

REPUBLIC OF SOUTH AFRICA

COURTS OF LAW AMENDMENT BILL

*(As amended by the Portfolio Committee on Justice and Correctional Services
(National Assembly))
(The English text is the official text of the Bill)*

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

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Amendment of section 36 of Act 32 of 1944, as substituted by section 1 of Act 55 of 2002

2. Section 36 of the Magistrates' Courts Act, 1944, is hereby amended—

(a) by the substitution for subsection (2) of the following subsection:

“(2) If a plaintiff in whose favour a default judgment has been granted has **[agreed]** consented in writing that the judgment be rescinded or varied, a court **[must]** may rescind or vary such judgment on application by any person affected by it.”; and

(b) by the addition of the following subsections:

“(3) (a) Where a judgment debt, the interest thereon at the rate granted in the judgment and the costs have been paid in full, whether the consent of the judgment creditor for the rescission of the judgment has been obtained or not, a court may, on application by the judgment debtor or any other person affected by the judgment rescind that judgment.

(b) The application contemplated in paragraph (a)—

- (i) must be made on a form which corresponds substantially with the form prescribed in the rules;
- (ii) must be accompanied by reasonable proof that the judgment debt, the interest and the costs have been paid;
- (iii) must be accompanied by proof that the application has been served on the judgment creditor, at least 10 court days prior to the hearing of the intended application;
- (iv) may be set down for hearing on any day, not less than 10 court days, after service thereof; and
- (v) may be heard by a magistrate in chambers.

(4) A court may make any cost order it deems fit with regard to an application contemplated in paragraph (a).”.

Amendment of section 45 of Act 32 of 1944

3. Section 45 of the Magistrates' Courts Act, 1944, is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(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 instituted or about to be instituted in such court, have jurisdiction in any such matter]** Subject to the provisions of section 46, the parties may consent in writing to the jurisdiction of either the court for the district or the court for the regional division to determine any action or proceedings otherwise beyond its jurisdiction in terms of section 29(1).”; and

(b) by the addition of the following subsection:

“(3) Any consent given in proceedings instituted in terms of section 57, 58, 65 or 65J by a defendant or a judgment debtor to the jurisdiction of a court which does not have jurisdiction over that defendant or judgment debtor in terms of section 28, is of no force and effect.”.

Insertion of section 55A in Act 32 of 1944

4. The following section is hereby inserted in the Magistrates' Courts Act, 1944, after section 55:

“Factors to be taken into account when considering an order which is just and equitable

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

- (a) the size of the debt;
- (b) the circumstances in which the debt arose;

- (c) the availability of alternatives to recover the debt;
- (d) the interests of the plaintiff or judgment creditor;
- (e) the rights and needs of the elderly, children, persons with disabilities and households headed by women;
- (f) social values and implications;
- (g) the amount and nature of the defendant's or judgment debtor's income;
- (h) the amounts needed by the defendant or judgment debtor for necessary expenses and those of the persons dependent on him or her and for the making of periodical payments which he or she is obliged to make in terms of an order of court, agreement or otherwise in respect of his or her other commitments; and
- (i) whether the order would, in the circumstances of the case, be grossly disproportionate.”.

Substitution of section 57 of Act 32 of 1944, as substituted by section 1 of Act 63 of 1976 and amended by section 2 of Act 81 of 1997

5. The following section is hereby substituted for section 57 of the Magistrates' Courts Act, 1944:

“Admission of liability and undertaking to pay debt in instalments or otherwise

57. (1) If any person (in this section called the defendant) has received a letter of demand or has been served with a summons demanding payment of any debt, the defendant may in writing—

- (a) admit liability to the plaintiff for the amount of the debt and costs claimed in the letter of demand or summons or for any other amount;
- (b) offer to pay the amount of the debt and costs for which he or she admits liability, in instalments or otherwise;
- (c) undertake on payment of any instalment in terms of his or her offer to pay the collection fees for which the plaintiff is liable in respect of the recovery of such instalment; and
- (d) agree that, in the event of his or her failure to carry out the terms of his or her offer, the plaintiff shall, without notice to the defendant, be entitled to apply for judgment for the amount of the outstanding balance of the debt for which he or she admits liability, with costs, and for an order of the court for payment of the judgment debt and costs in instalments or otherwise in accordance with his or her offer, and if the plaintiff or his or her attorney accepts the said offer, he or she shall advise the defendant of such acceptance in writing by registered letter.

(1A) The offer referred to in subsection (1)(b) must—

- (a) set out full particulars of the defendant's—
 - (i) monthly or weekly income and expenditure, supported where reasonably possible by the most recent proof in the possession of the defendant;
 - (ii) other court orders or agreements, if any, with other creditors for payment of a debt and costs in instalments; and
- (b) indicate the amount of the offered instalment.

(2) If, after having been advised by the plaintiff or his or her attorney in writing that his or her offer has been accepted, the defendant fails to carry out the terms of his or her offer, [the clerk of] the court [shall] may, upon the written request of the plaintiff or his or her attorney [accompanied by—

- (a) if no summons has been issued, a copy of the letter of demand;
- (b) the defendant's written acknowledgment of debt and offer and a copy of the plaintiff's or his attorney's written acceptance of the offer;
- (c) an affidavit or affirmation by the plaintiff or a certificate by his attorney stating in which respects the defendant has failed to carry out the terms of his offer and, if the defendant has made any payments since the date of the letter of demand or summons,

showing how the balance claimed is arrived at] and subject to subsection (2A)—

- [(i)](a) enter judgment in favour of the plaintiff for the amount or the outstanding balance of the amount of the debt for which the defendant has admitted liability, with costs; and 5
- [(ii)](b) order the defendant to pay the judgment debt and costs in specified instalments or otherwise in accordance with his or her offer, and such order shall be deemed to be an order of the court mentioned in section 65A(1). 10

(2A) The written request referred to in subsection (2) must be accompanied by—

- (a) the summons or if no summons has been issued, a copy of the letter of demand; 15
- (b) the defendant's written acknowledgment of liability and offer;
- (c) all the particulars and documentary evidence referred to in subsection (1A), in order for the court to be apprised of the defendant's financial position at the time the offer was made and accepted; 20
- (d) a copy of the plaintiff's or his or her attorney's written acceptance of the offer and proof of postage thereof to the defendant; and
- (e) an affidavit or affirmation by the plaintiff or a certificate by his or her attorney stating in which respects the defendant has failed to carry out the terms of his or her offer and, if the defendant has made any payments since the date of the letter of demand or summons, showing how the balance claimed is arrived at. 25

(2B) The court—

- (a) may request any relevant information from the plaintiff or his or her attorney in order for the court to be apprised of the defendant's financial position at the time judgment is requested; 30
- (b) must act in terms of the provisions of the National Credit Act and the regulations thereunder dealing with over-indebtedness, reckless credit and affordability assessment, when considering a request for judgment in terms of this section, based on a credit agreement under the National Credit Act; 35
- (c) may, if the defendant is employed, and after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate, authorise an emoluments attachment order referred to in section 65J; and
- (d) may, notwithstanding the defendant's consent to pay any scale of costs, make a costs order as it deems fit. 40

(3) When the judgment referred to in subsection (2) has been entered and an order made, and if the judgment debtor was not present or represented when the judgment was entered **[by the clerk of the court]** and the order made, the judgment creditor or his or her attorney **[shall forthwith]** must, within 10 days after it has received knowledge that judgment has been entered and an order made, advise the judgment debtor by registered letter of the terms of the judgment and order. 45

(4) Any judgment entered in favour of the plaintiff under subsection (2) **[shall have]** has the effect of a judgment by default.

(5) The provisions of this section apply subject to the relevant provisions of the National Credit Act where the request for judgment is based on a credit agreement under the National Credit Act.” 50

Substitution of section 58 of Act 32 of 1944, as substituted by section 1 of Act 63 of 1976

6. The following section is hereby substituted for section 58 of the Magistrates' Courts Act, 1944: 55

“Consent to judgment or to judgment and an order for payment of judgment debt in instalments

58. (1) If any person (in this section called the defendant), upon receipt of a letter of demand or service upon him or her of a summons demanding payment of debt, consents in writing to judgment in favour of the creditor 60

(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]** may, on the written request of the plaintiff or his or her attorney **[accompanied by—**

(a) if no summons has been issued, a copy of the letter of demand; and 5
(b) the defendant’s written consent to judgment,] and subject to subsection (1B)—

[i](a) enter judgment in favour of the plaintiff for the amount of the debt and the costs for which the defendant has consented to judgment; and 10

[ii](b) if it appears from the defendant’s written consent to judgment that he or she 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 or she has consented to judgment, order the defendant to pay 15 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).

(1A) If the defendant consents to an order of court for payment in specified instalments referred to in subsection (1)(b), the consent must— 20

(a) set out full particulars of his or her—

(i) monthly or weekly income and expenditure, supported where reasonably possible by the most recent proof in the possession of the defendant; 25

(ii) other court orders or agreements, if any, with other creditors for payment of a debt and costs in instalments; and

(b) indicate the amount of the offered instalment.

(1B) The written request referred to in subsection (1) must be accompanied by— 30

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

(b) the defendant’s written consent to judgment; and

(c) if the defendant consents to an order of court for payment in specified instalments referred to in subsection (1)(b)— 35

(i) the written consent; and

(ii) the full particulars and documentary evidence referred to in subsection (1A) in order for the court to be apprised of the defendant’s financial position at the time the defendant consented to judgment. 40

(1C) The court—

(a) may request any relevant information from the plaintiff or his or her attorney in order for the court to be apprised of the defendant’s financial position at the time the judgment is requested; 45

(b) must act in terms of the provisions of the National Credit Act and the regulations thereunder dealing with over-indebtedness, reckless credit and affordability assessment, when considering a request for judgment in terms of this section, based on a credit agreement under the National Credit Act;

(c) may, if the defendant is employed, and after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate, authorise an emoluments attachment order referred to in section 65J; and 50

(d) may, notwithstanding the defendant’s consent to pay any scale of costs, make a costs order as it deems fit. 55

(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.

(3) The provisions of this section apply, subject to the relevant provisions of the National Credit Act, where the application for judgment is based on a credit agreement under the National Credit Act.”. 60

Substitution of section 65 of Act 32 of 1944, as substituted by section 2 of Act 63 of 1976

7. The following section is hereby substituted for section 65 of the Magistrates' Courts Act, 1944:

“Offer by judgment debtor after judgment 5

65. (1) If at any time after a court has given judgment for the payment of a sum of money and before the issue of a notice under section 65A(1), the judgment debtor makes a written offer to the judgment creditor to pay the judgment debt in specified instalments or otherwise and such offer is accepted by the judgment creditor or his or her attorney, [the clerk of] the court [shall] may, subject to subsection (2), at the written request of the judgment creditor or his or her attorney, accompanied by the offer order the judgment debtor to pay the judgment debt in specified instalments or otherwise in accordance with his or her offer [, and such order shall be deemed to be an order of the court mentioned in section 65A(1)]. 15

(2) The offer referred to in subsection (1) must be supported, where reasonably possible, by the most recent proof in the possession of the debtor relating to his or her income and expenditure, other court orders or agreements with other creditors for payment of a debt in instalments and assets and liabilities as prescribed by the rules. 20

(3) The court—

- (a) may request any relevant information from the judgment creditor or his or her attorney in order for the court to be apprised of the judgment debtor's financial position at the time the written request, for an order to pay the judgment debt in specified instalments or otherwise, is made; 25
- (b) must act in terms of the provisions of the National Credit Act and the regulations thereunder dealing with over-indebtedness, reckless credit and affordability assessment when considering a request for an order in terms of this section, if the judgment is based on a credit agreement under the National Credit Act; and 30
- (c) may, if the debtor is employed, and after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate, authorise an emoluments attachment order referred to in section 65J. 35

(4) An order made under subsection (1) is deemed to be an order of the court mentioned in section 65A(1).”.

Amendment of section 65E of Act 32 of 1944, as inserted by section 2 of Act 63 of 1976 and amended by section 7 of Act 81 of 1997

8. Section 65E of the Magistrates' Courts Act, 1944, is hereby amended by the substitution for subsection (1) of the following subsection: 40

“(1) If at the hearing of the proceedings in terms of a notice under section 65A(1) the court is satisfied—

- (a) that the judgment debtor has movable or immovable property which may be attached and sold in order to satisfy the judgment debt or any part thereof, the court may— 45
 - (i) authorise the issue of a warrant of execution against such movable or immovable property or such part thereof as the court may deem fit; or
 - (ii) authorise the issue of such a warrant together with an order in terms of section 73; or 50
- (b) that there is a debt due to the judgment debtor which may be attached in terms of section 72 to satisfy the judgment debt and costs or part thereof, the court may authorise the attachment of that debt in terms of that section; or
- (c) that the judgment debtor or, if the judgment debtor is a juristic person, the director or officer summoned as representative of the juristic person, 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 or her attorney to pay the judgment debt and costs in specified instalments or otherwise, [whether by way of an 55

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, **[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,]** where the judgment debtor is a natural person and is employed and after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate, in addition authorise 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.”.

Substitution of section 65J of Act 32 of 1944, as inserted by section 2 of Act 63 of 1976 and amended by section 2 of Act 53 of 1983 and section 11 of Act 81 of 1997

9. The following section is hereby substituted for section 65J of the Magistrates’ Courts Act, 1944:

“Emoluments attachment orders

65J. (1) (a) Subject to the provisions of subsection (2), a judgment creditor may cause an order (hereinafter referred to as an emoluments attachment order) to be issued from the court of the district in which the **[employer of the]** judgment debtor resides, carries on business or is employed, **[or, if the judgment debtor is employed by the State, in which the judgment debtor is employed].**

(b) An emoluments attachment order—

- (i) **[shall]** must 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]** must 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.

(1A) (a) The amount of the instalment payable or the total amount of instalments payable where there is more than one emoluments attachment order payable by the judgment debtor, may not exceed 25 per cent of the judgment debtor’s basic salary.

(b) For purposes of this section, “basic salary” means the annual gross salary a judgment debtor is employed on divided by 12 and excludes additional remuneration for overtime or other allowances.

(c) (i) When a court considers—

(aa) the authorisation of an emoluments attachment order; or

(bb) any other order contemplated in this section,

and after having considered all submissions before the court and after having called for and considered all further available documents, the court is satisfied that other emoluments attachment orders exist against the judgment debtor, the court must postpone the further consideration of the authorisation or other order and set the matter down for hearing.

(ii) The party applying for the authorisation of an emoluments attachment order or other order contemplated in this section, must serve notice of the date of the hearing referred to in subparagraph (i) on the other creditors or their attorneys, and on the judgment debtor, if he or she was not present or represented when the consideration of the authorisation of an emoluments attachment order or other order was postponed.

(iii) The court may after hearing all parties at the ensuing hearing, make an order regarding the division of the amount available to be committed to

each of the emoluments attachment orders, after satisfying itself that each order is just and equitable and the sum of the total amount of the emoluments attachment orders is appropriate and does not exceed 25 per cent of the judgment debtor's basic salary."

- (2) An emoluments attachment order [**shall not**] may only be issued [— 5
- (a) **unless the judgment debtor has consented thereto in writing or** if 5
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 10
- (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** 15
- (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].** 20 25

(2A) A judgment creditor or his or her attorney must serve, on the judgment debtor and on his or her employer, a notice, which corresponds substantially with the form prescribed in the rules, of the intention to have an emoluments attachment order issued against the judgment debtor in accordance with the authorisation of the court referred to in subsection (2). 30

(2B) The notice referred to in subsection (2A) must inform the judgment debtor and his or her employer—

- (a) of the judgment creditor's intention to have an emoluments attachment order issued against the judgment debtor in accordance with the authorisation of the court referred to in subsection (2); 35
- (b) of the full amount of the capital debt, interest and costs outstanding, substantiated by a statement of account; and
- (c) that, unless the judgment debtor or his or her employer files a notice of intention to oppose the issuing of the emoluments attachment order within 10 days after service of the notice on them, an emoluments attachment order will be sought. 40

(2C) (a) The notice of intention to oppose contemplated in subsection (2B)(c) must state the grounds upon which the judgment debtor or employer wishes to oppose the issuing of the emoluments attachment order. 45

(b) The grounds which may be used to oppose the issuing of the emoluments attachment order include, but are not limited to, the following:

- (i) That the amounts claimed are erroneous or not in accordance with the law; or
- (ii) that 25 per cent of the judgment debtor's basic salary is already committed to other emoluments attachment orders and that the debtor will not have sufficient means left for his or her own maintenance or that of his or her dependants. 50

(c) The notice of intention to oppose must be accompanied by—

- (i) a certificate by the employer of the judgment debtor setting out particulars of— 55
- (aa) all existing court orders against the judgment debtor or agreements with other creditors for payment of a debt and costs in instalments; and
- (bb) when reasonably attainable, the amounts needed by the debtor for necessary expenses and those of the persons dependent on him or her and for the making of periodical payments which he 60

- or she is obliged to make in terms of an agreement or otherwise in respect of his or her other commitments.
- (ii) the contact details of all the relevant judgment creditors or their attorneys; and
 - (iii) the latest salary advice of the judgment debtor. 5
- (2D) If a notice of intention to oppose is filed and the judgment creditor or his or her attorney does not accept the reasons for the opposition, he or she or his or her attorney may set the matter down for hearing in court with notice to the judgment debtor and employer and if the opposition is based on overcommitment of the judgment debtor’s salary to existing court orders or agreements with other creditors for payment of a debt and costs in instalments, notice must be given to the other judgment creditors or their attorneys. 10
- (2E) The court may, after hearing all parties and after satisfying itself that the order is just and equitable— 15
- (a) 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 the sufficient means necessary for his or her maintenance and that of his or her dependants; or
 - (b) make any order, including an order regarding the division of the amount available to be committed to all the emoluments attachment orders, after satisfying itself that the amount is appropriate and does not exceed 25 per cent of the judgment debtor’s basic salary and an order as to costs. 20
- (3) (a) Any emoluments attachment order **[shall] must** be prepared **[by the judgment creditor or his attorney, shall be]** and signed by the judgment creditor or his or her attorney **[and the clerk of the court, and shall be served on the garnishee by the messenger of the court in the manner prescribed by the rules for the service of process].** 25
- (b) The clerk of the court must ensure that the court— 30
- (i) has authorised the emoluments attachment order; and
 - (ii) has jurisdiction as provided for in subsection (1)(a), before issuing an emoluments attachment order authorised in terms of subsection (2) by signing it and may either ask the judgment creditor or his or her attorney for more information or refer the order to the court in the case of any uncertainty. 35
- (c) The emoluments attachment order must be served on the employer of the judgment debtor, (hereinafter called the garnishee) and if the judgment debtor was not present or represented when the emoluments attachment order was authorised, also on the judgment debtor, by the sheriff in the manner prescribed by the rules for the service of process. 40
- (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 or her 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. 50
- (b) The judgment creditor or his or her attorney **[shall, at the reasonable request of the garnishee or the judgment debtor,] must** furnish **[him or her] the garnishee and the judgment debtor,** free of charge with a quarterly statement containing particulars of the payments received up to the date concerned and the balance owing. 55
- (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) (a) If, after the service of such an emoluments attachment order on the garnishee, the garnishee believes or becomes aware or it is otherwise shown that the— 60

- (i) judgment debtor, after satisfaction of the emoluments attachment order, will not have sufficient means for his or her own **[and his dependants']** maintenance[, **the court shall**] or that of his or her dependants; or
- (ii) amounts claimed are erroneous or not in accordance with the law, the garnishee, judgment debtor or any other interested party must without delay and in writing notify the judgment creditor or his or her attorney accordingly.
- (b) The written notification referred to in paragraph (a) must set out the reasons for believing or knowing that the judgment debtor will not have sufficient means for his or her own maintenance or that of his or her dependants or that the amounts claimed are erroneous or not in accordance with the law.
- (c) The judgment creditor or his or her attorney must, after receiving the notice contemplated in paragraph (a), without delay indicate whether he or she accepts the reasons given in that notification and if not, set the matter down for hearing in court with notice to the garnishee, judgment debtor or any other interested party referred to in paragraph (a).
- (d) The court may, after hearing all parties and after satisfying itself that the order is just and equitable—
- (i) rescind the emoluments attachment order or amend it in such a way that it will affect only the balance of the emoluments of the judgment debtor over and above the sufficient means necessary for his or her maintenance and that of his or her dependants; or
- (ii) make any order including an order regarding the division of the amount available to be committed to all the emoluments attachment orders, after satisfying itself that the amount is appropriate and does not exceed 25 per cent of the judgment debtor's basic salary and an order as to costs.
- (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.
- (8) (a) Whenever any judgment debtor to whom an emoluments attachment order relates leaves the service of a garnishee before the judgment debt has been paid in full, such judgment debtor **[shall] must** forthwith advise the judgment creditor or his or her attorney in writing of the name and address of his or her new employer, and the judgment creditor or his or her attorney may cause a certified copy of such emoluments attachment order to be served on the said new employer, together with an affidavit or affirmation by him or her or a certificate by his or her attorney specifying the payments received by him or her since such order was issued, the costs, if any, incurred since the date on which that order was issued and the balance outstanding.
- (b) An employer on whom a certified copy referred to in paragraph (a) has been so served, **[shall] is** thereupon **[be]** bound thereby and **[shall then be] is** deemed to have been substituted for the original garnishee, subject to the right of the judgment debtor, the garnishee or any other interested party to dispute the existence or validity of the order and the correctness of the balance claimed.
- (9)**[(a)]** Whenever any judgment debtor to whom an emoluments attachment order relates, leaves the service of the garnishee before the judgment debt has been paid in full and becomes self-employed or is employed by someone else, he or she **[shall, or shall] is, or is** pending the service of the emoluments attachment order on his or her new employer, again **[be]** obliged to comply with the relevant order referred to in subsection (1)(b).
- (10) (a) 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.

(b) A garnishee who—

- (i) unreasonably fails to timeously deduct the amount of the emoluments attachment order provided for in subsection (4)(a); or
 - (ii) unreasonably fails to timeously stop the deductions when the judgment debt and costs have been paid in full,
- is liable to repay to the judgment debtor any additional costs and interest which have accrued or any amount deducted from the salary of the judgment debtor after the judgment debt and costs have been paid in full as a result of such failure.

(c) The Rules Board for Courts of Law must make a reference to the provisions of paragraph (b) on Form 38 of Annexure 1 to the rules, containing the emoluments attachment order.”

Substitution of section 65M of Act 32 of 1944, as inserted by section 2 of Act 63 of 1976

10. The following section is hereby substituted for section 65M of the Magistrates’ Courts Act, 1944:

“Enforcement of certain judgments of [Supreme] division of High Court or court for regional division

65M. If a judgment for the payment of any amount of money has been given by a division of the [Supreme] High Court of South Africa or a court for a regional division, the judgment creditor may file with the clerk of the court from which the judgment creditor is required to issue a notice in terms of section 65A(1), a certified copy of such judgment and an affidavit or affirmation by the judgment creditor or a certificate by his or her attorney specifying the amount still owing under the judgment and how such amount is arrived at, and thereupon such judgment, whether or not the amount of such judgment would otherwise have exceeded the jurisdiction of the court, shall have all the effects of a judgment of such court and any proceedings may be taken thereon as if it were a judgment lawfully given in such court in favour of the judgment creditor for the amount mentioned in the affidavit or affirmation or the certificate as still owing under such judgment, subject however to the right of the judgment debtor to dispute the correctness of the amount specified in the said affidavit or affirmation or certificate.”

Amendment of section 73 of Act 32 of 1944 as amended by section 18 of Act 40 of 1952 and section 5 of Act 63 of 1976

11. Section 73 of the Magistrates’ Courts Act, 1944, is hereby amended by—

- (a) the substitution for the heading of the following heading: “**Suspension of execution of debt**”; and
- (b) the substitution for subsection (1) of the following subsection:

“(1) The court may, [upon] on the 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 or her, suspend execution against that debtor either wholly or in part on such conditions as to security or otherwise as the court may determine.”

Amendment of section 86 of Act 32 of 1944

12. Section 86 of the Magistrates’ Courts Act, 1944, is hereby amended by the addition of the following subsection:

“(5) If a party abandons a judgment given in his or her favour because the judgment debt, the interest thereon at the rate granted in the judgment and the costs have been paid, no judgment referred to in subsection (2) or (3) shall be entered in favour of the other party.”

Insertion of section 106C in Act 32 of 1944

13. The following section is hereby inserted in the Magistrates' Courts Act, 1944, after section 106B:

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

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

(2) Any person who fraudulently obtains or issues a judgment, or any instalment order or emoluments attachment order in terms of this Act, is guilty of an offence and on conviction liable to a fine or to imprisonment not exceeding three years.”

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Insertion of section 23A in Act 10 of 2013

14. The Superior Courts Act, 2013, is hereby amended by the insertion of the following section after section 23:

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“Rescission of judgment with consent of plaintiff or where judgment debt has been paid

23A. (1) If a plaintiff in whose favour a default judgment has been granted has consented in writing that the judgment be rescinded, a court may rescind such judgment on application by any person affected by it.

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(2) (a) Where a judgment debt, the interest thereon at the rate granted in the judgment and the costs have been paid, whether the consent of the judgment creditor for the rescission of the judgment has been obtained or not, a court may, on application by the judgment debtor or any other person affected by the judgment, rescind that judgment.

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(b) The application contemplated in paragraph (a)—

- (i) must be made on a form which corresponds substantially with the form prescribed in the rules;
- (ii) must be accompanied by reasonable proof that the judgment debt, the interest thereon and the costs have been paid;
- (iii) must be accompanied by proof that the application has been served on the judgment creditor, at least 10 business days prior to the hearing of the intended application;
- (iv) may be set down for hearing on any day, not less than 10 business days after service thereof; and
- (v) may be heard by a judge in chambers.

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(c) A court may make any cost order it deems fit with regard to an application contemplated in paragraph (a).”

Transitional provisions

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

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

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(b) This subsection applies only to default judgments and subsequent orders in terms of the Magistrates' Courts Act, 1944.

(c) The application contemplated in paragraph (a)—

- (i) must be made on a form which corresponds substantially with the form prescribed in the Schedule to this Act; 5
- (ii) must be accompanied by a supporting affidavit;
- (iii) must be accompanied by proof that the application has been served on the other party, at least 10 court days prior to the hearing of the intended application;
- (iv) may be set down for hearing on any day, being not less than 10 court days after service thereof; and 10
- (v) may be heard by a magistrate in chambers.

(d) The court must rescind a default judgment or subsequent order contemplated in paragraph (a), if it is proved that the default judgment or subsequent order was not obtained and granted in accordance with the law or may give any other order it deems fit in the circumstances. 15

(e) No cost order shall be made with regard to an application contemplated in paragraph (a): Provided that the judgment debtor or affected person who applies for the review contemplated in paragraph (a) acted reasonably in bringing the application.

(f) The clerk or registrar of the court must render reasonable assistance to a party wishing to bring an application contemplated in paragraph (a): Provided that the State or that clerk or registrar shall not be liable for any damage or loss resulting from assistance given in good faith by that clerk or registrar to such party in the compilation or preparation of any process or document. 20

(g) The operation of this subsection shall cease after a period of three years after the date on which this Act, or the date on which the last provisions of this Act, has come into operation. 25

(3) Despite the amendment of any provision of the Magistrates' Courts Act, 1944, by this Act, such provision, for purposes of the disposal of any legal proceedings referred to in subsection (1), remains in force as if such provision had not been amended.

(4) An investigation or prosecution or other legal proceedings in respect of conduct which would have constituted an offence referred to in section 106C of the Magistrates' Courts Act, 1944, which was initiated before the commencement of this Act must be concluded, instituted and continued as if this Act had not been passed. 30

Short title and commencement

16. (1) This Act is called the Courts of Law Amendment Act, 2017, and comes into operation on a date fixed by the President by proclamation in the *Gazette*. 35

(2) Different dates may be fixed in respect of different provisions of this Act.

SCHEDULE

**APPLICATION TO REVIEW DEFAULT JUDGMENT AND
SUBSEQUENT ORDER**

(Section 15(2))

IN THE MAGISTRATE’S COURT FOR THE DISTRICT/REGION

HELD AT

CASE NO.....

In the matter between

.....Applicant

and

.....Respondent

Take notice that application will be made on behalf of the above-mentioned applicant for the review of the default judgment and subsequent order/s granted in this case, on at (time) on the basis that the judgment and subsequent order/s have not been obtained and granted in accordance with the law.

The affidavit of, annexed hereto, will be used in support of the application.

DATED AT on

.....(Applicant/applicant’s attorney)

Address

.....

TO: (1) (Respondent or respondent’s attorney)

Address:

.....

(2) The clerk/registrar of the court

Address:

.....

MEMORANDUM ON OBJECTS OF THE COURTS OF LAW AMENDMENT BILL

1. PURPOSE OF BILL

The purpose of the Bill is to amend various sections of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944) (the MCA), in order to address alleged abuses in the emoluments attachment order (EAO) system. It further seeks to amend the sections of the MCA dealing with the rescission or abandonment of court judgments to accommodate the Department of Trade and Industry's (the dti) removal of adverse consumer credit information project. The amendments have a bearing on civil debts and are aimed at protecting debtors who often find themselves in financial difficulties as a result of debts incurred by them and who cannot escape the "debt trap" due to the abuses that seem to be taking place in this area of the law and also to put in place measures that will assist them in overcoming the effects of court judgments relating to their continued indebtedness. The Bill further amends the Superior Courts Act, 2013 (Act No. 10 of 2013) (the SCA), to provide for the rescission of judgments with the consent of the judgment creditor and for the rescission of judgments where the judgment debt has been settled.

2. OBJECTS OF BILL

The Bill aims to curb alleged abuses in the EAO system and to provide for an additional mechanism in terms of which court judgments may be rescinded or abandoned without incurring prohibitive legal costs. The amendments are intended to alleviate the plight of certain debtors who often find themselves at the receiving end of a debt collecting system and certain common law principles that keep debtors in a state of indebtedness, from which it is difficult to escape.

3. CLAUSE-BY-CLAUSE DISCUSSION OF BILL

3.1 Clause 1

This clause inserts a definition of "court day" as the MCA does not contain a definition, whilst various definitions are found in, among others, the SCA, the Uniform Rules of the High Court and the MCA Rules. The clause also inserts a definition of the National Credit Act, 2005 (Act No. 34 of 2005) (the NCA), as several references are made to that Act in the proposed amendments.

3.2 Clause 2

This clause amends section 36 of the MCA, which deals with the rescission of judgments. The dti embarked on a project aimed at the removal of adverse consumer credit information. The project involves, amongst others, the amendment of legislation dealing with the rescission or abandonment of judgments in order to assist certain categories of consumers in accessing credit by removing adverse credit information from credit bureaux. The dti reported that many judgment creditors refuse to consent to the rescission of judgments or to abandon judgments following the payment of the debt. This results in the debtor having to apply to the court for the rescission of the judgment, often at great cost. The dti suggested that the MCA be amended to provide for an automatic procedure to rescind judgments, in line with section 71A of the NCA. However, reports of fraudulent rescissions of judgments have emerged leading to the concern that a complete automatic rescission of judgment without the intervention of the court might lead to further fraudulent actions. It is vital that the judgment creditor's rights are also protected. Accordingly, the amendment to section 36 seeks to make the application for rescission of judgment, where the debt has been paid, less cumbersome and inexpensive, by providing for a standard prescribed form to be used. Application for rescission of judgment brought by way of the prescribed form may be made in chambers to a magistrate who may make a cost order he or she deems fit. The application can be set down for hearing on any date not less than 10 court days after service thereof.

3.3 Clause 3

This clause seeks to amend section 45 of the MCA which deals with consent to the jurisdiction of a court. Clause 3 seeks to provide that parties can consent to the jurisdiction of a magistrate's court to determine causes of action otherwise beyond its jurisdiction in terms of section 29(1). Either the district or regional division of the magistrate's court may deal with an action otherwise beyond its jurisdiction if the parties consent in writing to the jurisdiction of such district or regional division of the magistrate's court. A new subsection (3) stipulates that consent given in proceedings in terms of sections 57, 58, 65 and 65J of the MCA to the jurisdiction of a court which does not have jurisdiction over the defendant or judgment debtor is of no force and effect. Although the original purpose of section 45 was to allow parties to consent to the jurisdiction of a lower court where the amount of the claim exceeded the monetary jurisdiction of the lower court, the proviso in section 45 as it currently exists has been used to consent to the jurisdiction of a specific magistrate's court. In consenting to the jurisdiction of a specific magistrate's court, consumers are often required or find themselves consenting to the jurisdiction of a magistrate's court far away from where the consumer is either residing, carrying on business or employed. In consequence, the consumer ends up not being able to access such far away courts to challenge the order should the consumer wish to do so. In *University of Stellenbosch Legal Aid Clinic & 15 Others vs Minister of Justice and Correctional Services & 16 Others*, (the *Stellenbosch* case)¹, the Court declared that section 45 does not permit a judgment debtor to consent in writing to the jurisdiction of a magistrate's court other than that in which the judgment debtor resides or is employed, in respect of the enforcement of a credit agreement to which the NCA applies.

3.4 Clause 4

This clause inserts section 55A in the MCA and gives guidance to magistrates' courts regarding the factors which should be taken into account when considering an order which is "just and equitable", in line with the Constitutional Court judgment in the *Stellenbosch* case.

3.5 Clause 5

This clause amends section 57 of the MCA which provides for the admission of liability and undertaking to pay a debt in instalments or otherwise. In terms of the current provisions of section 57, if the defendant fails to comply with his or her undertaking, the clerk of the court is required to grant judgment against the defendant as well as order the defendant to pay the judgment debt and costs in specified instalments or otherwise. All this is done by the clerk of the court without any oversight by the court. The amendment now provides that the court is the one that must grant such an order. The amendment also requires the judgment debtor to furnish information as well as documentary proof thereof so as to apprise the court of the defendant's current financial position before a judgment is granted and an instalment order is made. Rule 12(5) of the Magistrates' Courts Rules already requires that judgments which emanate from the application of the NCA must be referred to the court. In some courts these matters are referred to the courts but in others they are not, due to different interpretations of the law. The amendment of section 57 to provide that only a court, not the clerk, may enter judgment and order payment in instalments, will address inconsistencies in the application of this requirement. Further amendments entail that the court must be satisfied that

1. *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice And Correctional Services and Others* (16703/14) [2015] ZAWCHC 99; 2015 (5) SA 221 (WCC); [2015] 3 All SA 644 (WCC); (2015) 36 ILJ 2558 (WCC)(8 July 2015); *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 v Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* [2016] ZACC 32.

the order is just and equitable and must act in terms of the provisions of the NCA when it is considering a request for judgment where the foundation of the request for judgment is a credit agreement under the NCA. The court may, already at this stage, authorise an EAO.

3.6 Clause 6

This clause amends section 58 of the MCA, which provides that a clerk of the court must grant judgment and an instalment order where the defendant has consented to judgment or to judgment and an order for the payment of judgment debts in instalments. The amendments are similar to those proposed in clause 5 discussed above.

3.7 Clause 7

This clause amends section 65 of the MCA which provides that the clerk of the court must make an instalment order where the judgment debtor has offered to pay the judgment debt in instalments, after judgment has been granted, but before a section 65A(1) notice has been issued. Clause 7 seeks to provide that a court may make an instalment order in terms of this section. Documentary evidence relating to the judgment debtor's financial position must accompany the offer for the court to be apprised of the judgment debtor's financial position. The court may also, at this stage, authorise an EAO.

3.8 Clause 8

This clause amends section 65E(1)(c) of the MCA, which provides for the orders a court may make at the hearing of section 65A(1) proceedings, to bring it in line with the intended amendment of section 65J that only a court may authorise the issuing of an EAO and that consent to an EAO be done away with. The court must be satisfied that it is just and equitable that an EAO be issued and that the amount is appropriate.

3.9 Clause 9

This clause amends section 65J of the MCA, which provides for the issuing of EAO's. The most important amendments are the following:

- 3.9.1 An EAO may only be issued from the court in which the judgment debtor resides, carries on business or is employed and only if the court has so authorised.
- 3.9.2 A cap of 25 % is placed on the judgment debtor's salary with regard to the amount that may be committed to EAO's. A court procedure is provided to deal with the division of the 25% if there is more than one EAO.
- 3.9.3 A preliminary procedure is introduced in terms of which a notice of intention to have an EAO issued must be served on the judgment debtor and his or her employer. A notice of intention to oppose the issue of an EAO can be filed. If the judgment creditor or his or her attorney does not accept the reasons for opposing the issuing of an EAO, the matter may be set down for hearing in court. If no intention to oppose is filed, an EAO may be issued in accordance with the authorisation by the court.
- 3.9.4 The garnishee (employer) and debtor must be furnished with a free quarterly statement setting out details relating to payments made and the balance owing. Currently the judgment creditor must furnish such a statement on reasonable request by the garnishee or judgment debtor.

- 3.9.5 If the garnishee believes or becomes aware that the judgment debtor will not have sufficient means for his or her or his or her dependants' maintenance or that the amounts claimed are erroneous or not in accordance with the law, the judgment creditor must be informed accordingly, who must forthwith set the matter down for hearing in respect of the EAO in question if he or she is not satisfied with the reasons given by the garnishee.
- 3.9.6 A garnishee will be liable to repay the debtor if he or she unreasonably fails to deduct the instalment amount timeously or unreasonably fails to stop deductions when the judgment debt has been paid in full. It seems that employers do not deduct the EAO's timeously, resulting in interest being added to the unpaid amount or do not stop the deductions when the judgment has been paid in full. In order for employers to be mindful of their duties, a sanction is provided whereby the employer must repay amounts that became due as a result of his or her failure to deduct the amount or any amounts timeously or to stop payments by the judgment debtor after the debt has been paid in full.

3.10 Clause 10

This clause amends section 65M of the MCA. Currently, only a court of a district may conduct financial inquiries in respect of judgments of a district court or a division of the High Court for the payment of any amount of money. Therefore, the amendment seeks to enable a court of a district to deal with judgments from the regional division as well and for such judgments to be transferred to the district court for the debt collection process.

3.11 Clause 11

This clause amends section 73 of the MCA. The replacement of the heading of the section is meant to align the heading with the provision of the section, whereas the substitution of subsection (1) is a consequential amendment following the amendment of the other sections in respect of EAO's.

3.12 Clause 12

This clause amends section 86 of the MCA, which deals with the abandonment of judgments. Section 86(2) and (3), however, further provide that where the party so abandoning was the plaintiff or applicant, judgment in respect of the part abandoned must be entered in favour of the defendant or respondent with costs and where the party abandoning was the defendant or respondent, judgment in respect of the part abandoned must be entered in favour of the plaintiff or applicant in terms of the claim in the summons or application. The interpretation of these subsections has given rise to divergent decisions by the courts, for example that it constitutes a complete reversal of the abandoned judgment. Clause 12 amends section 86 to provide that if a party abandons a judgment in his or her favour because the judgment debt has been paid, no judgment shall be entered in favour of the other party.

3.13 Clause 13

This clause inserts a new section 106C in the MCA. The amendment seeks to criminalise conduct in terms of which a person (creditor) requires another person applying for a loan, to consent to judgment or any instalment order or EAO prior to the granting of a loan and where any person fraudulently obtains or issues a judgment or any instalment order or EAO. It must be pointed out that section 90(2)(k)(iii) of the NCA already declares the practice of requiring the consent of a person applying for a loan, to judgment or EAO prior to the granting of the loan, unlawful. Unlawful provisions are void and when an agreement contains an unlawful provision, a court must sever that provision from the agreement, or alter the provision to render it lawful if it is reasonable

to do so. Alternatively, a court may declare the entire agreement unlawful (section 90(3) and (4) of the NCA). Furthermore, numerous judgments and EAO's are obtained fraudulently. Although the existing criminal law can be applied when an offender is apprehended, it is suggested that an offence, dealing specifically with this abuse in respect of judgments and court orders, be created. It could also act as a deterrent for court officials not to collude with external parties in granting judgments and EAO's unlawfully and to take their duties seriously.

3.14 Clause 14

This clause of the Bill inserts a new section 23A in the SCA and contains provisions for the rescission of a judgment with the consent of the judgment creditor or the rescission of a judgment where the judgment debt has been paid. There are no substantive provisions in the SCA dealing with the rescission of judgments by consent, similar to those in section 36 of the MCA. The dti has, as was done in respect of the MCA, also approached the Department, as part of its removal of adverse credit information project, to consider the inclusion of provisions in the SCA, to provide for the rescission of judgments with the consent of a judgment creditor, to assist certain categories of consumers in accessing credit by removing adverse credit information from credit bureaus.

3.15 Clause 15

This clause of the Bill provides for transitional arrangements and seeks to ensure a smooth transition from the current provisions of the MCA to the new provisions and to provide legal certainty by providing that pending proceedings should continue as if the new Act had not been passed. However, proceedings may not be continued if the judgments and EAO's were granted irregularly. Provision has also been made for a procedure to review irregularly obtained judgments and orders.

3.16 Clause 16 contains the short title and the commencement provisions.

4. DEPARTMENTS AND PARTIES CONSULTED

- 4.1 A separate draft Magistrates' Courts Bill and Superior Courts Bill were published on the Department's website and submitted to interested parties in the legal fraternity. Comments were then received from—
- (a) the Council for Debt Collectors;
 - (b) the Association of Debt Recovery Agents;
 - (c) Attorneys De Beer and De Klerk;
 - (d) Bayport Financial Services;
 - (e) Attorneys Munnik Basson Dagama Incorporated;
 - (f) Flemix and Associates;
 - (g) Gerhard van der Merwe Attorneys;
 - (h) the Law Society of South Africa (LSSA);
 - (i) Old Mutual Finance;
 - (j) the Magistrate, Johannesburg;
 - (k) Microfinance South Africa; and
 - (l) the South African National Association of Progressive Sheriffs.
- 4.2 Comments on the Superior Courts Bill were received from the Honourable Judge Binns-Ward, the Commission for Gender Equality, the LSSA, the General Council of the Bar and Standard Bank.
- 4.3 Further inputs on the later versions of the two Bills were also received from the dti and the National Treasury, the Rules Board, the Branch: Courts Services of the Department of Justice and Constitutional Development, the Limpopo Civil Court Forum and the SA Human Rights Commission.

5. IMPLICATIONS FOR PROVINCES

There are no implications for provinces.

6. FINANCIAL IMPLICATIONS FOR STATE

The amendments could increase the workload of magistrates. Training of magistrates and court personnel is also critical.

7. PARLIAMENTARY PROCEDURE

7.1 The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the Bill should be dealt with in accordance with the procedure set out in section 75 of the Constitution, since it contains no provisions to which the procedure set out in sections 74 or 76 of the Constitution applies.

7.2 The Constitution distinguishes between four categories of bills as follows: Bills amending the Constitution (section 74); Ordinary Bills not affecting provinces (section 75); Ordinary Bills affecting provinces (section 76); and Money Bills (section 77). A Bill must be correctly tagged otherwise it would be constitutionally invalid.

7.3 The Bill has been considered against the provisions of the Constitution relating to the tagging of Bills, and against the functional areas listed in Schedule 4² and Schedule 5³ to the Constitution.

7.4 The crux of tagging has been explained by the courts especially the Constitutional Court in the case of *Tongoane and Others v Minister of Agriculture and Land Affairs and Others 2010 (8) BCLR 741 (CC)*. The court in its judgment stated as follows:

“[58] What matters for the purpose of tagging is not the substance or the true purpose and effect of the Bill, rather, what matters is whether the provisions of the Bill “in substantial measure fall within a functional area listed in schedule 4”. This statement refers to the test to be adopted when tagging Bills. This test for classification or tagging is different from that used by this court to characterise a Bill in order to determine legislative competence. This “involves the determination of the subject matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the [legislation] is about”. (footnote omitted)

[60] The test for tagging must be informed by its purpose. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the process concerned with preventing interference in the legislative competence of another sphere of government. The process is concerned with the question of how the Bill should be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content.”

7.5 In light of what the Constitutional Court stated in the abovementioned case, the test essentially entails that “any Bill whose provisions in substantial measure” fall within a specific Schedule must be classified in terms of that Schedule.

² Functional areas of concurrent national and provincial legislative competence

³ Functional areas of exclusive provincial legislative competence

- 7.6 The Bill seeks to amend the MCA and the SCA so as to provide for the rescission of default judgments by consent and the rescission of judgments where the judgment debt has been settled. High Courts deal with rescission of default judgments in terms of common law in accordance with the procedure set out in the Rules of the High Court. Neither the SCA nor the Rules of the High Court provide for the rescission of default judgment pursuant to consent or liquidation of the debt.
- 7.7 The High Courts have stated, in some of the cases which have served before them, that they do not have the authority to develop common law in order to provide for the rescission of default judgment where consent has been furnished or the debt has been settled, but that it is the legislature's duty to do so in the circumstances. The effect of this amendment is that the legislature is exercising its original powers thereby giving the High Courts, through legislation, the powers they did not have at common law.
- 7.8 In the final analysis, it is our view that the subject matter of the Bill does not fall within any of the functional areas listed in either Schedule 4 or Schedule 5 to the Constitution. Consequently, we are of the opinion that this Bill is an ordinary Bill not affecting provinces and that it must be dealt with in accordance with the procedure set out in section 75 of the Constitution.

8. REFERRAL TO NATIONAL HOUSE OF TRADITIONAL LEADERS

The opinion is held that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.