Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: **16703/14**

In the matter between:

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

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

and

SOUTH AFRICAN HUMAN RIGHTS COMMISSION	**Amicus Curiae**

JUDGMENT: WEDNESDAY, 08 JULY 2015

DESAI J

[1] The facts underpinning this application relate to the debt collection procedure employed by the micro-lending industry and give rise to significant disquiet, if not alarm.

[2] The emoluments attachment order (EAO) contemplated in section 65J of the Magistrates' Court Act 32 of 1944 (The MCA) permits the attachment of a debtor's earnings and obliges his or her employer (the garnishee) to pay out of such earnings specific instalments to the judgment creditor or his or her attorney. The instalments are to be paid until the judgment debt and legal costs are paid in full.

[3] The fact that the debtor is a low income earner is immaterial. His employer is compelled to deduct from his monthly salary or weekly wages the amount specified in the EAO and pay it to the creditor for the debts allegedly owed by him. There is no statutory limit on the amount which may be deducted from the earnings of a debtor in terms of an EAO. Nor is there a limit on the number of EAOs which may be granted against a particular debtor.

[4] The problems with regard to the latter omissions are graphically illustrated in these proceedings. In respect of the Second Applicant herein, an EAO was granted for more than half his salary. The Fourth Applicant was even less fortunate. The clerk of the court issued three EAOs on the same day attaching almost her entire salary.

[5] Section 65A of the MCA provides that following an enquiry by a magistrate into a debtor's financial position, the Court may make such order as it deems "just and equitable". However, in respect of the present applicants, the clerk of the court issued EAOs attaching their earnings without any evaluation of their ability to afford the deductions to be made from their salaries and without deciding whether or not the issuing of an EAO itself would be just and equitable. The whole process of obtaining the EAOs was driven by the creditors without any judicial oversight whatsoever.

[6] As Mr A Katz SC, who appeared with Mr S Magardie on behalf of the applicants, correctly pointed out, the most disturbing feature of this matter is the manner in which the respondents – the micro-lenders – forum shop for courts which would entertain the applications for judgment and the issuing of EAOs. It is common cause that most of the orders were obtained from courts located a great distance from where the debtors resided and worked. The debtors' rights to access the courts and enjoy the protection of the law were clearly compromised in these instances.

[7] Worse still, were the attempts by some of the respondents' counsel to defend such practices. I shall revert to this aspect in due course.

[8] Another feature of this matter which warrants immediate noting is the manner in which the consents to jurisdiction and the judgments themselves were obtained. The circumstances described by the parties – both the debtors and the representatives of the micro-lending industry – lead to the irresistible conclusion that the consents obtained were not given either voluntarily or on an informed basis.

[9] This application focuses sharply on the processes employed by the micro-lenders to secure repayment of the loans. It was argued on their behalf that their conduct falls squarely within the relevant legislative framework and the law pertaining to such matters. Whether they are correct is the central issue before me.

[10] The First Applicant in these motion proceedings is the University of Stellenbosch Legal Aid Clinic. It is a law clinic which assists several thousand persons a year with legal advice and representation. Its clients are principally low wage earners in the Cape winelands area and nearby towns. In the course of its work the clinic encountered evidence of the apparent large scale abuse of EAOs by credit providers and allegations of fraud in the process of the EAOs being issued.

[11] Moreover the clinic's uneducated and financially unsophisticated clients were frequently the victims of predatory lending practices by credit providers which ultimately resulted in them defaulting on their payments. What followed was an EAO and a cycle of debt from which there was little, if any, hope of escape.

[12] Relying upon documentary reports and other research, First Applicant contended that as a result of the abuse of the EAO system, millions of people across the country are trapped in the same situation.

[13] The First Applicant brings this application in the public interest in terms of Section 38(1)(d) of the Constitution, Act no.108 of 1996 (the Constitution). It may, of course, also bring this application in its own interest as it relies on the objective unconstitutionality of a statute for the relief it seeks (Section 38(1)(a)).

[14] The Second to Sixteenth Applicants are clients of the first Applicant and bring this application in order to protect and advance their own rights and interests. They are all adult women or men, mainly employed, if employed at all, as general workers on the lower end of the wage scale. Save for the three who reside in Paarl or Macassar, they are all resident in Stellenbosch.

[15] The first respondent is The Minister of Justice and Correctional Services. Mr DO Potgieter SC with Ms L Dzai appeared on his behalf. Potgieter SC stated unequivocally that save for the costs order sought against him, the First

Respondent will abide by the decision of this court. In effect, the State is not opposing the relief sought by the applicants.

[16] The Fourth to Eleventh and Thirteenth to Sixteenth Respondents are described as “the credit providers”. The Seventeenth Respondent, Flemix, a firm of attorneys, is their external debt collector and also acts on their behalf in opposing these proceedings.

[17] Flemix, the Seventeenth Respondent, specialises in debt collection and provides such services to forty-five credit providers. It has “150 000 active cases” and the total value of the books that it collects is R1 597 585 832.00 (that is, over one and a half billion rands). Flemix and the credit providers on whose behalf it acts, are represented in these proceedings by Mr PF Louw SC and Ms Karrisha Pillay

[18] The Eighteenth Respondent in these proceedings is the Association of Debt Recovery Agents (ADRA). It was admitted at its own instance with the agreement of the parties and the consent of this court. ADRA is a non-profit organisation. It purports to represent the interests of the ‘formal’ debt collection industry. Its counsel were Mr DE Van Loggerenberg SC and Mr J Malan.

[19] Lastly, the South African Human Rights Commission (HRC) sought admission as an *amicus curiae*. It was admitted as such. Some of the issues which arise in this matter fall within their mandate to promote the respect of human rights and monitor and prevent rights abuses, especially in vulnerable communities who are at greater risk of exploitation. They were represented at the hearing by Mr J Brickhill and Ms E Webber.

[20] The relief ultimately sought by the applicants at the end of the hearing is largely contained in its Notice of Motion. In the said document it sought declarators, *inter alia*, that:

> "The words "the judgment debtor has consented thereto in writing" which appear in section 65J(2)(a) of the MCA…; and section 65J(2)(b)(1) and section 65J(ii) of the MCA are inconsistent with the constitution and invalid to the extent that they fail to provide for judicial oversight over the issuing of an EAO against a judgment debtor."

[21] They further sought an order declaring invalid EAOs obtained with the written consent of the debtors in jurisdictions alien to them on the basis that it was not permitted by legislation.

[22] The other principal relief sought by the applicants related to the setting aside of the EAOs granted against each of them, it being contended that the orders were unlawful and invalid.

[23] Pivotal to the debt collection procedure employed by the respondents (those represented by Flemix) was the written consent of the debtor. Having defaulted on his or her debt, the debtor was asked to sign, and did sign, a written consent to judgment; the payment of the debt by way of instalments; the issuing of an EAO against him; and the jurisdiction of a court located some distance from his home.

[24] It may be that a debtor would readily concede that he has defaulted on his payment of the debt. However, it is most unlikely that he would knowingly and willingly agree to pay instalments he cannot afford, have the instalments deducted from his salary and agree that the matter be decided in a court which he cannot hope to access should he wish to mitigate the harsh consequences of the EAO.

[25] The individual applicants alleged that they either did not sign the consents, that the documents were not explained to them or that they signed the documents under pressure from the debt collectors.

[26] The Flemix respondents are not in a position to deny the allegations as none of the individual debt collectors who are available could recall their interactions with the applicants. A third party is simply not in a position to deny the allegation against the debt collectors who cannot be traced.

[27] Ms AE Jordaan, an attorney, who deposed to an affidavit on behalf of Flemix, suggests that the debt collectors would not have acted in the manner alleged by the individual applicants because they have received extensive training which requires them to "at all times act scrupulously and honestly as debt collectors".

[28] It is an unassailable fact that a debt collection agent is not remunerated for a "negative" trace back. That means if a debt collector fails to obtain the signed consents of the debtor, he is not paid. The debt collector is accordingly not independent and is under pressure to obtain as many signed consents as possible in order to be adequately remunerated. The written consents to EAOs are in the circumstances obtained by debt collectors who "execute hundreds of instructions annually" and who have a vested interest in procuring the debtors consent.

[29] In the case of six of the written consents to judgment, the witnesses in whose presence these documents were required to be signed were not physically present at the time the individual applicants allegedly signed the documents. The Flemix debt collectors and "witnesses" unlawfully placed their signatures on the consent to judgment documents *ex post facto* in breach of Rule 4(2) of the MCA. The debt collectors were clearly neither scrupulous nor honest in this instance.

[30] Ms Jordaan contended that a detailed income and expenditure statement was completed by the individual applicants during their consultations with the debt collectors. None of these income and expenditure statements or any of the debtors payslips – which the Flemix debt collectors training manual requires to be obtained from the debtors – were made available to the court. In all likelihood none exist.

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

[32] The consents, it seems, were signed neither voluntarily nor on an informed basis. Their validity is accordingly open to serious doubt. The same would apply to any judgment or EAO issued in terms thereof. A court confronted with such a document will of necessity approach it with a great deal of circumspection.

[33] The individual applicants were all granted loans, often at interest rates of 60% per annum, from a “loan originator” who previously operated in the Stellenbosch area. The loans were granted without reasonable steps being taken to assess the applicants’ existing financial means and obligations prior to concluding the credit agreement. The individual applicants were granted the loans with the repayments at times exceeding 50% of their monthly income. The affordability assessment was either perfunctory or non-existent. The Second Applicant’s affordability assessment indicates his sole expense to be groceries of

R50 per month. In the case of the Ninth Applicant her only expense is groceries of R100 per month. The affordability assessments in respect of the Fourth and Fifteenth Applicants reflect that they have no expenses at all.

[34] The aforementioned loans were advanced in breach of Section 81 of the National Credit Act, 34 of 2005 (NCA) which seeks to prevent the granting of reckless credit through affordability assessments.

[35] The Fourth Applicant's monthly net income at was R3759.82 at the time she was granted a loan of R7982.00 which was to be repaid in six instalments of R1986.00 per month.

[36] The Eighth Applicant's monthly net income was R2260.00. He was a granted a loan of R6280.00 to be repaid in monthly instalments of R1574.00.

[37] The Fourteenth Applicant's monthly disposable income at the time of the loan was R1221.53. She was granted a loan of R1842.00 to be repaid in six monthly instalments of R513.00.

[38] The above reflects the nature and extent of the loans advanced. These were quite obviously reckless loans and unsurprisingly the applicants defaulted on their repayments.

[39] Legislation provides no statutory limit on the EAOs which may be granted against a debtor or the amount which may be deducted from his or her salary or wages. Significant amounts of a debtor's net salary are deducted from his or her earnings in terms of the EAOs. There is no "sufficient reason" for the unrestricted deprivation of a debtor's earnings and means of support.

[40] The attachment of a debtor's salary or wages to secure payment of a debt amounts to an attachment of property. The depletion of a debtor's income as a consequence of it being attached to pay a judgment debt may lead to the subsequent loss of other property such as a house or movable assets owned by the debtor. The reduction of a low earning debtor's income has a direct impact on his right to shelter, health and family life.

[41] The individual applicants are a group of low income earners living in Stellenbosch, supporting themselves and their families on salaries of between R1200.00 and R8000.00 per month. The group includes farmworkers, cleaners and security guards. For debtors who work in low paid and vulnerable occupations, their salaries or wages are invariably their only asset and means of survival. A substantial reduction of this asset has the potential of reducing human dignity. The State, if it is a party to the grant of the EAO, has the duty to refrain from conduct which results in the debtor being left impoverished or facing a life of "humiliation and degradation" (See: **Minister of Home Affairs and Others v Watchenuka and Another 2004(4) SA326 paras 27 – 32**). The ability of people to earn an income and support themselves and their families is central to the right to human dignity (See: Section 10 of the Constitution). Any court order or

legislation which deprives a person of their means of support or impairs the ability of people to access their socio-economic rights constitutes a limitation of their right to dignity.

[42] The Constitution provides that when interpreting the Bill of Rights, a court may consider foreign law (See Section 39(1)(a)). In this case a comparison between South African and foreign law highlights the shortcomings of the EAO scheme established by the MCA and relied upon, and exploited, by the Flemix respondents. The foreign jurisdictions recognise the problems which arise from the abuse of EAOs by unscrupulous creditors. These jurisdictions address the problem by employing protective measures at the time when the attachment order is issued.

[43] The court's attention has been directed by Mr P Brickhill and Ms E Webber to the solutions adopted in five jurisdictions.

[44] In the United States of America, federal law places a cap on the amount of an employee's earnings that may be garnished in any one week at only 25% of a debtor's after-tax income may be attached per week.

[45] In Germany, a limit is also imposed upon the amount of income that may be attached. Detailed and precise tables prescribe the amount of earnings that can be attached according to the band of income into which the debtor's earnings fall and the number of his or her dependents. The tables are revised regularly and the system is progressive in that a higher proportion of earnings is attached when individuals earn more. In addition, some forms of remuneration, such as annual bonuses and certain security payments, cannot be attached. Other special circumstances, such as disability, are also taken into account and allow a debtor to retain a larger proportion of his or her salary.

[46] In Australia, when the earnings of a debtor are attached, the debtor must be left with a minimum amount of $447.70, adjusted regularly.

[47] In Rwanda, legislation imposes a cap of one third of the salary of a debtor. Only this proportion may be attached.

[48] In England and Wales, legislation provides for a Protected Earnings Rate (PER). The PER is the amount of money that is required by the debtor to support himself and his family. It includes expenses such as food, rent, mortgage, electricity and gas. The exact amount of the PER is determined by a court or a court official, taking into account the circumstances of the individual.

[49] These provisions place restrictions upon the officials who issue the EAOs and do not require a debtor to subsequently initiate a review or challenge. Rather, the needs of the debtor are considered from the beginning. The same result is achieved by requiring judicial oversight when each EAO is issued.

[50] If I understood Louw SC correctly he was not averse to the introduction in South Africa of legislation to the effect that only a proportion of the earnings of a debtor may be attached or that a cap be placed on the amount that can be attached. Katz SC did not express any clear view in this regard. Perhaps it was not necessary for him to do so as he argued strongly for judicial oversight. In any event, the objective conditions in this country with its vast disparities of wealth may result in a "cap" or the proportion of a debtor's salary being attached, impacting differently on the various sectors of our society. If that proposition is correct, judicial oversight would be the only remaining mechanism for dealing with EAOs without compromising the dignity of the poor.

[51] The right of access to courts is fundamental to the rule of law in a constitutional state. The Flemix respondents are obtaining judgments and EAOs against the applicants in courts far removed from their homes and places of work and in places which they could not hope to reach, the right to approach the courts was seriously jeopardised, if not effectively denied. This violation of the rights of debtors to access courts and enjoy the protection of the law was the product of the Flemix respondents' forum shopping for courts which would entertain their applications for judgments and the issuing of EAOs. As Katz SC

contended, quite correctly in my view, this is the most disturbing feature of the debt collecting processes employed by the micro-lenders.

[52] The applicants reside in Stellenbosch but the judgments were granted and EAOs issued in Kimberley, Winberg and elsewhere. Their employers are also in Stellenbosch whereas Section 65J of the MCA expressly states that the EAO must be issued from the court of the district in which the employer of the judgment debtor resides, carries on business, or is employed.

[53] Section 65J creates some safeguards for the implementation of an EAO against a judgment debtor, such as the right to dispute the existence or validity of the order or the correctness of the balance claimed and the power of the court to set aside or amend an EAO on good cause. These protections are effectively meaningless when the person whose salary or wage has been attached under an EAO, his or her employer is unable to access the court which issued the order. In order to obtain the said judgments and EAOs the Flemix respondents relied upon the consents. The circumstances in which the consents were obtained is referred to earlier on in this judgment.

[54] Flemix and ADRA contend that their conduct in using the provisions of Section 45 of the MCA for the purposes of “navigating around” magistrates’ courts which would allegedly “simply refuse to entertain Section 58 matters”, does not constitute forum shopping.

[55] They argue that it is “well-nigh impossible to obtain judgments” in certain magistrates’ courts. Flemix refers to examples from 23 listed magistrates’ courts, which do not include the Stellenbosch Magistrates’ Court, where the employers of the individual applicants reside. If litigants are unhappy with the outcome of the matters in a particular magistrates’ court, there are several lawful remedies available to them for redress.

[56] Again, as Katz SC suggests, the assertion by Flemix and ADRA that their conduct was not forum shopping but a means of ensuring that their clients’ (the micro-lenders) were afforded their constitutional right of access to courts, is extraordinary. The Constitutional Court (see: **Chirwa v Transnet Ltd and Others 2008 (4) SA (CC) at 124**) and the Supreme Court of Appeal (see; **S v J (695/10) [2010] ZASCA 139 at para 38)** have criticised the practice of litigants engaging in forum shopping by initiating proceedings in courts of their choosing for the purpose of convenience or procedural advantage.

[57] The conduct of the Flemix respondents, and I suppose Flemix itself, in using Section 45 of the MCA to bypass courts in areas in which the debtors, or their employers, reside, in order to obtain judgements in courts which would otherwise not have jurisdiction and which in any event would have no jurisdiction to issue an EAO against that debtor is a patent case of forum shopping. It is forum shopping within the ordinary meaning of that term.

[58] The fact that the teams of lawyers acting on behalf of Flemix and ADRA, consisting of experienced senior and junior counsel, have argued against that conclusion reflects poorly upon them. Incidentally, ADRA was founded *inter alia* to uphold the ethical standards of the debt collectors.

[59] Flemix, a firm of attorneys, is unduly embedded in its clients' case. It has deposed to affidavits on behalf of its clients, the micro-lending industry. It may have properly defended the validity of the impugned provisions of the Act or its clients' role in the industry, but its role in "navigating" around courts to obtain judgments against the debtors is susceptible to criticism and may be in breach of their professional ethics. Their professional body is best placed to decide this matter.

[60] The Flemix respondents do not dispute that the EAOs issued to the Second to Ninth and the Twelfth to Fifteenth Respondents were all issued in magistrates' courts other than those in which the employers of the said applicants reside or carry on business.

[61] The EAOs against these applicants were therefore issued in breach of the statutory requirements contained in Section 65J (1)(a) of the MCA.

[62] The Flemix respondents have no answer to the applicants' contention that no other court other than the court in the area in which the garnishee (the employer) resides is entitled to issue an EAO. This is clear from Ms Jordaan statement:

> "It matters not where judgment was obtained – for purposes of the EAO system the only court that has jurisdiction to issue an EAO is the court which is closest to the employer."

[63] Louw SC, in oral argument, conceded that the relevant EAOs had to be set aside.

[64] As no defence whatsoever has been raised in respect of paragraph 4 of the Applicant's Notice of Motion – the setting aside of the EAOs against the individual applicants - it follows that the said EAOs must be declared unlawful and set aside.

[65] That, however, is not the end of this matter. This application relates to twelve EAOs and all were irregularly, if not unlawfully, obtained. Ms Jordaan, the attorney for the Flemix respondents, states that there are 150 000 active cases. In the light of how the debt collecting agents secured the consents, the forum shopping involved and the fact that all the EAOs in this matter were unlawfully obtained in the wrong jurisdiction, it is safe to assume that thousands, if not tens of thousands from Ms Jordaan's 150 000 cases involving ordinary working people in debt, are having significant portions of their salaries or wages deducted based on unlawfully obtained EAOs.

[66] I am not at liberty to inquire into any, or all, of those orders. Yet I cannot in good conscience ignore their plight. I trust that the Flemix respondents and Ms Jordaan will not pursue EAOs obtained against the debtors in the wrong jurisdiction. That may in fact be illegal. The First, Second and Third Respondents, the HRC and the Law Society must endeavour to ensure that appropriate measures are in place to monitor the situation.

[67] The International Labour Organisations' Protection of Wages Convention (the Convention) places an obligation on each state to prevent the violation of socio-economic rights by private actors in its jurisdiction. While South Africa is not a party to the Convention (which came into force in 1952) 97 states have ratified it. As a consequence the Convention has probably reached the status of international customary law which is binding on all states. At the very least, the Convention's provisions are highly persuasive.

[68] The Convention contains a number of provisions that are aimed at protecting debtors. For example, it provides that:

> "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."

[69] In addition, the Convention requires that the judiciary or another impartial body capable of providing an adequate remedy must supervise the attachment of wages and that the laws or regulations of the states shall prescribe appropriate penalties and remedies for violations of the provisions of the Convention.

[70] The ILO's recommendation concerning the Protection of Wages contains similar restrictions to those in the Convention. It provides *inter alia* that:

> "All necessary measures should be taken to limit deductions from wages to the extent deemed to be necessary to safeguard the maintenance of the worker and his family… . Before a decision for such a deduction is taken, the worker concerned should be given a reasonable opportunity to show cause why the deduction should not be made."

[71] Similarly, the UN Guiding Principles on Business and Human Rights (the RUGGI principles) place a duty upon the state to take measures to prevent the abuse of human rights in their territory by business enterprises. States are obliged to reduce legal and practical barriers that may deny individuals a remedy.

[72] The Human Rights Council resolution 26/22 of 15 July 2014 raises the concern of legal and practical barriers to remedies for business related human rights abuses, which may leave those aggrieved without an effective remedy, through judicial or non-judicial avenues.

[73] While reports of the UN General Assembly and Human Rights Council are not binding, they are highly persuasive and generally express the current consensus among States.

[74] It seems to be firmly established in international law that states have a duty to protect their citizens against the abuse of human rights by business enterprises in their territory. Where such abuses do occur, states have a duty to provide victims with an effective remedy. These duties should be taken into account in the interpretation of the provisions of the MCA and the Constitution.

[75] The South African EAO system established by the MCA fails to comply with the principles set out above in that:

1. EAOs may be issued by a clerk of the court without the involvement of a judicial officer.
2. Workers are not given an opportunity to make representations before an EAO is issued.
3. When an excessive portion of a debtor's earnings is attached, the remedy provided by the MCA is the opportunity to review and set aside the order. However, this will not be an effective remedy if Section 45 of the MCA is interpreted such that it allows indigent debtors to consent to the jurisdiction of distant courts.

[76] 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.

[77] In **Chief Lesapo v The North West Agricultural Bank and Another 2000 (1) SA 409 (CC)** the court stressed that, not only is a person entitled to have a legal dispute resolved by an independent court or tribunal, but "any constraint upon a person or property shall be exercised by another only after recourse to a court of law" (see: **Chief Lesapo at para 16**).

[78] The Constitutional Court in **Jaftha v Schoeman and Others 2005 (2) SA 140 (CC)** dealt with the constitutional validity of section 66(1)(a), which provided for the sale in execution of property (in this case people's homes) in order to satisfy a debt. The court in effect held that section 66(1)(a) of the MCA was unconstitutional and invalid due to its failure to provide for judicial oversight over sales in execution against the immovable property of judgment debtors.

[79] In **Gundwana v Steko Development CC and Others 2011 (3) SA 608 (CC)** the constitutional Court reasserted the constitutional requirement of judicial oversight of execution against the property of the individual.

[80] The principles in the **Lesapo, Jaftha** and **Gundwana** cases are clearly applicable when EAOs are issued. Those cases dealt with sales in execution of property in order to satisfy a judgment debt. EAOs are execution orders that are made against a salary or wages of an individual in order to satisfy a judgment debt. In **Jaftha** and **Gundwana** the impugned sections prescribe a process for execution similar to the process prescribed in section 65J(2) of the Act. In all these cases the absence of judicial supervision and the consequences of the execution process infringes several of the debtors' constitutional rights. As I have already stated, the attachment of an excessive portion of a debtor's earnings infringes on the right of the debtor and her family to dignity, as well as their rights to access to healthcare, food, education and housing.

[81] In all of the above cases the debtors are vulnerable and necessarily over indebted. In this context there is a real risk of abuse by unscrupulous creditors. In the light of the obvious similarities, the arguments for judicial oversight in **Lesapo, Jaftha** and **Gundwana** apply with equal force to the issuance of EAOs.

[82] The respondents claim that it is simply not possible for every execution order to be overseen by a magistrate and that the process provided by the impugned provision facilitates the collection of debt in the most viable manner. And they assert that the scheme is constitutionally valid because it allows the debtor to have the execution order subsequently varied or set aside.

[83] These grounds of justification were held to be unsound or insufficient by the Constitutional Court in the cases cited.

[84] The process of issuing an EAO 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 EAO 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).

[85] 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 EAOs 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.

[86] The issue of jurisdiction arises in the context of Prayer 3 of the applicants' Notice of Motion and the counter-application brought by the Flemix respondents. In effect it seeks a declarator that section 45 of the MCA does not permit a judgment debtor to consent in writing to the jurisdiction of a magistrate's court other than the one in which that debtor resides.

[87] The legislative provisions that are relevant to the question of jurisdiction are the following:

1. Section 45 of the MCA provides that in certain circumstances parties may consent to the jurisdiction of a court to determine any action that is otherwise beyond its jurisdiction.
2. Section 65J(1)(a) of the MCA which provides that an EAO must be issued from the court of the district that the employer of the judgment debtor resides, carries on business or is employed.
3. Section 90(2)(a)(k)(vi)(bb) of the NCA provides that the provision of a credit agreement is unlawful if it expresses on behalf of the consumer a consent to jurisdiction of any court seated outside the jurisdiction of a court in which the consumer resides or works.
4. Section 91 of the NCA provides that a credit provider must not directly or indirectly require or induce a consumer to enter into a supplementary agreement that contains a provision that would be unlawful if it were included in a credit agreement.

[88] Sections 45 and 65J of the MCA cannot be read together. Section 45 provides that the parties may consent to the jurisdiction of a court that does not ordinarily have jurisdiction. Section 65J (1)(a) stipulates that EAOs may be issued from the court of the district in which the employer of the judgment debtor resides, carries on business or is employed. The narrow provisions of section 65J cannot be reconciled with the broad provisions of Section 45.

[89] It is clear from the heading of section 65J ("Emoluments attachment orders") that the section is intended to cover a specific regime to govern EAOs. The cluster of provisions in this section covers all of the aspects relevant to EAOs.

[90] It is a well-established principle in law that where two provisions are contradictory, the provision that is specific trumps the provision that is general. In this case, the provisions of section 65 are specific in that they govern emoluments attachment orders. Accordingly, Section 65J quite clearly trumps section 45.

[91] It seems to me that the protection of consumers is clearly the underlying rationale to the limitation of jurisdiction in sections 90 and 91. By contrast, section 45 takes a broad approach to jurisdiction, which directly contradicts and undermines sections 90 and 91. It undermines the objects or purposes of the NCA. The NCA's limitation of section 45 is in the circumstances necessarily implied.

[92] The fact that the NCA's jurisdiction provisions trump section 45 is also supported by the following:

1. The interpretative principle that states that when the provisions of a later Act are inconsistent with the provisions of an earlier act, the later act supersedes the earlier provisions. The NCA came into force on 1 June 2006, while section 45 of the MCA came into force in July 1945.

2. The NCA establishes a protective regime aimed at preventing the exploitation and abuse of consumers. The broad consent provided for in section 45 of the MCA fails to protect consumers. In the circumstances it is clear that section 45 of the MCA is inconsistent with sections 90 and 91 of the NCA and is trumped by the latter provisions.

[93] If section 45 is properly interpreted in the context of the MCA and in the light of the Bill of Rights, it does not apply to causes of action based on agreements covered by the NCA. It follows that when a debtor admits that he or she is liable for a debt and consents to an EAO, section 45 does not permit that debtor to consent to the jurisdiction of a court outside of the district where the debtor works or resides.

[94] The court places on record its indebtedness to the *amicus curiae* and their counsel Mr Brickhill and Ms Webber for their contribution to these proceedings.

In the result IT IS ORDERED THAT:

1. The emolument attachment orders issued against the Second to Sixteenth Applicants in favour of the Fourth to Sixteenth Respondents and set out in annexure A to the Notice of Motion, are declared to be unlawful, invalid and of no force and effect.

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’ 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 emolument attachment order against a judgment debtor.

3. It is declared that in proceedings brought by a creditor for the enforcement of any credit agreement to which the National Credit Act 34 of 2005 (“the National Credit Act”) 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.

4. The First to the Third Respondents, the HRC, the Law Society and the Advice Offices are urged to take whatever steps they deem necessary to alert debtors as to their rights in terms of this judgment.

5. The Eighteenth Respondent’s application to strike out is dismissed with costs.

6. The Seventeenth and Eighteenth Respondents' counter-applications are dismissed with costs.

7. Fourth to Eighteenth Respondents (excluding the Twelfth Respondent) are ordered to pay the Applicants' costs, including the costs of two counsel, jointly and severally.

8. A copy of these proceedings is to be forwarded by the First Applicant to the Law Society of the Northern Province for it to determine whether Ms AE Jordaan and Flemix & Associates Incorporated have breached their ethical duties particularly with regard to forum shopping to secure emolument attachment orders.

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DESAI J