

## Attachment Orders Declared Unconstitutional

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31 Jul 2015

In a judgment delivered on 8 July 2015 in the case of *The University of Stellenbosch and 15 Others v The Minister of Justice and Correctional Services and 17 Others* (Case Number 16703/14), the court ruled that in proceedings brought by a creditor for the enforcement of any credit agreement to which the National Credit Act, No 34 of 2005 applies, s45 of the Magistrates' Court Act, No 32 of 1944 (Magistrates' Court Act) does not permit a debtor to consent in writing to the jurisdiction of a Magistrate's Court other than one in which that debtor resides or is employed.

The court further ruled that s65J(2)(b)(i) and s65J(2)(b)(ii) of the Magistrates' Court Act are inconsistent with the Constitution of the Republic of South Africa, 1996 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.

The case involved 15 individual applicants who were all granted loans, often at interest rates of 60% per annum from a 'loan originator' who previously operated in the Stellenbosch area. The credit providers granted the loans without taking reasonable steps to assess the applicants' existing financial means and obligations prior to concluding the credit agreements. The individual applicants were granted loans with the repayments at times exceeding 50% of their monthly income. The applicants resided and were employed in Stellenbosch but judgments were granted and emolument attachment orders issued in Kimberly, Wynberg and elsewhere. The credit providers alleged that the applicants consented to such jurisdiction in terms of s45 of the Magistrates' Court Act which provides that in certain circumstances parties may consent to the jurisdiction of a court to determine any action that is otherwise beyond its jurisdiction. However, s65J(1)(a) of the Magistrates' Court Act provides that an emolument attachment order must be issued from the court of the district that the employer of the judgement debtor resides, carries on business or is employed.

The court held that s45 and s65J of the Magistrates' Court Act cannot be read together, in that the narrow provisions of s65J cannot be reconciled with the broad provisions of s45. Section 65J is specifically intended to cover emolument attachment orders and 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. Accordingly, s65J trumps s45 and the court declared the emolument attachment orders unlawful, invalid and of no force and effect.

The emolument attachment orders were issued by the clerk of the court without any judicial oversight nor any evaluation of the applicants' ability to afford the deductions from their salaries. The emolument attachment orders were also made without deciding whether or not the issuing of the emolument attachment orders would be just and equitable.

South African legislation does not provide any statutory limit on the number of emolument attachment orders which may be granted against a debtor or the amount which may be deducted from his salary. The ability of people to earn an income and support themselves and their families is central to the right to human dignity as contained in s10 of the Constitution. For this reason, many foreign jurisdictions such as the United States of America, Germany, Australia, Rwanda, England and Wales limit the amount of income that may be attached depending on the amount of the debtor's salary and/or the amount of money that is required by a debtor to support himself.

The court considered a number of Constitutional Court judgments which 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. The court ruled that the process of issuing emolument attachment orders requires an evaluation of the amount of money to be attached per month compared to the amount of money needed by the debtor to support himself and his family. Judicial oversight should therefore be mandatory and should occur when the emolument attachment order is issued and accordingly s65J(2)(b)(i) and s65J(2)(b)(ii) of the Magistrates' Court Act were in the circumstances constitutionally invalid to the extent that they allow for emolument attachment orders to be issued by a clerk of the court without judicial oversight.