rate of 60.00% per year.

12. In terms of the agreement you are also liable for all costs on attorney and client scale that our client will have to spend in order to obtain judgment against yourself as well as all commissions that our client will have to pay out in order to obtain payment from yourself as well as interest on the amount referred to above until such time as the total amount has been paid by yourself.

13. The effect of our client been registered as a micro lender is that the provisions of the Usury Act of 1978 do not apply to the loan agreement between our client and yourself.

14. The first purpose of this letter is to demand payment from yourself of the amount of R4623.58 (Four Six Two Three Rand and Five Eight Cents) and costs on attorney

and client scale. Should you pay the amount within 10 (ten) business days from the date of this letter to our client, our client will not take any further legal proceedings against yourself.

15. Should you not pay the amount of R4623.58 (Four Six Two Three Rand and Five Eight Cents) and costs on attorney and client scale incurred within 10 (ten) business days to our client, our client may take further legal steps against yourself. This means that summons may be issued by a Magistrates Court in which you may be named as the defendant.The summons will be served on you by the sheriff and you will be called on to enter an appearance to defend the action. The matter will proceed to court and should judgment be obtained against you the court order will once again be served on you by the sheriff and thereafter the judgment will be executed. This means, for example, that the sheriff may attach and sell your goods in order to obtain money to pay to our client in order to satisfy the judgment. You may also be subpoenaed to appear in court in terms of section 65 of the Magistrates Court Act 32 of 1944. You will be held liable for all the costs that our client will have to incur in order to obtain the judgment and thereafter execution of the judgment.

16. The process set out above can be shortened, should you acknowledge your debt to our client and undertake to pay off the outstanding debt to our client, in monthly instalments, until the debt together with interest, expenses and costs on attorney and client scale have been paid. This agreement will be made an Order of Court and should you default with any payment even if it is just one payment, we will obtain a Judgment against you in terms of Section 58 of the Magistrates Court Act 32 of 1944, without any further notice to you, save for a notice as required in terms of Section 129 of the National Credit Act 34 of 2005. We will then obtain an Emolument Attachment Order against your salary, for monthly payments of the debt in instalments, until the debt together with interest expenses and costs on attorney & client scale have been paid and settled in full.

17. If you sign the attached document under the heading "Acknowledgement of Debt", you acknowledge that you are legally indebted to our client in the sum of R4623.58 (Four Six Two Three Rand and Five Eight Cents) and costs on attorney and client scale incurred.

18. You do not have to sign the acknowledgment of debt. Should you decide not to sign the acknowledgment of debt our client may after 10 (ten) business days of the date of this letter proceed to institute action against yourself. The benefit of acknowledging your debt to our client is that you will ultimately save substantial costs.

19. Section 58 of the Magistrates Court Act 32 of 1944 provides that you may consent to judgment and that a court may enter judgment against you, should you fail to honour the payment arrangement made by yourself.

20. The only requirement for the consent is that this letter of demand must be handed to you personally before you may sign the consent. You are therefore requested to confirm that you received this letter of demand before you sign the consent to judgment.

21. The Magistrates Court Act 32 of 1944 makes it possible for you to offer to pay the debt owing to our client in instalments.

22. Section 65J of the Magistrates Court Act 32 of 1944 makes it possible for you to give consent to our client to ask the Magistrates Court to issue an order, called an emoluments attachment order, to instruct your employer to pay the amounts of the instalments that you have offered to pay to our client to our client directly.

23. The benefit of you making this arrangement is that initially, payments will be automatically deducted from your nominated bank account and later, your employer will be required to attend to making the payment to us, our client or its nominee, as the case may be.

Mr Xekethwana. It informs him about the default and demands payment within 10 business days, failing which he may negotiate arrangements to pay the arrears within that period or refer the agreement to a debt counsellor for the resolution of any dispute under the agreement. This letter too repeats that a credit assessment was done and that the agreement was not reckless.

[53] The third document is a notice of consent to judgment, offer to pay the debt in instalments and consent to an emoluments attachment order, purportedly given by Mr Xekethwana. It states that he agreed to pay the monthly instalments of R807, escalating at the rate of 10% per year. It also says that he was consenting to judgment being entered against him and an emoluments attachment order being issued. It was purportedly signed by the credit provider and Mr Xekethwana at Stellenbosch on 4 September 2012 and in the presence of two witnesses.

[54] The fourth document is a consent to jurisdiction purportedly given by Mr Xekethwana and the credit provider. It records that the parties had agreed that the magistrates' court for the district of Beaufort West will have jurisdiction in the matter between them and for payment of R4 623 together with interest at the rate of 60% and legal costs on attorney and client scale.

[55] Armed with these fraudulent documents, the credit provider applied to the clerk of the court at the magistrate's office in Beaufort West for judgment and an emoluments attachment order. The clerk of the court granted the requests on 22 October 2012. Although the emoluments attachment order was granted by the clerk of the court it crucially states:

> "Whereas it has been made to appear to the above-mentioned Court that emoluments are at present or in future owing or accruing to the judgment debtor by or from the garnishee and that after satisfaction of the following order sufficient means will be

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24. It is important for you to understand that after the amounts have been deducted from your salary, you must have adequate funds to maintain yourself as well as your dependents."

> left to the judgment debtor to maintain himself or herself and those dependent upon him or her."

[56] This assertion is plainly untrue. It was never made apparent to the court that after the payment of the judgment debt from Mr Xekethwana's salary, sufficient means would be left for him to maintain himself and his family. This was not proved even to the clerk of the court herself. But more significantly this assertion shows that the credit provider understood the provisions regulating the granting of emoluments attachment orders correctly. The relevant section requires the court and not a clerk of the court, to grant emoluments attachment orders, after satisfying itself that the judgment debtor will have sufficient money to maintain himself and his family. The statement that such orders are issued by the court is repeated in the answering affidavit filed on behalf of the credit provider. This affidavit was deposed to by the credit provider's attorney. Yet the order was sought and obtained from the clerk of the court.

[57] Unhappy with the emoluments attachment orders granted against them, some of the applicants asked the credit provider to reduce the amounts so that they could be left with enough money to support themselves and their families. But the credit provider refused. It is this recalcitrance of the credit provider which led to this litigation. The individual applicants instructed the Law Clinic to institute proceedings, to challenge the orders taken against them.

Litigation

[58] In September 2014, the Law Clinic instituted these proceedings in the High Court. In the main it sought an order declaring the emoluments attachment orders obtained from the clerks of the court against the individual applicants to be invalid and of no force and effect. The Law Clinic asserted that these orders were unlawful by reason that they were based on fraudulent documents and were issued by clerks of the court who had no power to grant them. It also sought an order declaring that section 45 of the Magistrates' Courts Act does not empower a judgment debtor to

consent to jurisdiction of a magistrates' court of the area other than that in which the judgment debtor resides or works. While the Flemix respondents and the Association sought a declaration to the effect that the section does empower debtors to give such consent.

[59] The Law Clinic also challenged the constitutional validity of section 65J(2) of the Magistrates' Courts Act and sought a declaration that the phrase "the judgment debtor has consented thereto in writing" is inconsistent with the Constitution and invalid to the extent that it fails to provide for judicial oversight when an emoluments attachment order is granted against a judgment debtor.

[60] Based on the undisputed evidence of the individual applicants, the High Court granted an order that declared unlawful the emoluments attachment orders and set them aside. No appeal was sought against this order.

[61] With regard to the declaration relating to section 45, the High Court considered the interface between that section and sections 90 and 91 of the National Credit Act. Section 90 provides that a provision in the credit agreement that expresses consent of the consumer to jurisdiction of a court located outside the area where the consumer lives or works is unlawful. Section 91 stipulates that a credit provider may not require or induce a supplementary agreement that contains an unlawful provision.

[62] The High Court also compared section 45 to section 65J of the Magistrates' Courts Act. Section 65J declares that an emoluments attachment order may be issued from a court of the district in which the judgment debtors' employer resides, carries on business or is employed. The Court concluded that the narrow provisions of section 65J cannot be reconciled with the broader provisions of section 45. Applying the principle that says if a specific provision in a statute contradicts a general provision, the former trumps the latter, the High Court declared that a judgment debtor may not grant consent to jurisdiction of a court other than that of the area where the debtor lives or works.

[63] Regarding the invalidity claim the High Court, relying on *Chief Lesapo*,[30] *Jaftha*[31] and *Gundwana*,[32] held:

> "The Constitutional Court has emphasised the general principle that there must be judicial oversight where an applicant seeks an order to execute against or seize control of the property of another person. This principle has been reiterated in a number of Constitutional Court judgments."[33]

[64] The High Court concluded that, on the reasoning in *Gundwana*, "judicial oversight over the issue of an emoluments attachment order must be mandatory" and declared:

> "The process of issuing an [emoluments attachment order] requires an evaluation of the amount of money to be attached per month as compared to the amount needed by the debtor to support herself and her family. On the reasoning in *Gundwana*, judicial oversight over the issue of an [emoluments attachment order] must be mandatory (rather than being subject to the discretion of the clerk of the court) and must occur when the execution order is issued (not subsequently, when an attempt might be made to have the execution order varied or set aside).
>
> Section 65J(2)(b)(i) and section 65J(2)(b)(ii) of the MCA are in the circumstances constitutionally invalid to the extent that they allow for [emoluments attachment orders] to be issued by a clerk of the court without judicial oversight. This is so both with regard to international law and to the current jurisprudence of the Constitutional Court."[34]

[65] Consequently, the High Court issued this order:

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[30] *Chief Lesapo* n 16 above.

[31] *Jaftha* n 18 above.

[32] *Gundwana v Steko Development CC and Others* [2011] ZACC 14; 2011 (3) SA 608 (CC); 2011 (8) BCLR 792 (CC).

[33] *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* [2015] ZAWCHC 99; 2015 (5) SA 221 (WCC); [2015] 3 All SA 644 (WCC) (High Court judgment) at para 76.

[34] Id at paras 84–5.

> "2.1 The words "the judgment debtor had consented thereto in writing" in section 65J(2)(a) of the Magistrates' Act 32 of 1944 ("the Magistrates' Court Act") and;
>
> 2.2 Section 65J(2)(b)(i) and section 65J(2)(b)(ii) of the Magistrates' Court Act, are inconsistent with the Constitution of the Republic of South Africa Act, 1996 ("the Constitution") and invalid to the extent that they fail to provide for judicial oversight over the issuing of an emoluments attachment order against a judgment debtor."[35]

[66] Whereafter, the order of invalidity was submitted to this Court for confirmation.

[67] The South African Human Rights Commission (Commission), which was established in terms of chapter nine of the Constitution was admitted as an amicus curiae. The Commission was allowed to submit written argument and advance oral submissions at the hearing.

Issues

[68] There are two main issues arising in this matter. The first is whether the order of invalidity issued by the High Court should be confirmed. The second and relating to the appeal is whether the declaration made by that Court should be overturned and replaced by a declaration to the effect that a judgment debtor may, for purposes of granting an emoluments attachment order, consent to jurisdiction of a magistrates' court other than the court of the area where the debtor resides or works.

Confirmation

[69] This Court will confirm the declaration of invalidity of section 65J(2) if it is satisfied that the order was properly made. This is despite the fact that the parties, including the Minister of Justice, have argued the matter on the footing that the

[35] Id at para 94.

impugned provision was invalid. For such concession does not bind this Court which must still satisfy itself that the impugned provision is indeed invalid by reason that it is inconsistent with the Constitution. This Court may not render a judgment based on an incorrect application of the law just because all parties agreed to it.[36]

[70] The Court may be satisfied that the order falls to be confirmed only if it has been established that the impugned provision unjustifiably limits rights entrenched in the Bill of Rights. This is because the applicants put forward some of those rights as the benchmark against which the validity of section 65J(2) must be tested. Although a number of rights were relied upon in the papers, in this Court the applicants confined their attack to rights in section 34 of the Constitution.[37] This decision was apparently influenced by two factors. The High Court based its conclusion on decisions of this Court in *Chief Lesapo*, *Jaftha* and *Gundwana*. The other factor is that the applicants had asserted and the High Court had upheld that the constitutional defect lies in the fact that section 65J(2) fails to provide for judicial oversight when an emoluments attachment order is granted.

[71] Therefore we must investigate whether the impugned provision does not provide for judicial oversight at the time an emoluments attachment order is issued. If it does not, whether the omission limits the right entrenched in section 34 of the Constitution.

[72] The High Court proceeded from the premise that section 65J(2) did not provide for judicial oversight without interpreting that section. This was an error. The Court was bound to determine for itself whether indeed the section failed to provide for judicial oversight. The parties' admission in this regard did not and could not relieve the High Court from that duty because it related to a question of law. The validity of

[36] *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para 68.

[37] In their papers the applicants also relied on sections 9, 10, 25(1) and 28 of the Constitution.

an Act of Parliament cannot depend on the whims of parties in a particular litigation. It is an objective legal issue to which the parties' views are immaterial.

[73] Since here the ground for the challenge is that section 65J(2) fails to provide for judicial oversight, it is necessary first to determine what the concept means before undertaking the interpretation of the section.

Judicial oversight

[74] The phrase "judicial oversight" was defined in *Jaftha* by this Court as denoting a decision by a court, following a consideration of relevant facts. In that case the Court observed:

> "Judicial oversight permits a magistrate to consider all the relevant circumstances of a case to determine whether there is good cause to order execution . . . Even if the process of execution results from a default judgment the court will need to oversee execution against immovables. This has the effect of preventing the potentially unjustifiable sale in execution of the homes of people who, because of their lack of knowledge of the legal process, are ill-equipped to avail themselves of the remedies currently provided in the Act."[38]

[75] We must therefore interpret section 65J to determine whether it empowers the court or a clerk of the court to grant an emoluments attachment order. If it is only the court that is mandated to issue the order, then the inevitable conclusion must be that the impugned provision provides for judicial oversight.

[76] The Constitution obliges us to give the relevant provision a meaning that preserves its validity, provided the text is reasonably capable of that meaning. In other words a construction that places the provision within constitutional bounds must

[38] *Jaftha* above n 18 at para 59.

be preferred over the one that renders it inconsistent with the Constitution.[39] Thus in *De Beer NO,* Yacoob J said:

> "Where a statutory provision is capable of more than one reasonable construction, one which would lead to constitutional invalidity and the other not, a court ought to favour the construction which avoids constitutional invalidity, provided such interpretation is not unduly strained."[40]

[77] We must also read section 65J(2) not only in the context of the Act but also of Chapter IX which deals with execution. Reading section 65 as a whole reveals two procedures arising out of payment of judgment debts in instalments. The one procedure is where the judgment debtor makes a written offer to the judgment creditor before the creditor issues a notice in terms of section 65A(1). If the debtor offers to pay the judgment debt in specified instalments and the creditor accepts the offer, the clerk of the court must upon a written request by the creditor, order the debtor to pay the judgment debt in those instalments.

[78] This process which is initiated by the judgment debtor does not culminate in an emoluments attachment order. If the debtor keeps her word and duly pays the instalments, the need for an emoluments attachment order does not arise. The object of this sort of order is to attach the debtor's salary and deduct from it instalments to be paid to the creditor in settlement of the judgment debt.

[79] But where the process leading up to an order that the judgment debt be paid in instalments is initiated by the judgment creditor, an emoluments attachment order is necessary to give effect to payment. This is because the creditor may initiate this process only where the debtor has failed to pay the judgment debt and is not in possession of assets to be attached. In that event the debtor's failure coupled with no

[39] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*) at para 23.

[40] *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* [2001] ZACC 9; 2002 (1) SA 429 (CC); 2001 (11) BCLR 1109 CC at para 24.

offer to pay the debt in instalments supports the fact that unless coerced, the debtor is unlikely to pay the judgment debt.

[80] Section 65A(1) empowers the creditor to issue notice calling upon the judgment debtor to appear before a court in chambers on a specified date to enable the court to enquire into the financial position of the debtor and to make such order as the court may deem just and equitable. This notice may only be issued if the judgment debt remains unpaid for a period of at least 10 days from the date on which the order for payment was made. If the debtor fails to appear on the specified date, having been properly served with the notice, the creditor may apply for a warrant authorising the sheriff to arrest the debtor and bring her before a competent court which shall enquire into the failure to appear.

[81] On appearance before the court in chambers, the court shall call upon the debtor to give evidence on her financial position and permit her cross-examination by the creditor. The court may also receive further evidence relevant to the debtor's financial position from the debtor and the creditor. The object of this enquiry is to determine the debtor's ability to pay the judgment debt in instalments.

[82] In determining the debtor's ability, the court is guided by considerations listed in section 65D(4). These include the debtors income, expenses necessary for her own maintenance and the support of her dependants and her other financial commitments as disclosed in evidence. Once satisfied that the debtor will be able to pay instalments and still have sufficient funds for necessary expenses, section 65E empowers the court to order the debtor to pay the judgment debt in specified instalments. In addition, if the debtor is employed by a person who resides, carries on business or works within the court's area of jurisdiction, section 65E(1)(c) mandates the court to issue an emoluments attachment order in accordance with section 65J(1), for the payment of the judgment debt by the debtor's employer.

[83] What emerges from reading section 65 as a whole is that this provision sets out consecutive steps to be followed, if the judgment creditor wishes to have the debt paid in instalments. This route is available to the creditor if the debtor has no assets. If during the enquiry it emerges that the debtor has assets, the court may issue a writ of execution against such assets. What is of importance is the fact that it is the court which determines the various issues. It is an enquiry by the court albeit in chambers. Even the granting of an emoluments attachment order is granted by the court. It is in this context that section 65J, which forms an integral part of section 65, is to be read and understood.

Section 65J

[84] In relevant part section 65J reads:

> "(1)(a) Subject to the provisions of subsection (2), a judgment creditor may cause an order (hereinafter referred to as an emoluments attachment order) to be issued from the court of the district in which the employer of the judgment debtor resides, carries on business or is employed, or, if the judgment debtor is employed by the State, in which the judgment debtor is employed.
>
> (b) An emoluments attachment order—
>
> (i) shall attach the emoluments at present or in future owing or accruing to the judgment debtor by or from his or her employer (in this section called the garnishee), to the amount necessary to cover the judgment and the costs of the attachment, whether that judgment was obtained in the court concerned or in any other court; and
>
> (ii) shall oblige the garnishee to pay from time to time to the judgment creditor or his or her attorney specific amounts out of the emoluments of the judgment debtor in accordance with the order of court laying down the specific instalments payable by the judgment debtor, until the relevant judgment debt and costs have been paid in full.
>
> (2) An emoluments attachment order shall not be issued—
>
> (a) unless the judgment debtor has consented thereto in writing or the court has so authorised, whether on application to the court or otherwise, and such authorisation has not been suspended; or

(b) unless the judgment creditor or his or her attorney has first—

(i) sent a registered letter to the judgment debtor at his or her last known address advising him or her of the amount of the judgment debt and costs as yet unpaid and warning him or her that an emoluments attachment order will be issued if the said amount is not paid within ten days of the date on which that registered letter was posted; and

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

(3) Any emoluments attachment order shall be prepared by the judgment creditor or his attorney, shall be signed by the judgment creditor or his 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.

(4)(a) Deductions in terms of an emoluments attachment order shall be made, if the emoluments of the judgment debtor are paid monthly, at the end of the month following the month in which it is served on the garnishee, or, if the emoluments of the judgment debtor are paid weekly, at the end of the second week of the month following the month in which it is so served on the garnishee, and all payments thereunder to the judgment creditor or his attorney shall be made monthly with effect from the end of the month following the month in which the said order is served on the garnishee.

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

(5) An emoluments attachment order may be executed against the garnishee as if it were a court judgment, subject to the right of the judgment debtor, the garnishee or any other interested party to dispute the existence or validity of the order or the correctness of the balance claimed.

(6) If, after the service of such an emoluments attachment order on the garnishee, it is shown that the judgment debtor, after satisfaction of the emoluments

> attachment order, will not have sufficient means for his own and his dependants' maintenance, the court shall 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.
>
> (7) Any emoluments attachment order may at any time on good cause shown be suspended, amended or rescinded by the court, and when suspending any such order the court may impose such conditions as it may deem just and reasonable."

[85] It is apparent from the text that the granting of an emoluments attachment order depends on conditions listed in section 65J(2). These are the debtor's written consent or a prior authorisation by the court or where the debtor had previously been ordered to pay the judgment debt in instalments and has defaulted. In this regard, the creditor must send a registered letter to the debtor, advising her of the outstanding balance and warning her that an emoluments attachment order will be issued if the debt is not paid within 10 days from the date of postage of the letter. In addition, the creditor must also file an affidavit with the clerk of the court setting out the amount outstanding and payments already made.

[86] Section 65J(1) states that it is the judgment creditor who may cause an emoluments attachment order to be issued from the court with jurisdiction over the area where the debtor's employer resides, carries on business or works. If the debtor works for the State, the court with jurisdiction over the area where the debtor is employed. The words "a judgment creditor may cause an order to be issued from the court of the district" are central to determining whether the power to issue such orders vests in the court or the clerk of the court. We have already noted that if the inquiry into the debtor's financial position is conducted by a court with jurisdiction over the area where the debtor's employer lives or works, that court may also issue the emoluments attachment order.

[87] There is no indication that the situation is different in the case where an emoluments attachment order is not made at the conclusion of the inquiry into the

debtor's financial position and where the creditor later makes the request at the court with the necessary jurisdiction. In section 65J reference to the clerk of the court is made only once. It is in section 65J(3) which reads:

> "Any emoluments attachment order shall be prepared by the judgment creditor or his attorney, shall be signed by the judgment creditor or his 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."

[88] The judgment creditor prepares an emoluments attachment order by completing Form 38 designed by the makers of the Magistrates' Courts Rules.[41] The form contains these words:

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[41] Magistrates' Courts Act, 1944 (Act No. 32 of 1944)

Regulations

Annexure 1 : Forms

Form 38 : Emoluments Attachment Order - Section 65J of the Magistrates' Court Act 1944 (Act 32 of 1944)

IMPORTANT NOTICE:

YOUR ATTENTION IS DIRECTED to section 65J(3) of the Magistrates' Courts Act, 1944 (read with section 3(1) of the Sheriffs Act, 1986), which provides that only a sheriff may serve this order on a garnishee in the manner prescribed by rule 9 of the Magistrates' Courts Rules. Service of this order by a person who is not a sheriff appointed in terms of section 2 of the Sheriffs Act, 1986, constitutes a criminal offence in terms of section 60(1)(gA) of the Sheriffs Act, 1986, and renders such service invalid and of no effect. A person who is convicted of an offence in terms of section 60(1)(gA) of the Sheriffs Act, 1986, shall be liable to a fine or to imprisonment for a period not exceeding three years or both such fine and such imprisonment.

YOUR ATTENTION IS FURTHER DIRECTED to section 65J(6) of the Magistrates' Courts Act, 1944, which provides as follows:

"If, after the service of such an emoluments attachment order on the garnishee, it is shown that the judgment debtor, after satisfaction of the emoluments attachment order, will not have sufficient means for his or her own and his or her dependants' maintenance, the court shall 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."

In the Magistrate's Court for the District/Region of .....held at ..... Case No. .....of 20.....

In the matter between

..... Judgment Creditor.

and

..... Judgment Debtor.

.....

.....

..... Particulars for the identification of the judgment debtor inclusive of his or her identity or work number or date of birth and address.

..... Garnishee.

Address of garnishee. .....

Whereas it has been made to appear to the above-mentioned Court that emoluments are at present or in future owing or accruing to the judgment debtor by or from the garnishee and that after satisfaction of the following order sufficient means will be left to the judgment debtor to maintain himself or herself and those dependent upon him or her;

It is ordered:

(1) That the said emoluments are attached;

(2) That the garnishee pay to the judgment creditor or his or her attorney on the ..... day of each and every month/week after this order has been granted the sum of R..... of the emoluments of the said judgment debtor until a sufficient amount has been paid to satisfy a judgment or order obtained against the judgment debtor by the judgment creditor in the ..... Court at ..... on the ..... day of ..... for the amount of R ..... (on which judgment or order the amount of R ..... remains unpaid) with costs amounting to R ..... and the costs of attachment amounting to R ..... as well as R ..... sheriff's fees.

Dated at ..... this ..... day of ....., 20.....

By Order of the Court,

.....

Registrar/Clerk of the Court.

.....

Judgment Creditor/Attorney for Judgment Creditor.

Address of Judgment Creditor/Attorney for Judgment Creditor.

.....

.....

.....

> "Whereas it has been made to appear to the above-mentioned 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 himself or herself and those depended on him or her;
> It is ordered."

[89] The quoted statement indicates that the issues mentioned in it were proved to the court and not a clerk of the court. It is the court that orders that an emoluments attachment order be issued. The form concludes with the phrase "by order of the Court" and makes provision for the clerk of the court and the judgment creditor to sign the form. This accords with section 65J(3) which requires the judgment creditor to prepare an order that is signed by her and the clerk of the court. Accordingly, the construction that the emoluments attachment orders may be issued by a clerk of the court is not supported by the text of section 65J. The correct interpretation is that such orders are issued by a court. The fact that the parties here have wrongly applied the section does not change its meaning which must be established with reference to the text.

Relevant factors

[90] A court that determines a request for the issuing of an emoluments attachment order in terms of section 65J(1) is guided by the factors listed in section 65D(4). The latter section obliges the court to take into account the nature of the debtor's income, the amount she needs for her upkeep and support of her dependants. The validity of an emoluments attachment order depends on whether the debtor has sufficient residual income to support herself and her dependants. Thus such order may only apply to

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Attention is directed to the provisions of section 65J (10) of the Magistrates' Courts Act, 1944, which reads as follows:

'Any garnishee may, in respect of the services rendered by him or her in terms of an emoluments attachment order, recover from the judgment creditor a commission of up to 5 per cent of all amounts deducted by him or her from the judgment debtor's emoluments by deducting such commission from the amount payable to the judgment creditor.'

funds that are in excess of the amount she needs for the maintenance of her own and that of her dependants. If no such funds are available, an emoluments attachment order should not be granted.

[91] The fact that an emoluments attachment order should not impact negatively on the debtor's financial capacity to support herself and her dependants is reinforced by the provisions of section 65J(6). In peremptory terms, this section obliges the court to rescind an emoluments attachment order if it is shown that after executing it, the debtor will be left with insufficient means to support herself and her dependants. Section 65J(6) is in line with international law. The International Labour Organisation Protection of Wages Convention provides:

> "Wages may be attached or assigned only in a manner and within limits prescribed by national laws or regulations. Wages shall be protected against attachment or assignment to the extent deemed necessary for the maintenance of the worker and his family."[42]

[92] Read together sections 65D(4) and 65J(6) safeguard the worker's salary from attachment, to the extent that the salary is necessary for the worker to support herself and dependants. That principle is pivotal to adjudication of every application for an emoluments attachment order. It must be followed at all times. For non-compliance with it renders an emoluments attachment order fatally defective and such order falls to be set aside as soon as it is shown that it interferes with the upkeep of the debtor and her dependants.

[93] Owing to the widespread incorrect application of section 65J, I consider it necessary to make a declaration that emoluments attachment orders may be issued by a court only. A court to which an application is made must do so after taking into account factors set out here. This will provide the poor and vulnerable debtors with immediate protection. Unlike the High Court order of invalidity which targets and is

[42] International Labour Organisation Protection of Wages Convention (No. 95), 1949 at Article 10.

restricted to section 65J(2), leaving that part of section 65J which empowers the granting of emoluments attachment orders intact. Even if that order were to come into effect at once, vulnerable workers would still be at the risk of these orders issued by clerks without any guidance and protection to workers. Happily, the interpretation of section 65J preferred here brings it within constitutional bounds.

[94] Consequently, I hold that section 65J provides for judicial supervision. Assuming that the Constitution requires judicial supervision when emoluments attachment orders are issued, the section meets that requirement. In these circumstances I cannot confirm the order of invalidity made by the High Court.

Difference in interpretation

[95] I have read the judgment prepared by my colleague Cameron J (second judgment). Although we agree that section 65J(2) imposes preconditions for issuing emoluments attachment orders and that the power to issue these orders sits in section 65J(1), which was not challenged, and which does not form part of the invalidity order made by the High Court, the second judgment holds that the invalidity order must be confirmed.[43] I have a number of difficulties with this conclusion.

[96] If section 65J(2) on the common understanding of both judgments does not confer the power to issue the orders but lays down preconditions – what is the basis of concluding that this section authorises the granting of orders without judicial supervision? The only answer to this question is that it does not. The preconditions in section 65J(2) do not constitute a source of power to issue emoluments attachment orders. There is a clear disconnect between the ground for the invalidity, namely, failure to provide for judicial oversight and the provision declared invalid.

[97] Consequently the relief granted in the form of an order of invalidity provides no protection to the thousands of vulnerable debtors. This is because on the approach

[43] Second judgment at [143] to [145].

of the second judgment, section 65J(1) confers the power to issue the emoluments attachment orders by someone other than the court and those orders are not judicially sanctioned. But the order that is ultimately granted leaves section 65J(1) intact. Therefore, those orders may continue to be issued. This is because the declaration of invalidity is limited to section 65J(2) only.

[98] Moreover, the second judgment does not say who "from the court" is empowered to issue an emoluments attachment order. For an order to be issued, someone must have granted it or authorised that it be issued. On the interpretative approach of the second judgment, the difficulty is that the relevant words "a judgment creditor may cause an order . . . to be issued from the court" do not spell out who from the court may issue the order. The ambiguity of these words leaves one not knowing whether the provision means that it is the court itself or a clerk of the court or an interpreter or some other court official working at the court or even all of the above, who are entitled to issue the orders.

[99] But happily the ambiguity may be resolved by applying "a mandatory constitutional canon of statutory interpretation".[44] According to this canon where the language of a statute is reasonably capable of more than one interpretation, a court must prefer a meaning that brings the legislation within constitutional bounds over the construction that leads to inconsistency with the Constitution. In *Hyundai* this principle was formulated in these terms:

> "The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution."[45]

[44] *Fraser v ABSA Bank Limited* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at para 43.

[45] *Hyundai* above n 39 at para 22.

And later:

> "Accordingly, judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section."[46]

[100] Here we must determine whether the words "from the court" are capable of a meaning that accords with the assumed constitutional guarantee that whenever execution is sought against one's property regardless of whether movable or immovable, the execution must be subject to judicial oversight. In doing so we must keep in mind that "court" is defined in the Act as "a magistrate's court for any district or for any regional division". Therefore, a court does not mean a clerk of the court or a registrar or messenger of the court. Section 58A makes this point clear. It provides:

> "Any judgment by default entered in terms of this Act by the clerk of the court, shall be deemed to be a judgment of the court".

[101] It is apparent from section 58A that the Act itself does not treat orders made by a clerk of the court as court orders but deems them to be court orders. But significantly, this deeming provision is limited to orders granted in default judgment applications. Moreover, in terms of section 12 only a magistrate "may hold a court". This signifies that a court as envisaged in the Act, may be constituted by a magistrate. A clerk of the court or registrar or some other official cannot constitute a court. Without a magistrate, there can be no court. It is in this context that the word "a judgment creditor may cause an order . . . to be issued from the court" must be read and understood.

[102] These words mean that the judgment creditor may move the court to issue an emoluments attachment order. In other words the creditor must obtain the order from the court. An order obtained from a clerk of the court or some other official is not an

[46] Id at para 23.

order issued from the court. This is so because under the Act an order issued from the court must be an order from a magistrate because she alone constitutes the court.

[103] This is not only a reasonable interpretation of section 65J(1) but is also an interpretation that renders the section consistent with the Constitution. Accordingly it must be preferred over any meaning. It also accords with the scheme of the Act in terms of which orders are issued by the court. Where the Act allows a clerk of the court to issue orders, it deems them to be court orders.

[104] The second judgment holds that the language of the text is not reasonably capable of a constitutionally compliant construction. For this conclusion it relies on the phrase "as if it were a court judgment" in section 65J(5). On face value the phrase appears to support the second judgment. But a closer examination of the entire section 65J indicates otherwise. Firstly, it does not appear from the text that any person other than the court is empowered to issue emoluments attachment orders. And if so, who that person is. This is the first hurdle the second judgment must clear.

[105] Secondly, when the phrase "as if it were a court judgment" is read in the context of the structure of the entire section 65J, a different meaning emerges. That structure is the following. The court grants an emoluments attachment order in terms of section 65J(1) if one of the preconditions in section 65J(2) is present. Once the order is granted or issued, the judgment creditor must take a further step before execution. It cannot without more proceed to execute. The judgment creditor must act in terms of section 65J(3).

[106] Section 65J(3) provides:

> "Any emoluments attachment order shall be prepared by the judgment creditor or his attorney, shall be signed by the judgment creditor or his 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."

[107] In terms of section 65J(3) the judgment creditor is under a duty to prepare an emoluments attachment order by completing the relevant form. Once this is done she or her attorney must sign the prepared order which must also be signed by the clerk of the court. The signed order must then be served on the garnishee by the messengers of the court. In this context what is served is not an order issued under section 65J(1) but the one prepared by the judgment creditors. It is the same order to which section 65J(5) refers when it says "an emoluments attachment order may be executed against the garnishee as if it were a court judgment". Read in this sense, the apparent support for the construction preferred in the second judgment evaporates. In this sense the order prepared and signed by the judgment creditor constitutes an equivalent of a writ of execution which is a step taken before execution. The writ is ordinarily executed as if it is a court order.

[108] Finally, I need to comment on the second judgment's revolutionary approach to execution. On that approach it means that from now onwards execution against movable and immovable property must involve judicial oversight. However, it is not clear whether where a court has granted an order for payment of money or delivery of goods, the court must be engaged again if the judgment debtor fails to pay the judgment debt or whether the sheriff may proceed to execute against movable property of the debtor or take possession and deliver the goods. This is because at the time the order is granted, the court does not enquire into whether the money would be paid or the goods would be delivered. Payment or delivery are matters that arise later after service of the order on the judgment debtor.

[109] If upon service the judgment debtor pays, no execution is triggered. Execution becomes necessary only if there is a failure to pay or deliver in terms of the court order. That is why in respect of immovable property, the judgment creditor has to go back to the court for leave to execute against immovable property if authorisation was not given at the time of making the order. The second judgment dispenses with the distinction drawn between movable and immovable, pertaining to execution.

The appeal

[110] The Flemix respondents and the Association sought to appeal against paragraph 3 of the High Court's order. That declared "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."[47] The two appeals overlapped to a large extent and three main arguments were advanced. First, they submitted that section 45 of the Magistrates' Courts Act (section 45) and sections 90 and 91 of the National Credit Act must be read in a manner that avoids conflict. Second, even if it is not reasonably capable of avoiding the conflict, the declarator they sought must still be granted because in the schedule that lists the provisions of the National Credit Act that trump Chapter IX of the Magistrates' Court Act, section 90 of the National Credit Act is not included. It was submitted that this signifies a clear indication that section 90 was not intended to prevail over section 45. Third, it was contended that section 45 promotes the right of access to courts by enabling parties, for convenience and cost effectiveness, to consent to the jurisdiction of a court that would otherwise not have jurisdiction. Each of these arguments must be addressed.

Do sections 90 and 91 of the National Credit Act conflict with section 45?

[111] Section 45 deals with jurisdiction by consent. It provides:

> "(1) Subject to the provisions of section forty-six, the court shall have jurisdiction to determine any action or proceeding otherwise beyond the jurisdiction, if the parties consent in writing thereto: Provided that no court other than a court having jurisdiction under section twenty-eight shall, except where such consent is given specifically with reference to particular proceedings already

[47] It should be noted that both the Flemix respondents and the Association accepted that for purposes of granting an emoluments attachment order under section 65J of the Act, section 45 does not permit a debtor to consent in writing to the jurisdiction of a court other than "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".

> instituted or about to be instituted in such court, have jurisdiction in any such matter.
>
> (2) Any provision in a contract existing at the commencement of the Act or thereafter entered into, whereby a person undertakes that, when proceedings have been or are about to be instituted, he will give such consent to jurisdiction as is contemplated in the proviso to subsection (1), shall be null and void."

[112] Reading the two subsections of section 45 together, it is clear that the section prohibits what will be defined as "pre-emptive" consent to jurisdiction – consent to jurisdiction that is given at a time prior to any proceedings having been initiated or which are about to be initiated. In other words, the consent can be given only once proceedings are imminent.

[113] Section 90(2)(k)(vi)(bb) of the National Credit Act holds that:

> "(2) A provision of a credit agreement is unlawful if—
>
> . . .
>
> (k) it expresses, on behalf of the consumer—
>
> . . .
>
> (vi) a consent to the jurisdiction of—
>
> . . .
>
> (bb) any court seated outside the area of jurisdiction of a court having concurrent jurisdiction and in which the consumer resides or works or where the goods in question (if any) are ordinarily kept."

And section 91(2) of the same Act holds that:

> "[a] credit provider must not directly or indirectly require or induce a consumer to enter into a supplementary agreement or sign any document, that contains a provision that would be unlawful if it were included in a credit agreement."

[114] Both the Flemix respondents and the Association argue that sections 90(2)(k)(vi)(bb) and 91(2) of the National Credit Act and section 45 can be read together. They submit that sections 90(2)(k)(vi)(bb) and 91(2) are concerned with provisions that would be prohibited if they were in a credit agreement (either because they are included in the agreement itself or through a supplementary agreement or other document) but that it must be, in theory, possible for the provision in question to form part of a credit agreement. They then point to the section 45 prohibition on pre-emptive consents to jurisdiction. As noted above, section 45 only allows non-pre-emptive consents that arise from existing or soon-to-be initiated proceedings. The Flemix respondents and the Association argue that non-pre-emptive consents could never be included in a credit agreement because as a practical reality they arise from the workings of the credit agreement itself. Non-pre-emptive consents require there to be a dispute brewing and a dispute arising from a credit agreement cannot begin to brew unless the credit agreement has already come into force. If the credit agreement must have come into force before the non-pre-emptive consent can exist, then the non-pre-emptive consent could never have been included in the credit agreement to begin with and so the prohibition in sections 90(2)(k)(vi)(bb) and 91(2) will not apply.

[115] It is a clever argument. But it is unpersuasive. Firstly, the focus of sections 90 and 91 is on "unlawful provisions" and section 91(2) is in the hypothetical "if it *were* included". The Association argue that the "document" referred to in section 91(2) must be a credit agreement-related document. But the wording of the statue clearly states "any" document so this assertion is unsustainable. So we are looking at hypothetical provisions. The question is simply: would the provision of a document be unlawful *if* that provision were in a credit agreement.

[116] Here we are concerned with section 45 consents to jurisdiction. These exist in a document that is signed. They can[48] include a provision in which a consumer

[48] I state "can" because, in theory, a consumer could consent, under section 45, to the jurisdiction of a court where "the goods in question (if any) are ordinarily kept". This is because section 45 allows for consents to

consents to the jurisdiction of a court seated outside the area of jurisdiction of a court having concurrent jurisdiction and in which the consumer resides or works or where the goods in question (if any) are ordinarily kept. If that provision were transported into a credit agreement, it would be unlawful under section 90(2)(k)(vi)(bb). Section 90(2)(k)(vi)(bb) does not specify whether the "consent" it prohibits is pre-emptive or not, it simply talks about "a consent to the jurisdiction . . . .". The Flemix respondents and the Association's technical focus on whether, by logic, a consent to jurisdiction included in a credit agreement would be pre-emptive and, therefore, not possible under section 45(2) both overcomplicates and side-steps the legislative prohibition in the National Credit Act. It must be rejected.

[117] The Flemix respondents also submit in the appeal that section 91(2) prohibits only specific conduct, namely when a credit provider "directly or indirectly require[s] or induce[s] a consumer to enter into a supplementary agreement or sign any document, that contains a provision that would be unlawful if it were included in a credit agreement". They contend that a section 45 consent is a voluntary agreement that does not involve any inducing or requiring by the credit provider. But the facts patently illustrate how this assertion is wrong and that these consents are often induced and debtors are frequently subject to outside pressure. The wording of the statute also sets a low threshold – "indirectly . . . induce". By informing a debtor about the section 45 procedure and providing them with the necessary documents, the credit provider has indirectly induced the consumer to sign the consent. This interpretation is underscored by the purposes of the National Credit Act, one of which is "to prohibit certain unfair credit and credit marketing practices". And section 91 itself is titled "Prohibition of unlawful provisions in credit agreements and supplementary agreements". The focus is on the unlawful provisions rather than the credit provider's conduct.

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jurisdiction beyond those courts "having jurisdiction under section twenty-eight" of the Magistrates' Courts Act and a court with jurisdiction over the goods in question might not be covered by section 28.

[118] So there is a conflict here, to the extent that some consents to jurisdiction under section 45 are not permissible under sections 90 and 91 of the National Credit Act. It may be more accurate to say that sections 90 and 91 "limit" section 45, rather than "conflict" with it. This is because sections 90 and 91 only prevent section 45 consents that (i) deal with a relationship arising out of a credit agreement and (ii) provide consent to the jurisdiction of a court seated outside the area of jurisdiction of a court having concurrent jurisdiction and in which the consumer resides or works or where the goods in question (if any) are ordinarily kept. But whether it is seen as a limitation or a partial conflict makes no difference for present purposes, as will now emerge.

Schedule 1 of the National Credit Act

[119] Section 2(7)(a) of the National Credit Act states that:

> "Except as specifically set out in, or necessarily implied by, this Act, the provisions of this Act are not to be construed as—
>
> (a) limiting, amending, repealing or otherwise altering any provision of any other Act."

The Schedule, entitled "Rules Concerning Conflicting Legislation", then sets out a list of legislation that conflicts with the National Credit Act. The Schedule details provisions of the National Credit Act that conflict with the legislation at issue and the "conflict resolution rule" that solves the conflict. According to section 172(1) of the National Credit Act, "if there is a conflict between a provision of this Act mentioned in the first column of the table set out in Schedule 1, and a provision of another Act set out in the second column of that table, the conflict must be resolved in accordance with the rule set out in the third column of that table".[49]

[120] The Flemix respondents and the Association draw attention to the fact, that although Chapter IX of the Magistrates' Courts Act (of which section 45 is a part) is listed in the second column of Schedule 1, sections 90 and 91 of the National Credit

[49] Section 172(1) of the National Credit Act.

Act are not included in the list of provisions of the National Credit Act that prevail to the extent of a conflict with Chapter IX. On this basis, they argue that sections 90 and 91 of that statute should not be read to limit, amend, repeal or otherwise alter section 45.

[121] This approach ignores a key phrase in section 2(7) – "necessarily implied". What I have set out above shows that sections 90 and 91 partially conflict with or limit section 45 – and that this is necessarily implied by an interpretation of both statutes. "Necessarily implied" means that the implication is necessary and not merely possible.[50] But, as my analysis shows,[51] a reading of the plain language of sections 90 and 91 of the National Credit Act, in the light of the mischief they are designed to prevent, clearly meets this test.[52]

Right of access to courts

[122] Finally, both the Association and the Flemix respondents submit that section 45 consents enhance access to courts and that this must be considered when interpreting the provisions.[53] According to the Association, debtors can reduce litigation costs through consents. For example, a debtor may wish to consent to the jurisdiction of a

[50] See *Kent NO v South African Railways* 1946 AD 398 at 405:

> "In considering that question, it is necessary to bear in mind a well-known principle of statutory, construction, viz., that Statutes must be read together and the later one must not be so construed as to repeal the provisions of an earlier one, or to take away rights conferred by an earlier one unless the later Statute expressly alters the provisions of the earlier one in that respect or such alteration is a necessary inference from the terms of the later Statute. The inference must be a necessary one and not merely a possible one."

[51] One might add that section 172 and Schedule 1 do not purport to set out an exhaustive list of explicit conflicts. Thus, section 4(7) of the National Credit Act regulates how the National Credit Act and the Electronic Communications and Transactions Act 25 of 2002 should be read together if there is an inconsistency – yet this statute is not included in the schedule at all. In addition, counsel for the applicants in the confirmation proceedings (respondents in the appeal) observed that the Schedule applies only to "conflicts" properly so termed. Here we are not dealing with a "conflict", but a limitation or qualification.

[52] The High Court, at para 91, similarly found that "[t]he [National Credit Act's] limitation of section 45 is in the circumstances necessarily implied".

[53] Access to courts is protected by Section 34 of the Constitution, and Section 39(2) of the Constitution provides that:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal, or forum must promote the spirit, purport and objects of the Bill of Rights."

single court for both the judgment debt and the issuing of the emoluments attachment order where these two would otherwise be in separate jurisdictions. By doing so, the debtor saves on the costs of instructing different attorneys in different jurisdictions and the time and expense of separate proceedings. The Association also submits that allowing section 45 consents to jurisdiction enables creditors and debtors to choose magistrates' courts that have greater capacity to deal with judgments quickly. And speedier justice enhances access to courts.

[123] The argument of the Flemix respondents focuses more on access to courts for the creditors. They submit that there is a practical reality that a number of magistrates' courts refuse to consider section 58[54] applications for judgment, because, in their view, section 58 is not permitted by the National Credit Act. Section 45 consents are, therefore, necessary to allow creditors to approach different courts that will entertain their applications.

[124] To take the Association's arguments first. It is conceivable that in some circumstances a section 45 consent may result in cost-savings for the debtor. But the facts of this case show, to an order of considerable magnitude, the contrary. Where a debtor consents to a magistrates' court located many miles away from his or her residence, the debtor will likely incur much greater costs and practical difficulties. In my view, the risks of the latter markedly outweigh the potential benefits of the former.

[125] Although it may be possible for the debtor to ensure, through a section 45 consent, that the same jurisdiction will deal with the judgment debt and the issuing of any emoluments attachment order, there is no guarantee that this is how section 45 consents will be used. So the Association has failed to show why reading section 45 as compatible with sections 90 and 91 of the National Credit Act will ensure better protection of the right of access to courts.

[54] Of the Magistrates' Courts Act.

[126] Now the Flemix respondents. Their remedy lies in bringing a legal challenge to the conduct of the magistrates' courts that routinely deny section 58 applications. What they cannot do is to ask this Court to re-interpret distinct statutory provisions supposedly to alleviate an unconnected problem. In fact, the Flemix respondents were in the process of launching a High Court application for declaratory relief on the issue when the applicants launched their initial application in this matter. Once these proceedings were launched, the Flemix respondents filed a counter-application requesting "[a] declaratory order that all Magistrates' Courts are obliged to grant judgment in favour of credit providers who comply with the requirements of sections 57 and 58 of the Magistrates' Courts Act 32 of 1944 as read with the relevant provisions of the National Credit Act, 34 of 2005". This was dismissed with costs. The Flemix respondents appealed to this Court against this dismissal. For the reasons I have given, that appeal must fail.[55]

[127] In the circumstances I would set aside the High Court's order but declare that only a magistrates' court may issue an emoluments attachment order in terms of section 65J(1) of the Magistrates' Courts Act 32 of 1944. I would also dismiss the appeal.

CAMERON J (Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Froneman J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring):

[128] I have had the pleasure and benefit of reading the judgment of my colleague Jafta J (first judgment). I gratefully adopt its exposition of the background facts and of the statutory and constitutional provisions. It sets out vividly the searing stories of human stress and distress that lie behind this litigation. But I do not agree with its overall approach, nor with its outcome. I have also had the benefit of reading the judgment of my colleague Zondo J (third judgment), and concur in his judgment and order.

[55] The High Court did not deal at all with the first part of the counter-application of the Flemix respondents.

[129] There are two major differences with the first judgment. First, we differ on an issue of principle. The first judgment assumes, without affirming definitively, that the Constitution requires judicial supervision when orders issued from a court are executed and finds that this is how the contested provision ought to be properly interpreted.[56] The High Court in striking down the contested provision went further. It pointed out that this Court's judgments have repeatedly found that where an applicant seeks an order to execute against or seize control of the property of another person, there must be judicial oversight.[57] To my mind, the High Court was right. This is not a principle that should merely be assumed in deciding this case. It has been established in the jurisprudence of this Court that execution of court orders is part of the judicial process.[58] It requires judicial oversight. Though previous cases dealt with debtors' homes,[59] the principle underlying them was that judicial oversight of the execution process against all forms of property is constitutionally indispensable. Clearly then, the fundamental principles relating to the proscription against self-help flowing from the section 34 right of access to courts apply, with equal force, to the execution process. I would therefore affirm the breadth of the High Court's approach.

[130] Indeed, this case is a prime example of why judicial oversight over the execution process is required.[60] An emoluments attachment order may deal with the enforcement of a judgment debt, but it is a substantive decision in itself. By granting an order that a debtor will pay the debt through her wages, the court is deciding how the debt will be paid. A decision on the means of paying a debt can often be as

[56] First judgment at [94].

[57] High Court judgment above n 33 at paras 76-81.

[58] See *Chief Lesapo* above n 16 at para 13; *Jaftha* above n 18 at paras 43-4 and 52-4 and especially at paras 56, 58-9 and 62-4; *Gundwana* above n 32 at paras 37-41.

[59] In *Gundwana* above n 32 at para 41, this Court found that:

> "The combined effect of [*Chief Lesapo* and *Jaftha*] is that execution may only follow upon judgment in a court of law. And where execution against the homes of indigent debtors who run the risk of losing their security of tenure is sought after judgment on a money debt, further judicial oversight by a court of law of the execution process is a must."

[60] For a rigorous approach to judicial oversight of the grant of emoluments attachment orders, see the Full Bench judgment in *Minter NO v Baker* 2001 (3) SA 175 (W) (Fevrier and Selvan AJJ); see too Brett Bentley [2013] *De Rebus* 31.

important as the debt itself – and parties may contest the means of payment, even when they do not dispute that the debt itself must be paid.[61] A large debt payable through lenient means may be less burdensome than a small debt payable in one go.

[131] An emoluments attachment order is clearly burdensome. It severely constricts the autonomy of the debtor to decide how she will pay off the debt. It is also inflexible as it does not adapt to the debtor's changing circumstances from week to week.[62] It goes directly off a debtor's wages – and these wages will often form the means for the debtor's day-to-day survival. These are all important considerations to be borne in mind when deciding whether an emoluments attachment order should be granted.[63] What is more, a debtor's personal circumstances may well have changed in the interim between when a judgment debt is entered and ordered to be paid in instalments and when an emoluments attachment order is sought. It is, therefore, crucial that these considerations are taken into account at the time the emoluments attachment order is sought.

[132] All this accentuates the importance of the High Court's encompassing approach to execution against property and the constitutional necessity for judicial supervision over it. The broader approach takes fuller account of the harsh effects in the absence of judicial oversight, acknowledging that they threaten the livelihood and dignity of low-income earners, a distinctly vulnerable group in our society. Even though *Jaftha* and *Gundwana* dealt with the section 26 right of access to housing, they find analogous application here, where indigent debtors run the risk of losing a part of their only property – their monthly income.

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[61] See *Chief Lesapo* above n 16 at paras 13-5. In particular at para 15:

> "The judicial process, guaranteed by section 34, also protects the attachment and sale of a debtor's property, even where there is no dispute concerning the underlying obligation of the debtor on the strength of which the attachment and execution takes place."

[62] Through section 65J(6) and (7), an emoluments attachment order can be rescinded, suspended or amended – but these provisions kick in only after the emoluments attachment order has been granted.

[63] A decision that illustrates the practical operation of emoluments attachment orders is *MBD Securitisation (Pty) Ltd v Booi* [2015] ZAFSHC 134; 2015 (5) SA 450 (FB), especially at paras 29 and 41.

[133] Primarily, the debtor's section 34 right of access to court is breached by an execution process not sanctioned by a court. Moreover, taking away the basic income that indigent debtors rely on for subsistence, without court supervision, rubs right up against the right to dignity (which underlies all the socio-economic rights of housing, food and health care). It may also implicate the protection against arbitrary deprivation of property afforded under section 25.[64]

[134] I now turn to a second, bigger difference with the first judgment. Together with associated relief, the High Court granted an order striking down certain words in section 65J(2)(a), (b)(i) and (b)(ii) of the Act "to the extent that they fail to provide for judicial oversight over the issuing of an emolument[s] attachment order against a judgment debtor". The first judgment would deny this order confirmation (the other relief the applicants obtained remains intact). Instead, it parses the provision at issue to render it conformable with the assumption that judicial oversight is constitutionally necessary. It finds that the ills and abuses this application details are the result, not of debtors' and debt collectors' use of a provision that is constitutionally offensive, but merely of widespread incorrect practical application of the provision.[65] So the remedy is not to strike down the provision – a highly interventive route, which laps at the boundary separating judicial power from legislative prerogative – but a declaratory order that sets right the wrong understanding of the provision.

[135] The interpretive route is attractive. Since *Hyundai*, it has been gold-plate doctrine in this Court that judges must embrace interpretations of legislation that fall within constitutional bounds over those that do not, provided that the interpretation can be reasonably ascribed to the section.[66] Where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, it should

[64] Section 25(1) of the Constitution provides:

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

[65] First judgment at [93].

[66] *Hyundai* above n 39 at para 23.

be preserved. Only if this is not possible, this Court has held, should resort be had to the remedy of notional severance.[67]

[136] The High Court's order here – striking down the provision "to the extent" that it failed constitutional conformity – was an order of notional severance.[68] Was it right to grant it? That depends on whether the impugned portions of section 65J(2) are reasonably capable of being read to mean that emoluments attachment orders can be granted only with judicial oversight – that is, by a magistrate only, and not by the clerk of the court.

[137] The first judgment reasons that the text of section 65J(2) does not support the construction that emoluments attachment orders may be issued by a clerk of the court. The correct interpretation, it finds, is that these orders are issued by a court.[69] And it is only the court that is mandated to issue the order.[70] It grounds this interpretation in the provisions of especially section 65A(1)(a) and the other provisions that precede section 65J. Section 65A(1)(a) enables a judgment creditor to issue a notice to a debtor whose judgment debt remains unsatisfied for the debtor "to appear before a court in chambers . . . to enable the court to inquire into the financial position of the debtor and to make such order as the court may deem just and equitable".[71]

[138] The first judgment points to provisions that guide the court in the inquiry.[72] It also invokes provisions that empower the court to order the debtor to pay the judgment debt in specified instalments and "in addition authorize the issue of an emoluments attachment order by virtue of section 65J(1)" if satisfied that the judgment debtor (i) "has made an offer in writing to the judgment creditor or his

[67] Id at para 26.

[68] See *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) (*National Coalition*) at paras 63-7, usefully explicating the remedy of notional severance.

[69] First judgment at [89].

[70] Id at [93].

[71] Id at [80].

[72] Section 65D(4).

attorney to pay the judgment debt and costs in specified instalments or otherwise" or (ii) "if such an offer has not been made, that the judgment debtor is able to pay the judgment debt and costs in reasonable instalments".[73]

[139] The first judgment concludes that these provisions, seen as a whole, support the conclusion that it is the court, and not the clerk of the court, that grants emoluments attachment orders.[74] It also notes that the statutory form a judgment creditor must fill in for the issue of an emoluments attachment order recites that the requirements set out "have been made to appear to the above-mentioned court".[75] From this, the first judgment infers that the court itself, and not its clerk, must be satisfied of the requirements.

[140] This approach cannot in my view save section 65J(2) from its constitutional shortfalls. Section 65J forms a part of Chapter IX of the Act, entitled "Execution". But it operates with its own force as a free-standing provision. No language links section 65J directly to sections 65A, 65D or 65E. It is true that section 65E, which deals with proceedings initiated under section 65A, provides that a court may "authorize the issue of an emoluments attachment order by virtue of section 65J(1)". But clearly not all emoluments attachment orders are issued through this process.[76] For those that have been issued outside the section 65E process, there is no equivalent guarantee of judicial oversight.

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[73] Section 65E.

[74] First judgment at [83], [85] to [87] and [93].

[75] Id at [88].

[76] As the first judgment recognises at [87]:

> "There is no indication that the situation is different in the case where an emoluments attachment order is *not* made at the conclusion of the inquiry into the debtor's financial position and where the creditor later makes the request at the court with the necessary jurisdiction."

According to a report by the National Industry Steering Committee *National Treasury/Banking Association of South Africa Joint Statement on Responsible Lending: Position Paper on the Retrospective Actions for Emoluments Attachment Orders* (September 2013), there are 683 215 emoluments attachment orders currently in existence. Only 68 390 of these were obtained via section 65A and section 65J.

[141] Here, a little difference goes a long way. Under section 65E, the court authorises the issue of the emoluments attachment order. The word is significant.[77] It must be contrasted with section 65J(1) which envisages simply that the emoluments attachment order is "issued from the court".[78] The only wording that suggests any court authorisation at all is in section 65J(2)(a), which, as we will see, is stated only as an alternative to a clerk-issued order.

[142] So there can be no reason why a court that determines a request for the issuing of an emoluments attachment order in terms of section 65J(1) should be guided by the factors listed in section 65D(4).[79] Section 65D, like section 65E, relates to a specific process that though connected, does not completely overlap with section 65J. The crucial provision that puts into operation the issuing of emoluments attachment orders is section 65J. So we must give it its own autonomous significance. And – adding to the mischief – there is nothing anywhere in the provision that requires a magistrate to give consideration to whether a debt should be paid in instalments or, more particularly, what proportion of the judgment debtor's emoluments the emoluments attachment order should cover.

[143] Then there is the wording of section 65J itself. Section 65J(1) – which the applicants did not directly attack, and which did not form part of the High Court's

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[77] Note that section 65E(4) envisages that "the judgment creditor issues or causes to be issued" an emoluments attachment order.

[78] Chapter IX overall seems to evince a distinction between "issue" and "authorise the issue of". See section 74D. Further, section 62, in relevant part, provides that:

> "(1) Any *court* which has jurisdiction to try an action shall have jurisdiction to *issue* against any party thereto any form of process in execution of its judgment in such action.
>
> (2) A court (in this subsection called a second court), other than the court which gave judgment in an action, shall have jurisdiction on good cause shown to stay any warrant of execution or arrest *issued by another court* against a party who is subject to the jurisdiction of the second court."

In *Ems v Viljoen* 1947 (4) SA 78 (O), Fischer JP held that a warrant of execution can be lawfully issued by the clerk of the court (though the warrant of execution was set aside on other grounds). This Court in *Jaftha* above n 18 at para 15 implicitly recognises the same (that a clerk can issue a warrant of execution), which prompted it to read into section 66(1)(a) of the Act protections of judicial oversight.

[79] First judgment at [90].

order of invalidity – sets the scene for section 65J(2), which was the focus of their attack. It provides, subject to subsection (2), that "a judgment creditor may cause an order . . . to be issued from the court". The prime agency is clear – it is the judgment creditor. Not the court. The judgment creditor causes the order to be issued. And the emoluments attachment order is issued not "by" the court, but "from" the court. The portents of judicially unsanctioned execution are unpalatably signalled. Unsurprisingly, the Flemix respondents conceded as much in their answering affidavit in the High Court.

[144] Subsection (2) subjects the issue of an emoluments attachment order to preconditions (an order "shall not be issued . . . unless . . . ."). These require either the written consent of the judgment creditor or court authorisation;[80] or, alternatively, that the process in section 65J(2)(b) is followed.[81]

[145] Strikingly, subsection (2)(a) licenses the issue of an emoluments attachment order in two circumstances. These are posited as alternatives. The order may be issued if the debtor consents in writing. Or it may be issued if "the court has so authorised". The conjunction "or" seems to make linguistically plain that an emoluments attachment order may be obtained through the debtor's written consent even when the court has not authorised it. If at all times it is a court that issues an emoluments attachment order, whyever would the alternative phrase be necessary? This conforms with the scene-setting provisions of subsection (1), which locate the

[80] Section 65J(2)(a).

[81] Section 65J(2)(b) requires that the judgment creditor or his or her attorney has first—

> "(i) sent a registered letter to the judgment debtor at his or her last known address advising him or her of the amount of the judgment debt and costs as yet unpaid and warning him or her that an emoluments attachment order will be issued if the said amount is not paid within two 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."

agency in the judgment creditor and envisage the issue of the order "from" the court, and not by it. All of this points to judicially unsanctioned execution.

[146] The no-sanction scheme conforms also with section 65J(5). This provides that an emoluments attachment order may be executed "as if it were a court judgment". Against the backdrop of subsection (2), this seems to signal further license for absence of judicial sanction. It posits that an order may be obtained that is not a court judgment – namely through the judgment debtor's written consent – but that it may nevertheless be executed "as if it were" a court judgment. Again, whyever would this provision have been necessary if emoluments attachment orders were issued by a court only?

[147] It is possible to try to repress or smooth away these verbal eruptures of unsanctioned extra-judicial debt-enforcement. But this cannot be done comfortably, nor, in my view, plausibly. The linguistic significations are just too overt. They block any reasonable route to linguistic amelioration. The interpretive attempt is, against the warning of this Court in *De Beer N.O.*, "unduly strained".[82] And it risks stepping beyond the limits of the judicial function into the terrain of the Legislature by interpreting the statute beyond what is linguistically viable.

[148] It is true, as the first judgment points out, that the provision envisaging consent on the part of the judgment debtor must be read in the context of the provisions that precede it. But that context, to my mind, cannot save the provision from the plain meaning of its wording, which is to permit judicially unsanctioned enforcement of judgment debts.

[149] The safest, soundest and most secure remedy, one that recognises the plain meaning of the language, and the constitutional limits it seeks to transgress, is to strike the offensive legislation down, as the High Court did.

[82] *De Beer N.O.* at para 24, quoted in the first judgment at [76].

Magistrates' Court Rules

[150] Nor can the Magistrates' Court Rules be used to save the impugned provision. The Flemix respondents and the Association argued that section 65J could be saved through the application of rule 4(4) of the Magistrates' Court Rules (Rules), which came into effect in July 2014.[83] Rule 4(4) provides that rule 12(5) applies to "a request for judgment in terms of section 57 and 58".[84] Rule 12(5) provides that the registrar or clerk of the court "shall refer to the court any request for judgment on a claim founded on any cause of action arising out of or based on an agreement governed by the National Credit Act, or the Credit Agreements Act" and that "the court shall thereupon make such order or give such judgment as it may deem fit".[85] According to the Flemix respondents and the Association, the effect of these Rules is to create a comprehensive legislative scheme in which it is impossible to obtain an emoluments attachment order without judicial supervision.

[151] This argument cannot be sustained. First, an invalid statutory scheme cannot be saved by a regulation.[86] The Association pointed out that in the definitions section of the Act, "this Act" includes the Rules. Of course. But that does not give the Rules the same legislative force as the Act itself.[87]

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[83] Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa GN R507 *GG* 37769, 27 June 2014.

[84] Rule 4(4) of the Rules reads as follows:

> "Rules 12(5), (6), (6A) and (7) apply to a request for judgment in terms of sections 57 and 58 of the Act."

[85] Rule 12(5) of the Rules provides in full:

> "The registrar or clerk of the court shall refer to the court any request for judgment on a claim founded on any cause of action arising out of or based on an agreement governed by the National Credit Act, or the Credit Agreements Act, 1980 (Act 75 of 1980), and the court shall thereupon make such order or give such judgment as it may deem fit."

[86] *Moodley and Others v Minister of Education and Culture, House of Delegates and Another* [1989] ZASCA 45; 1989 (3) SA 221 (A) at 233D-G.

[87] Even if the Rules could save the statute, which is clearly not accepted here, it is doubtful that they could do so decades after the statute was enacted. See *New National Party of South Africa v Government of the Republic of South Africa and Others* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) at para 22:

> "Consistent with this objective approach to statutory invalidity, the circumstances which become apparent at the time when the validity of the provision is considered by a Court are not necessarily irrelevant to the question of its consequential invalidity. However, a statute cannot have limping validity, valid one day, invalid the next, depending upon changing circumstances. Its validity must ordinarily be determined as at the date it was passed.

[152] Second, and as highlighted by the amicus, the South African Human Rights Commission, section 65J is not limited to judgment debts that arise out of the National Credit Act or the Credit Agreements Act. It applies to a broader range of judgment debts than rule 12(5) envisages. So, even trying to use patchwork, as the argument would have us do, rule 12(5) does not fill the gap completely. Finally, even if there is a guarantee of judicial oversight over requests for judgment on those claims governed by rule 12(5), this does not equate to judicial oversight over the granting of an emoluments attachment order. An emoluments attachment order might be granted in separate proceedings to those of the judgment debt. For the reasons set out earlier,[88] the decision to grant an emoluments attachment order requires its own guarantee of judicial oversight. Rule 12(5) cannot help.[89]

[153] I conclude that the High Court's reading of the provision was correct, and so too the order of invalidity it granted. That order implicitly incapacitates section 65J(1), which permits a judgment creditor to cause an emoluments attachment order to be issued from the court. This is because section 65J(1) permits the judgment creditor to do so only if one of the alternative processes set out in section 65J(2) has been satisfied – "[s]ubject to the provisions of subsection (2)". Two of those processes are constitutionally unsound for want of judicial oversight – and no judicial oversight is provided by section 65J(1) itself. So section 65J(1) is necessarily rendered inoperative to the extent that it allows for those constitutionally invalid processes. The section 36 limitation analysis also does not help the respondents in this case. There is no justification for the infringement of section 34, despite the

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> Nevertheless, the implementation of an Act which passes constitutional scrutiny at the time of its enactment, may well give rise to a constitutional complaint, if, as a result of circumstances which become apparent later, its implementation would infringe a constitutional right."

[88] See [130] to [131].

[89] Counsel for the Association conceded during oral argument that its contentions were premised on rule 12(5) saving the statute. Since rule 12(5) is not capable of doing so, the argument fails.

Flemix respondents' suggestion to the contrary.[90] No expansion of the High Court's order is, therefore, required.

[154] This means that debtors whose rights would have been infringed under the constitutionally invalid provisions of section 65J receive immediate protection from the date of the order.[91] As from that date, emoluments attachment orders may be issued only when a court has so authorised.[92] Of course the Legislature is free to develop further how this judicial oversight must operate. And the door is not closed to any future challenge against the adequacy of judicial oversight. But that is for another time.

[155] So the substance of the High Court's order must be confirmed (though in the third judgment it is rendered in the form of a reading in, rather than a severance), subject only to a minor clarification I would add. Section 90(2)(k)(vi)(bb) of the National Credit Act provides that a provision in a credit agreement is unlawful if the consumer expresses consent to the jurisdiction of "any court seated outside the area of jurisdiction of a court having concurrent jurisdiction and in which the consumer resides or works or where the goods in question (if any) are ordinarily kept". The prohibition against written consent in paragraph 3 of the High Court's order must therefore make provision for the additional jurisdictional instance the order omits, namely where the goods are kept.

Retrospectivity

[156] The applicants conceded that debts recovered under past emoluments attachment orders should not be affected by any declaration of invalidity. But, beyond that, they contended that there was no reason to limit the retrospective operation of the

[90] The Flemix respondents contend that emoluments attachment orders are rooted in the debtor's consent and that the order is "issued" by the Court. As these proceedings show, the very problem is that consent is often obtained dubiously, far from the courtroom. And the very problem is that it is not the Court that issues the order. That the debtor has a later opportunity to dispute the order, as the Flemix respondents also contended, does not meet the initiating invalidity.

[91] First judgment at [93].

[92] Being the part of section 65J(2) left standing.

declaration. They disclaimed any evidence of dislocation or uncertainty that would result if the order operates retrospectively. This was because the constitutional invalidity of the provisions at issue would not result in judgments against debtors being rendered invalid.

[157] By contrast, the Association and Flemix respondents urged that invalidity should operate solely prospectively, invoking for this contention the general principle in this Court that an order of legislative invalidity operates from the time of the order only.[93] They urged that retrospectivity would subject the credit industry as a whole to "systemic risk". Retrospectivity would be highly adverse to the entire credit industry. It is an issue that deserves the proper consideration of the National Treasury and the South African Reserve Bank, who are responsible for oversight of the banking and credit industry. Given that these institutions are not before the Court, the Court should craft an order that does not undermine their legitimate interests in securing the stability of the credit and banking industries.

[158] The Minister supported the respondents' plea for a prospective order only because of remedies. This stance seemed to stem from two main reasons. First, retrospectivity would, as the respondents argued, create significant uncertainty in the credit industry. Second, legislation is pending to address the abuse of emoluments attachment orders. This Bill, we were told during argument, is already being circulated in its second draft.

[159] Though the matter is difficult, I am inclined to issue a prospective order only. It is true that the grievous effect of this is that past emoluments attachment orders, unscrupulously procured or issued, will continue to be operative, unless individually challenged. But I am persuaded by the consideration that the issue is one of considerable complexity, best regulated by the Legislature. In these circumstances,

[93] *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* [2014] ZACC 3; 2014 (3) SA 106 (CC); 2014 (4) BCLR 373 (CC) at para 47; and *Engelbrecht v Road Accident Fund and Another* [2007] ZACC 1; 2007 (6) SA 96 (CC); 2007 (5) BCLR 457 (CC) at para 45.

the Court does best by reverting to its accustomed practice and principle. These point to prospectivity.

Costs

[160] The Law Clinic submitted that the proper order for costs would be to order costs against all of the parties who opposed the confirmation application. It accepted, however, that perhaps in this case the Minister should not have to pay costs. It asked for the costs of three counsel when three counsel were used and otherwise for two counsel. In the unusual circumstances of this case the costs of a third counsel are warranted where used. The Association by contrast emphasised that it was a non-profit organisation and was not connected to Flemix. It pursued this litigation in the interests of its members and the public and it submitted that *Biowatch*[94] should apply to it. Flemix pointed out that it had consented to the judgment regarding the 15 individual applicants.

[161] There is no reason why the High Court's costs order should not be confirmed. It correctly applied *Biowatch*.

ZONDO J (Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Khampepe J, Madlanga J, Mhlantla J and Nkabinde J concurring):

Introduction

The main question for determination in this matter is whether the Magistrates' Courts Act[95] (Act) provides for judicial oversight when an emoluments attachment order is issued against a judgment debtor in favour of a judgment creditor. The High Court answered this question in the negative. It held that section 65J(2) of the Act is

[94] *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*).

[95] 32 of 1944.

inconsistent with section 34 of the Constitution[96] and invalid to the extent that it fails to provide for judicial oversight when emoluments attachment orders are issued. The matter has now been referred to this Court for confirmation of that order of invalidity. In his judgment (first judgment), my Colleague, Jafta J, concludes that the Act does provide for judicial oversight in this regard. He holds, therefore, that the High Court erred in concluding differently. He declines to confirm the order of invalidity.

[162] In his judgment (second judgment), my Colleague, Cameron J, concludes that the Act does not provide for judicial oversight in all cases when an emoluments attachment order is issued. He, therefore, agrees with the High Court except that, like me, he agrees that notional severance is not appropriate and that a reading-in, with limited severance, is the appropriate remedy in this case. I concur in the second judgment. However, I write separately to deal with the issue from another angle and to provide additional reasons for my conclusion.

[163] To determine whether the Act provides for judicial oversight, it is necessary to inquire into whether it is the court or someone else that has the power to issue emoluments attachment orders. If it is the Magistrates' Court, that will mean that the Act provides for judicial oversight. If it is someone else, that will mean that there is no judicial oversight unless, prior to the issuing of an emoluments attachment order, there is judicial intervention. The first judgment says that under the Act the power to issue emoluments attachment orders vests with the court whereas the second judgment says that it vests with the clerk of the court.

[96] Section 34 of the Constitution reads:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

Are emoluments attachment orders issued by the court?

[164] Emoluments attachment orders are provided for under Chapter IX of the Act. That chapter deals with execution. Section 61 defines the term "emoluments" as including—

> "(i) salary, wages or any other form of remuneration; and
> (ii) any allowances,
> whether expressed in money or not."

The same section defines the word "debts" as including "any income from whatever source other than emoluments".

[165] Section 65J(1)(a) and (b)[97] tells us who may cause an emoluments attachment order to be issued, what an emoluments attachment order does and what its legal force is. The gist of paragraph (a) is that it confers power on a judgment creditor to cause an emoluments attachment order to be issued "from the court" in which the employer of the judgment debtor resides, carries on business or is employed. The thrust of paragraph (b) is that an emoluments attachment order attaches the emoluments owing or accruing to the judgment debtor by or from his or her employer to the amount necessary to cover the judgment debt and the costs of the attachment. Paragraph (b) also places an obligation on the employer of the judgment debtor to pay from time to time to the judgment creditor specific amounts from the emoluments of the judgment debtor. The amounts must accord with the order of the court laying down specific instalments payable by the judgment debtor until the relevant judgment debt and costs have been paid in full. I do not propose to discuss sections 65J(a) and (b) at this stage and will do so a little later.

[166] Section 65A(1) deals with a situation where a court has given judgment for the payment of a sum of money or has ordered the payment in specified instalments or

[97] See section 65J(1)(a) and (b) at [171] below.

otherwise of such an amount and the judgment order remains unsatisfied for a period of 10 days. Section 65A(1)(a) provides that in such a case—

> ". . . the judgment *creditor may issue, from the court* of the district in which the judgment debtor resides, carries on business or is employed . . . a notice calling upon the judgment debtor . . . to appear before the court in chambers on a date specified in such notice . . . to enable the court to inquire into the financial position of the judgment debtor and to make such order as the court may deem just and equitable."

[167] Section 65A(1)(b) and (c) provides:

> "(b) A notice referred to in paragraph (a) shall be drawn up by the judgment creditor or his or her attorney, signed by the judgment creditor or his or her attorney and the clerk of the court, and served by the sheriff, or by the attorney of the judgment creditor or any candidate attorney in his or her employ, on the judgment debtor . . . in the manner prescribed by the rules for the service of process in general and at least ten days before the date fixed in the notice for the appearance before the court.
>
> (c) The fees and charges in respect of a notice served by any attorney or candidate attorney shall be determined in accordance with the tariffs prescribed by the rules for the service of process by a sheriff: Provided that no such fees and charges shall be payable unless personal service of the notice has been effected."

[168] Section 65E(1)(c) confers power on the Magistrates' Court to "authorize the issue of an emoluments attachment order by virtue of section 65J(1) for the payment of the judgment debt and costs by the employer of the judgment debtor . . .". Section 65E(1) relates to proceedings in terms of section 65A(1). Section 65E(1) gives the court certain powers if it is satisfied as to certain matters. One of those is that, if the court is satisfied "that the judgment debtor . . . at any time after receipt of a notice referred to in section 65A(1), has made an offer in writing to the judgment creditor or his attorney to pay the judgment debt and costs in specified instalments *or otherwise, whether by way of an emoluments attachment order or otherwise*, or, if such an offer has not been made, that the judgment debtor is able to pay the judgment

debt and costs in reasonable instalments, *the court may* order the judgment debtor to pay the judgment debt and costs in specified instalments . . .” and postpone any further hearings of the proceedings. In addition, “if the judgment debtor is employed by any person who resides, carries on business or is employed in the district, or if the judgment debtor is employed by the State in the district,” the court has power to “*in addition authorize the issue of an emoluments attachment order by virtue of section 65J(1)* for the payment of the judgment debt and costs by the employer of the judgment debtor, and postpone any further hearings of the proceedings”.

[169] We see that under this provision the power of the court is to “authorize the issue of an emoluments attachment order . . .”. Its power is not to issue an emoluments attachment order itself. The court’s role is to authorise that someone else issue the emoluments attachment order. I make this distinction not to say that there is no judicial oversight because, if the court authorises the issuing of an emoluments attachment order, there is judicial oversight. I do so to make the point that this provision suggests that the role of issuing emoluments attachment orders may be for someone else to play and not the court.

[170] Since in terms of section 65E(1)(c) the court authorises “the issue of an emoluments attachment order by virtue of section 65J(1)”, it is necessary to quote section 65J(1). The heading to section 65J is: “Emoluments attachment orders”. Section 65J(1) has paragraphs (a) and (b). They read:

> “(a) Subject to the provisions of subsection (2), a judgment creditor may cause an order (hereinafter referred to as an emoluments attachment order) to be issued from the court of the district in which the employer of the judgment debtor resides, carries on business or is employed, or, if the judgment debtor is employed by the State, in which the judgment debtor is employed.”
>
> (b) An emoluments attachment order—
>
> (i) shall attach the emoluments at present or in future owing or accruing to the judgment debtor by or from his or her employer (in this section called the garnishee), to the amount necessary to cover the judgment and

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

[171] The first judgment deals with the issue at hand on the basis that section 65J(1)(a) is the source of the power for the issue of emoluments attachment orders. Section 65J(1)(a) does not expressly say that the court or the clerk of the court or anyone else has the power to issue or make an emoluments attachment order. So, if it is the court or the clerk of the court that has that power, then that power must be necessarily implied in the provision. The first judgment says that section 65J(1)(a) must be given a meaning that is consistent with the Constitution if it can be given such a meaning without straining the language of the statute. It says that the meaning that must be given to the provision is that it is the court and not the clerk of the court that has the power to issue an emoluments attachment order contemplated in the provision. The judgment implies that this meaning can be given to this provision without straining the language of the provision.

[172] At face value, the proposition that section 65J(1)(a) should be read as meaning that it is the court that issues emoluments attachment orders contemplated in section 65J(1)(a) seems attractive. However, upon further reflection, one realises that the proposition is not sustainable. Section 65J confers upon a judgment creditor the power to "cause an [emoluments attachment] order . . . to be issued *from* the court . . .". If one were to say that the provision means that the court issues the emoluments attachment order, one would be forced to read the provision as saying that "a judgment creditor may cause an [emoluments attachment] order . . . to be issued [*by*] the court . . .". That would mean that a judgment creditor has power to in effect instruct the court to issue an emoluments attachment order. That would be the meaning of the phrase "may cause an [emoluments attachment] order . . . to be issued

from the court . . .". The meaning that a litigant may effectively instruct a court to make or grant a certain order is not a meaning that is consistent with the Constitution. It is one that is inconsistent with the independence of the Judiciary. It is linguistically impossible to give this provision the meaning that it is the court that issues an emoluments attachment order.

[173] The phrase "a judgment creditor may cause an [emoluments attachment] order . . . to be issued . . ." means that the judgment creditor has the authority to ensure that the emoluments attachment order is issued. If you have power to cause something to be done, it means that you have control over whatever may be necessary to ensure that it is done. It means that you can do the thing yourself or you can instruct somebody else to do it and you can see to it that it is done. Under section 65J(1)(a), the person who has the power to cause an emoluments attachment order to be issued is a judgment creditor. A judgment creditor cannot have power to cause a court to issue an emoluments attachment order. It may be that he or she may have power to cause the clerk of the court, but not the court, to issue an emoluments attachment order.

[174] The proposition that section 65J(1)(a) must be given the meaning that it is the court that issues an emoluments attachment order contemplated therein overlooks the fact that that meaning would require that the provision be read to say: "Subject to subsection (2), a judgment creditor may cause an order (herein after referred to as an emoluments attachment order) to be issued [by] the court." In other words, the word "from" which appears before the words "the court" in section 65J(1)(a) would have to be replaced with the word "by". While there may be a case where it would be justified to read "from" as "by" in a statutory provision, it does not appear to me that, in the context of this provision, there would be justification to do so. I note that the first judgment does not expressly go that far. However, the meaning it attaches to section 65J(1)(a) can only be attributed to that provision if the word "from" is to be replaced with the word "by". Otherwise, there is no other way to accommodate the suggested meaning within that provision.

[175] To read the word "from" to mean "by" in section 65J(1)(a) also overlooks the fact that the word "from" in this provision is used as part of the concept of issuing. When one looks at the Act, one sees that there are other sections in which issuing is used with either the word "from" or the words "out of". A few examples should suffice. Section 4(3) and (4) of the Act both contain the phrase "issued out of any court". Respectively, they read:

> "(3) Every process issued out of any court shall be of force throughout the Republic.
> (4) Any process issued out of any court may be served or executed by the messenger of the court appointed for the area within which such process is to be served or executed."

In section 65A(1)(a) we also find the concept of something being "issued from the court" which we find in section 65J(1)(a). In so far as is relevant, section 65A(1)(a) reads:

> "If a court has given judgment for the payment of a sum of money or has ordered payment in specified instalments or otherwise of such an amount and such judgment or order has remained unsatisfied . . . the judgment creditor may issue, from the court of the district in which the judgment debtor resides, carries on business or is employed . . . a notice calling upon the judgment debtor to . . . appear before the court . . . ."

This means that the use of the word "from" in section 65J(1)(a) is deliberate. If that is the case, it cannot be read as "by".

[176] The proposition that section 65J(1)(a) must be read to mean that it is the court that issues an emoluments attachment order contemplated therein also overlooks the fact that, where under the Act, there is judicial intervention before an emoluments attachment order is issued, it is not the court that issues the emoluments attachment order. The court only authorises the issue of the emoluments attachment order. In support of this, it is only necessary to refer to sections 65J(2)(a) and 74D. In

section 65J(2)(a) we find the following: " . . . unless the judgment debtor has consented thereto in writing or the court has so authorised". In section 74D we find the words: " . . . where the administration order provides for the payment of instalments out of future emoluments or income, the court shall *authorize the issue of an emoluments attachment order in terms of section 65J* in order to attach emoluments at present or in future owing . . .".

[177] There is also section 65E(1)(c) which contains this part: " . . . the court may order the judgment debtor to pay the judgment debt and costs in specified instalments and . . . in *addition authorize the issue of an emoluments attachment order by virtue of section 65J(1)* for the payment of the judgment debt . . .". Therefore, reading section 65J(1)(a) as meaning that it is the court that issues an emoluments attachment order goes against the actual role of the court in relation to emoluments attachment orders. The scheme of the Act is that, where the court has a role to play in regard to emoluments attachment orders, its role is to authorise the issuing of such orders and someone else issues them. Where the court does not authorise the issue of an emoluments attachment order – and there are such cases – it has no role at all to play in the issuing of emoluments attachment orders.

[178] It is necessary to also consider the meaning of the word "issued" in the phrase "issued from the Court" in section 65J(1)(a). Its meaning may reveal whether what is contemplated is a judicial function or an administrative function. If it is a judicial function, that may help us to conclude that it is the court that issues the order. If it is an administrative function, that would point to the function being performed by someone other than a Magistrate or the Court.

[179] *Winer v Garcia*[98] dealt with the issue of a warrant. In that case Hopley J said:

> "A person empowered to grant and issue warrants may, on receiving sufficient information to justify his action, "grant" a warrant and order it to be prepared. When

[98] *Winer v Garcia & Another* (1908) 25 SC 576 (*Winer v Garcia*).

> it is ready he completes it by signing it and doing any other thing which is necessary on his part to make it a perfect instrument. He has then issued it."[99]

In *Nxumalo*[100] Kuper J regarded the issuing of summons to occur when it is signed by the Registrar and handed to the plaintiff's attorney to enable him or her to have it served. He put it thus:

> "Now, when is it that an action is commenced? It is quite clear in my view that, once a summons has been issued, i.e. once it has been signed by the Registrar of this Court and handed to the plaintiff's attorney to enable him to have the matter served, the litigation has commenced . . . ."[101]

[180] In *Protea Assurance Co Ltd*[102] Hofmeyr J said about the word "issue":

> "The term 'issue' is not defined in the Rules and as a transitive verb its ordinary meaning, in my opinion, is merely to send (hand) out, publish or put in circulation."[103]

Black's Law Dictionary[104] gives the verb "issue" the following meanings:

> "Issue (*v*) To send forth; to emit; to promulgate; as, an officer issues orders, process issues from a court. To put into circulation; as the treasury issues notes. To send out, to send out officially; to deliver, for use, or authoritatively; to go forth as authoritative or binding . . . ."

When the verb "issue" is used with reference to a writ, Black's Law Dictionary gives it the following meaning:

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[99] Id at 588.

[100] *Nxumalo v Minister of Justice and Others* 1961 (3) SA 663 (W).

[101] Id at 667A.

[102] *Protea Assurance Co Ltd v Vinger* 1970 (4) SA 663 (O) at 664-5.

[103] Id at 396.

[104] Black *Black's Law Dictionary* 4 ed (West Publishing Co, St Paul USA, 1968) at 964.

> "A writ is 'issued' when it is delivered to an officer, with the intent to have it served."

[181] Although one cannot rely on the Rules of the Magistrates' Court to interpret provisions of the Act, it needs to be pointed out that the word "issue" in the context of court processes under the Rules of the Magistrates' Court is normally used in relation to the function of the clerk of the court or Registrar of the court. Good examples in this regard are to be found in Rule 36 of the Rules of the Magistrates' Court. Rule 36(1) reads:

> "The process for the execution of any judgment for the payment of money, for the delivery of property whether movable or immovable, or for ejectment shall be by warrant *issued and signed* by the registrar or clerk of the court and addressed to the sheriff."

Rule 36(5) reads:

> "The registrar or clerk of the court shall at the request of a party entitled thereto *reissue* process issued under sub-rule (1) *without the court having sanctioned the reissue.*"

[182] Rule 37 contemplates that the court would authorise the issue of, for example, emoluments attachment orders in the circumstances contemplated therein. It does not contemplate that the court does the actual issuing of an emoluments attachment order. Rule 37(1) reads:

> "Where any warrant or emoluments attachment order or garnishee order has been lost or mislaid, the court may on the application of any interested party and after notice to any person affected thereby, *authorise* the issue of a second or further warrant or emoluments attachment order or garnishee order, as the case may be, on such conditions as the court may determine and may make such order as to costs as it may deem fit."

[183] Rule 46 specifically deals with the attachment of emoluments by emoluments attachment orders. Rule 46(1) contemplates that it is a judgment creditor who issues an emoluments attachment order. It reads:

> "*When an emoluments attachment order is issued by a judgment creditor* out of any court other than the court in which the judgment or order was obtained, a certified copy of the judgment or order against the judgment debtor shall accompany the affidavit or affirmation or certificate referred to in section 65J(2)(b) of the Act."

[184] It seems to me that the meaning of the word "issue" in the phrase "a judgment creditor may cause an [emoluments attachment] order . . . to be issued . . ." in section 65J(1)(a) is the same as the meaning of that same word in the sentence: the plaintiff may cause a summons to be issued. Causing a summons to be issued does not involve a judicial officer. To cause a summons to be issued, a plaintiff or their attorney would prepare the summons, sign it, get the clerk of the court or Registrar, as the case may be, to sign it and hand it over to someone so that it can be taken to the Sheriff or messenger of the court who would have to serve it. Interestingly, section 65J(3) contemplates a similar process in regard to an emoluments attachment order. Section 65J(3) reads:

> "*Any emoluments attachment order shall be prepared by the judgment creditor or his attorney, shall be signed by the judgment creditor or his 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."

[185] The provision of section 65J(3) captures all the steps for the preparation of an emoluments attachment order and the journey it travels until it is issued and served. The first step is the preparation of the emoluments attachment order. That is done by the judgment creditor or his or her attorney. The second step is that the order is signed by the judgment creditor or his or her attorney. The third is that it is signed by the clerk of the court. Thereafter, it is served on the garnishee. In this journey of the emoluments attachment order there is no judicial intervention. In my view, when

section 65J(1)(a) says that "a judgment creditor may cause an [emoluments attachment] order . . . to be issued from the court", it is referring to the process outlined in section 65J(3). Since there is no role for the court in that process, there is no judicial oversight. Under section 65J(1)(a) an emoluments attachment order is not issued by a court. It is issued by the clerk of the court.

[186] Elsewhere in this judgment[105] I have said that under section 65J(1)(a) a judgment creditor is given power to cause an emoluments attachment order to be issued from the court. I have also said that that is effected when the process provided for in section 65J(3) is carried out. What one therefore has is that in section 65J(1)(a) a judgment creditor is given power to cause an emoluments attachment order to be issued from a court and in section 65J(3) provision is made that tells us how an emoluments attachment order gets issued.

[187] In section 65A(1)(a) and (b) we have the same thing. In section 65A(1)(a) we find this concept of a judgment creditor having power to issue a certain notice from the court just as he or she has the power under section 65J(1)(a) to cause an emoluments attachment order to be issued from the court. In section 65J(3) we find the provision that says that "[a]ny emoluments attachment order shall be prepared by the judgment creditor or his attorney, shall be signed by the judgment creditor or his attorney and the clerk of the court, and shall be served on the garnishee by the messenger of the court . . .". Then in section 65A(1)(b) we find a provision comparable to section 65J(3). Section 65A(1)(b) reads:

> "A notice referred to in paragraph (a) shall be drawn up by the judgment creditor or his or her attorney, signed by the judgment creditor or his or her attorney and the clerk of the court, and served by the sheriff or by the attorney of the judgment creditor or any candidate attorney in his or her employ, on the judgment debtor . . . ."

[105] See [166], [172] to [174].

[188] This type of provision is there to show how the notice in terms of section 65A(1)(a) or the emoluments attachment order, in the case of section 65J(3), is issued. In providing how the notice or emoluments attachment order is issued, section 65A(1)(b), in the case of the notice contemplated under section 65A(1)(a), or, an emoluments attachment order, in the case of section 65J(3), reveals that the court is not the one that issues either the notice or an emoluments attachment order. In fact one finds the same thing in section 65A(6)(c) and (7). In section 65A(6)(c) provision is made for the court to authorise the issuing of a warrant and in subsection (7) one finds a provision that tells us how that warrant gets issued. Section 65A(6)(c) provides, in so far as it is relevant, that, if the court is "satisfied on the ground of sufficient proof or otherwise that the judgment debtor . . . has failed to remain in attendance . . . the court may, at the request of the judgment creditor or his or her attorney, authorise the issue of a warrant directing the sheriff to arrest the said judgment debtor . . .". Then subsection (7) reads: "A warrant authorised under subsection (6) shall be prepared by the judgment creditor or his or her attorney, signed by the judgment creditor or his or her attorney and the clerk of the court, and executed by the sheriff".

[189] The location of section 65J(3) is also important in the whole scheme of section 65J. Section 65J(1)(a) tells us that a judgment creditor has power to cause an emoluments attachment order to be issued. Paragraph (b) tells us what an emoluments attachment order does. Subsection (2) lays down conditions that must be met or satisfied before an emoluments attachment order may be issued. Then subsection (3) tells us the various steps that must be taken to have an emoluments attachment order issued and served.

[190] Section 65J(1)(b) explains what an emoluments attachment order does. It reads:

> "(b) An emoluments attachment order—
>
> (i) shall attach the emoluments at present or in future owing or accruing to the judgment debtor by or from his or her employer (in this section

called the garnishee), to the amount necessary to cover the judgment and the costs of the attachment, whether that judgment was obtained in the court concerned or in any other court; and

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

[191] What emerges from paragraph (b)(i) is that an emoluments attachment order attaches the judgment debtor's present and future emoluments. What emerges from paragraph (b)(ii) is that an emoluments attachment order obliges the garnishee (the judgment debtor's employer) to pay, from time to time, to the judgment creditor or his or her attorney specific amounts out of the emoluments of the judgment debtor in accordance with the order of court laying down the specific instalments payable by the judgment debtor until the relevant judgment debt and costs have been paid in full.

[192] It seems that it is paragraph (b)(ii) that confers legal force on an emoluments attachment order. Without that provision, an emoluments attachment order would not place any legal obligation upon the judgment debtor's employer to pay the emoluments over to the judgment creditor or his or her attorney. After all, despite it being called an order, an emoluments attachment order is not granted or issued by a court. Therefore, it is not a court order.

[193] It is now appropriate to deal with section 65J(2). It reads:

"An emoluments attachment order shall not be issued—

(a) unless the judgment debtor has consented thereto in writing or the court has so authorised, whether on application to the court or otherwise, and such authorisation has not been suspended; or

(b) unless the judgment creditor or his or her attorney has first—

(i) sent a registered letter to the judgment debtor at his or her last known address advising him or her of the amount of the judgment debt and costs as yet unpaid and warning him or her that an

> emoluments attachment order will be issued if the said amount is not paid within ten days of the date on which that registered letter was posted; and
>
> (ii) filed with the clerk of the court an affidavit or 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 provisions of subparagraph (1) have been complied with on the date specified therein."

[194] Section 65J(2) precludes the issuing of an emoluments attachment order unless either one of the conditions falling under paragraph (a) or those falling under paragraph (b) have been met. Under paragraph (a) there are two conditions and they are alternative to each other. The two conditions are that "the judgment debtor has consented thereto in writing or the court has so authorised, whether on application to the court or otherwise, and such authorisation has not been suspended". Subsection (2)(a) means that an emoluments attachment order may be issued if the judgment debtor has consented thereto in writing or if the court has so authorised.

[195] Where the court has authorised the issue of an emoluments attachment order, there is judicial oversight in regard to the issuing of an emoluments attachment order. However, where a judgment debtor has consented thereto in writing, there is no judicial oversight. The first judgment does not deal with the fact that section 65J(2)(a) contemplates that one of the situations under which an emoluments attachment order may be issued is where a judgment debtor "has consented thereto in writing" and that another one is where the court has authorised the issue of an emoluments attachment order. If the position was that an emoluments attachment order was issued by a court only, there would be no need for the provision that an emoluments attachment order is also issued where the judgment debtor has provided written consent or where the court has authorised the issue of an emoluments attachment order.

[196] The view that in every case under the Act judicial oversight is provided for before an emoluments attachment order may be issued is irreconcilable with the fact that one of the scenarios contemplated by section 65J(2)(a) is where an emoluments attachment order is issued on the basis that there is a written consent of the judgment debtor and is not authorised by the court.

[197] Subsection (2)(b) sets out two conditions that must both be met. They are in subparagraphs (i) and (ii). In regard to the condition in subparagraph (i) it is significant that part of what the judgment creditor or his or her attorney must do by way of a registered letter is to warn the judgment debtor that "an emoluments attachment order will be issued if the said amount is not paid within ten days of the date on which the registered letter was posted". The fact that this provision requires the judgment creditor or his or her attorney to give the judgment debtor a warning – not that an emoluments attachment order may be issued – but that as a matter of fact it "will be issued if the said amount is not paid . . ." is irreconcilable with the proposition that it is the court that issues emoluments attachment orders.

[198] If it were the court that issues emoluments attachment orders, the provision would have been formulated in a way that showed that the court may or may not issue that order. The fact that the provision is formulated in a way that is to the effect that an emoluments attachment order will be issued is indicative of the fact that it is within the power of the judgment creditor to issue or not to issue the emoluments attachment order. The way in which this part of subsection (2)(b)(i) is formulated is consistent with section 65J(1)(a) where the latter provides that, subject to subsection (2), "a judgment creditor may cause an [emoluments attachment] order . . . to be issued . . .".

[199] I have already dealt with section 65J(3). Subsection (5) is important. It reads:

> "*An emoluments attachment order may be executed against the garnishee as if it were a court judgment,* subject to the right of the judgment debtor, the garnishee or any

> other interested party to dispute the existence or validity of the order or the correctness of the balance claimed."

The question that this provision raises is this: if an emoluments attachment order is a court order as the first judgment implies it is, why would a provision be necessary that says that an emoluments attachment order may be executed *as if it were* a court judgment? The answer is that there would be no such need. The need exists because an emoluments attachment order is not a court order.

[200] The provisions of section 65J(6) and (7) are also important. Respectively, they read:

> "(6) If, after the service of such an emoluments attachment order on the garnishee, it is shown that the judgment debtor, after satisfaction of the emoluments attachment order, will not have sufficient means for his own and his dependant's maintenance, *the court shall 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.
>
> (7) Any emoluments attachment order may at any time on good cause shown *be suspended, amended or rescinded by the court*, and when suspending any such order *the court may* impose such conditions as it may deem just and reasonable."

[201] The importance of subsections (6) and (7) is that there is a clear and express role for the court after an emoluments attachment order has been issued and served. At that stage provision is made for the court to suspend, rescind or amend it. If there is a role for the court at the time of the issue of all emoluments attachment orders, why is it that that role is not clearly and expressly spelt out in regard to that time in the same way in which the court's role after the service of emoluments attachment orders is clearly and expressly provided for?

[202] Section 73 reads:

> "Order for payment by instalments
>
> (1) The court may, upon application of any judgment debtor or under section 65E(1)(a)(ii) or 65E(1)(c) and if it appears to the court that the judgment debtor is unable to satisfy the judgment debt in full at once, but is able to pay reasonable periodical instalments towards satisfaction thereof or *if the judgment debtor consents to an emoluments attachment order* or a garnishee order being made against him, suspend execution against that debtor either wholly or in part on such conditions as to security or otherwise as the court may determine."

This provision reveals that there are cases where an emoluments attachment order is made on the strength of the fact that the judgment debtor has consented to such an order and not that a court has authorised the issue of the emoluments attachment order.

[203] I conclude that there is no justification in law for the proposition that section 65J(1)(a) must be construed to mean that it is the court that issues emoluments attachment orders contemplated in that provision. I also conclude that under the Act there are cases where the court authorises the issue of emoluments attachment orders and there are cases where emoluments attachment orders are issued without any court intervention. This means that there is judicial oversight in those cases where it is the court that authorises the issuing of emoluments attachment orders but there is no judicial oversight in those cases where emoluments attachment orders are issued without any prior intervention of the court. I am, therefore, of the view that, to the extent that the Act makes provision for the latter category of cases, it is inconsistent with section 34 of the Constitution and is, therefore, constitutionally invalid.

Remedy

[204] The order of invalidity that was granted by the High Court read as follows:

> "2. It is declared that:
>
> 2.1 the words 'the judgment debtor has consented thereto in writing' in section 65J(2)(a) of the Magistrates' [Courts] Act 32 of 1944 ("the Magistrates' Courts Act") and;
>
> 2.2 section 65J(2)(b)(i) and section 65J(2)(b)(ii) of the Magistrates' Courts Act,
>
> are inconsistent with the Constitution of the Republic of South Africa Act, 1996 ("the Constitution") and invalid to the extent that they fail to provide for judicial oversight over the issuing of an emoluments attachment order against a judgment debtor."

This was an order of notional severance. It declared a statutory provision invalid "to the extent that" it permitted conduct inconsistent with the Constitution. The order of constitutional invalidity in 2.1 of the High Court order simply declares the words "the judgment debtor has consented thereto in writing" in section 65J(2)(a) to be inconsistent with the Constitution and invalid "to the extent that they fail to provide for judicial oversight over the issuing of emoluments attachment orders". I do not think that this was an appropriate remedy. In my view it is not the words "the judgment debtor has consented thereto in writing" that are constitutionally offensive. What 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. The constitutional defect with which we are concerned is an omission.

[205] The order of constitutional invalidity in 2.2 of the High Court order simply declares that "section 65J(2)(b)(i) and section 65J(2)(b)(ii) of the Magistrates' Courts Act, are inconsistent with the Constitution . . . and invalid to the extent that they fail to provide for judicial oversight over the issuing of an emoluments attachment order." The remedy the High Court gave was notional severance. Again, the constitutional defect is the absence of words providing for judicial oversight.

[206] What is the appropriate remedy? In my view, notional severance is not appropriate. The appropriate remedy is a reading-in. This is because we are here dealing with a constitutional defect that takes the form of a legislative omission. The order granted by the High Court will leave the statutory provision looking exactly the same after the judgment has been handed down as it looked before the judgment in circumstances where the section has not been wholly declared invalid.

[207] Speaking about notional severance and reading-in, Ackermann J said in *National Coalition:*[106]

> "The device of notional severance can effectively be used to render inoperative portions of a statutory provision, where it is the *presence* of particular provisions which is constitutionally offensive and where the scope of the provision is too extensive and hence constitutionally offensive, but the unconstitutionality cannot be cured by the severance of actual words from the provision."[107]

Ackerman J went on:

> "Where, however, the invalidity of a statutory provision results from an omission, it is not possible, in my view, to achieve notional severance by using words such as 'invalid to the extent that' or other expressions indicating notional severance. An omission cannot, notionally, be cured by severance. This is implicit in the constitutional jurisprudence of Canada and the United States dealt with later in this judgment and has been expressly so held in Germany. The only logical equivalent to severance, in the case of invalidity caused by omission, is the device of reading in. In the present case there are only two options; declaring the whole of s 25(5) to be invalid or reading in provisions to cure such invalidity."[108]

[208] In *National Coalition* reading-in was effectively in paragraph 2 of the order. Paragraph 2 reads:

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[106] *National Coalition* above n 68.

[107] Id at para 63.

[108] Id at para 64.

> "2. The appeal of the applicants succeeds and paras 1, 2 and 3 of the order made by the High Court are set aside and replaced with the following:
>
> 2.1 the omission from s 25(5) of the Aliens Control Act 96 of 1991, after the word 'spouse' of the words 'or partner, in a permanent same-sex life partnership', is declared to be inconsistent with the Constitution;
>
> 2.2 s 25(5) of the Aliens Control Act 96 of 1991, is to be read as though the following words appear therein after the word 'spouse': 'or partner, in a permanent same-sex life partnership'."[109]

[209] These words are apposite. Although, in the main, reading-in is thus the appropriate remedy in this case, it needs to be used jointly with severance because of the way the statutory provisions are structured. Certain words must be severed from the provisions and certain words must be read-in. In my view, the word "or" in section 65J(2)(a) must be severed and in its place the word "and" should be read-in. That will ensure that under subsection (2)(a) an emoluments attachment order will not be issued unless the judgment debtor has not only consented to it in writing but also the court has authorised its issue. This will differ from the current position where, if the judgment debtor has consented in writing to the issuing of an emoluments attachment order, that is enough and the court's authorisation is not required. Furthermore, after the word "authorised" in section 65J(2)(a) we must read in the words "after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate". Reading-in these words is necessary to ensure that the court will consider whether it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate before it authorises the issuing of the emoluments attachment order.

[210] In section 65J(2)(b)(i) the word "will" should also be severed and the word "may" should be read in its place. This is necessary to acknowledge the fact that whether or not an emoluments attachment order will be issued is not certain as it will depend upon the court's exercise of a discretion. At the end of section 65J(2)(b)(ii) the full-stop must be severed, a colon and the word "and" must be read in. Then, a

[109] Id at para 98.

new section 65J(2)(b)(iii) must be read into the provision after section 65J(2)(b)(iii) which will read as follows:

> "(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."

[211] The order I propose is prospective only and not retrospective. In this regard I agree with the reasons given in the second judgment for making the order prospective only.[110] For the sake of clarity, included in the order is section 65J(2)(a) and (b) as it reads after the severance and reading-in. Words that have been severed are shown by way of strikethrough and words that have been read-in are underlined.

Order

[212] In the result the following order is made:

1. The appeals are dismissed with costs.
2. The order of constitutional invalidity made by the Western Cape Division of the High Court is not confirmed.
3. The use of the word "or" after the word "writing" and the omission of the word "and" in the place of the word "or", and the omission of the words "after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate" after the word "authorised" in section 65J(2)(a) of the Magistrates' Courts Act, 1944 are inconsistent with the Constitution and invalid.
4. The use of the word "will" after the words "an emoluments attachment order" and the omission of the word "may" in the place of the word "will" in section 65J(2)(a) of the Magistrates' Courts Act, 1944 are inconsistent with the Constitution and invalid.

[110] See [156] to [159] of the second judgment.

5. The omission of:

   (a) a semi-colon in the place of the full-stop at the end of section 65J(2)(b)(ii) of the Magistrates' Courts Act, 1944;

   (b) the word "and" at the end of section 65J(2)(b)(ii) of the Magistrates' Courts Act, 1944; and

   (c) sub-paragraph (iii) under section 65J(2)(b) of the Magistrates' Courts Act, 1944 reading:

   > "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."

   is inconsistent with the Constitution and invalid.

6. Section 65J(2) of the Magistrates' Courts Act, 1944 shall be read as though:

   (a) the word "or" after the word "writing" in paragraph (a) is replaced with the word "and";

   (b) the words: "after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate." appear after the word "authorised" in paragraph (a);

   (c) the word "will" after the words "an emoluments attachment order" in paragraph (b)(i) is replaced with the word "may";

   (d) the full-stop at the end of paragraph (b)(ii) is replaced with a semi-colon and the word "and" appears after the semi-colon;

   (e) the provision:

   > "(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."

   appears as paragraph (b)(iii) after paragraph (b)(ii).

7. The orders in 2, 3, 4, 5, 6 and 8 operate with effect from the handing down of this judgment.

8. It is declared that section 65J(2)(a) and (b) of the Magistrates' Courts Act, 1944 reads as follows:

"**65J. Emoluments attachment orders**

. . .

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

(a) unless the judgment debtor has consented thereto in writing ~~or~~ and the court has so authorised after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate, whether on application to the court or otherwise, and such authorisation has not been suspended; or

(b) unless the judgment creditor or his or her attorney has first—

(i) sent a registered letter to the judgment debtor at his or her last known address advising him or her of the amount of the judgment debt and costs as yet unpaid and warning him or her that an emoluments attachment order ~~will~~ 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."

9. The respondents who opposed confirmation of the order of constitutional invalidity made by the Western Cape Division of the High Court are ordered to pay the applicants' costs jointly and severally, the one paying the other to be absolved, including the costs of three counsel.

For the University Of Stellenbosch Legal Aid Clinic:	G M Budlender SC, A Katz SC and S Margardie instructed by Webber Wentzel.
For the Minister of Justice and Correctional Services:	D Potgieter SC and L Dzai instructed by the State Attorney.
For Flemix & Associates Incorporated Attorneys:	P F Louw SC and K Pillay instructed by Werksmans Attorneys.
For the Association of Debt Recovery Agents NPC:	D N Unterhalter SC, D E Loggerenberg SC, A R G Mundell SC and K S Hofmeyr instructed by Knowles Hussain Linsey Inc.
For the South African Human Rights Commission:	J Brickhill and E Webber instructed by Legal Resources Centre.