

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

SHIRLY FORTUIN

Ninth Applicant

JEFFREY HAARHOFF

Tenth Applicant

JOHANNES HENDRICKS

Eleventh Applicant

DOREEN ELAINE JONKER

Twelfth Applicant

BULELANI MEHLOMAKHULU

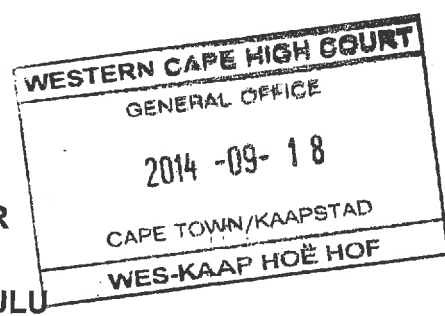
Thirteenth Applicant

SIPHOKAZI SIWAYI

Fourteenth Applicant

NTOMBOZUKO TONYELA

Fifteenth Applicant



Webber Wentzel
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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 & ASSOCIATES INCORPORATED	Seventeenth Respondent

NOTICE OF MOTION

TAKE NOTICE THAT the first to sixteenth applicants ('the applicants') intend applying to this Court on **Monday 24 November 2014** at 10h00 or as soon thereafter as counsel may be heard for orders:

1. Condoning the applicants' non-compliance with the Uniform Rules relating to time-periods, forms and service and granting leave for this application to be heard as one of urgency;

2. Declaring:

2.1 the words "*the judgment debtor has consented thereto in writing or*" in section 6J(2)(a) of the Magistrates' Courts Act 32 of 1944 ('the Magistrates' Courts Act') and;

2.2 section 65J(2)(b)(i) and section 65J(2)(b)(ii) of the Magistrates' Courts Act:

4

to be inconsistent with the Constitution of the Republic of South Africa Act, 1996 ('the Constitution') and invalid to the extent that they fail to provide for judicial oversight over the issuing of an emoluments attachment order against a judgment debtor;

3. Declaring that in proceedings brought by a judgment 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 judgment debtor to consent in writing to the jurisdiction of a magistrates court other than that in which that judgment debtor resides or is employed;
4. Declaring the emoluments attachment orders issued against the second to sixteenth applicants in favour of the fourth to sixteenth respondents and set out in annexure "A" hereto, to be unlawful, invalid and of no force and effect;
5. Directing the fourth to sixteenth respondents to deliver to the applicants' attorneys, within 10 (ten) days of the date of this order, all original credit agreements and pre-disclosure forms and quotations as defined in the National Credit Act, in respect of any credit agreements concluded between any of the second to sixteenth applicants and any of the fourth to sixteenth respondents;

6. Granting the applicants, upon compliance by the fourth to sixteenth respondents with paragraph 5 of this order, leave to supplement these papers and to add to, vary or amend the relief sought in the notice of motion, and to enrol the varied or amended relief on reasonable notice to the respondents;
7. Directing the first respondent, the fourth to seventeenth respondents and any other respondent opposing this application, to pay the costs of this application;
8. Further and/or alternative relief.

And that the attached affidavits of the applicants and the annexures hereto will be used in support of this application.

TAKE NOTICE FURTHER that the applicants have appointed the address of their attorneys as set out below at which they will accept notice and service of all process in these proceedings.

TAKE NOTICE FURTHER that if you intend opposing this application, you are required:

- (a) to notify the applicants attorneys in writing within 5 (five) days of service of this application upon you and;

(b) to deliver your answering affidavits, if any, by no later than Thursday 16 October 2014.

And further that you are required to appoint in such notice of opposition an address referred to in Rule 6(5)(b) at which you will accept notice and service of all documents in these proceedings.

DATED AT CAPE TOWN ON THIS THE 18th DAY OF SEPTEMBER 2014



WEBBER WENTZEL

Applicants' Attorneys

15th Floor, Convention Tower

Heerengracht, Foreshore

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TO:

THE REGISTRAR OF THIS HONOURABLE COURT

CAPE TOWN

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AND TO:

THE STATE ATTORNEY

First and Second Respondent's Attorneys

4th Floor

22 Long Street

Cape Town

T: (021) 441 9200

AND TO:

THE NATIONAL CREDIT REGULATOR

Third Respondent

127 15th Road

Randjiespark

Midrand

AND TO:

FLEMIX AND ASSOCIATES INCORPORATED

Seventeenth Respondent and Fourth to

Sixteenth Respondents' Attorneys

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Annexure A

No.	Applicant	Judgment Creditor	EAO Case No.	Court issued
2.	Vusumzi George Xekethwana	Mavava Trading 279	8671/2012	Beaufort West Magistrates Court
		Onecor (Pty) Ltd	7105/12	Beaufort West Magistrates Court
3.	Monia Lydia Adams	Mavava Trading 279	Unknown	Johannesburg Magistrates Court
4.	Angeline Arrison	Amplisol (Pty) Ltd	7489/2012	Kimberley Magistrates Court
		Amplisol (Pty) Ltd	7490/2012	Kimberley Magistrates Court
		Amplisol (Pty) Ltd	7491/2012	Kimberley Magistrates Court
		Triple Advanced Investments 40	13501/2012	Kimberley Magistrates Court
5.	Lisinda Doreen Bailey	Onecor (Pty) Ltd	15245/2012	Kimberley Magistrates Court
		Experato (Pty) Ltd	7013/2012	Winburg Magistrates Court
6.	Fundiswa Bikitsha	Experato (Pty) Ltd	7280/2011	Winburg Magistrates Court
		Experato (Pty) Ltd	7279/2012	Winburg Magistrates Court
7.	Merle Bruintjies	Onecor (Pty) Ltd	11539/2012	Kimberley Magistrates Court
		Las Manos Investments 174	9875/12	Kimberley Magistrates Court
8.	Johannes De Klerk	Polkadots Properties 172	13619/2012	Kimberley Magistrates Court
9.	Shirly Fortuin	Money Box Investments 232	7428/2012	Kimberley Magistrates Court
10.	Jeffrey Haarhof	Maravedi Credit Solutions (Pty) Ltd	218/2014	Stellenbosch Magistrates Court
11.	Johannes Hendricks	Icom (Pty) Ltd	4137/2011	Paarl Magistrates Court
12.	Doreen Elaine Jonker	Villa des Roses 168	7641/2012	Kimberley Magistrates Court
13.	Bulelani Mehlomakhulu	Maravedi Credit Solutions (Pty) Ltd	13679/2012	Kimberley Magistrates Court
14.	Siphokazi Siwayi	Money Box Investments 251	13468/2012	Kimberley Magistrates Court
15.	Ntombozuko Tonyela	Triple Advanced Investments 99	13710/2012	Kimberley Magistrates Court
16.	Dawid Van Wyk	Maravedi Credit Solutions (Pty) Ltd	1424/2013	Stellenbosch Magistrates Court

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- First Applicant
- Second Applicant
- Third Applicant
- Fourth Applicant
- Fifth Applicant
- Sixth Applicant
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- Thirteenth Applicant
- Fourteenth Applicant
- Fifteenth Applicant

DAWID VAN WYK	Sixteenth Applicant
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FOUNDING AFFIDAVIT

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I, the undersigned,

JOSEF KRUGER VAN DER WALT

(KRUGER VAN DER WALT)

do hereby state under oath that:-

1. I am an adult male South African citizen and a duly admitted practicing attorney and the director of the University of Stellenbosch Legal Aid Clinic ('the first applicant'). My offices are at 44 Banhoek Road, Stellenbosch, Western Cape Province.
2. The facts set out in this affidavit are true and within my personal knowledge unless the context indicates to the contrary. Although I am a law teacher, *inter alia*, where I make legal submissions, I rely on advice that the applicants have received from their legal representatives.
3. I am authorised to bring these proceedings on behalf of the first applicant and to sign this affidavit on its behalf.

A THE PURPOSE OF THIS APPLICATION


4. Section 65J of the Magistrates' Court Act 32 of 1944 ('the **Magistrates' Court Act**') authorises a judgment creditor to attach the salary or wages of a judgment debtor in order to satisfy a civil judgment debt.
5. The mechanism through which this is achieved is known as an emoluments attachment order ('**EAO**').



6. In terms of section 65J(2) of the Magistrates' Court Act, where a judgment debtor has consented to an EAO in writing or the judgment creditor has complied with section 65J(2)(b), the judgment creditor may without more prepare an EAO, which if signed by the clerk of court and served on the employer of the judgment debtor ('the garnishee') is binding and of full force and effect.
7. A garnishee on whom an EAO has been served is obliged by section 65J(1)(b)(ii) of the Magistrates' Court Act to make the deductions required by the EAO from the judgment debtor's salary or wages.
8. These amounts must then be paid over to the judgment creditor or his attorney.
9. Section 65J(2) of the Magistrates' Court Act does not require a judicial officer to authorise the issuing of an EAO against a judgment debtor who has consented in writing to an EAO or against a judgment debtor in respect of whom the judgment creditor has complied with section 65J(2)(b) of the Act.
10. Nor does it provide for any form of prior enquiry by a court into whether the judgment debtors can actually afford the deductions to be made from their salaries in terms of the EAO.
11. In relation to these categories of judgment debtors, the entire process of preparing, issuing and serving an EAO is from start to finish determined by the judgment creditor, without judicial oversight at all.



12. The purpose of this application is to declare the failure of section 65J(2)(a), section 65J(2)(b)(i) and section 65J(2)(b)(ii) of the Magistrates' Court Act to provide for judicial oversight over the issuing EAO's against judgment debtors in all cases, to be inconsistent with the Constitution of the Republic of South Africa, 1996 ('the Constitution') and invalid.
13. The applicants also seek declaratory relief concerning the legality of the EAO's issued against the individual applicants, the proper interpretation of section 45 of the Magistrates' Court Act and a mandatory interdict relating to the underlying credit agreements in terms of which judgments against the second to sixteenth applicants were obtained and EAO's against them subsequently issued.
14. This affidavit is structured as follows:
 - 14.1 I begin by describing the parties and their interest and standing;
 - 14.2 I then address the jurisdiction of this Court to determine the relief sought;
 - 14.3 I set out the legal framework;
 - 14.4 I then broadly outline the factual circumstances and the *modus operandi* by which EAO's were issued against the second to sixteenth applicants;
 - 14.5 Thereafter I address the systematic nature of abuses of the EAO system and the effects of these abuses; and

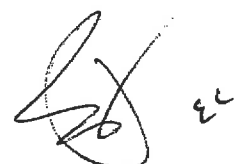


14.6 Finally, I set out the legal grounds on which the applicants contend that relief sought in the notice of motion should be granted and the urgency of this application.

B THE PARTIES

The first applicant

15. The first applicant is the University of Stellenbosch Legal Aid Clinic. The first applicant is a legal aid clinic established by the University of Stellenbosch and registered with the Cape Law Society as a law clinic in terms of the Attorneys Act 53 of 1979. The first applicant provides free legal services to the indigent and training to final-year law students in the practical application of the law. The first applicant's full time staff consists of eight attorneys, eight candidate attorneys, a paralegal and myself as director.
16. The first applicant assists approximately 3000 indigent persons a year with legal advice and representation. The main focus areas of the first applicant are debt relief, farm evictions and family matters. The first applicant's clients are mostly people working as labourers on farms in the Cape Winelands area and low wage earners in towns such as Stellenbosch and Paarl.
17. In recent years, issues relating to debt relief and exploitative lending practices have consumed a significant proportion of the first applicant's time and resources. To address some of these problems, the first applicant has established a Financial Literacy Project which is staffed by attorneys specialising in providing advice and



assistance in debt relief matters. At this stage the first applicant currently assists more than 200 people a month with advice in respect of EAO's issued against their wages or salaries and investigations into the circumstances in which these orders were issued.

18. The first applicant brings this application in its own interest in terms of section 38(1)(a) of the Constitution. I submit in this regard that a litigant such as the first applicant, who relies on the objective unconstitutionality of a statute for the relief sought, will have standing even though the rights infringed by the statute are those of other persons and not that of the litigant itself.
19. The relief sought in these proceedings relates to the constitutionality of a law and conduct of the respondents, which has resulted in hundreds of poor and desperate people approaching the first applicant's offices for help with regard to EAO's issued against their incomes. The first applicant accordingly has a direct and sufficient interest in the relief sought in these proceedings and, I submit, the necessary standing to bring this application in its own interest.
20. The first applicant also brings this application in the public interest in terms of section 38(1)(d) of the Constitution.
21. The factors relevant to determining whether an applicant may be afforded standing to act in the public interest by way of section 38(1)(d) of the Constitution, were set out by the Constitutional Court in *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 CC at paragraphs 14 to 17. These factors, which are not



a closed list and which must be considered in the light of the circumstances of each case, are the following:

- 21.1 the nature of the relief sought;
- 21.2 the extent to which the relief sought is of general and prospective application;
- 21.3 the range of persons or groups who may be directly or indirectly affected by any order made by the court;
- 21.4 the opportunity that these persons or groups have to present evidence and argument to the court;
- 21.5 the degree of vulnerability of the people affected;
- 21.6 the nature of the right said to be infringed and the consequences of the infringement; and
- 21.7 whether there is another reasonable and effective manner in which the challenge can be brought.

22. These factors overlap to an extent and I address them below.

The nature of the relief sought

23. The provisions and application of the law being challenged in this application is of significant public importance. The issue raised by this application is whether it is constitutionally permissible for a person's wage or salary to be attached without any form of judicial oversight in order to satisfy a judgment debt. This issue has




implications and prospective effect for the public in general and in particular, the livelihoods and very survival of vulnerable low income debtors whose wages or salaries are subject to an EAO.

24. The first applicant's concerns regarding the EAO process are not only confined to the circumstances under which the EAO's at issue in this case were issued. As I will explain in further detail later in this affidavit, there is widespread public concern and evidence of endemic abuse of EAO's by credit providers as well as allegations of systemic fraud and corruption in the process of issuing of EAO's.

The degree of vulnerability of the people affected

25. The first applicant's clients in debt relief and EAO matters are all vulnerable low paid workers who are struggling to survive on the vastly diminished wages they receive after the deduction of emoluments attachment orders. They are people who in most cases have low levels of education and very basic or non-existent levels of financial literacy.
26. Consumers such as the first applicant's clients, who are uneducated, financially unsophisticated and employed in the lower end of the wage scale, are also particularly vulnerable to incurring debt as a result of predatory lending practices and reckless lending by credit providers. When they are unable to repay the debt, the issuing of emoluments attachment orders, without judicial oversight and in the absence of a limit on the amount of the deductions which can be made from a debtor's salary, can trap people in a vicious cycle of debt from which there is little, if any hope of escape.

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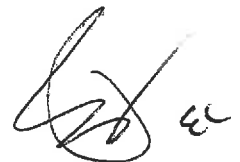
27. As the documentary reports and research, which I refer to later, will demonstrate, as a result of abuse of the EAO system, millions of people across the country find themselves trapped in exactly this situation.

The rights infringed

28. Any unlawful conduct with regard to EAO's directly affects a number of constitutional rights of the victims of such conduct, including their rights to dignity, their right of access to courts and their right not to be arbitrarily deprived of their property. The basic socio-economic rights required for a human to survive: shelter, electricity, sufficient food, health care as well as other rights such as access to education for children are all threatened when a debtor cannot afford the deductions taken from her salary under an EAO and lacks the means to challenge the order in the court which issued it.
29. The rule of law itself is implicated when court orders are issued by administrative officials without judicial oversight and without due regard to the constitutional rights of persons affected by their orders.

Alternative manner in which these proceedings could be brought

30. There is no other reasonable and effective manner in which the relief sought in these proceedings could be brought. It would be not be feasible for the first applicant to have brought separate applications in the Magistrates' Courts for appropriate relief in respect of the EAO's at issue in this case. Individual applications to challenge EAO's would in any event only be applicable to the



individual applicants and not to the public at large or any other person affected by an EAO against their wages.

31. As I explain later, the EAO's were issued in different magistrates' courts across the country and the cost of bringing individual applications in each case would be prohibitive. A legal aid clinic such as the first applicant has limited resources. It does not have the capacity to perform the role of the courts and the state credit regulators when it comes to ensuring effective oversight of the system of issuing emoluments attachment orders.


32. Secondly, only this Court, by virtue of section 170 of the Constitution, has the jurisdiction to determine this challenge insofar as it relates to the constitutionality of the legislation which authorises the issue of EAO's without judicial oversight.

33. For all these reasons, it is contended that the first applicant is genuinely acting in the public interest and that it is clearly in the public interest for these proceedings to be brought.

The second to sixteenth applicants

34. The second to sixteenth applicants are individuals and clients of the first applicant who consulted the first applicant for advice and assistance regarding the issuing or threatened issuing of EAO's against their wages or salaries.

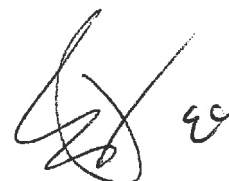
35. The second to sixteenth applicants bring this application in order to protect their own rights and interests.
36. The second applicant is Vusumzi George Xekethwana, an adult male general worker. He lives in Kayamandi township, Stellenbosch.
37. The third applicant is Monia Adams, an adult female lay counsellor residing at Macassar, Western Cape Province.
38. The fourth applicant is Angeline Arrison, an adult female food services assistant residing at 4 Hoek Street, Cloetesville, Stellenbosch.
39. The fifth applicant is Lusinda Dorell Bailey, an adult female cleaning assistant residing at 37 White Hart Street, Jamestown, Stellenbosch.
40. The sixth applicant is Fundiswa Virginia Bikitsha, an adult female cleaning assistant residing at Kayamandi, Stellenbosch.
41. The seventh applicant is Merle Bruintjies, an adult female general worker residing at Cloetesville, Stellenbosch.
42. The eighth applicant is Johannes Petrus De Klerk, an adult male general worker residing at 212 Phyllaria Flats, Jan Cilliers Road, Stellenbosch.
43. The ninth applicant is Shirly Fortuin, an adult female cleaning assistant residing at Cloetesville, Stellenbosch.
44. The tenth applicant is Jeffrey Haarhof, an adult male security guard and residing at Kayamandi, Stellenbosch.

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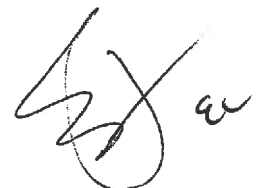
45. The eleventh applicant is Johannes Hendricks, an adult male, unemployed and residing in Groot Drakenstein, Paarl.
46. The twelfth applicant is Doreen Elaine Jonker, an adult female general worker residing in Cloetesville, Stellenbosch.
47. The thirteenth applicant is Bulelani Mehlomakhulu, an adult male maintenance worker residing at Milky Town, Paarl.
48. The fourteenth applicant is Siphokazi Siwayi, an adult female baker residing at Kayamandi, Stellenbosch.
49. The fifteenth applicant is Ntombuzuko Tonyela, an adult female, unemployed, residing at Kayamandi, Stellenbosch.
50. The sixteenth applicant is David Van Wyk, an adult male farmworker residing at Klapmuts, Stellenbosch.

The first to third respondents

51. The first respondent is the Minister of Justice and Correctional Services. The first respondent is the national executive authority responsible for the administration of the Magistrates' Court Act and is cited in his official capacity in terms of Rule 10A of the Uniform Rules. A principal place of business of the First Respondent is at 120 Plein Street, Cape Town. This application will be served on the first respondent at care of the State Attorney, 32 Long Street, Cape Town.



52. The second respondent is the Minister of Trade and Industry. The second respondent is the member of the Cabinet responsible for consumer credit matters and the administration of the National Credit Act 34 of 2005 ('the National Credit Act'). The second respondent is cited in his official capacity in terms of Rule 10A of the Uniform Rules. Service of this application will be effected on the second respondent at care of the State Attorney, 32 Long Street, Cape Town.
53. The second respondent is cited by virtue of any interest in the relief sought by the applicants in these proceedings. No relief is sought against the second respondent, except in the event that he opposes this application.
54. The third respondent is the National Credit Regulator, a juristic person established in terms of section 12 of the National Credit Act, with its principal place of business at 127 15th Road, Randjiespark, Midrand, Gauteng. The third respondent is responsible for ensuring the development of an accessible credit market, the registration of credit providers and for performing the enforcement functions listed in section 15 of the National Credit Act.
55. The third respondent is cited because of any interest it may have in this application and/or the investigation and evaluation of possible contraventions of the National Credit Act by one or more of the fourth to seventeenth respondents. No relief is sought against the third respondent except in the event that it opposes this application.



The fourth to sixteenth respondents

56. The fourth to sixteenth respondents are private companies who were granted judgments and subsequently EAO's against one or more of the second to sixteenth applicants. All of these respondents, except the thirteenth respondent, are registered credit providers in terms of section 40 of the National Credit Act. All these respondents were represented by the seventeenth respondent, Flemix and Associates Incorporated ('Flemix and Associates'), when they sought and obtained judgments and EAO's against the second to sixteenth applicants. This application will accordingly be served on Flemix and Associates, at their offices in Bellville, Western Cape, in their capacity as the fourth to sixteenth respondent's attorneys.
57. The fourth respondent is Mavava Trading 279, a company incorporated in South Africa with its registered address at 152 5th Avenue, Kleinmond. Service of this application will be effected on the fourth respondent at care of Flemix and Associates, the fourth respondent's attorneys.
58. The fifth respondent is Onecor (Pty) Ltd, a company incorporated in South Africa with its registered office at 2nd Floor, Atrium Building, 60 Glenwood Road, Lynwood Glen. Service of this application will be effected on the fifth respondent at care of Flemix and Associates, the fifth respondent's attorneys.



59. The sixth respondent is Amplisol (Pty) Ltd, a company incorporated in South Africa with its registered office is at 3rd Floor, 3 Commerce Square, 39 Rivonia Road, Sandhurst. Service of this application will be effected on the sixth respondent at care of Flemix and Associates, the sixth respondent's attorneys.
60. The seventh respondent is Triple Advanced Investments 40, a company incorporated in South Africa with its registered office at 2 Megan Street, Eldoraigne. Service of this application will be effected on the seventh respondent at care of Flemix and Associates, the seventh respondent's.
61. The eighth respondent is Bridge Debt, a firm or business with its registered office at 2nd Floor Atrium Building, 60 Glenwood Road, Lynwood Glen and whose full and further details are unknown to the applicants. According to the records of the Companies and Intellectual Property Commission ('CIPC'), the registration number of the eighth respondent is 2009/001358/07. This same registration number is also being used by an entity called "Experato (Pty) Ltd", an entity whose name does not appear in the records of the CIPC. Service of this application will be effected on the eighth respondent at care of Flemix and Associates Incorporated.
62. The ninth respondent is Las Manos Investments 174, a company whose registered address is 209 van der Hoff Road, Extension 3 Pretoria Gardens. Service of this application will be effected on the eighth respondent at care of Flemix and Associates Incorporated, the ninth respondent's attorneys.



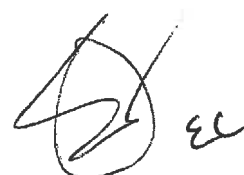
63. The tenth respondent is Polkadots Properties 172, a close corporation whose registered office is at 209 Van Der Hoff Road, Extension 3 Pretoria Gardens. Service of this application will be effected on the tenth respondent at care of Flemix and Associates Incorporated, the tenth respondent's attorneys.
64. The eleventh respondent is Money Box Investments 232, a close corporation whose registered office is at 209 Van Der Hoff Road, Extension 3 Pretoria Gardens. Service of this application will be effected on the eleventh respondent at care of Flemix and Associates Incorporated, the eleventh respondent's attorneys.
65. The twelfth respondent is Maravedi Credit Solutions (Pty) Ltd, a company whose registered address is 1st Floor Blake House, 32 Flanders Drive, Mount Edgecombe. Service of this application will be effected on the twelfth respondent at Flemix and Associates Incorporated, the twelfth respondent's attorneys.
66. The thirteenth respondent is Icom (Pty) Ltd, a company whose further particulars are unknown to the applicants. Service of this application will be effected on the thirteenth respondent at care of Flemix and Associates Incorporated, the thirteenth respondent's attorneys.
67. The fourteenth respondent is Villa des Roses 168, a company whose registered address is 12 Monaco Boardwalk Manor, Faerie Glen. Service of this application will be effected on the fourteenth respondent at care of Flemix and Associates Incorporated, the fourteenth respondent's.



68. The fifteenth respondent is Money Box Investments 251, a company whose registered address is 60 Glenwood Road, Lynwood Glen. Service of this application will be effected on the fifteenth respondent at care of Flemix and Associates Incorporated, the fifteenth respondent's attorneys.
69. The sixteenth respondent is Triple Advanced Investments 99, a company whose registered address is GLMI House, 164 Totius Street, Groenkloof. Service of this application will be effected on the sixteenth respondent at care of Flemix and Associates Incorporated, the sixteenth respondent's attorneys.

The seventeenth respondent

70. The seventeenth respondent is Flemix and Associates Incorporated (**'Flemix and Associates'**), a firm of attorneys who specialise in debt collection and have offices in Port Elizabeth, Cape Town, Durban, Bloemfontein, Nelspruit, Johannesburg and Polokwane.
71. On 15 September 2014, Ms Aanisah Parker, a candidate attorney at the offices of the applicants' attorneys, spoke to Ms Beth-Maree Leen of the seventeenth's respondent's offices in Bellville, Cape Town. Ms Leen confirmed to Ms Parker that Flemix and Associates represents the fourth to sixteenth respondents and will accept service of this application on their behalf.
72. The seventeenth respondent was previously known as Coombe and Associates Incorporated and changed its name to Flemix and Associates Incorporated with

A handwritten signature, possibly 'S. Leen', is written in black ink. To the right of the signature are the initials 'cc'.

effect from 1 March 2013. Clifford Coombe was the sole director of the seventeenth respondent prior to its name change on 1 March 2013.

73. The seventeenth respondent is cited specifically in this application because of its role in obtaining EAO's against the second to sixteenth applicants. This aspect is dealt with in more detail later in this affidavit and in the supporting affidavits of the individual applicants.
74. I turn now to the jurisdiction of this court to determine the relief sought by the applicants.

C JURISDICTION

75. In terms of section 21(1) of the Superior Courts Act 10 of 2013 ('the Superior Courts Act'), this Court has jurisdiction, *inter-alia*, in relation to all persons being in and all causes arising in its area of jurisdiction.
76. As explained by the individual applicants in their supporting affidavits, the EAO's issued against them were issued in respect of their default on loan or credit agreements which the applicants entered into in Stellenbosch, Somerset West and Paarl, towns which are all within the jurisdiction of this court. The individual applicants all reside and are employed within the jurisdiction of this court.
77. The various documents relied upon by the fourth to sixteenth respondents to obtain their judgments and EAO's against the individual applicants, were all allegedly signed at the individual applicant's homes and places of work, within the jurisdiction of this court.

78. The unlawful conduct by which a number of the individual applicants were compelled to sign these documents, occurred within the jurisdiction of this Court. Most importantly, the deductions from the individual applicant's salaries, which deductions the applicants contend are unlawful, are taking place within the jurisdiction of this Court. It is submitted that the applicants' cause of action in relation to the constitutionality of the law and conduct at issue in this matter, arose in the jurisdiction of this Court.
79. The first respondent, who is the member of the National Executive responsible for the administration of the Magistrates' Court Act, sections of which are the subject of the constitutional challenge in these proceedings. Furthermore he has one of his principal places of business within the jurisdiction of this Court.
80. It is this Court which is the most accessible for the individual applicants to turn to in seeking to challenge the unlawful deductions from the salaries and the law which authorised them. For these reasons, I submit that not only does this court have jurisdiction in terms of section 21 of the Superior Courts Act, but that considerations of convenience and common sense justify this Court exercising jurisdiction to adjudicate the issuing arising in this application.

D THE LEGAL FRAMEWORK

81. The issuing of an EAO in terms of Section 65J of the Magistrates' Court Act is one of a number of different mechanisms in the machinery created by the Magistrates' Court Act for the recovery of judgment debts.



82. The other mechanisms provided for in the Magistrates' Court Act include execution against a debtor's moveable or immoveable property, administration orders in terms of section 74 and an order following an enquiry into the debtor's financial position in terms of section 65A of the Magistrates' Court Act.
83. This application is principally concerned with the mechanism provided for in section 65J of the Magistrates' Court Act: emoluments attachment orders. I will however also address the provisions of section 58 of the Magistrates' Court Act in detail because, as I explain later, the seventeenth respondent, Flemix and Associates, relied on the provisions of section 58 when obtaining judgments and EAO's against the fourth to sixteenth applicants.

Section 65J proceedings: emoluments attachment orders

84. I emphasise below in bold typescript those aspects of Section 65J of the Magistrates' Court Act which are of particular relevance to these proceedings. By way of introduction, the term '*emoluments*' is defined in section 1 of the Act as including '*salary, wages or any other form of remuneration; and any allowances, whether expressed in money or not*'.
85. Section 65J(1)(a) of the Magistrates Court Act provides that:

'(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.'



86. Section 65J(1)(b) of the Act states that an emoluments attachment order -

(i) shall attach the emoluments at present or in future owing or accruing to the judgment debtor by or from his or her employer (in this section called the garnishee), to the amount necessary to cover the judgment and the costs of the attachment, whether that judgment was obtained in the court concerned or in any other court; and

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

87. In terms of section 65J(2), an emoluments attachment order shall not be issued-

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

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

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

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

88. Section 65J(3) states that:

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

89. In terms of section 67J(5) of the Act:

'(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.'

90. Sections 65J(6) and (7) of the Act provide as follows:

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

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attachment order or amend it in such a way that it will affect only the balance of the emoluments of the judgment debtor over and above such sufficient means.

'(7) Any emoluments attachment order may at any time on good cause shown be suspended, amended or rescinded by the court, and when suspending any such order the court may impose such conditions as it may deem just and reasonable.'

91. Section 65J creates a mechanism for recovering a judgment debt through an EAO, but makes this subject to a number of procedural requirements. These in summary are:

91.1 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 [section 65J(1)(a)];

91.2 where the judgment debtor is employed by the State, the EAO must be issued from the court of the district in which the judgment debtor is employed [section 65J(1)(a)];

91.3 an EAO may not be issued unless: [section 65J(2)];

91.3.1 the judgment debtor has consented thereto in writing; or

91.3.2 a court has so authorised on application or otherwise and such authorisation has not been suspended; or



- 91.3.3 unless the judgment creditor has sent the judgment debtor a registered letter warning him that an emoluments attachment order will be issued unless the amount is paid within ten days and filed with the clerk of court an affidavit or certificate setting out the details of the judgment debt;
- 91.4 a judgment debtor, the garnishee or any interested party has the right to dispute the existence or validity of the order or the correctness of the balance claimed [section 65J(5)];
- 91.5 the court is obliged to rescind or amend an EAO if it is shown that after satisfaction of the EAO, the judgment debtor will not have sufficient means for his own and his dependants maintenance [section 65J(6)];
- 91.6 the court may at any time on good cause shown suspend, amend or rescind any EAO and when suspending any such order may impose such conditions as it may deem just and reasonable [section 65J(7)].
92. Section 65J of the Magistrates Court Act creates some safeguards for the implementation of an EAO against a judgment debtor.
93. The most important of these are the judgment debtor's right to dispute the existence or validity of the order or the correctness of the balance claimed and the power of a court to set aside or amend an EAO on good cause or where its implementation would result in the judgment debtor not having sufficient means to maintain herself or her dependants.

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94. Crucially, the efficacy of these procedural safeguards depends on the ability of a judgment debtor having access to the court which issued the emoluments attachment order, so that she can dispute the validity of the order, and/or dispute the correctness of the balance claimed, and/or show that the implementation of the order would leave her with insufficient means for herself or her dependants and/or challenge the order on any good cause.
95. These protections are effectively meaningless when the person whose salary or wages has been attached under an EAO or their employer (the garnishee) is unable to access the court which issued the order.
96. It is submitted that it is precisely for this reason that section 65J(1)(a) of the Magistrates' Court Act provides that an EAO must be issued from the court of the district in which the employer resides, carries on business or is employed.
97. This provision was deliberately inserted by the legislature for the convenience of both employers and employees, who for various reasons, may wish to dispute any aspect of the validity of an EAO.
98. It is in this context that the provisions of section 45 of the Act become significant.

Section 45 of the Magistrates Court Act: consent to jurisdiction

99. Section 45 of the Act addresses the jurisdiction of a magistrates court by the consent of the parties and provides as follows:

'(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.

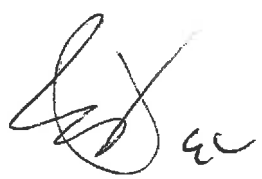
(2) Any provision in a contract existing at the commencement of the Act or thereafter entered into, whereby a person undertakes that, when proceedings have been or are about to be instituted, he will give such consent to jurisdiction as is contemplated in the proviso to subsection (1), shall be null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

100. Where a party does consent in writing to the jurisdiction of a court, such consent is however subject to compliance with the requirements of section 90 read with section 91 of the National Credit Act.

Section 90 and section 91 of the National Credit Act

101. In terms of section 90(1) of the National Credit Act, a credit agreement must not contain an unlawful provision.

102. Section 90(2)(a)(k)(vi)(bb) of the National Credit Act states that a provision of a credit agreement *"is unlawful if it expresses, on behalf of the consumer....a consent to the jurisdiction of any court seated outside the area of jurisdiction of a court having concurrent jurisdiction and in which the consumer resides or work or where the goods in question (if any) are ordinarily kept."*



103. Section 91 of the National Credit Act states that a credit provider ***"must not directly or indirectly require or induce a consumer to enter into a supplementary agreement or sign any document that contains a provision that would be unlawful if it were included in a credit agreement"***.

104. Any conduct by a credit provider which requires or induces a consumer to sign a document consenting to the jurisdiction of a court outside the area of jurisdiction of the court in which the consumer resides or works, is therefore unlawful and prohibited by the National Credit Act.

Section 58 proceedings: consent to judgment and payment in instalments

105. Section 58 of the Magistrates' Court Act states that:

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

- (a) *if no summons has been issued, a copy of the letter of demand; and*
- (b) *the defendant's written consent to judgment-*
 - (i) *enter judgment in favour of the plaintiff for the amount of the debt and the costs for which the defendant has consented to judgment; and*
 - (ii) *if it appears from the defendant's written consent to judgment that he has also consented to an order of court for payment in specified instalments or otherwise of the amount of the debt and costs in respect of which he has consented to judgment, order the defendant to pay the judgment debt and costs in specified instalments or otherwise in accordance with this consent, and such order shall be deemed to be an order of the court mentioned in section 65A (1).*

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

106. It will be noted from the highlighted portions of section 58(1)(b)(ii) of the Magistrates' Court Act, that where a defendant has consented to an order for the payment of the debt in instalments and such an order has been granted by the clerk of the court, the order is deemed to be one mentioned in section 65A(1) of the Magistrates Court Act.
107. Section 65(A)(1) of the Magistrates Court Act in turn provides that if a court has given judgment for the payment of a sum of money or has ordered the payment in specified instalment or otherwise of such amount and such an order has not been complied with within 10 days of the date it was given or the date when the amount become payable, the creditor may issue from the court of the district in which the debtor resides or is employed, a notice calling upon the judgment debtor to appear before the court in chambers in order to enable the court to enquire into the judgment debtor's financial position and to make such order as the court deems just and equitable.
108. This is yet another indication in the statutory debt collection scheme that it is the court, and only that court, of the district in which the debtor resides or is employed that is required to issue an emoluments attachment order and/or conduct an enquiry into the financial position of the debtor.
109. Rule 4 of the Magistrates' Court Rules regulates applications for judgment in terms of section 58 of the Magistrates Court Act. The Rule states:

(1)(a) The letter of demand referred to in sections 57 and 58 of the Act shall contain particulars about the nature and amount of the claim.



(b) Where the original cause of action is a credit agreement under the National Credit Act, 2005, the letter of demand referred to in section 58 of the Act must deal with each one of the relevant provisions of sections 129 and 130 of the National Credit Act, 2005, and allege that each one has been complied with.

(2) A request in writing referred to in section 59 of the Act shall be directed to the registrar or clerk of the court by means of Form 5A or 5B, as the case may be, supported by an affidavit containing such evidence as is necessary to establish that all requirements in law have been complied with.

(3) A consent to judgment in terms of section 58 of the Act shall be signed by the debtor and by two witnesses whose names shall be stated in full and whose addresses and telephone numbers shall also be recorded.

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

110. Rule 12 (6) states that **"If the action be on a liquid document or any agreement in writing the plaintiff shall together with the request for default judgment file the original of such document or the original agreement in writing or an affidavit setting out reasons to the satisfaction of the court or the registrar or clerk of the court, as the case may be, why such original cannot or should not be filed."**

111. Rule 12(6A) provides that **"If a claim is founded on any cause of action arising out of or regulated by legislation, then the plaintiff shall together with the request for default judgment file evidence confirming compliance with the provisions of such legislation to the satisfaction of the court."**

112. In terms of Rule 12(7), the registrar or clerk of the court has a discretion to refer a request for judgment in terms of section 57 or section 58 to the court. The Rule states that the registrar or clerk may refer to the court any request for judgment and the court may thereupon-



- (a) *if a default judgment be sought, call upon the plaintiff to produce such evidence either in writing or oral in support of his or her claim as it may deem necessary;*
- (b) *if a judgment by consent be sought, call upon the plaintiff to produce evidence to satisfy the court that the consent has been signed by the defendant and is a consent to the judgment sought;*
- (c) *give judgment in terms of plaintiffs request or for so much of the claim as has been established to its satisfaction;*
- (d) *give judgment in terms of defendant's consent;*
- (e) *refuse judgment; or*
- (f) *make such other order as it may deem fit."*

113. Rule 12(5) states that ***"the Registrar or clerk of the court shall refer to the court any request for judgment on a claim founded on any cause of action arising out of or based on an agreement governed by the National Credit Act or the Credit Agreements Act, 1980 (Act 75 of 1980) and the court shall thereupon make such order or give such judgment as it may deem fit"***.

114. Although Rule 4 does not expressly state that the provisions of Rule 12(5) are applicable to proceedings in terms of section 57 and section 58 of the Magistrates Court Act, it is submitted that Rule 12(5) read in its context and given the provisions of the National Credit Act, is applicable to proceedings brought by a creditor in terms of section 58, when it is alleged that the debt arises from an agreement governed by the National Credit Act and that the debtor has consented to judgment in writing.



115. In other words, it is submitted that where a creditor's cause of action arises from a credit agreement under the National Credit Act and the creditor relies on the provisions of section 58 of the Act, clerks of court are in every such case obliged to refer the request for judgment to the court.

116. In the circumstances of the individual applicants' cases, this was not done.

117. The facts of this case demonstrate why the decision to issue an EAO on a person's income simply cannot be left to the discretion of a clerk of court. Given the dire consequences for the debtor whose livelihood and very ability to survive is at risk, judicial oversight and control over the issuing and enforcement of emoluments attachment orders is a must.

D THE FACTUAL BACKGROUND

118. The factual circumstances of the individual applicants against whom the EAO's at issue in this case were issued, are set out in detail in their supporting affidavits.

119. Some of the documentation referred to by the applicants in their supporting affidavits was obtained by the first applicant from the Directorate of Priority Crime Investigation ('the Hawks Anti-Corruption Unit').

120. The Hawks Anti-Corruption Unit are currently conducting a criminal investigation into Bridge Debt (also known as Experato Pty (Ltd), the eighth respondent, Onecor (Pty) Ltd, the fifth respondent, Flemix and Associates, the seventeenth respondent, and two other entities - S A Micro Loan (also known as S A Multi Loan) as well as an entity known as Bridge Loan.




121. From the first applicant's interactions with officers at the Hawks Anti-Corruption Unit, I am advised that the officers have perused EAO court files at the Kimberley and Beaufort West Magistrates' Courts. The unit has not formulated final charges at this stage and is in the process of bringing the Financial Services Board on board to assist with its investigation.

122. The supporting affidavits of the applicants speak for themselves. They show a pattern of credit being advanced recklessly to indebted and desperate low income consumers, the use of intimidation, duress and other coercive measures to induce the applicants into signing documents consenting to jurisdiction of courts in distant towns the applicants have no hope of approaching for relief, and the abandonment of the EAO's or offers to reduce them when probing queries about these EAO's are directed to Flemix and Associates by the first applicant or the applicants' employers.

123. Above all, the applicants' supporting affidavits demonstrate that EAO's are issued by clerks of court all over the country without any regard to the actual income of a judgment debtor and his or her ability to support themselves after such orders are issued.

124. In some cases, multiple EAO's were granted simultaneously against a single debtor and in others EAO's were granted for amounts in excess of half the judgment debtors' salary.

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125. In the table below, I set out the details of the individual applicant's salary or wages, the amounts of the EAO's which were granted against them, the courts which granted the orders and the magisterial district in which the individual applicants' and their employers reside. The table below only reflects the EAOs which Flemix & Associates had facilitated. Some of the individual applicants also have other EAOs that they are paying. The individual applicants supporting affidavits explain their particular situation in more detail and set out instances in which the EAO's originally granted have since been paid or reduced by Flemix and Associates.

No	Applicant	Applicant's Income	EAO Amount issued ¹	Court issued	Debtor's place of employment and residence
2.	Vusumzi Xekethwana	R2400.00	R807.00 <u>R712.00</u> R1519.00	Kimberley Magistrates' Court	Stellenbosch
3.	Monia Adams	R5000.00	R1015.17	Johannesburg Magistrates' Court	Stellenbosch
4.	Angeline Arrisson	R4300.00	R640,00 R690,00 R650.00 <u>R975.96</u> R2955, 96	Kimberley Magistrates' Court	Stellenbosch

¹ The total amount of the EAO's appear in bold

No	Applicant	Applicant's Income	EAO Amount issued	Court issued	Debtor's place of employment and residence
6.	Fundiswa Bikitsha	R7000.00	R1000.00 <u>R1200.00</u> R2200.00	Winburg Magistrates' Court	Stellenbosch
7.	Merle Bruintjies	R2600.00	R725.00 <u>R670.89</u> R1395, 89	Kimberley Magistrates' Court	Stellenbosch
8.	Johannes De Klerk	R2300.00	R862.99	Kimberley Magistrates' Court	Stellenbosch
9.	Shirly Fortuin	R8000.00	R850.00	Kimberley Magistrates' Court	Stellenbosch
10.	Jeffrey Haarhof	R5000.00	R648.96	Hankey Magistrates' Court	Stellenbosch
11.	Johannes Hendricks	R1200.00	R1100.00	Paarl Magistrates' Court	Paarl
12.	Doreen Jonker	R2500.00	R1200.00	Kimberley Magistrates' Court	Stellenbosch
13.	Bulelani Mehlomakhulu	R3680.00	R670.00	Kimberley Magistrates' Court	Stellenbosch

No	Applicant	Applicant's Income	EAO Amount issued	Court issued	Debtor's place of employment and residence
15.	Ntombozuko Tonyela	Nil	R736.71	Kimberley Magistrates' Court	Stellenbosch
16.	Dawid Van Wyk	R2600.00	R648.06	Stellenbosch Magistrates' Court	Stellenbosch

Obtaining EAO's: the *modus operandi*

126. From the facts set out in our clients, the second to sixteenth applicants, attached supporting affidavits and the facts of other Flemix and Associates related EAO cases being handled by the first applicant of which I have personal knowledge, the *modus operandi* by which these EAO's are obtained, can be described as follows:

126.1 An unknown man arrives unannounced at either the workplace or the home of one of the debtors' ('the individual'). He does not present himself with a business card and if he does introduce himself, it is done in such a way that the individual cannot recall his details. He is usually in a hurry and informs the individual that he is there about an outstanding debt but does not have time to discuss the matter. In order to avoid the embarrassment of being harassed for a debt at their workplace, or feeling intimidated by the presence of a stranger in their home, the individual

signs the documents without properly reading or understanding their contents. The individuals are not provided with copies of anything they have signed;

126.2 While he does not leave any documents with the individuals, from the documents we receive from Flemix and Associates when we enquire about these cases, some or all of the following four documents appear to be submitted to the clerk of court who issues the emoluments attachment order:

- 126.2.1 a notice of default purportedly in terms of section 129 of the National Credit Act ("default notice");
- 126.2.2 a demand purportedly in terms of section 58 of the Magistrates' Court Act ("demand letter");
- 126.2.3 a combined consent to judgment, offer to pay debt in instalments, and emoluments attachment order purportedly in terms of sections 58 and 65J of the Magistrates' Court Act ("consent form"); and
- 126.2.4 a written consent to jurisdiction of a particular magistrate's court ("consent to jurisdiction form").

'Default notice'



127. The first document, the default notice, is in purported compliance with section 129 of the National Credit Act in order to proceed with a default judgment. Section 129 of the National Credit Act provides that no legal proceedings to enforce a credit agreement may be brought until the credit receiver has been advised that s/he is in default.
128. The default notice identifies the creditor and confirms that the basis for the debt is a written loan agreement. However, as they explain in their supporting affidavits, the individuals have no contractual relationship with or any knowledge of the creditor described in the default notice. The default notice indicates a specific amount in which the individual is in arrears with respect to the payment of the credit agreement, but there is no indication how this amount was calculated.

'Demand letter'

129. The 'demand letter' notes, *inter alia*, that "*it is important for you to understand that after the amounts have been deducted from your salary, you must have adequate funds to maintain yourself and your dependents*".

'Consent form'

130. The 'consent form' is in purported compliance with sections 58 and 65J of the Magistrates' Court Act.
131. The consent form is an attempt at having the individuals consent to a specified amount, which is apparently "*the capital amount and the contractual interest*"; interest at either 15.55% or 60%; costs on an attorney and client scale; collection



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commission; agents fees; a specified monthly instalment; an automatic 10% annual escalation on the monthly instalment and a statement that "*s/he will have sufficient means for his/her own and dependant's (sic) maintenance after the deduction of the monthly instalments.*"

'Consent to jurisdiction form'

132. The 'consent to jurisdiction form' is an attempt to ensure the individuals grant consent to the jurisdiction of a magistrate's court which in terms of section 28 of the Magistrates' Courts Act, would otherwise not have jurisdiction in the matter. The individuals explain in their supporting affidavits that it was never pointed out to them that they were consenting to the jurisdiction of a magistrate's court which is not only far away from where they live and work nor did their employer, as the garnishee, agree to the jurisdiction of a court which does not have such jurisdiction.
133. In any event, it is submitted that because the judgment creditor's claim is based on a credit agreement, such a written consent to jurisdiction is null and void, and that requiring a consumer to sign such a document is a prohibited practice in terms of section 91 of the National Credit Act.
134. Flemix & Associates then approaches the clerk at the magistrates court of its choice, with at least two documents: a request for judgment form ("RM5B") and an emoluments attachment order. The request for judgment form restates the alleged judgment debt, the 15.5% or 60% annual interest rate, the collection

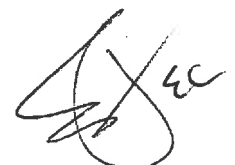


commission (which is now specified as 10%) and legal costs on an attorney and client scale.

135. The clerk of the court invariably proceeds to note a judgment against the individuals on these terms. On the basis of the request for judgment form, the clerk of the court also issues an emoluments attachment order.

E NON COMPLIANCE WITH MAGISTRATES COURT RULES

136. Even if the section 58 procedure by which a clerk of court - not the court - grants judgment and an EAO in respect of a cause of action which is governed by the National Credit Act is lawful, which is denied: it is submitted that it is clear that in the cases of the EAO's granted against the individual applicants, there was material non-compliance with the requirements prescribed for the granting of judgment in terms of section 58 of the Magistrates Court Act.
137. As I explained earlier, where, as in the cases against the individual applicants, a creditor seeks judgment based on a written consent to judgment in terms of section 58 of the Magistrates' Court Act, the creditor must comply with the provisions of Rule 4, Rule 12(6) and Rule 12(6A) of the Magistrates Court Rules.
138. I set out below the respects in which there was non-compliance with the provisions of the Magistrates' Court Rules in the applications for EAO's brought against the individual applicants.



Failure to file prescribed affidavit

139. Where a request for judgment is made to a clerk of court in terms of Section 58 of the Magistrates Court Act, Rule 4(2) provides that such a request must *inter alia* be "**supported by an affidavit containing such evidence as is necessary to establish that all requirements in law have been complied with.**"
140. The Hawks Anti-Corruption Unit have provided the first applicants' with copies of the court files from the Kimberley Magistrates Court relating to EAO's issued by the clerk of that court against the individual applicants. In all of these cases, Flemix & Associates or its predecessor Coombe & Associates, sought judgment based on the provisions of section 58 of the Magistrates' Court Act. Except in one case (Johannes Hendricks), these court files do not contain the affidavit prescribed by Rule 4(2).

Failure to file original credit agreement

141. Rule 12 (6) states that "*If the action be on a liquid document or any agreement in writing the plaintiff shall together with the request for default judgment file the original of such document or the original agreement in writing or an affidavit setting out reasons to the satisfaction of the court or the registrar or clerk of the court, as the case may be, why such original cannot or should not be filed.*"
142. The court files provided to the first applicant by the Hawks Anti-Corruption Unit do not contain the original credit agreement relied on, a copy of the agreement or any affidavit as required by Rule 12(6).



143. I turn now to illustrate the widespread abuse of the system of emoluments attachment orders in South Africa.

F ENDEMIC ABUSE OF THE EAO SYSTEM

The October 2008 University of Pretoria Research Report

144. During October 2008, the University of Pretoria Law Clinic published a research report entitled '*The Incidence of and the Undesirable Practices relating to Garnishee Orders in South Africa*'. Copies of this report and a later follow up report, which are relevant and important for this Court to understand the context to this matter are annexed. The October 2008 University of Pretoria Report is attached marked "KV1".

145. These two reports are not attached to prove the truth of their contents. Rather, they are attached to demonstrate that concerns exist in relation to the implementation of EAO's in South Africa, and what those concerns are. The concerns relate to abuse, or at the very least, potential abuse of EAO's in South Africa.

146. The methodology and data sets of the October 2008 report are set out at pages 11 to 13 and pages 26 to 28. The report was based on a data set of 86 459 employees both with and without EAO's against their salaries, obtained from employers in six different industries. For the purposes of the report, a subset of 43 305 cases were analysed and a data set of 670 individual employees whose salaries were subject to an EAO were scrutinised.



147. The research report identified a number of abuses in the debt collecting process, specifically regarding EAO's and suggested a number of legislative and industry reforms. Of relevance to the issues in these proceedings, page 7 of the executive summary of the October 2008 research report stated the following:

"Jurisdiction

Although section 65J(1)(a) of the Magistrate's Court Act clearly states that the emoluments attachment order must be issued from the jurisdiction 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, from the jurisdiction where the judgment debtor is employed, this is often not applied.

It is agreed that this provision was made for the benefit and convenience of the employer and or employee who wishes to apply to court for amendment, suspension or rescission of such order.

This provision is circumvented by creditors obtaining consent from ignorant consumers to the jurisdiction of specific other courts. In other instances this provision is simply not enforced by clerks of the civil court. See in this regard the report on the level of understanding regarding jurisdiction amongst clerks of court.


Issuing the emoluments attachment order from a court often situated far away from the employer/employee makes it extremely difficult and unlikely for the debtor or his employer to challenge the order."

148. At page 16 of the report, the results of the research report's investigation into the knowledge on jurisdiction of Magistrates' Court clerks are set out. The report points out that in the Northern Cape, where the vast majority of the EAO's in this case were issued, only 27% of clerks provided the correct answer to the questions posed by the researcher on jurisdiction of the court to issue EAO's.

149. The report pointed out on page 7 that *"In the case of a written consent, the clerk of court has no way of verifying the authenticity of the signature of the debtor or*

the reasonableness of the instalments consented to, even the circumstances under which the consent was obtained."

- 150. The report at page 8 stated that where an EAO was issued, "There is no enquiry into the financial affairs of the debtor and the creditor often decides unilaterally on the amount of the instalment. Neither the creditor nor the clerk of court granting the emoluments attachment order is aware of the existence or not of other garnishee orders".
- 151. On the question of judicial oversight of EAO's, the report states at p 9 that "the exclusion of the discretion and supervision of presiding officers in the granting of and determination of the deductions to be made comes at a heavy price. In many instances, clerks of the court lack the necessary knowledge and skill to effectively and efficiently administer these orders." (emphasis added).
- 152. The report's executive summary also deals with the lack of a statutory cap on the amount to be attached, stating that "While regulation 23.3.6 in terms of the Public Finance Management Act 1 of 1999 caps the emoluments attachment to 40% of the state employee's salary, no such cap exists for debtors employed in the private sector. In most European jurisdictions, caps are applicable. The same applies to the United States of America."
- 153. In order to demonstrate that that the complaints of the individual applicants in their supporting affidavits are not isolated but are in fact endemic across the country, I quote in full from the report's conclusions at pages 9 to 11 on its case studies and the typical irregularities identified in the research study:



"SELECTED CASE STUDIES

Comprehensive case studies where irregularities abound were undertaken. Numerous examples of different types of irregularities were found. The typical irregularities are:

- **Consent**

In many cases the debtors averred that they never signed consent to judgment even though judgment was granted on such basis. In some instances the debtors alleged duress or misrepresentation. Cases of blank consents, incomplete documentation and forgery of signatures are reported on.

- **Obtaining, issuing and service**

The jurisdiction rule was frequently ignored. The orders were forthwith issued by the wrong court, mostly for the sake of the collector's convenience frustrating redress. Sometimes false orders were processed through fraudulent documentation forwarded to employers. Service was, in some instances, not affected by the sheriff but by an agent or lay person.

- **Overcharging**

The research team found unlawful and burdensome charges to be added to the capital amount of the original debt in numerous cases. The worst incidence of exploitation and over-charging was contingency fees of 25% that was added by the collectors to the capital amounts, instead of this amount being deducted from the money collected. Added to this 25% fee was a further "double" entry for collection costs which are allowed normally per instalment up to a certain maximum.

- **Lack of communication**

Insufficient communication between employer / payroll administrator and employee created late payments, issuing of further court process and continued deductions even after the setting aside of emoluments attachment orders by court.

- **Alterations effected after issuing**

A number of emoluments attachment orders perused contained alterations effected in pen. It was unclear whether these were effected before or after issuing of such orders and who was responsible for these alternations.

- **Duplication of orders on same debt**

Cases where more than one judgment and/or more than one emoluments attachment order arising from the same debt were obtained were identified."

- 154. Unfortunately the 2008 University of Pretoria research report did not result in either legislative amendments or changes in practice. In a follow up report published in 2013, the University of Pretoria again identified major shortcomings in the EAO process and infringement of the rights of consumers. This report dealt with irregularities that still prevailed since 2008, as well as newly identified abuses of the process.

The 2013 University of Pretoria Report

- 155. I attach marked "KV2", a copy of this report. At page 33, the report states the following regarding the issues of jurisdiction identified in the previous report:

"There is also no uniformity amongst courts as some magistrates' courts will grant an emoluments attachment order based on a consent to jurisdiction in terms of Section 45 and some courts refuse applications where there is no jurisdictional link."

- 156. On the following page the report states:

"The main argument against conferring jurisdiction in terms of section 45 in the absence of a jurisdictional link is that it is difficult and costly for the consumer to query the validity or the contents of the order or to rescind an emoluments attachment order where the court in which the order was granted is situated far from the jurisdiction of the employer. An application to challenge, rescind or amend the order will in all probability require the services of a local attorney as well as a correspondent attorney in the jurisdiction of the seat of the court that granted the order. The same will apply if the order has to be set aside upon final payment for credit bureau profile purposes. These logistical constraints will result in the parties not enjoying the protection or the benefit of the law."

The fact that there are courts granting emoluments attachment orders without a jurisdictional link has led to forum shopping amongst debt collectors. Indications are that the willingness and/or competency of a specific court (staff) to grant emoluments attachment orders in a timely fashion plays a role when a jurisdiction

is decided upon by the debt collector."

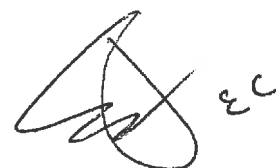
157. The 2013 report refers to the extensive media coverage given in 2012 and 2013 to fraudulent practices conducted in the emoluments attachment order process at certain magistrates' courts.
158. The report at page 4 quotes the second respondent, Minister of Trade and Industry Rob Davies as referring to "*outright preying on the vulnerabilities of low income and working people*".
159. Also at page 4, the 2013 University of Pretoria report quotes the then Minister of Finance, Pravin Gordhan, expressing his concerns about the garnishment of wages in his budget speech as follows:

"We are concerned by the abuse of emoluments attachment orders that has left many workers without money to live on after they have serviced their debts every month. We are in discussion with the National Credit Regulator, the Department of Justice and banks, to ensure that the lending market remedies its behaviour. In the meanwhile, all employers, including the public sector, can play a role and assist their workers to manage their finances and to interrogate all emoluments attachment or garnishee orders to ensure that they have been properly issued. I also call on the various law societies to take action against members who abuse the system."

160. Against this background, I deal now with the legal basis for the relief sought in the notice of motion.

G RELIEF SOUGHT

The emoluments attachment orders issued against the second to sixteenth applicants are unlawful and invalid

A handwritten signature in black ink, followed by the initials 'ec'.

161. The EAO's issued against the second to sixteenth applicants were all issued from Magistrates Courts other than the Magistrates Courts in which the employers of these applicants reside or carry on business. The applicants submit that these EAO's are unlawful and invalid, on three separate grounds.
162. First, these EAO's were issued in contravention of section 65J(1)(a) of the Magistrates' Court Act. The provisions of section 65J(1)(a) of the Magistrates' Court Act, read with Rule 46(1) are clear: an emoluments attachment order must be issued from the court of the district in which the employer of the judgment debtor resides, carries on business or is employed.
163. Except in the case of the sixteenth applicant, none of the EAO's at issue in these proceedings were issued from courts in which the individual applicant's employers reside, carry on business or are employed. On this ground alone, I submit that the EAO's issued against the second to fifteenth applicants were issued unlawfully and that they are null and void, and invalid.
164. Secondly, it is submitted that the issuing of the EAO's by a clerk of court was unlawful and that such an order could only have been issued by a court of law. Rule 12(5), which came into effect on 15 October 2010, provides that a clerk of court "*shall refer to the court any request for judgment on a claim founded on any cause of action arising out of or based on an agreement governed by the National Credit Act or the Credit Agreements Act, 1980 (Act 75 of 1980) and the court shall thereupon make such order or give such judgment as it may deem fit*".



165. In the cases of the second to sixteenth applicants, the claims against them were based on credit agreements to which the National Credit Act applied.
166. The clerk of court was accordingly obliged to refer these requests for judgment to the court. The failure of the clerk of court to do so renders the EAO's issued against the second to sixteenth applicants unlawful, null and void and invalid for this reason as well.
167. Thirdly, it is submitted that the fourth to seventeenth respondents' reliance on written consents to jurisdiction in terms of section 45 of the Magistrates' Court Act, purportedly signed by the second to sixteenth applicants, do not render the issuing of the EAO's lawful. The respondents in whose favour these EAO's were issued are all credit providers registered in terms of the National Credit Act. Their cause of action in the proceedings against the second to sixteenth applicants was based on credit agreements to which the provisions of the National Credit Act were applicable.
168. As is clear from the individual applicants supporting affidavits, unknown persons acting on behalf of the judgment creditors required or induced the second to sixteenth applicants to sign consents to the jurisdiction of courts other than the courts in which these individual applicants reside. In terms of section 91 of the National Credit Act, such requirement or inducement by the relevant respondents was unlawful.



169. It is inconceivable and far-fetched to believe that the second to sixteenth applicants would have willingly and with informed consent agreed to the jurisdiction of and the attachment of their wages and salaries by a clerk of court in a town hundreds of kilometres away, which they had never been to in their lives.
170. The question which the fourth to seventeenth respondents must answer is this: why did they choose to institute proceedings in courts in Kimberley, Johannesburg, Winburg and Hankey in respect of agreements concluded in the Western Cape by defendants residing and working in the Western Cape?
171. The only credible answer is that that the fourth to seventeenth respondents objective was to make it as difficult as possible for the second to sixteenth applicants, all of whom are impecunious, to approach these magistrates courts for relief from the emoluments attachment orders issued against them. It was an abuse of process and the seventeenth respondent has facilitated this abuse.
172. Other answers to this question may emerge from the ongoing criminal investigation by the Hawks Anti-Corruption Unit into the issuing of EAO's from the Kimberley Magistrates' Court and other magistrates courts, and the role of certain of the respondents in the issuing of these orders.

Delivery of the original credit agreements and leave to supplement papers and amend relief sought



173. The applicants seek orders directing the fourth to seventeenth respondents to deliver, within 10 days of the date of an order to that effect by this Court, the original credit agreements purportedly concluded between the second to sixteenth applicants and one or more of the fourth to seventeenth respondents, together with the original pre-agreement disclosure forms and quotations prescribed by section 92 of the National Credit Act.

174. In terms of section 92 and section 93 of the National Credit Act, the applicants have a clear right to these documents, which were not provided to them at the time when they entered into credit agreements with the fourth to sixteenth respondents.

175. The applicants require the original documents referred to above in order to assess whether the credit agreements which they concluded with the fourth to sixteenth respondents were reckless credit agreements or unlawful credit agreements as defined in section 80 and section 89 of the National Credit Act. The applicants will seek leave, upon receipt of these documents, to file supplementary affidavits and amend the relief in the notice of motion in order to apply for appropriate orders in terms of section 83(2) and/or section 89(5) of the National Credit Act. The applicants will, if appropriate, enrol the amended application on reasonable notice to the respondents.

Declaratory relief relating to jurisdiction

176. The issue of the jurisdiction of magistrates' courts, other than those in which judgment debtors or their employers reside, to issue EAO's has been consistently

identified as a problem in the two research reports of the University of Pretoria which I referred to earlier.

177. It is inconsistent with the rule of law and the right of everyone to equal protection of the law that questions of jurisdiction of the clerk of a court - let alone the court itself - to attach a person's wage or salary in terms of an EAO, are subject to the discretion and widely divergent interpretations of the law by clerk of courts (who are not required to have a legal qualification), with clerks in some magistrates courts agreeing to accept written consents to jurisdiction and others not.

178. Where a judgment creditor's cause of action is founded on a credit agreement to which the National Credit Act applies, section 45 of the Magistrates' Court Act does not permit the judgment debtor to consent to the jurisdiction of a court other than that in which the judgment debtor or the garnishee resides. To the extent that the ordinary meaning of section 45 does not permit such a reading, it should be interpreted in accordance with the spirit, purport and object of the Bill of Rights.

179. Debt collectors 'forum shop' for courts in which the clerks are more likely to issue EAO's than those which do not.

180. Through the device of obtaining written consents to jurisdiction from debtors, which the University of Pretoria research reports make clear are widely obtained through duress, what little right there is to have an EAO amended, suspended or rescinded, is made practically impossible for a judgment debtor to vindicate and too costly and inconvenient for the garnishee to challenge.

181. The effect of this is that the power to issue EAO's, which is public power, is being exercised irrationally, arbitrarily and in breach of the rule of law, which is a founding value in the Constitution. In short, the practice is an abuse.

Constitutionality of section 65J(2)(a) and section 65(J)(2)(b) of the Magistrates' Court Act

182. The applicants submit that the failure of section 65(J)(2)(a) and section 65J(2)(b) of the Magistrates' Court Act to provide for judicial oversight and authorisation of issuing of an EAO against a judgment debtor in all cases, is inconsistent with a number of provisions in the Bill of Rights, including:

- 181.1 the right to equality and equal protection of the law in section 9;
- 181.2 the right not to be arbitrarily deprived of property in section 25(1);
- 181.4 the right of access to courts in section 34;
- 181.5 the rights of children in section 28 and;
- 181.6 the right to human dignity in section 10.

Violation of the right to equality and equal protection of the law

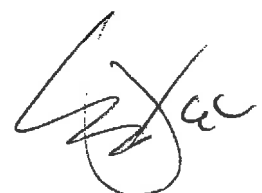
183. Section 65J(2)(a) and section 65J(2)(b) of the Magistrates Court Act differentiates between three instances and categories of judgment debtors in respect of which an EAO may be issued.

184. The first category is judgment debtors who have consented in writing to the issuing of an EAO. This category is provided for in section 65J(2)(a).
185. The second category is judgment debtors against whom a court on application or otherwise has authorised an EAO and such authorisation has not been suspended. This category is also provided for in section 65J(2)(a).
186. The third category is judgment debtors in respect of whom the judgment creditor has complied with the requirements of section 65J(2)(b)(i) and section 65J(2)(b)(ii). This category of judgment debtors is provided for in section 65J(2)(b) of the Magistrates' Court Act.
187. In relation to the first and third categories of judgment debtors set out above, a judgment creditor may issue an EAO attaching the salaries or wages of these judgment debtors without the authorisation of a court and without any prior enquiry by the court into the financial situation of such judgment debtors.
188. On the other hand, judgment debtors against whom an application to court for an EAO is brought, become subject to an EAO only after the judgment debtor has applied to the court, on notice to the judgment debtor, for an EAO and the court, not the clerk of court, has authorised such an order. The court would not authorise such an order unless satisfied that the judgment debtor would be able to pay the judgment debt and costs in reasonable instalments.
189. An EAO may also be issued by a court in terms of section 65J(2)(a) after a judgment debtor has been notified in terms of section 65A(1) to appear in court



for any enquiry into his or her financial position. The court can then make an order for periodic payments and authorise an EAO. In this instance, section 65A(1)(a) of the Magistrates' Court Act expressly provides that the court after such a financial enquiry, may make "*such order as the court may deem just and equitable*".

190. By failing to provide for judicial oversight and authorisation of the issuing of an EAO in respect of judgment debtors falling into the first and third categories outlined above, section 65J(2)(a) and section 65J(2)(b) deprives these judgment debtors of the benefit of appearing before a court for an enquiry into their financial position, after which a court may make any order which is just and equitable. The latter enquiry involves the court's supervision of the judgment debtor's indebtedness and capacity to pay the debt taking into account what is needed to maintain the debtor and the debtor's dependents before their salary is attached in terms of an EAO.
191. The differentiation provided for in section 65J(2) between a judgment debtor who has consented to an EAO, a judgment debtor in respect of whom a judgment creditor has complied with section 65J(2)(b) and those judgment debtors who become subject to an EAO after it has been authorised by the court on application or otherwise and following an enquiry into the debtors financial position, is an irrational differentiation with no connection to a legitimate governmental purpose.



192. Section 65J(2)(a) and section 65J(2)(b) of the Magistrates' Court Act accordingly deny certain categories of judgment debtors the right in section 9(1) of the Constitution to equality and equal protection and benefit of the law.
193. There is no legitimate purpose in depriving judgment debtors who have consented to an EAO in writing, of the benefit of judicial oversight and authorisation of such an EAO before it is issued.
194. In the first place, I point out that the rules of both the Magistrates' Court and the High Court provide for judicial oversight over the granting of judgments against defendants, even if such defendants have consented to judgment in writing.
195. Rule 12(7) of the Magistrates Court Rules recognises that notwithstanding that a debtor has consented to judgment in writing, the clerk of court may refer such a consent to judgment to the court. The court itself may investigate the nature of the consent and "*call upon the plaintiff to produce evidence to satisfy the court that the consent has been signed by the defendant and is a consent to the judgment sought*".
196. Similarly, in terms of the Uniform Rules of the High Court, a defendant who confesses to judgment in writing retains the benefit of judicial oversight and authorisation of judgment being granted according to such written confession. Rule 31(1)(c) of the Uniform Rules thus provides that judgment according to such confession may only be granted by a judge on application to the registrar.



197. If the granting of judgments against defendants who have consented to judgment in writing remains subject to judicial scrutiny and oversight, it is unclear what rational basis there is for the issuing of an EAO against a judgment debtor, who has consented thereto in writing, not also being subject to judicial oversight.
198. There may moreover be any number of reasons why a judgment debtor may have consented in writing to an EAO.
199. As the supporting affidavits demonstrate, particularly with regard to vulnerable and financially unsophisticated debtors, he or she may have consented in ignorance of his or her rights or under duress by the judgment creditor or his agents.
200. The written consent to an EAO itself may not have been signed by the judgment debtor, as stated by a number of the individual applicants. In relation to the category of judgment debtors who have consented thereto, the University of Pretoria 2013 Research Report states at page 24 that issuing an EAO against these judgment debtors was found to create the following problems:

"In instances where the amount of the garnishee was agreed to by the debtor, it is often found that that debtors due to financial illiteracy, do not understand the full financial risks, costs and obligations of the agreements they enter into, According to the 2012/2013 Global Competitiveness Report by the World Economic Forum, South Africa's mathematics education ranks second to last in a survey of 144 countries.

Debtors are often unaware of the maximum interest rates and fees that may be charged and do not appreciate the influence these charges may have on the repayment period. Debtors are also not always honest about their financial situation and either inflate their situation and propose unrealistic instalments that they cannot keep up with or they exaggerate their inability to pay by making equally unrealistically low proposals."



- 201. In a country such as South Africa where poverty and illiteracy abound, it is precisely for these reasons that judicial oversight over the issuing of EAO's against judgment debtors who have consented to an EAO, is crucial.
- 202. The failure of section 65J(2)(a) of the Magistrates' Court Act to afford this category of judgment debtors the benefit of an individualised judicial enquiry into their financial position before issuing an EAO, violates their rights to equal protection and benefit of the law.
- 203. There is furthermore no legitimate purpose and rational basis for not affording judicial oversight over the issuing of an EAO against debtors in respect of whom a judgment creditor complies with section 65J(2)(b) of the Magistrates' Court Act.
- 204. Judgment debtors in this category are those who have failed to respond to a registered letter sent by a judgment creditor demanding payment of the debt and in respect of whom the judgment creditor files a certificate in terms of section 65J(2)(b)(ii).
- 205. The 2013 University of Pretoria research report at page 25 identified the following problems regarding the issuing of an EAO against this category of judgment debtor:

"No mention is made [in the section 65J(2)(b)(i) letter] of the amount of the instalment that will be applied for if the outstanding amount is not paid within 10 days. The judgment creditor must also file an affidavit or certificate with his attorney setting forth the debt, costs and proposed instalments. These are not served on the employer or the employee with the result that the employee only becomes aware of the amount to be deducted after the deduction has been affected. There is no enquiry into the financial affairs of the debtor and the creditor or his agent often decide unilaterally on the amount of the




instalment. Neither the creditor nor his agent nor the clerk of court granting the emoluments attachment order is aware of the existence or not of other garnishee orders."

206. The ostensible purpose of section 65J(2) of the Magistrates Court Act is to permit a judgment creditor to obtain payment of a judgment debt from an employed judgment debtor by way of an EAO for the deduction of the debt in instalments from the judgment debtor's emoluments. This on the face of it may be a legitimate purpose in a statutory debt collection scheme.

207. In order to achieve this purpose however, section 65J(2)(a) and section 65J(2)(b) differentiates between different categories of judgment debtors. Judgment debtors who consent to an EAO in writing and judgment debtors in respect of whom the judgment creditor complies with section 65J(2)(b), are not afforded the benefit of a judicial enquiry into the issuing of an EAO against them, while judgment debtors in respect of whom the judgment creditor applies to court for an EAO are afforded such an enquiry.

208. The underlying *causa* ie the existence of a judgment debt, is however the same in all three cases. There is no rational connection between the purpose of the section 65J ie the recovery of a judgment debt from an employed debtor by way of an EAO and the differentiation imposed by section 65J(2)(a) and section 65J(2)(b) between judgment debtors who have the benefit of judicial authorisation of the issuing of an EAO and those who do not.



Violation of right not to be arbitrarily deprived of property and right of access to courts

209. I submit that the failure to afford judicial oversight in all cases where an EAO is issued against a debtors' salary or wages, infringes the right of everyone in terms of section 25(1) of the Constitution not to be arbitrarily deprived of property and the right of access to courts in section 34 of the Constitution.
210. The absence of judicial oversight over EAO's manifests itself in irregularities such as there being no check as to whether the consent is indeed signed by the judgment debtor, whether the amount stated is the amount owed to the judgment creditor, whether the costs and fees are correctly calculated, whether the *in duplum* rule has been exceeded or whether after the emoluments attachment order is executed, there is sufficient means for the debtors' own and their dependents' maintenance.
211. The facts of the individual cases demonstrate that many of the applicants had EAO's issued against them for amounts of over a third and in some cases half their salaries. Money that would otherwise have been spent on food, shelter, medicine, clothing, school fees and other necessities of the individual applicants was effectively seized from their salaries without any semblance of a hearing before an independent judicial officer.
212. Unlike the process envisaged in sections 65A(1)(a) of the Magistrates' Court Act in which the enquiry into the judgment debtor's means is investigated before the attachment of her wages or salary is made, there was no enquiry, let alone an



enquiry by a court, into the appropriateness of these EAO's before they were granted against the individual applicants.

213. The failure of section 65J(2)(a) and section 65J(2)(b) to afford judicial oversight over the issuing of an EAO against judgment debtors in all cases, accordingly results in an arbitrary deprivation of their salary or wages which have been attached in terms of the EAO.
214. In order not to be arbitrary, a deprivation of property must be procedurally fair.
215. Judgment debtors who have consented to an EAO in writing or who fall within the category provided for in section 65J(2)(b), are deprived of a hearing before an independent judicial officer brought on application, as provided for in section 65J(1)(a), where a court authorises an EAO after an enquiry into their financial situation.
216. With respect to judgment debtors against whom an EAO is obtained in terms of section 65J(2)(b), no prior notice is given to them by the judgment creditor of the instalments which will be sought to be paid in terms of the EAO.
217. In both instances, the process of issuing EAO's against these debtors without a hearing and authorisation by a judicial officer, infringes their rights to procedural fairness before an EAO is issued.
218. Section 65J(2)(a) and section 65J(2)(b) contains no guidelines or criteria to guide a creditor or clerk of court when issuing an EAO against judgement debtors in terms of these sections. The power of a clerk of court to authorise the issuing of



an EAO is a discretionary power conferred by legislation and requires sufficient and adequate criteria to govern its exercise.

219. Neither section 65J as a whole or section 65J(2)(a) and section 65J(2)(b) in particular contain any criteria to guide the clerk of court in determining the affordability of the instalments under an EAO or the circumstances under which a request for judgment by consent and a written consent to EAO should be referred to the court for authorisation. For this reason alone these provisions are unconstitutional on the basis of the Constitutional Court's reasoning in *Dawood, Shalabi and Thomas v Minister of Home Affairs and Others* 2000 (3) SA 296 CC at para 47.
220. The University of Pretoria research reports have also highlighted the arbitrary process by which clerks of court exercise their powers to issue EAO's and the arbitrary manner in which written consents to jurisdiction are accepted in magistrates courts across the country.
221. The failure of section 65J(2)(a) and section 65J(2)(b) to provide for judicial oversight over the issuing of EAO's against judgment debtors in all cases, not only constitutes an arbitrary deprivation of property without the approval of a court, but a manifest and unjustifiable limitation on the right of access to courts in section 34 of the Constitution.
222. The conduct of the judgment creditors in obtaining the individual applicants' written consent to the jurisdiction of courts in areas in which they have no hope of



approaching the courts for relief, compounds the violation of these debtors' right of access to courts.

223. As is clear from section 65J(3), the EAO itself is prepared by the judgment creditor or his attorney. In cases which fall within section 65J(2)(b) of the Magistrates' Court Act, the judgment creditor himself not only decides the amounts to be deducted from the judgment debtor's salary or wages but also decides whether, after satisfaction of the order, sufficient means will be left to the judgment debtor to maintain herself and those dependant on her.

224. In leaving these decisions solely in the hands of the judgment creditor and by failing to provide for exclusive judicial oversight over the issuing of EAO's, section 65J(2) breaches the common law rule of natural justice *nemo iudex in sua causa* which requires that disputes must be heard by an impartial and unbiased tribunal. The issuing of an EAO results in the judgment debtor effectively being deprived of a portion of her salary or wages through the decision of a judgment creditor who sits in judgment of his own cause.

225. Section 65J(2)(a) and section 65J(2)(b) are accordingly deficient in three main respects: the sections do not prescribe the minimum documentation and information on which the decision to issue an EAO is based; they do not provide the judgment debtor with an opportunity to make representations before issuing an EAO and they do not provide for an enquiry by a court as to the lawfulness of the order sought by the judgment creditor.

226. These provisions, because they exclude judicial oversight over the issuing of EAO's against certain categories of judgment debtors, allow for far reaching decisions affecting the livelihood of workers and their families to be made by administrative clerks with insufficient information at their disposal, without a hearing and without even a desktop enquiry into the lawfulness of the debt and costs. This is contrary to the rule of law.

Violation of children's rights and the right to dignity

227. In terms of section 28(1)(c) of the Constitution, the individual applicants' children have a right to basic nutrition, shelter, basic health care services and social services. The unlawful attachment of their parents' salaries or wages, particularly in the case of the vulnerable category of low income debtors at issue in this case, obviously impacts on the extent to which a child's parents can afford basic necessities such as food, electricity and school fees for their children.

228. By way of example, I refer the Court to the supporting affidavit of the third applicant, Monia Adams, a single mother of two school going children, who was served with an EAO for the deduction of R1015.00 a month from her salary of R5000.00 a month. Ms Adams sent a letter to Flemix and Associates pleading with them to reduce the EAO from R1015.00 a month to R150,00 a month because of her circumstances and expenses for her children. Flemix and Associates refused her request.

229. Flemix and Associates did however offer to reduce this particular EAO by R65.00.



230. At its most basic level, the conduct of the fourth to seventeenth respondents and the legislation which authorised the attachment of the individual applicants salaries without judicial authorisation, infringed the individual applicants' rights to human dignity. The issuing of these EAO's took no account of what effect excessive and unaffordable deductions in terms of the EAO's would have on the personal well-being of the individual applicants and their families.

Compliance with Rule 16A

231. The applicants have complied with the provisions of Rule 16A of the Uniform Rules in respect of the constitutional issues raised in this application. A copy of the notice in terms of Rule 16A(1)(b) setting out the description of the constitutional issues raised in this application is annexed marked "KV3", and will be handed to the Registrar, when this application is filed, for the necessary action to be taken in terms of Rule 16A(1)(c) and Rule 16A(1)(d).

H URGENCY

232. This application is urgent or at the very least semi-urgent. The applicants will be prejudiced and not afforded substantial relief by having to wait for a hearing of this matter in due course on the ordinary opposed motion roll.

233. The second to sixteenth applicants are being subjected on a continuing basis to deductions from their wages and salaries pursuant to unlawfully obtained emoluments attachment orders. It cannot be expected of the individual applicants and their families to wait for relief at a hearing in due course and in the meantime



to continue enduring unlawful deductions from their salaries and wages or to live in fear that the fourth to seventeenth respondents will proceed to implement their unlawfully issued emoluments attachment orders.

234. The relief which the applicants seek with respect to the declaration of constitutional invalidity of section 65J(2)(a) and section 65J(2)(b) of the Magistrates' Court Act is similarly urgent as is the declaratory order regarding section 45 of the Magistrates' Court Act.

235. As long as the provisions which the applicants seek to impugn remain in force, attachments of the salaries or wages of judgment debtors by way of EAO's, may take place without any form of judicial oversight and enquiry into the financial ability of these judgment debtors to afford deductions in terms of an EAO. Clerks of court will also retain their unguided discretionary powers to issue EAO's and accept written consents to jurisdiction which are patently in breach of the National Credit Act.

236. The applicants in bringing this application have taken care to depart from the usual time periods in the Uniform Rules only to the extent required by the exigencies of this case. The applicants' have afforded the respondents a period of 15 court days from service of this application to file their opposing affidavits, which it is submitted is an appropriate and sufficient time for the respondents to respond to this application. The respondents will accordingly not be prejudiced by the limitation of the time periods provided for in the Uniform Rules for the filing of answering affidavits.

I CONCLUSION

237. It is submitted that the applicants have established that both the EAO's issued against the individual applicants and the provisions of section 65J(2)(a) and section 65J(2)(b) of the Magistrates' Courts Act which authorised the issuing of these EAO's, are inconsistent with the Constitution and invalid. Section 172(1)(a) of the Constitution accordingly requires the relief sought in terms of prayer 2 and prayer 4 of the notice of motion.

238. This Court has a discretion in terms of section 172(1)(b) of the Constitution, to make any order which is just and equitable. It is submitted that prayer 3, prayer 5 and prayer 6 of the notice of motion are appropriate, just and equitable relief.

239. In the circumstances, the applicants submit that the orders sought in the notice of motion, together with costs, including the costs occasioned by the employment of two counsel, fall to be granted.



JOSEF KRUGER VAN DER WALT




Signed and sworn before me at Matieland P.O on this 17 day of September 2014 the deponent having acknowledged that he knows and understands the contents of this affidavit, has no objection to taking the prescribed oath and considers the oath to be binding on his/her conscience.



COMMISSIONER OF OATHS

"I certify that the DEPONENT has acknowledged that he/she knows and understands the contents of this affidavit, that he/she does not have an objection to taking the oath, and that he/she considers it to be binding on his/her conscience and which was sworn to and signed before me and that the administering oath complied with the regulations contained in Government Gazette No. R 1238 of 21 July 1972, as amended."

 E. Clark
SIGNATURE: _____ FULL NAMES
Commissioner of Oaths
Designation: BRANCH MANAGER on behalf of Republic of South Africa
Date: 17-09-2014
Place: MATIELAND
Business Address: POST OFFICE

SOUTH AFRICAN POST OFFICE
MATIELAND
17 SEP 2014
BRANCH MANAGER