CONSTITUTIONAL COURT OF SOUTH AFRICA

In the matter between: CASE NO. CCT127/15

ASSOCIATION OF DEBT RECOVERY AGENTS NPC Appellant/Applicant

and

THE UNIVERSITY OF STELLENBOSCH LEGAL AID CLINIC First Respondent

VUSUMUZI GEORGE ZEKETHWANA Second Respondent

MONIA LYDIA ADAMS Third Respondent

ANGELINE ARRISON Fourth Respondent

LISINDA DORRELL BAILEY Fifth Respondent

FUNDISWA VIRGINIA BIKITSHA Sixth Respondent

MERLE BRUINTJIES Seventh Respondent

JOHANNES PETRUS DE KLERK Eighth Respondent

SHIRLY FORTUIN Ninth Respondent

JEFFREY HAARHOFF Tenth Respondent

JOHANNES HENDRICKS Eleventh Respondent

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BULELANI MEHLOMAKHULU Thirteenth Respondent

SIPHOKAZI SIWAYI Fourteenth Respondent

NTOMBOZUKU TONYELA Fifteenth Respondent

DAWID VAN WYK	Sixteenth Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Seventeenth Respondent
MINISTER OF TRADE AND INDUSTRY	Eighteenth Respondent
NATIONAL CREDIT REGULATOR	Nineteenth Respondent
MAVAVA TRADING 279 (PTY) LIMITED	Twentieth Respondent
ONECOR (PTY) LIMITED	Twenty First Respondent
AMPLISOL (PTY) LIMITED	Twenty Second Respondent
TRIPLE ADVANCED INVESTMENTS 40 (PTY) LIMITED	Twenty Third Respondent
BRIDGE DEBT (PTY) LIMITED	Twenty Fourth Respondent
LAS MANOS INVESTMENTS 174 (PTY) LIMITED	Twenty Fifth Respondent
POLKADOTS PROPERTIES 172 (PTY) LIMITED	Twenty Sixth Respondent
MONEY BOX INVESTMENTS 232 (PTY) LIMITED	Twenty Seventh Respondent
MARAVEDI CREDIT SOLUTIONS (PTY) LIMITED	Twenty Eighth Respondent
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VILLA DES ROSES 168 (PTY) LIMITED	Thirtieth Respondent
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TRIPLE ADVANCED INVESTMENTS 99 (PTY) LIMITED	Thirty Second Respondent
FLEMIX & ASSOCIATES INCORPORATED ATTORNEYS	Thirty Third Respondent

And in the matter between:

MAVAVA TRADING 279 PROPRIETARY LIMITED	First Appellant / Applicant
ONECOR PROPRIETARY LIMITED	Second Appellant/ Applicant
AMPLISOL PROPRIETARY LIMITED	Third Appellant/ Applicant
TRIPLE ADVANCED INVESTMENTS 40 PROPRIETARY LIMITED	Fourth Appellant / Applicant
BRIDGE DEBT PROPRIETARY LIMITED	Fifth Appellant/ Applicant
LAS MANOS INVESTMENTS 174 PROPRIETARY LIMITED	Sixth Appellant/ Applicant
POLKADOTS PROPERTIES 172 PROPRIETARY LIMITED	Seventh Appellant/ Applicant
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VILLA DES ROSES 168 PROPRIETARY LIMITED	Tenth Appellant/ Applicant
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TRIPLE ADVANCED INVESTMENTS 99 PROPRIETARY LIMITED	Twelfth Appellant/ Applicant
FLEMIX & ASSOCIATES INCORPORATED	Thirteenth Appellant/ Applicant

and

THE UNIVERSITY OF STELLENBOSCH LEGAL AID CLINIC	First Respondent

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ASSOCIATION OF DEBT RECOVERY AGENTS NPC	Twenty First Respondent

WRITTEN ARGUMENT IN RESPONSE TO DIRECTIVE DATED 27 AUGUST 2015

1. This argument is submitted on behalf of the first to thirteenth appellants in the second appeal, referred to herein as "the Flemix appellants", in response to the directive of the Chief Justice dated 27 August 2015.

THE FORENSIC FACTS

2. The respondents ("the Legal Aid Clinic") sought two main declaratory orders in the court a quo.

   2.1 The first was an order to the effect that certain words in section 65J(2) of the Magistrates' Courts Act, 32 of 1944, are inconsistent with the Constitution of the Republic of South Africa Act 1996.

   2.2 The second was an order that section 45 of the Magistrates' Courts Act does not apply in proceedings to enforce a credit agreement which is subject to the National Credit Act, 34 of 2005.

3. The court a quo issued the declaratory orders as sought.

3.1 Order two of the orders declared that section 65(J)(2) of the Magistrates' Courts Act is pro tanto unconstitutional; and

3.2 order three declared the correct interpretation of section 45 of the said act.

4. The court below made one composite costs order that did not distinguish between orders two and three.

5. The court also issued certain auxiliary and consequential orders of which order eight directly concerns the Flemix appellants because the use of section 45 of the Magistrates' Courts Act by the relevant firm of attorneys (Flemix, the thirteenth appellant) was referred to the Law Society of the Northern Provinces.

6. The Legal Aid Clinic applied to this Honourable Court (referred to as "the Constitutional Court") for an order to confirm the order of constitutional invalidity issued by the court a quo, viz order two, and the Flemix appellants appealed against the confirmation application (by taking the step contemplated in Constitutional Court Rule 16(2)). The confirmation application and the appeal against

the finding of constitutional invalidity are together referred to below as “the confirmation case”.

7. A problem that arose was whether an appeal against the order concerning section 45 of the Magistrates’ Act could and should be prosecuted directly in the Constitutional Court or whether leave to appeal should first be sought from the court a quo, either to a full bench of the High Court or to the Supreme Court of Appeal. After having considered the issues of convenience and costs, the Flemix appellants decided to apply for leave to appeal against orders three and eight as well as costs order five to the Constitutional Court, “the non-confirmation case” herein.

OVERVIEW OF ISSUES AND PRINCIPAL SUBMISSIONS

8. After the Constitutional Court had received the confirmation and non-confirmation cases, the Chief Justice directed, on 27 August 2015, that the parties must file argument on the following points:

> “a) whether orders 3-8 of the High Court order are dependent upon or otherwise connected with the order of invalidity made at order 2 of the High Court and, if so, whether leave to appeal against orders 3-8 of the High Court is automatic when an application under section 172(2)(d) of the Constitution is lodged in respect of the order of invalidity; and, if not,

(b) whether this Court has jurisdiction to consider the application for leave to appeal against orders 3-8 of the High Court in terms of section 167(3)(b) of the Constitution and, if so, whether it is in the interests of justice to grant direct access to this Court."

9. The point raised in paragraph (a) can immediately be disposed of: the Flemix appellants do not contend that orders three to eight are dependent upon or otherwise connected to the order of constitutional invalidity made in order two. Leave to appeal regarding the non-confirmation case is thus not automatic under section 172(2)(d) of the Constitution.

10. It is rather the case of the Flemix appellants that the Constitutional Court can and should assume the jurisdiction to entertain the non-confirmation case when it deals with the confirmation case.

11. In essence we submit it is indisputable that the Constitutional Court has the jurisdiction to deal with the non-confirmation case. The only question is whether it should hear that case. This is not a categorical question but one of discretion that is fact-sensitive.

THE AMBIT OF THIS APPLICATION

12. We understand that the question put in paragraph 4(b) of the directive is limited in scope.

13. The directive is not, as we understand it, an invitation to present argument on the merits of the application for leave to appeal in the non-confirmation case.[1] The merits of the application for leave to appeal will be relevant only if the Constitutional Court directs that it will entertain the application.

14. We understand the directive to reduce to the following two questions:

    14.1 The first is the categorical question whether the Constitutional Court has the jurisdiction to determine the non-constitutional case, given that other courts in our hierarchy also have the jurisdiction to determine that case.

[1] Whether the non-confirmation case concerns a constitutional matter or any other matter, an application for leave to appeal has to be brought to the Constitutional Court. The success of the application for leave would be dependent on the prospects of success of the appeal. If the application concerns a constitutional matter, leave will only be granted if it is in the interests of justice to grant leave, taking into account that, although not decisive, the existence of prospects of success is an important component of the interest-of-justice analysis. See **Grootboom v NPA** 2014 2 SA 68 (CC) par [36]. The same is ultimately true of appeals regarding any other matters that raise arguable points of law of general public importance where the yardstick put up by section 167(3)(b)(ii) for granting leave to appeal is whether the point "ought to be considered" by the Constitutional Court. This is practically the same as the interests of justice requirement that applies to appeals on constitutional issues. Cf **Paulsen v Slip Knot Investments 777 (Pty) Ltd** 2015 3 SA 479 (CC) par [13] to [31].

Does the jurisdiction of the other courts in other words oust the jurisdiction of the Constitutional Court? As we noted above, we submit that the Constitutional Court obviously has the jurisdiction to decide that case, no matter that other courts may also have jurisdiction to do so. We develop this point further below.

14.2 The second question is whether the Constitutional Court, having the jurisdiction to decide the case, should nevertheless decline to hear it in order to allow the matter to take its course through the hierarchy of our courts.[2] This is the principal issue that we analyse below.

ASSUMPTIONS

15. For purposes of these heads of argument the following assumptions may thus be made:

[2] This "declination" question is akin to the situation that arises where a party to an arbitration agreement sues the other party in a court. The arbitration agreement does not deprive the court of its jurisdiction but the court will normally decline to exercise its jurisdiction to allow the parties to arbitrate, cf **Parekh v Shah Johan Cinemas (Pty) Ltd** 1980 1 SA 301 (D) 305 F-H.

15.1 The non-confirmation case raises either constitutional issues[3] or points of law[4];

15.2 the points are arguable[5];

15.3 the points are of general public interest[6];

15.4 the points ought to be considered by the Constitutional Court, aliter, it is in the interests of justice that they be considered by the Constitutional Court.[7]

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[3] Which it in fact does – the interpretation of section 45 of the Magistrates' Courts Act adopted by the court a quo is based on the court's interpretation of section 91 of the National Credit Act. The interpretation of the latter act raises constitutional issues, vide **Paulsen** supra at par [14]. Moreover, the effect of the finding of the court a quo on this issue appears to be that judgments and emoluments attachment orders obtained in the past are void – the judgment operating ex tunc. This clearly has an effect on the rights of the relevant judgment creditors because the judgments and emoluments attachment orders are constitutional property protected by section 25 of the Constitution, see **NCR v Opperman** 2013 2 SA 1 (CC). Section 45 of the Magistrates' Courts Act also concerns questions relating to the access of creditors to the court system, which is recognised and protected by section 34 of the Constitution. The order referring Flemix to the Law Society also impacts on the attorney's dignity and her right to practice her profession and sections 10 and 22 of the Constitution are thus impacted.

[4] We submit that the non-confirmation case does not concern facts as such but the interpretation of the statutes in question which are – apart from being constitutional issues, also questions of law. The proposition that the interpretation of a statute is a question of law is trite, see **Kabinet van SWA v Chileane** 1989 1 SA 349 (A) at 364 C.

[5] Whether the points are arguable relates to the prospects of success on appeal yardstick. In **Paulsen** supra at par [21] it was pointed out that gifted counsel can make any point of law appear to be at least superficially attractive. But, to be arguable, the point must have some prospects of success (**Paulsen** par [22]). We submit that the Flemix arguments on section 45 do enjoy reasonable prospects of success: Flemix does not argue that section 45 can be applied to an emoluments attachment order to allow a debtor to consent to the jurisdiction of a court other than the one where the debtor's employer works or is present – Flemix thus does not argue that section 45 trumps section 65(J)(2). Flemix's arguments are limited to consents to jurisdiction for purposes of obtaining judgment. We submit that on the plain language of section 91 of the National Credit Act parties may not include a provision <u>in a credit agreement</u> that is subject to this act, regarding jurisdiction. Non constat that the parties may not thereafter and, indeed after the debtor has fallen into default, enter into the type of agreement contemplated in section 45 of the Magistrates' Courts Act. This is not an inclusion in a <u>credit agreement.</u> In order to navigate around this reality, section 91 of the National Credit Act must be interpreted by amending its clear words. The prima facie position supports Flemix's legal argument and it must thus enjoy reasonable prospects of success.

[6] It is submitted that the points in issue "transcend the narrow interests of the litigants and implicate the interest of a significant part of the general public", **Paulsen** supra par [26]. We submit that it is self-evident that the matter has this effect: The Legal Aid Clinic brought the application for the declaratory order in the public interest, the court a quo had unusually sharp comments on Flemix's section 45 practices – the court even admonished counsel for putting forth Flemix's argument and to top it all, he referred Flemix to the Law Society, precisely for their section 45 practices. The points are clearly in the public interest.

16. We repeat that these assumptions will be comprehensively expanded should the Flemix applicants be granted the right to apply for leave to appeal. In other words, only if the Constitutional Court does not decline to deal with the non-confirmation case at this point will the merits of the application for leave to appeal become relevant.

17. We now turn to the principal issue, namely whether on the unusual forensic facts of this matter, the Constitutional Court should or should not at this point decline to deal with the non-confirmation case.

THE PRESENT MATTER

18. As pointed out above, the present matter is, seen from a forensic point of view, unusual. It is neither an application for direct access nor an application for leave to appeal after all other appeal procedures have been exhausted. A hybrid position has arisen where the non-confirmation case has been dealt with by the High Court and where the normal process of appeal would lead to either

[7] The interests of justice yardstick does not allow for precise definition. It is dependent on the facts of each case, see **Bruce v Fleecytex Johannesburg CC** 1998 2 SA 1143 (CC) par [9], dealing with an application for direct access where the same test is employed. It is submitted that it is clearly in the interests of justice for the Constitutional Court to determine the matter. The only question is whether it should do so now or allow it to flow through other courts of appeal before it returns to the Constitutional Court.

the full bench or the Supreme Court of Appeal and then, ultimately, to the Constitutional Court. It can be accepted that but for the confirmation case, the Flemix appellants would have sought leave to appeal from the court a quo in the normal course.[8] At this point the question is thus whether the non-confirmation case should be allowed to "leap-frog" over the possibilities of appeal to the full bench and the Supreme Court of Appeal.[9] The Constitutional Court has repeatedly held that it would normally not be in the interests of justice to grant direct access to the Constitutional Court because it is generally undesirable for one court to sit both as court of first and final instance.[10]

19. The abhorrence of a perverted process has the consequence that the Constitutional Court will decline to deal with the matter if the Court considers it prudent for the matter to be fleshed out in the lower courts. Although the concept of declination of jurisdiction may not be part of our common law, our courts have decided

[8] Which the Flemix appellants have, ex abudanti cautela, done. But the High Court application for leave to appeal will probably not be moved until such time as the Constitutional Court has decided whether or not to entertain the non-confirmation case at this point.

[9] "Leap-frogging" was considered by Moseneke DCJ in **National Treasury v Opposition to Urban Tolling Alliance** 2012 6 SA 223 (CC) at par [23] to [30]. We return to this judgment below.

[10] The aphorism is that justice does not reside in the correct outcome of the case but in the judicial process with the result that if the integrity of the process is compromised, so is the concept of justice. On the other hand, if the court reaches the wrong conclusion – even the apex court – but via an unimpeachable process, the result is deemed just.

particular jurisdiction cases on grounds reminiscent of forum non conveniens.[11]

20. In the common law countries the doctrine of forum non conveniens has been developed to counteract the much more liberal approach of the English law to the issue of jurisdiction. In English law the competence of the court to hear a case is a procedural matter and is dependent on the service of a writ on the defendant. If the court authorizes the service of a writ on a defendant outside the jurisdiction of the English courts, the defendant may raise forum non conveniens as an answer to the English court assuming jurisdiction. The court then has the discretionary power to refuse to take jurisdiction.[12] The approach of the English court to a

[11] The principle of forum non conveniens is reflected in section 7 of the Admiralty Jurisdiction Regulation Act, 105 of 1983 which provides that a court may decline to exercise its admiralty jurisdiction if it is of the opinion that the action can more appropriately be adjudicated upon by another court. See also **Cargo laden and lately laden on board the MV Thalassimi Avgi v MV Dimitris** 1989 3 SA 820 (A) and **Great River Shipping Inc v Sunnyface Marine** 1992 4 SA 313 (C). It would, however, seem that our courts are generally not entitled to decline to hear cases properly brought before them in the exercise of their jurisdiction, see for example **Longman Distillers v Drop-in Group of Liquor Supermarkets (Pty) Ltd** 1990 2 SA 906 (A) at 914 E-G in respect of applications ad fundandam jurisdictionem. In **Agri Wire (Pty) Ltd v Commissioner, Competition Commission** 2013 5 SA 484 (SCA) Wallis JA remarked in par [19]:

> "Save in admiralty matters, our law does not recognise the doctrine of forum non conveniens, and our courts are not entitled to decline to hear cases properly brought before them in the exercise of their jurisdiction."

However, convenience factors and policy considerations associated with forum non conveniens have repeatedly been referred to in our courts, see cf Forsyth **Private International Law** 5 ed 185 et seq referring to section 9(1) of the Supreme Court Act, 59 of 1959, the exception of lis alibi pendens, the approach of our courts where both plaintiff and defendants are peregrine of South Africa and with reference to the doctrine of causae continentia. At 187 he concedes that our law does not recognise a doctrine of forum non conveniens proper but strongly argues for the adoption of such a rule and finds that the way to its adoption has been paved by the SCA decision in **Bid Industrial Holding (Pty) Ltd v Strang** 2008 3 SA 355 (SCA) where the court inter alia recognise that "It is open to the defendant to contest, among other things, whether the South African court is the forum conveniens and whether there are sufficient links between the suite and this country to render litigation appropriate here rather than in the court of the defendant's domicile."

[12] See in general: P M North and J J Forsyth **Cheshire and North's Private International Law** 12th ed at 179.

challenge of forum non conveniens was set out by Lord Goff in six principles in **The Spiliada**[13]. The six points are:

20.1 The court will only stay its proceedings if there is another appropriate forum for the action;

20.2 the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay;

20.3 if there is another connecting factor over and above service of process with the English Court, the burden on the defendant becomes more pronounced;

20.4 the court will then analyse the facts to determine whether there are factors indicating another court to be the natural forum "that with which the action had the most real and substantial connection";

20.5 if there is no other available forum, the court will refuse a stay;

20.6 if, however, there is another available forum which prima facie is more appropriate for the trial, it will grant a stay unless there are circumstances by reason of which justice

[13] [1987] AC 460 (HL).

requires that a stay should nevertheless not be granted and in this enquiry the court considers all the circumstances of the case, including circumstances that go beyond those taking into account when considering connecting factors with other jurisdictions.

21. The cases in which the doctrine of causae continentia have been considered[14] highlight considerations of sensibility, practicality and efficiency.

22. It is submitted that these considerations, if translated to the present matter, indicate the following:

22.1 In the first place, the principle of "leap-frogging" other courts of appeal is not anathema.[15]

22.2 The question that must be answered is whether there is any reason for another court of appeal first to deal with the non-confirmation case. The non-confirmation case does not require any development of the common law, it is a simple matter of statutory interpretation and is not fact-sensitive. It is a primary legal issue (the interpretation of a statute always amounting to the application of constitutional norms).

[14] E.g. the judgment of Cameron JA in **Permanent Secretary for the Department of Welfare, EC v Ngxuza** 2001 4 SA 184 (SCA) at par [22] to [23].
[15] See again **National Treasury** supra par [30].

22.3 It would be eminently practical, reasonable and convenient for the non-confirmation matter to be heard together with the confirmation matter. The matters share the same factual context, formed part of the same papers and the legal arguments of the two cases overlap.

22.4 It would amount to wastage of time and costs for what is effectively one half of the case to be dealt with by the Constitutional Court at this point and the other half to meander through an application for leave to appeal, through either the full bench or the Supreme Court of Appeal back to this court in circumstances where the views of the judges of appeal will be interesting but ultimately irrelevant because the matter is of such importance that the Constitutional Court will ultimately have to deal with it.

22.5 Separating the confirmation case from the non-confirmation case will practically be difficult – they are inter-connected in the papers and in the arguments that were presented in the court a quo. Although they deal with separate issues, it would ultimately be convenient to deal with them at the same time.

SUBMISSION

23. The Constitutional Court has jurisdiction to consider the application for leave to appeal against orders 3 to 8 of the High Court in terms of section 167(3)(b) of the Constitution and it is indeed in the interests of justice to grant direct access to the Constitutional Court.

P F LOUW SC

KARRISHA PILLAY

Chambers
3 September 2015

WERKSMANS ATTORNEYS
CAPE TOWN

Per: LOUIS DU PREEZ
3 September 2015

LIST OF AUTHORITIES

South African Case-Law

1. **Agri Wire (Pty) Ltd v Commissioner, Competition Commission** 2013 5 SA 484 (SCA)
2. **Bid Industrial Holding (Pty) Ltd v Strang** 2008 3 SA 355 (SCA)
3. **Bruce v Fleecytex Johannesburg CC** 1998 2 SA 1143 (CC)
4. **Cargo laden and lately laden on board the MV Thalassimi Avgi v MV Dimitris** 1989 3 SA 820 (A)
5. **Great River Shipping Inc v Sunnyface Marine** 1992 4 SA 313 (C)
6. **Grootboom v NPA** 2014 2 SA 68 (CC)
7. **Kabinet van SWA v Chileane** 1989 1 SA 349 (A)
8. **Longman Distillers v Drop-in Group of Liquor Supermarkets (Pty) Ltd** 1990 2 SA 906 (A)
9. **National Treasury v Opposition to Urban Tolling Alliance** 2012 6 SA 223 (CC)
10. **NCR v Opperman** 2013 2 SA 1 (CC)
11. **Parekh v Shah Johan Cinemas (Pty) Ltd** 1980 1 SA 301 (D)
12. **Paulsen v Slip Knot Investments 777 (Pty) Ltd** 2015 3 SA 479 (CC)
13. **Permanent Secretary for the Department of Welfare, EC v Mgxuza** 2001 4 SA 184 (SCA)

Foreign Case-Law

14. **The Spiliada** [1987] AC 460 (HL)

Other Literature

15. Forsyth **Private International Law** 5 ed 185

16. P M North and J J Forsyth **Cheshire and North's Private International Law** 12th ed at 179

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APPELLANT'S/APPLICANT'S WRITTEN ARGUMENT IN TERMS OF DIRECTIONS DATED 27 AUGUST 2015

1.

The appellant/applicant is The Association of Debt Recovery Agents NPC ("ADRA").

2.

ADRA presents this written argument in response to the directions of the acting senior registrar of this court dated 27 August 2015.

AD PARAGRAPH 4(a) OF THE DIRECTIONS:

3.

Paragraph 3 of the order of the High Court is not dependent upon or otherwise connected with the order of invalidity made at order 2 of the High Court.

4.

ADRA does not appeal or apply for leave to appeal against paragraph 4 of the order of the High Court.

5.

Paragraph 5 of the order of the High Court is materially connected with the order of invalidity made at order 2 of the High Court for the reasons set out s v "Ad paragraph 5 of the order of the High Court" below.

6.

Paragraph 6 of the order of the High Court is not dependent upon or otherwise connected with the order of invalidity made at order 2 of the High Court.

7.

Paragraph 7 of the order of the High Court is materially connected with the order of invalidity made at order 2 of the High Court for the reasons set out s v "Ad paragraph 7 of the order of the High Court" below.

8.

ADRA does not appeal or apply for leave to appeal against paragraph 8 of the order of the High Court.

Ad paragraph 5 of the order of the High Court:

9.

In terms of this order ADRA's application to strike out was dismissed with costs.

10.

ADRA, in fact, delivered two applications to strike out, both of which were not opposed by any of the parties.

11.

Both applications to strike out related to inadmissible evidence / argumentative matter which the Legal Aid Clinic of the University in its founding affidavit attempted to use for the purpose of substantiating the relief which culminated in paragraph 2 of the order of the High Court.

12.

The High Court eventually relied upon "*documentary reports and other research*" in support of paragraph 2 of its order and, consequently, dismissed ADRA's applications to strike out such reports and evidence as inadmissible hearsay evidence, etc.

13.

Paragraph 5 of the order of the High Court is, therefore, materially connected with the order of invalidity made at order 2 of the High Court.

Ad paragraph 7 of the order of the High Court:

14.

In terms of this order ADRA was ordered to pay the Legal Aid Clinic's and the other applicants' costs, including the costs of two counsel, jointly and severally with the Flemix respondents.

15.

The costs order materially relate to paragraph 2 of the order of the High Court in that most of the court time taken up by argument in the High Court (approximately 70%) related to paragraph 2 of the said order.

16.

It is submitted that leave to appeal against paragraphs 5 and 7 of the order of the High Court are automatic as part of ADRA's appeal against the order of

invalidity in terms of section 172(2)*(d)* of the Constitution, read with rule 16(2) of the Rules of this Court, for the following reasons:

16.1 it would make no sense, and be cost-inefficient, if orders 5 and 7 were, despite their material connectivity with the order of invalidity, had either to be dealt with in an appeal in another forum or had to be subject (if legally possible) to an order of direct access to this court;

16.2 an anomalous situation could arise if paragraphs 5 and 7 had to be dealt with on appeal in another forum if, on such appeal, it is ordered that either or both of paragraphs 5 and 7 should be reversed but this court confirms the order of invalidity and *vice-versa*;

16.3 this court, as ultimate appeal court, has to deal with the order of invalidity in all its facets, including the ones materially connected therewith, which includes paragraphs 5 and 7;

16.4 section 172(2)*(d)* of the Constitution does not exclude orders such as paragraphs 5 and 7 of the order of the High Court when it lays down the right to an automatic appeal of a person contemplated therein.

AD PARAGRAPH 4(b) OF THE DIRECTIONS:

17.

Paragraph 3 of the order of the High Court, and ADRA's counter-application which was dismissed in paragraph 6 of the said order, relate to the proper

interpretation of section 45 of the Magistrates' Courts Act 32 of 1944 ("the MCA") and sections 90(2)*(k)*(iv)*(bb)* and 91*(a)* of the National Credit Act 34 of 2005 ("the NCA").

18.

In contradistinction to paragraph 3 of the order of the High Court, ADRA, in its counter-application, sought an order in the following terms:

> "*1. Declaring that in any proceedings on a claim founded on any cause of action arising out of or based on an agreement governed by the National Credit Act 34 of 2005 already instituted or about to be instituted by a credit provider against a consumer in a magistrate's court other than the court within the district of which the consumer resides, carries on business or is employed, or where the goods in question (if any) are ordinarily kept, the credit provider and the consumer may in writing consent to the jurisdiction of such other court in terms of the provisions of section 45(1) of the Magistrates' Courts Act 32 of 1944 despite the provisions of sections 90(2)(k)(vi)(bb) and 91(a) of the National Credit Act 34 of 2005*;"

19.

The interpretation of the aforesaid sections of the MCA and NCA by the Legal Aid Clinic and by ADRA is directly opposite. In addition, there is difference of interpretation amongst magistrates and amongst them and the Department of Justice and Correctional Services. The controversy exists since the coming into operation of the NCA. Accordingly, the proper interpretation of these

sections raises an arguable point of law.

20.

It is submitted that the correct interpretation of the MCA and the NCA is in the public interest for the following reasons:

20.1 legal certainty must, once and for all, be provided by this court under circumstances where there is a difference between magistrate's courts as to the proper interpretation and effect of the provisions of the MCA and the NCA concerned;

20.2 certainty as to what the correct interpretation and effect of the said provisions are, will lead to the proper protection of the rights of both credit providers and consumers in a credit industry which runs into billions of rand annually;

20.3 certainty will do away with the stigma of alleged forum shopping in the context used by the High Court in its judgment relating to paragraph 3 of the order.

SIGNED AT SANDTON ON THIS _____ DAY OF SEPTEMBER 2015

_____

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AND TO: WEBBER WENTZEL
ATTAORNEYS FOR THE FIRST TO SIXTEENTH RESPONDENTS IN BOTH APPEALS
15TH FLOOR, CONVENTION TOWER
HEERENGRACHT
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REF: O GELDENHUYS/2483446

AND TO: THE STATE ATTORNEY
ATTORNEYS FOR THE SEVENTEENTH AND EIGHTEENTH RESPONDENTS IN THE FIRST APPEAL (ALSO BEING THE EIGHTEENTH AND NINETEENTH RESPONDENTS IN THE SECOND APPEAL)
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REF: P MELAPI

AND TO: THE NATIONAL CREDIT REGULATOR
NINETEENTH RESPONDENT
127 15TH ROAD
RANDJIESPARK
MIDRAND

AND TO: WERKSMANS ATTORNEYS
ATTORNEYS FOR THE FIRST TO THIRTEENTH APPELLANTS / APPLICANTS IN THE SECOND APPEAL (ALSO BEING THE TWENTIETH TO TWENTY SEVENTH AND TWENTY NINTH TO THIRTY THIRD RESPONDENTS IN THE FIRST APPEAL)
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REF: FLUXMANS INC: J ANTUNES/M270/126126

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE CCT 127/15

In the matter between:-

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

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Seventeenth Respondent
THE MINISTER OF TRADE AND INDUSTRY	Eighteenth Respondent
THE NATIONAL CREDIT REGULATOR	Nineteenth Respondent
MAVAVA TRADING 279 (PTY) LIMITED	Twentieth Respondent
ONECOR (PTY) LIMITED	Twenty First Respondent
AMPLISOL (PTY) LIMITED	Twenty Second Respondent
TRIPLE ADVANCED INVESTMENTS 40 (PTY) LIMITED	Twenty Third Respondent
BRIDGE DEBT (PTY) LIMITED	Twenty Fourth Respondent
LAS MANOS INVESTMENTS 174 (PTY) LIMITED	Twenty Fifth Respondent
POLKADOTS PROPERTIES 172 (PTY) LIMITED	Twenty Sixth Respondent
MONEY BOX INVESTMENTS 232 (PTY) LIMITED	Twenty Seventh Respondent
MARAVEDI CREDIT SOLUTIONS (PTY) LIMITED	Twenty Eighth Respondent
ICOM (PTY) LTD	Twenty Ninth Respondent
VILLA DES ROSES 168 (PTY) LIMITED	Thirtieth Respondent
MONEY BOX INVESTMENTS 251 (PTY) LIMITED	Thirty First Respondent
TRIPLE ADVANCED INVESTMENTS 99 (PTY) LIMITED	Thirty Second Respondent
FLEMIX & ASSOCIATES INCORPORATED ATTORNEYS	Thirty Third Respondent

And in the matter between:-

MAVAVA TRADING 279 (PTY) LIMITED	First Appellant/Applicant
ONECOR (PTY) LIMITED	Second Appellant/Applicant

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

and

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

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

---

APPELLANT'S/APPLICANT'S SUPPLEMENTARY WRITTEN ARGUMENT IN TERMS OF DIRECTIONS DATED 27 AUGUST 2015 IN RESPONSE TO THE UNIVERSITY OF STELLENBOSCH LEGAL AID CLINIC RESPONDENTS' WRITTEN SUBMISSIONS

GENERALLY:

1.

AD PARAGRAPH 4 THEREOF:

ADRA's application for leave to appeal in this court against paragraphs 5 and 7 of the order of the High Court is in the alternative to ADRA's notice of appeal in this court and, in particular, on the basis that, should no automatic appeal lie against paragraphs 5 and 7 of the order, application for leave to appeal is made. Similarly, ADRA's application for leave to appeal in the High Court against paragraphs 3, 5, 6 and 7 of the order is made in the alternative, on the basis that ADRA is found not to be entitled to pursue the appeal against paragraphs 3, 5, 6 and 7 of the order in this court.

AD PARAGRAPH 5 OF THE ORDER OF THE HIGH COURT:

2.

AD PARAGRAPHS 5 TO 19 THEREOF:

2.1 ADRA's first application to strike out was wider than stated in paragraphs 15 to 18 of the written submissions under reply. A copy of the first application is annexed hereto, marked **"A"**.

2.2 ADRA's second application to strike out was also wider than stated in paragraphs 15 to 18 of the written submissions under reply. A copy of the second application is annexed hereto, marked **"B"**.

2.3 The University of Stellenbosch Legal Aid Clinic respondents did indeed seek to present the hearsay evidence which was, *inter*

alia, sought to be struck out, as the truth. This appears from the paragraphs sought to be struck out from the founding affidavit as appears from annexure **"A"** hereto.

2.4 Thus, for example, in paragraph 27 (which was sought to be struck out) the deponent to the founding affidavit stated the following:

"*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.*"

2.5 As pointed out in paragraph 12 of ADRA's written submissions, the High Court eventually relied upon exactly that hearsay evidence in support of paragraph 2 of its order and in dismissing ADRA's applications to strike out the hearsay evidence.

2.6 It is submitted that for the reasons set out in annexures **"A" and "B"** hereto, both applications to strike out, which materially pertain to paragraph 2 of the order of the High Court, should have been granted.

2.7 ADRA persists in its written submissions in respect of paragraph 5 of the order of the High Court.

AD PARAGRAPH 7 OF THE ORDER OF THE HIGH COURT:

3.

AD PARAGRAPH 19 THEREOF:

ADRA denies the submission that order 7 is not dependent upon the finding of unconstitutionality made by the High Court at order 2. ADRA persists in paragraph 15 of its written submissions that most of the court time take up by argument in the High Court (approximately 70%) related to paragraph 2 of the said order. Significantly, this percentage is not disputed.

AD PARAGRAPHS 3 AND 6 OF THE ORDER OF THE HIGH COURT:

4.

AD PARAGRAPHS 20 TO 38 THEREOF:

4.1 ADRA contends that the interpretation of section 45 of the Magistrates' Courts Act 32 of 1944 ("the MCA") and sections 90(2)*(k)*(iv)*(bb)* and 91*(a)* of the National Credit Act 34 of 2005 ("the NCA") raises an arguable point of law of general public importance which ought to be considered by this court.

4.2 ADRA's interpretation of the said sections, in contradistinction to the interpretation relied upon in paragraphs 32 to 35 of the written submissions under reply, and which ADRA will put forward if leave to appeal is granted, is, shortly, as follows:

4.2.1 It is the prerogative of a plaintiff, as *dominus litis*, to institute

proceedings against a defendant in a magistrate's court of the plaintiff's choice, provided that the plaintiff, if needs be, can prove that such court has jurisdiction in respect of the person of the defendant.[1] In the light of this fundamental principle of our law, there is nothing sinister about "forum shopping" by a plaintiff in instances where the law allows the plaintiff a choice and the plaintiff makes an election as to which court to use.[2]

4.2.2 Section 45(1) of the MCA extends the *dominus litis*-principle to the jurisdiction of a magistrate's court obtained by the written consent of the parties "*specifically with reference to particular proceedings already instituted or about to be instituted in such court.*"

4.2.3 Section 45(2) of the MCA provides that 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) [as referred to above], shall be null and void.

4.2.4 The common law principle underlying section 45(1) of the MCA is that of submission to jurisdiction.

4.2.5 In a constitutional context, the principle of submission to jurisdiction enhances the right of access to courts embodied

[1] *Malherbe v Britstown Municipality* 1949 (1) SA 281 (C) at 287.
[2] *Makhanya v University of Zululand* [2009] JOL 23690 (SCA) paras [61], [64] and [65].

in section 34 of the Constitution of the Republic of South Africa, 1996, because it confers, by consent between the parties, jurisdiction on a court which the court would otherwise not have had.[3] In this regard sight must not be lost of the meaning of jurisdiction. In ***Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in Liquidation)*** **1987 (4) SA 883 (A) at 886D** the Appellate Division adopted the following definition:

"*Jurisdiction ('gerigtsdwang') is defined by Vromans, following Berlichius, as*

'A lawful power to decide something in a case or to adjudicate upon a case, and to give effect to the judgment, that is, to have the power to compel the person condemned to make satisfaction'."

4.2.6 In consenting to jurisdiction, parties will, no doubt, be guided by factors such as accessibility of the court on which they intend to confer jurisdiction, cost-effectiveness, the swift obtainment of an order compelling the defendant to make satisfaction of the judgment, etc.

4.2.7 Under section 45(1) of the MCA the parties could, therefore, consent to the jurisdiction of the particular magistrate's court which best suits the needs of the case. Thus, for example, the parties can consent to the jurisdiction of the court where the employer of the defendant resides, carries on business

[3] *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in Liquidation)* 1987 (4) SA 883 (A) at 887A.

or is employed even though the latter court does not have jurisdiction in respect of the person of the defendant as contemplated in section 28(1)*(a)* of the MCA, if the plaintiff decides that proceedings in such court will result in the most effective and cost-effective manner in dealing with the matter and therefore seeks the consent of the defendant.

4.2.8 It is a well-known principle of statutory construction that statutes must be read together and that the later one must not be so construed as to repeal the provisions of an earlier one, or to take away rights conferred by an earlier one unless the later statute *expressly* alters the provision of the earlier one in that respect or such alteration is a *necessary* inference from the terms of the later statute.[4]

4.2.9 It is also a well-known principle of interpretation that the legislature does not intend absurd consequences.[5]

4.2.10 The present state of the law in respect of the interpretation of statutes is as follows:

4.2.10.1 Section 39(2) of the Constitution requires that the court, when interpreting any legislation, must do so through the prism of the Bill of Rights. Judicial officers must, accordingly, prefer interpretations of legislation which fall within constitutional bounds over those that do not, provided that any such interpretation can be reasonably ascribed to the particular section being interpreted. It

[4] *Kent NO v South African Railways* 1946 AD 398 at 405.
[5] Steyn, *Die Uitleg van Wette* 5ed at 118-119.

follows that where statutory provisions, like the impugned provisions, are reasonably capable of a meaning which places them within constitutional bounds, they should be preserved.[6]

4.2.10.2 Otherwise, the present state of the law in respect of the interpretation of statutes is laid down in ***Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 603F-604D**.

4.2.11 The draftsman of sections 90(2)*(k)*(vi)*(bb)* and 91*(a)* of the NCA was, obviously, aware of, *inter alia*, the following circumstances in framing those sections:

4.2.11.1 the fact that a plaintiff is *dominus litis* as set out above;

4.2.11.2 the principle of submission to jurisdiction;

4.2.11.3 that the principle of submission to jurisdiction underlies section 45(1) of the MCA;

4.2.11.4 that, under section 45(1) of the MCA, the parties can consent to the jurisdiction of the court in which the employer of the defendant resides, carries on business or is employed;

4.2.11.5 the fact that submission to jurisdiction by a plaintiff and a defendant enhances the right of access to courts as

[6] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) at 558E-559C and 560A-B.

contemplated in section 34 of the Constitution;

4.2.11.6 the provisions of section 45(2) of the MCA;

4.2.11.7 the principles of statutory interpretation;

4.2.11.8 the fact that, principally, the NCA is, *inter alia*, aimed at establishing a consistent enforcement framework relating to consumer credit and an accessible system of "*consensual resolution of disputes arising from credit agreements*" thus "*providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements*";[7]

4.2.11.9 the Bill of Rights.

4.2.12 It is, therefore, of utmost significance that the draftsman of the NCA included the following provision in that Act:

"*2.(7) Except as specifically set out in, or necessarily implied by, this Act, the provisions of this Act are not to be construed as-*

(a) limiting, amending, repealing or otherwise altering any provision of any other Act;

(b) exempting any person from any duty or obligation

[7] Section 3*(h)* and *(i)* of the NCA.

imposed by any other Act; or

(c) prohibiting any person from complying with any provision of another Act."

4.2.13 Sections 90(2)*(k)*(vi)*(bb)* and 91*(a)* of the NCA clearly relate only to *provisions* (in credit agreements, supplementary agreements and documents) that are unlawful. They do not oust the jurisdiction of magistrates' courts under sections 28(1)*(d)* and 28(1)*(f)* of the MCA, both of which are unrelated to a *provision* in credit agreements, etc, such as the ones contemplated by the said provisions of the NCA. Thus, for example, a credit provider can institute proceedings against a consumer in a court not having jurisdiction over the person of the consumer and, if the consumer appears and does not object to the jurisdiction of that court, the court will have jurisdiction in respect of the person of the defendant as contemplated in section 28(1)*(f)* of the MCA. There is nothing in the NCA which prohibits such a situation or renders it unlawful.

4.2.14 It is clear that the NCA neither expressly nor by necessary implication/inference[8] limits, amends, repeals or otherwise alters the provisions of section 45(1) of the MCA or take away rights conferred by that section. All that the NCA in fact does, is to materially align itself with the provisions of section 45(2) of the MCA insofar as *provisions* of credit

[8] Under the common law as well as under section 2(7) of the NCA the test is one of "necessary" inference or implication. "Mere" implication is, therefore, not sufficient (*Kent NO v South African Railways* 1946 AD 398 at 405; *R v Vos; R v Weller* 1961 (2) SA 743 (AD) at 749A-C).

agreements are concerned. The provisions of the NCA and the MCA are, therefore, reconcilable and not in conflict with each other. Thus, for example, a credit provider and a consumer are lawfully entitled to consent to the jurisdiction of a magistrate's court where the employer of the consumer resides, carries on business or is employed despite the fact that the consumer does not reside or is employed in such area of jurisdiction provided that such consent is, as contemplated in section 45(1) of the MCA, given specifically with reference to particular proceedings already instituted or about to be instituted in such court. To contend otherwise, as the respondents do, would lead to the absurd result that a consumer could not, for purposes of judgment by consent and the issuing of an EAO, consent to the jurisdiction of the court where the employer resides, carries on business or is employed. This would also impair the principle of cost-effectiveness.[9]

4.2.15 If the legislature intended to restrict the credit provider in *all* circumstances to the court in whose area of jurisdiction the consumer works or lives, or where the goods (if any) are ordinarily kept, it has, in formulating sections 90(2)*(k)*(vi)*(bb*) and 91*(a)* of the NCA, not chosen its words carefully enough by not specifically excluding the provisions of sections 28(1)*(d)*, 28(1)*(f)* and 45(1) of the MCA from the application of the NCA. In such instance, the NCA must be amended. Until then, the position as contended by ADRA must prevail.

[9] *African Bank Ltd v Myambo NO* 2010 (6) SA 298 (GNP) at 305A-B.

5.

It is submitted that the interpretation in the written submissions under reply is misconceived and fundamentally wrong.

6.

In the premises, ADRA persists in paragraphs 17 to 20 of its written submissions.

SIGNED AT SANDTON ON THIS _____ DAY OF SEPTEMBER 2015

_____
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CAPE TOWN
REF: FLUXMANS INC: J ANTUNES/M270/126126

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case Number: **CCT127/15**

In the matter between:-

THE ASSOCIATION OF DEBT RECOVERY AGENTS NPC Appellant/Applicant

and

THE UNIVERSITY OF STELLENBOSCH LEGAL AID CLINIC & 32 OTHERS Respondents

And in the matter between:-

MAVAVA TRADING 279 (PTY) LIMITED & 12 OTHERS Appellants/Applicants

and

THE UNIVERSITY OF STELLENBOSCH LEGAL AID CLINIC & 20 OTHERS Respondents

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SUBMISSIONS ON BEHALF OF THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES IN TERMS OF THE DIRECTIONS DATED 27 AUGUST 2015

INTRODUCTION:

1. These submissions are made on behalf of the Minister of Justice and Correctional Services in response to the Chief Justice's directions, dated 27 August 2015 ("the Directions").

2. Paragraph 4 of the Directions raise the following issues :

> *"(a) whether orders 3 – 8 of the High Court order are dependent upon or otherwise connected with the order of invalidity made at order 2 of the High Court and, if so, whether leave to appeal against orders 3 – 8 of the High Court is automatic when an application under section 172(2)((d) of the Constitution is lodged in respect of the order of invalidity; and if not,*
>
> *(b) whether this Court has jurisdiction to consider the application for leave to appeal against orders 3 – 8 of the High Court in terms of s167(3)(b) of the Constitution and, if so, whether it is in the interests of justice to grant direct access to this Court."*

AD PARAGRAPH 4(a) OF THE DIRECTIONS:

3. The crisp issue is whether orders 3 – 8 are dependent upon or otherwise connected with the order of invalidity in respect of the whole of section 65J(2)(b)(i) and (ii) and the words *"the judgment debtor has consented thereto* [an emoluments attachment order] *in writing"* in section 65J(2)(a) of the Magistrates' Courts Act, 32 of 1944 ("the MCA").

4. Order 3 dealt with the interpretation of s45 of the MCA in the context of credit agreements regulated by the National Credit Act, 34 of 2005 ("the NCA").

5. Order 4 urged certain parties to alert debtors to the terms of the judgment.

6. Order 5 dismissed an application to strike out with costs.

7. Order 6 dismissed a counter-application with costs.

8. Order 7 related to the overall costs of the application.

9. Order 8 refers the conduct of certain attorneys for investigation by the relevant Law Society.

10. While being mindful of the wide construction given to the words *"connected with"* contained in the previous version of section 167(3) of the Constitution in paragraphs [29] – [30] of *Alexkor Ltd v The Richtersveld Community 2004(5) SA 460 (CC)*, it is respectfully contended that orders 3 – 8 are neither dependent upon nor otherwise connected with the order of invalidity. Leave to appeal in respect of these orders is accordingly not automatic as part of the section 172(2)(d) confirmation proceedings.

11. ADRA's contention that orders 5 and 7 are materially connected with the order of invalidity, is misconceived. Order 2 dealt with the interpretation of the relevant sections of the MCA. It was a question of law unrelated to *"documentary reports and other research"* and as such it was unaffected by the outcome of the striking-out application. Order 7 dealt with the overall issue of

costs. It was not solely dependent upon or connected with the order of invalidity, but followed the outcome of the application as a whole and cannot meaningfully be dealt with in the confirmation proceedings which deal with order 2 only.

AD PARAGRAPH 4(b) OF THE DIRECTIONS:

12. Order 3 of the High Court entailed the proper interpretation and application of the relevant provisions of the MCA and the NCA. It is accepted that this court has jurisdiction to consider the application for leave to appeal against order 3 in terms of section 167(3)(b) of the Constitution. This is not the case insofar as the remaining orders 4 – 8 are concerned. The latter do not constitute constitutional matters or raise arguable points of law of general public importance which ought to be considered by the court. Any appeal against these orders would inevitably have to follow the normal course.

13. It is in the circumstances not in the interests of justice to grant direct access to this court insofar as the appeal against order 3 (or any of the remaining orders) is concerned, in that :

13.1 considerations of avoiding inconvenience and extra costs do not arise, given the fact that an appeal against any of orders 4 – 8 must follow the normal course and a dual process (confirmation proceedings as well as an appeal in the normal course) is inevitable;

13.2 in any event, it is inherent in the scheme created by s172(2)(d) that the dual process would have to be followed where there are confirmation as well as non-confirmation issues arising from a judgment of the High Court, such as in the present matter. Some inconvenience and extra costs are envisaged in such a situation and do not constitute exceptional circumstances, the latter being a prerequisite for direct access in accordance with the jurisprudence of this Court;

13.3 there is no justification for deviating from the rule that this Court would not lightly deal with matters without having had the benefit of the decisions of the other courts in the hierarchy, thus ensuring proper adjudication of cases at all levels of the judicial system. There is, for example, no element of urgency in obtaining a final decision attached to an appeal against orders 3 – 8;

13.4 the contention that there is overlap and that it would be practically difficult to deal separately with the confirmation and non-confirmation cases, is unfounded. The confirmation case could be argued without any reference at all to any of the remaining orders, given the fact that it concerns an independent issue, namely the proper interpretation of section 65J(2)(a) and (b) of the MCA which does not touch upon the subject matter of any of the remaining orders;

13.5 any legal uncertainty because of differences among Magistrates' Courts no longer obtain pursuant to the binding precedent established by the judgment of the High Court;

13.6 any stigma attaching to forum shopping is a factual issue to be determined in the normal course in the appeals process and cannot tilt the scales in favour of direct access in the circumstances.

14. It is accordingly contended that, while this court has jurisdiction in respect of order 3 only, there is no justification for granting direct access to this court in respect of orders 3 – 8, in the interests of justice.

DATED at CAPE TOWN on this 11th day of SEPTEMBER 2015.

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CONSTITUTION HILL

CCT Case No. 127/15

WCHC Case No. 16703/14

In the matter between:

MAVAVA TRADING 279 PROPRIETY LIMITED Appellants / Applicants

AND 12 OTHERS

and

THE UNIVERSITY OF STELLENBOSCH Respondents

LEGAL AID CLINIC AND 20 OTHERS

And

In the matter between:

ASSOCIATION OF DEBT RECOVERY AGENTS NPC Appellant

and

THE UNIVERSITY OF STELLENBOSCH Respondents

LEGAL AID CLINIC AND 33 OTHERS

WRITTEN SUBMISSIONS OF THE UNIVERSITY OF STELLENBOSCH LEGAL AID CLINIC RESPONDENTS IN RESPONSE TO THE DIRECTIONS DATED 27 AUGUST 2015

Introduction

1. The Directions issued by the Chief Justice on 27 August 2015 present two questions:

    1.1 First, whether orders 3 – 8 of the High Court are dependent upon or otherwise connected with the order of invalidity made at order 2 of the High Court and, if so, whether leave to appeal against orders 3 – 8 of the High Court is automatic when an application under section 172(2)(d) of the Constitution is lodged in respect of the order of invalidity; and if not;

    1.2 Secondly, whether this Court has jurisdiction to consider the application for leave to appeal against orders 3 to 8 of the High Court in terms of section 167(3)(b) of the Constitution and if so, whether it is in interests of justice to grant direct access to this Court.

2. The University of Stellenbosch Legal Aid Clinic ("the Respondents") submit that the answers are:

    2.1 Orders 3 to 8 of the High Court are **not** dependent upon or otherwise connected with the order of invalidity made by the High Court at order 2. Leave to appeal against orders 3 to 8 is **not** automatic when an application under section 172(2)(d) of the Constitution is lodged in respect of order 2;

2.2 This Court **does** have jurisdiction in terms of section 167(3)(b) of the Constitution to consider the application for leave to appeal against orders 3 to 8; and

2.3 It is **not** in the interests of justice to grant direct access, (or a direct appeal), as there are no reasonable prospects that this Court will reverse or materially alter these orders.

The first question

3. The Flemix Applicants accept that orders 3 to 8 are not dependent upon or otherwise connected with the order of invalidity made at order 2 and that leave to appeal against orders 3 to 8 is not automatic in respect of the application to confirm order 2.[1]

4. ADRA on the other hand contends that orders 5 and 7 are materially connected with the order of invalidity made by the High Court at order 2 and that leave to appeal against these orders is automatic as part of ADRA's appeal against order 2 in terms of section 172(2)(d) of the Constitution.[2]

4.1 ADRA filed a Notice of Appeal dated 27 July 2015 to this Court against order 2 as well as orders 5 and 7 **prior to** this Court issuing directions on whether orders 3 to 8 (ie including orders 5 and 7) are indeed susceptible to automatic

[1] Flemix Respondents Written Submissions, para 9

[2] ADRA Written Submissions, para 16

confirmation in terms of section 172(2)(d) of the Constitution.[3] It is submitted that no automatic appeal lies against orders 5 and 7 and that ADRA's notice of appeal is defective in this regard;

4.2 It is noted that ADRA has filed applications for leave to appeal in this Court against orders 5 and 7 and in the High Court against orders 3, 5, 6 and 7.

5. The scope of confirmation proceedings before this Court is determined by sections 172(2)(a) and 167(5) of the Constitution. They require this Court to make the final decision on whether an Act of Parliament, a provincial Act or conduct of the President is consistent with the Constitution.

6. Order 2 relates to the constitutional invalidity of section 65J(2)(a), section 65J(2)(b)(i) and section 65J(2)(b)(ii) of the Magistrates' Courts Act 32 of 1944 ("the Magistrates' Courts Act"). It is an order of constitutional invalidity of an Act of Parliament, which this Court must decide whether to confirm in terms of section 172(2)(a) of the Constitution. Order 2 deals only with the issue of **judicial oversight** in relation to emoluments attachment orders ("EAOs").

7. Orders 3 to 8 do not relate in any way at all to the issue of judicial oversight in respect of EAOs.

[3] ADRA Notice of Appeal dated 27 July 2015, page 3

8. Orders 3 to 8 are conceptually distinct from the order of constitutional invalidity made at order 2. They do not fall within the category of orders which sections 172(2)(a) and 167(5) of the Constitution require this Court to confirm. Orders 3 to 8 can only fall within the scope of section 172(2)(a) confirmation proceedings if they are ancillary orders connected with or dependent upon the order of constitutional invalidity made by the High Court at order 2.

9. An ancillary order is one which is **consequent upon** or **flows from** the order of unconstitutionality.[4] In order to be dependent upon or connected with order 2, orders 3 to 8 must **"*stand in a relationship of dependence*"** with the primary order of constitutional invalidity made at order 2.[5]

10. Plainly they do not.

11. Order 3 is a declaratory order concerning the interpretation of provisions of the National Credit Act and section 45 of the Magistrates' Courts Act relating to consent jurisdiction for the purposes of enforcing a credit agreement.[6] Order 6 concerns the dismissal of

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[4] *Dawood and Another; Shalabi and Another; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 396 at para 18

[5] *Gory v Kolver NO and Others* 2007 (4) SA 97 (CC) at para 47

[6] Order 3: "*It is declared that in proceedings brought by a creditor for the enforcement of any credit agreement to which the National Credit Act 34 of 2005 ("the National Credit Act") applies, section 45 of the Magistrates' Courts Act does not permit a debtor to consent in writing to the jurisdiction of a magistrates' court other than that in which that debtor resides or is employed*."

two counter-applications for declaratory orders which, in effect sought the reverse of the order made by the High Court at order 3.[7]

12. Neither order 3 nor order 6 are dependent upon the order of constitutional invalidity made at order 2.

13. Order 4 and order 8 set out steps which the High Court considered necessary in relation to the rights of debtors and the investigation of possible breaches of Flemix's ethical duties arising from the manner in which they sought and obtained EAOs.[8]

14. These orders followed concerns expressed by the High Court regarding forum shopping to obtain EAOs and consequent violation of the rights of debtors of access to courts.[9] Orders 4 and 8 are not dependent upon the order of constitutional invalidity made at order 2.

[7] *Order 6: "The Seventeenth and Eighteenth Respondents' counter-applications are dismissed with costs*."

[8] Order 4: "*The First to the Third Respondents, the HRC, the Law Society and the Advice Offices are urged to take whatever steps they deem necessary to alert debtors as to their rights in terms of this judgment*." ; Order 8: "*A copy of these proceedings are to be forwarded by the First Applicant to the Law Society of the Northern Province for it to determine whether Ms AE Jordaan and Flemix & Associates Incorporated have breached their ethical duties particularly with regard to forum shopping to secure emolument attachment orders*."

[9] See for example Judgment at paras 1, 6, 8, 24, 28, 29, 51, 52, 53, 59, 65 and 66

15. Order 5 relates to the dismissal of an application by ADRA to strike out two research reports by the University of Pretoria regarding widespread irregularities in the process of obtaining EAOs.[10] The High Court dismissed the application to strike out with costs.[11]

16. ADRA submits that order 5 is materially connected with the order of constitutional invalidity because the University of Stellenbosch Legal Aid Clinic attempted to use the two reports to substantiate the relief which culminated in the High Court granting order 2.[12] This submission is misplaced, for two reasons.

17. First: the reports were attached not to prove the truth of their contents, but to demonstrate the existence of concerns regarding the implementation of emoluments attachment orders and what those concerns are.[13] Secondly: the two reports were not used to substantiate the constitutional challenge and their contents could plainly not be determinative of the question of whether the impugned provisions of the Magistrates' Courts Act at issue are unconstitutional or not. Order 2 was granted by the High Court pursuant to a direct challenge to the constitutional validity of the impugned legislative provisions.

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[10] University of Pretoria, "*The Incidence of and the Undesirable Practices relating to Garnishee Orders in South Africa*", October 2008 ; University of Pretoria, "*The Incidence of and the Undesirable Practices relating to Garnishee Orders in South Africa. A follow up report",* September 2013

[11] Order 5: "*The Eighteenth Respondent's application to strike out is dismissed with costs."*

[12] ADRA Written Argument in response to Directions, para 11

[13] The Legal Aid Clinic's founding affidavit at para 145 stated that "*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.*"

18. The two research reports, and hence ADRA's application to strike them out, have no bearing on the legislative validity issue because the enquiry into the constitutional validity of a law is objective not subjective.[14] We accordingly submit that the order of constitutional invalidity made by the High Court at order 2 is not materially connected with or dependent on order 5.

19. Order 7 is a costs order.[15] The costs order was made in relation to the order declaring the individual EAOs unlawful and invalid (order 1), the order of constitutional invalidity (order 2), the declaratory order relating to jurisdiction (order 3) and the dismissal of the striking out and counter-applications (order 5 and order 6). Order 7 is not dependent upon the finding of unconstitutionality made by the High Court at order 2.

The second question

20. Section 167(3)(b) of the Constitution confers jurisdiction on this Court to decide constitutional matters[16] and any other matter, if this Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which *ought to be considered* by this Court.[17]

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[14] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at para 26

[15] Order 7: "*Fourth to Eighteenth Respondents (excluding the Twelfth Respondent) are ordered to pay the Applicants' costs, including the costs of two counsel, jointly and severally"*

[16] Section 167(3)(b)(i)

[17] Section 167(3)(b)(ii)

21. Orders 3 to 8 need not be considered by this Court and it is submitted ought not to be considered by this Court because there are no reasonable prospects that this Court will reverse or materially alter the orders granted by the High Court.

22. It is accepted that section 167(3)(b) of the Constitution confers jurisdiction on this Court to consider the application for leave to appeal against orders 3 to 8 of the High Court. However, it is submitted that it would **not** be in the interests of justice to grant direct access (or a direct appeal) as there are no prospects at all, let alone reasonable prospects, that this Court will reverse or materially alter orders 3 to 8 of the High Court.

23. Whether a matter falls within the scope of this Court's constitutional and/or non-constitutional jurisdiction is not decisive. This Court retains the discretion to grant leave to appeal, the fundamental criterion being whether it is in the interests of justice to grant leave to appeal. The interests of justice criterion applies to both this Court's constitutional[18] and non-constitutional[19] appellate jurisdiction.

24. This Court has repeatedly emphasised that in evaluating whether to grant leave to appeal, the prospects of success, although not the only factor, is an important and fundamental aspect of the enquiry.[20]

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[18] *S v Boesak* 2001 (1) SA 912 (CC) at paras 11 – 12 ('*Boesak*')

[19] *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* 2015 (3) SA 479 (CC) at para 30

[20] Boesak, at para 15. See also *De Lacy and Another v SA Post Office* 2011 (9) BCLR 905 (CC) at para 50; *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) at para 22

25. The relationship between prospects of success and interests of justice was explained by Yacoob J in *Minister of Home Affairs and Others v Tsebe and Others*[21]:

> "*I accept that the matter is of some importance but where, in a matter of public importance,* ***the judgment of a High Court is detailed and convincing it will ordinarily be in the interests of justice to grant leave to appeal only if there is a reasonable prospect that the High Court was wrong. We cannot ordinarily grant leave to appeal where the criticisms of a High Court judgment do not amount to prospects of success***."[22]

26. Section 167(3)(b)(ii) of the Constitution provides for this Court to grant leave to appeal if (a) the matter raises an arguable point of law; (b) that point is one of general public importance; and (c) the point ought to be considered by this Court.

27. It is accepted that the application for leave to appeal against orders 3 and 6 - but not orders 4, 5, 7 and 8[23] - raise arguable points of law, which are of general public importance.

28. However, it is submitted that an appeal against order 3 has no reasonable prospects of success and that it would accordingly not be in the interests of justice for this Court to consider the application for leave to appeal against these orders.

29. This Court has held that the interests of justice criterion applies equally to this Court's non-constitutional appellate jurisdiction in terms of section 167(3)(b)(ii) of the Constitution. In *Slipknot* Madlanga J stated:

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[21] *Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and Constitutional Development and Another v Tsebe and Others* (2012 (5) SA 467 (CC) ("*Tsebe*")

[22] Tsebe at para 89

[23] There are also no prospects of success against orders 4,5, 7 and 8, which is dealt with below.

> *"The interests of justice factor aims to ensure that the Court does not entertain any and every application for leave to appeal brought to it. Coming to this Court's non-constitutional appellate jurisdiction, the question arises: do interests of justice not come into the equation? I think they do. This is what the words "which ought to be considered by that Court" in section 167(3)(b)(ii) of the Constitution are directed at. If – for whatever reason – it is not in the interests of justice for this Court to entertain what is otherwise an arguable point of law of general public importance, then that point is not one that "ought to be considered by [this] Court".*[24]

Orders 3 and 6

30. The declaratory relief sought by the Respondents and granted by the High Court at order 3 related to the practice of Flemix debt collectors "requesting" debtors to agree in writing, in terms of section 45 of the Magistrates' Courts Act, to judgments and EAOs being issued against them in Magistrates Courts situated in areas other than those in which the debtors were residing or employed.

31. By way of example, all the individual applicants before the High Court live and work in Stellenbosch. The Flemix Applicants however sought and obtained (pursuant to written consents to jurisdiction signed by the debtors) judgments and EAOs against these individuals in Magistrates' Courts situated in Kimberley, Johannesburg, Hankey and Winburg. That can never be regarded as permissible.

32. 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*

[24] Slipknot at para 30

concurrent jurisdiction and in which the consumer resides or work or where the goods in question (if any) are ordinarily kept."

33. Section 91(2) of the National Credit Act prohibits a credit provider from directly or indirectly requiring or inducing a consumer to enter into a supplementary agreement **"or sign any document**"[25] (our emphasis) that contains a provision that would be unlawful if it were included in a credit agreement.

34. It is clear that the mischief which these sections of the National Credit Act aim to address is unfair and oppressive conduct in the form of a credit provider requiring a credit consumer to consent, for the purposes of debt enforcement proceedings, to the jurisdiction of a court, other than that in which the consumer resides or is employed. This is consistent with the overall purpose and objective of the National Credit Act, which this Court has held to be that of consumer protection.[26]

35. The words "*or sign any other document*" in section 91(2) are clear and unambiguous: it is a **prohibited practice** for a credit provider to **directly or indirectly** require a consumer to **sign any document**, (which would include the section 45 consent to judgment and EAO agreements used by the Flemix Applicants) if it contains a provision consenting to jurisdiction of a court other than that in which the consumer resides or is employed. Such a provision would be unlawful if included in a credit agreement.

[25] We note that at para 27.5 of its application for leave to appeal, Ms Jordaan, Flemix's deponent, purports to set out the wording of section 91 of the National Credit Act, but inexplicably leaves out the words "*or sign any document*" which appear in the section.

[26] *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) at para 40

36. The position taken by the Flemix Applicants in the High Court and in this Court, is that their conduct in "*navigating around*" courts that refused to grant their clients' judgments and EAOs was justifiable and that "*section 45 provided the solution*".

37. There are no prospects at all of this Court reversing the findings of the High Court that section 45 of the Magistrates' Courts Act may not be used for this purpose.

38. It is further submitted that there are no reasonable prospects of this Court concluding that the High Court erred by granting order 6 dismissing with costs the Flemix and ADRA counter-applications, which in form and effect sought the reverse[27] of the declaratory order granted by the High Court at order 3.

Order 4

39. At order 4, the High Court urged the Minister of Justice and Correctional Services, the Minister of Trade and Industry, the National Credit Regulator, the South African Human

[27] The relief sought in the ADRA counter-application was for an order "*Declaring that in any proceedings on a cause of action arising out of or based on an agreement governed by the National Credit Act 34 of 2005 already instituted or about to be instituted by a credit provider against a consumer in a magistrate's court other than the court of the district within which the consumer resides, carries on business or is employed, or where the goods in question (if any) or ordinarily kept, the credit provider and the consumer may in writing consent to the jurisdiction of such other court in terms of the provisions of section 45(1) of the Magistrates' Courts Act 32 of 1944 despite the provisions of sections 90(2)(a)(k)(vi)(bb) and 91(a) pf the National Credit Act 34 of 2005*."

The Flemix Applicants sought the following orders in their counter-application: "(*1) A declaratory order that all Magistrates' Courts are obliged to grant judgment in favour of credit providers who comply with the requirements of section 57 and 58 of the Magistrates' Courts Act, 32 of 19544 as read with the relevant provisions of the National Credit Act, 34 of 2005. (2) A declaratory order that consents to jurisdiction under section 45 of the Magistrates' Courts Act relating to judgments are valid and enforceable*."

Rights Commission, the Law Society and Advice Offices *"to take whatever steps they deem necessary to alert debtors as to their rights in terms of this judgment*."

40. It is noted that the Flemix Applicants do not appeal against order 1, which declared the EAOs obtained against the individual applicants unlawful and invalid. All of these orders were obtained in breach of section 65J of the Magistrates' Courts Act. Given that the Flemix Applicants conceded that these EAOs were invalid and unlawfully granted and that there is no appeal against order 1, it is unclear on what basis the Flemix Applicants appeal against order 4 made by the High Court. There are no prospects of this Court reversing or materially altering order 4.

Order 5

41. There are no prospects of this Court reversing the High Court's order dismissing the application to strike out the two University of Pretoria research reports. The reports were not tendered to prove the truth of their contents but to show that concerns exist regarding the implementation of EAOs.[28]

42. The proper way for ADRA to counteract the conclusions and views expressed in the two University of Pretoria Reports was to challenge, on affidavit, the methodology and conclusions in the reports. It should be noted that in its replying affidavit in the counter-application, ADRA had the opportunity to challenge the methodology and findings of the research reports. This was not done.

[28] See fn 13 above

Order 7

43. Order 7 directed ADRA and the Flemix Applicants to pay the Respondents' costs, including the costs of two counsel, jointly and severally. There are no reasonable prospects of this Court concluding that having successfully vindicated their constitutional rights, the University of Stellenbosch Legal Aid Clinic Respondents would not be entitled to their costs and that order 7 was wrongly granted.

Order 8

44. The High Court found that the Flemix Applicants forum shopped for courts that would entertain and grant applications for judgment and EAOs and that this compromised the debtors rights of access to courts and equal protection of the law.[29]

45. The Flemix Applicants contend that they were justified "*in vindicating their rights of access to courts*" by "*navigating around*" Magistrates' Courts which "*made it impossible*" for them to obtain judgments and EAOs.[30] The remedy available to the Flemix Applicants if they were aggrieved by these decisions of the Magistrates' Courts is to review the proceedings or appeal the judgment or order to a higher court.

[29] Judgment, para 6

[30] Flemix Application for Leave to Appeal, para 38

46. Instead, the Flemix Applicants utilised the provisions of section 45 of the Magistrates' Courts Act for a purpose for which it is not intended (ie to circumvent or "*navigate around*" certain Magistrates' Courts). It is submitted that there are no reasonable prospects of this Court reversing or materially altering order 8.

Conclusion

47. Any suggestions of convenience or complaints of the appeals against orders 3 to 8 meandering through the court system are both misplaced. Unsuccessful parties do not enjoy a right to an appeal. On the contrary, when a party is unsuccessful in litigation and if no prospects of success exist in respect of an appeal against the judgment that is generally the end of the matter. No appeal lies.

48. It is submitted that it is not in the interests of justice to grant direct access or a direct appeal in respect of orders 3 to 8 as an appeal against these orders has no reasonable prospects of success,[31] and therefore orders 3 to 8 ought not to be considered by this Court.

ANTON KATZ SC
SHELDON MAGARDIE
Counsel for the Respondents
Chambers, Cape Town
10 September 2015

[31] Orders 4, 5, 7 and 8 additionally are not arguable matters of law, which are of general public importance

CONSTITUTIONAL COURT OF SOUTH AFRICA

In the matter between:	CASE NO. CCT127/15
ASSOCIATION OF DEBT RECOVERY AGENTS NPC	Appellant/Applicant
and	
THE UNIVERSITY OF STELLENBOSCH LEGAL AID CLINIC	First Respondent
VUSUMUZI GEORGE ZEKETHWANA	Second Respondent
MONIA LYDIA ADAMS	Third Respondent
ANGELINE ARRISON	Fourth Respondent
LISINDA DORRELL BAILEY	Fifth Respondent
FUNDISWA VIRGINIA BIKITSHA	Sixth Respondent
MERLE BRUINTJIES	Seventh Respondent
JOHANNES PETRUS DE KLERK	Eighth Respondent
SHIRLY FORTUIN	Ninth Respondent
JEFFREY HAARHOFF	Tenth Respondent
JOHANNES HENDRICKS	Eleventh Respondent
DOREEN ELAINE JONKER	Twelfth Respondent
BULELANI MEHLOMAKHULU	Thirteenth Respondent
SIPHOKAZI SIWAYI	Fourteenth Respondent

NTOMBOZUKU TONYELA	Fifteenth Respondent
DAWID VAN WYK	Sixteenth Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Seventeenth Respondent
MINISTER OF TRADE AND INDUSTRY	Eighteenth Respondent
NATIONAL CREDIT REGULATOR	Nineteenth Respondent
MAVAVA TRADING 279 (PTY) LIMITED	Twentieth Respondent
ONECOR (PTY) LIMITED	Twenty First Respondent
AMPLISOL (PTY) LIMITED	Twenty Second Respondent
TRIPLE ADVANCED INVESTMENTS 40 (PTY) LIMITED	Twenty Third Respondent
BRIDGE DEBT (PTY) LIMITED	Twenty Fourth Respondent
LAS MANOS INVESTMENTS 174 (PTY) LIMITED	Twenty Fifth Respondent
POLKADOTS PROPERTIES 172 (PTY) LIMITED	Twenty Sixth Respondent
MONEY BOX INVESTMENTS 232 (PTY) LIMITED	Twenty Seventh Respondent
MARAVEDI CREDIT SOLUTIONS (PTY) LIMITED	Twenty Eighth Respondent
ICOM (PTY) LTD	Twenty Ninth Respondent
VILLA DES ROSES 168 (PTY) LIMITED	Thirtieth Respondent
MONEY BOX INVESTMENTS 251 (PTY) LIMITED	Thirty First Respondent
TRIPLE ADVANCED INVESTMENTS 99 (PTY) LIMITED	Thirty Second Respondent

FLEMIX & ASSOCIATES INCORPORATED ATTORNEYS	Thirty Third Respondent

And in the matter between:

MAVAVA TRADING 279 PROPRIETARY LIMITED	First Appellant / Applicant
ONECOR PROPRIETARY LIMITED	Second Appellant/ Applicant
AMPLISOL PROPRIETARY LIMITED	Third Appellant/ Applicant
TRIPLE ADVANCED INVESTMENTS 40 PROPRIETARY LIMITED	Fourth Appellant / Applicant
BRIDGE DEBT PROPRIETARY LIMITED	Fifth Appellant/ Applicant
LAS MANOS INVESTMENTS 174 PROPRIETARY LIMITED	Sixth Appellant/ Applicant
POLKADOTS PROPERTIES 172 PROPRIETARY LIMITED	Seventh Appellant/ Applicant
MONEY BOX INVESTMENTS 232 PROPRIETARY LIMITED	Eighth Appellant/ Applicant
ICOM PROPRIETARY LIMITED	Ninth Appellant/ Applicant
VILLA DES ROSES 168 PROPRIETARY LIMITED	Tenth Appellant/ Applicant
MONEY BOX INVESTMENTS 251 PROPRIETARY LIMITED	Eleventh Appellant/ Applicant
TRIPLE ADVANCED INVESTMENTS 99 PROPRIETARY LIMITED	Twelfth Appellant/ Applicant
FLEMIX & ASSOCIATES INCORPORATED	Thirteenth Appellant/ Applicant

and

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

THE NATIONAL CREDIT REGULATOR Twentieth Respondent

ASSOCIATION OF DEBT RECOVERY AGENTS NPC Twenty First Respondent

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WRITTEN SUBMISSIONS IN RESPONSE SUBMISSIONS FILED ON BEHALF OF THE STELLENBOSCH LEGAL AID RESPONDENTS

INTRODUCTION

1. In the written argument that we prepared in response to paragraph 4 and in accordance with paragraph 5 of the directive dated 27 August 2015, we stated our understanding of the nature of the present enquiry, namely that it is not an invitation to apply for leave to appeal but a preliminary investigation into the jurisdiction of the Constitutional Court. The question of prospects of success on appeal thus does not enter the picture. The Legal Aid Clinic has approached the mater from the perspective that the prospects of success is the main yardstick by which the directive must be answered as if this is an application for leave to appeal. We believe that the Legal Aid Clinic is wrong in its approach and we persist with the view that the prospects of success will only be relevant once the right to apply for leave to appeal has been

afforded and leave to appeal and the appeal itself are argued. Apart from the view that the prospects of success are irrelevant on the wording of the directive, there is also a practical reason why the Constitutional Court should not decide the present question on the basis of the ultimate prospects of success namely that, should the right to appeal be refused on the unexplored prospects yardstick, there would be no prospect of the High Court favourably considering any application for leave to appeal.

2. On the Legal Aid Clinic's approach the questions posed in the directive are collapsed into an application for leave to appeal. Although we quarrel with this methodology, we believe that it is nevertheless prudent to summarise the arguments that we presented in the High Court in response to the Legal Aid Clinic's attack to demonstrate that the prospects are rather that the Constitutional Court will upend or modify the High Court's orders 3 to 8. The merits argument set out below is but a summary of our arguments and not our actual arguments. The arguments that we presented to the High Court were comprehensive, fact and pleading specific and referred to the evidence contained in the affidavits. Without the evidence, the arguments can only be perfunctory.

3. Before sketching the outlines of our argument we must again stress that orders 3 to 8 of the High Court have caused uncertainty in the practices of collection attorneys and magistrates courts throughout South Africa. There is also uncertainty about the effect of the orders on judgments that were obtained on consents given in terms of section 45 of the Magistrates' Courts Act, 32 of 1944 prior to the High Court making the said orders. Should the orders of the High Court thus not be set aside or modified on appeal, the Constitutional Court should nevertheless declare that the orders do not operate ex tunc so that judgments and orders obtained on section 45 consents prior to the High Court judgment are valid and enforceable. Whatever its final decision on the merits may be, it is imperative for the Constitutional Court to grant the right to apply for leave to appeal, to consider the matter and to at the very least declare that the orders made by the High Court do not invalidate judgments obtained by section 45 consents.

4. It is also necessary to note that the Minister of Justice and Correctional Services has changed his approach to the matter. Whereas the Minister responsibly adopted a neutral position in the

High Court proceedings because the evidence did not support the section 45 relief, he now supports the Legal Aid Clinic's approach.

THE FLEMIX APPLICANTS' ARGUMENT

5. The Flemix applicants approach the debate from the perspective of the clear meaning of the words used in section 45 of the Magistrates' Courts Act. The section reads:

> "**45 Jurisdiction by consent of parties**
>
> (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 contemplate in the proviso to subsection (1), shall be null and void."

6. The section thus allows for a debtor to consent in writing to the jurisdiction of a magistrate's court that would otherwise not have jurisdiction if the consent is given with reference to particular proceedings. In other words, section 45 is triggered only once a cause of action has arisen (such as a breach of contract) and court proceedings are about to be instituted or have been instituted.

7. Sections 90 and 91 of the National Credit Act, 34 of 2005 do not impact upon section 45 because sections 90 and 91 regulate only the contents of credit agreements and not their execution or enforcement. As section 45 of the Magistrates' Courts Act arises only at the time of judicial proceedings, it is not in conflict with the National Credit Act sections.

THE LEGAL AID CLINIC'S ARGUMENT

8. As stated in the affidavit in support of leave to appeal, there were compelling arguments advanced on behalf of the Flemix applicants in response to the Legal Aid Clinic's arguments, none of which

were issuably dealt with in the judgment of the court a quo.[1] The response to the Legal Aid Clinic's arguments (and which has reasonable prospects of success) proceeded along the following lines:

8.1 Section 90(2)(k)(vi)(bb) of the National Credit Act provides that a credit agreement must not contain an unlawful provision and a provision of a credit agreement is amongst other things unlawful if it expresses, on behalf of the debtor, consent to jurisdiction of any court seated outside the jurisdiction of a court having concurrent jurisdiction and in which the debtor resides or works (or where the goods that were purchased in terms of a credit agreement are usually kept).

8.2 This section regulates at the credit agreement only and not regulate the events that take place after the credit agreement has been entered into. It merely precludes a consent to jurisdiction undertaking being contained in a credit agreement, which is indeed also precluded by section 45 of the Magistrates' Courts act.

[1] Affidavit in support of leave to appeal on behalf of Flemix: par 28.

8.3 The words of the subsection are clear and unambiguous. They do not prevent a debtor who entered into a credit agreement, which is subject to the National Credit Act and which does not contain a submission to the jurisdiction of a court other than the court that normally has jurisdiction over the person of the debtor in the territorial sense, to enter into an agreement whereby the consumer agrees to the jurisdiction of a court that does not have jurisdiction in the territorial sense. The agreement on jurisdiction can only be entered into as and when judicial proceedings are about to be instituted against the debtor.

8.4 Section 91 of the National Credit Act provides that a creditor must not directly or indirectly require or induce a debtor to enter into a supplementary agreement or sign any document that contains a provision that would be unlawful if it were to be included in a credit agreement. A consent to jurisdiction is not signed by a debtor being “induced” or “required” to sign such agreements, nor does section 45 of the Magistrates’ Courts Act apply to such situations. A consent to jurisdiction can be entered into only ad valvas curiae, has nothing to do

with the contents of the credit agreement and accordingly section 91 of the National Credit Act is not implicated.

8.5 It is in any event submitted that any inducement question is fact sensitive and can only have the consequence of a specific consent to jurisdiction agreement being set aside on the basis that the creditor was "required" or "induced" thereby to conclude the credit agreement. This is a factual question that can be decided only ex post facto and that cannot give rise to a declaratory order of the kind provided in order 3 of the court a quo. It is submitted that this interpretation is supported by section 2(7) of the National Credit Act.

9. We submit that in addition to the aforegoing, there is a reasonable prospect that on the evidence[2], the Constitutional Court will find that the relief sought by the Flemix respondents in relation to the counter-application ought to be granted.

Orders 4, 7 and 8

10. If the submissions made in relation to orders 3 and 6 are accepted, they will, we submit, result in orders 4, 7 and 8 also being

[2] Affidavit in support of leave to appeal on behalf of Flemix: par 32.

overturned. We accordingly submit that there is also a reasonable prospect of success in relation to those orders.

11. In any event we submit that the Legal Aid Clinic is wrong in its assertion that order 4 is consequent on order 1.[3] It is submitted that on any reading of the judgment and orders of the court a quo order 4 is not consequential upon order 1. Order 4 states, in terms, that its objective is to alert debtors "as to their rights in terms of this judgment"; there is clearly no connection between it and order 1. Order 7 is directly implicated by virtue of the confirmation proceedings.

SUBMISSION

12. We accordingly persist in our central submission that the Constitutional Court has jurisdiction to consider the application for leave to appeal against orders 3 to 8 of the High Court in terms of section 167(3)(b) of the Constitution and we now also submit that it is indeed in the interests of justice to grant direct access to the Constitutional Court.

[3] Submissions on behalf of the Stellenbosch Respondents: par 40.

P F LOUW SC

KARRISHA PILLAY

Chambers
18 September 2015

WERKSMANS ATTORNEYS
CAPE TOWN

Per: LOUIS DU PREEZ
18 September 2015

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CONSTITUTION HILL

CCT Case No. 127/15

WCHC Case No. 16703/14

In the matter between:

THE UNIVERSITY OF STELLENBOSCH LEGAL AID CLINIC AND 12 OTHERS	Confirmation Applicants

And

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND 17 OTHERS	Confirmation Respondents

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CONFIRMATION APPLICANTS' WRITTEN SUBMISSIONS:

APPLICATION FOR CONFIRMATION

TABLE OF CONTENTS

I INTRODUCTION

1. This is written argument in support of an application for confirmation arising from an order of constitutional invalidity ('the High Court order") made by Desai J pursuant to a judgment handed down in the High Court, Western Cape Division on 6 July 2014.[1]

2. At paragraph 2 of its order, the High Court declared the words "*the judgment debtor has consented thereto in writing*" in section 65J(2)(a) of the Magistrates' Courts Act 32 of 1944 ("the MCA") and section 65J(2)(b)(i) and section 65J(2)(b)(ii) of the MCA ("the impugned legislative provisions"), to be inconsistent with the Constitution of the Republic of South Africa, 1996 ("the Constitution") and invalid to the extent that they fail to provide for judicial oversight over the issuing of an emolument attachment order against a judgment debtor.[2]

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1 Vol 24: pp 2035 – 2065. The judgement is reported as University of Stellenbosch Legal Aid Clinic and others v Minister of Justice and Correctional Services and others (South African Human Rights Commission as amicus curiae) [2015] 3 All SA 644 (WCC)

2 Vol 24: pp 2066 - 2069

3. Paragraph 2, being an order concerning the constitutional validity of an Act of Parliament, requires this Court to make the final decision on whether the impugned legislative provisions are constitutional before it has any force.[3]

4. This application is made pursuant to sections 172(2)(*a*) and (*d*) of the Constitution and Rule 16(4) of the Rules of this Court for confirmation of the declaration of invalidity. The Confirmation Applicants contend that the reasoning and conclusions of the High Court are correct and paragraph 2 of the High Court order should be confirmed.

5. The directions issued by the Chief Justice on 23 September 2015[4] indicate that three applications are to be heard by this Court on 3 March 2016.

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[3] Section 167(4) of the Constitution:
"(5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force."

[4] Vol 26: pp 2031 – 2310

6. The first is an application for confirmation of the declaration of constitutional invalidity made at paragraph 2.[5] The second is an application for leave to appeal by the Association of Debt Recovery Agents NPC ("ADRA").[6] The third is an application for leave to appeal by Mavava Trading 275 (Pty) Ltd and twelve other respondents[7], whom will collectively be referred to as "*the Flemix Respondents*".

7. The directions dated 23 September 2015 require the parties to lodge written argument which must include argument on "*the merits of the applications for leave to appeal*."[8]

8. Confirmation proceedings in terms of section 172(2)(a) of the Constitution are distinct from an appeal or an application for leave to appeal to this Court.[9] The failure of the impugned legislative provisions to require judicial oversight in the issuing of emolument attachment orders ("EAOs") is the basis for the order of constitutional invalidity made at paragraph 2.

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5 Directions dated 23 September 2015, para 2 (a)
6 Directions dated 23 September 2015, para 2(b)
7 Directions dated 23 September 2015, para 2(b)
8 Directions dated 23 September 2015, para 6
9 President of the Republic of South Africa v South African Rugby Football Union and Others 1999 (2) SA 14 (CC) at para 36

9. It is this order alone which forms the subject matter of the confirmation proceedings and this written argument.

10. At this stage the merits of both the ADRA and Flemix applications for leave to appeal, which relate to orders other than the order of constitutional invalidity made at paragraph 2, are not considered. Submissions on the applications for leave to appeal and the merits of those appeals will be lodged in due course in accordance with paragraph 6 (c) of the directions.

11. The structure of this written argument is:

    11.1 **Part I** contains the introduction;

    11.2 **Part II** describes the factual background;

    11.3 **Part III** sets out the applicable statutory scheme for the collection of debt by means of emolument attachment orders;

11.4 Part **IV** describes the potential for abuse of the emolument attachment order mechanism during the civil debt collection process;

11.5 **Part V** deals with the constitutionality of the impugned legislative provisions; and

11.6 **Part VI** addresses the question of an appropriate remedy.

I THE BACKGROUND TO THE APPLICATION

12. The High Court described the facts which resulted in the application as facts which "*give rise to significant disquiet, if not alarm*."[10]

13. The Second to Sixteenth Applicants ("the individual applicants") are a group of workers employed mainly as general workers at the lower end of the wage scale. Their occupations include working on farms and

[10] Vol 24: p 2037

working as cleaners and security guards.[11]

14. A number of the individual applicants are unemployed. Those who are employed support themselves and their families on salaries of between R1200.00 and R7000.00 per month.[12] Except for three applicants who reside in Paarl or Macassar, they are all resident in Stellenbosch, Western Cape.

15. The individual applicants are all clients of the First Applicant, the University of Stellenbosch Legal Aid Clinic ("the Legal Aid Clinic"). The Legal Aid Clinic provides indigent members of the public with free legal assistance and advice on financial literacy and debt relief. The Legal Aid Clinic assists hundreds of people every month with advice in respect of EAOs against their salaries and wages. Most of the Legal Aid Clinic's clients are farmworkers employed on farms in the Cape Winelands area and low wage earners in the towns of Stellenbosch and Paarl.[13]

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11 Vol 1: pp 21 – 22.
12 The salaries of the individual applicants appear in the table at Vol 1, p 43.
13 Vol 1: pp. 15 – 16, paras 15 – 17.

16. The individual applicants approached the Legal Aid Clinic for assistance after they had defaulted on payment of loans, in a number of cases carrying interest rates of 60% per annum[14], which were granted to them by SA Multiloan, a 'loan originator' which previously operated in Stellenbosch, Western Cape Province.[15] SA Multiloan had granted a number of the individual applicants loans in respect of which the monthly repayments exceeding 50% of that individual's monthly income.[16]

17. At the time when it approved these loans to the individual applicants, SA Multiloan was obliged by section 81 of the National Credit Act 24 of 2005 ("the NCA") to prevent the granting of reckless credit by taking reasonable steps to assess a proposed consumer's existing financial means and obligations before entering into a credit agreement.[17]

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14 See for example Vol 5: p 352, line 11, p 419, line 11; Vol 6: p 447, line 23.

15 Vol 5: p 335, para 5.

16 Some examples are set out at paragraphs 20 to 23 of these submissions.

17 Section 81(2) of the NCA requires a credit provider to take reasonable steps to assess inter-alia the proposed consumer's "*existing financial means, prospects and obligations.*"

18. The 'affordability assessment' which SA Multiloan apparently conducted was however perfunctory in some cases[18] and non-existent in others.[19]

19. In the case of the fourth applicant, SA Multiloan granted her a loan of R7,982.00 to be repaid in six instalments of R1,966.00 per month. Her monthly net income at the time was R3,759.82.[20] The sixth applicant's disposable monthly income was recorded by SA Multiloan to be R4,618.01. She was granted a loan of R7982.00, repayable in six instalments of R1,985.00 per month.[21]

20. The eighth applicant's monthly net income was R2,260.00. SA Multiloan granted him a loan of R6,280.00, to be repaid in monthly instalments of R1,574.00 per month.[22]

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18 The second applicant's "affordability assessment" (Vol 5: p 344) records his sole expense as "groceries" of R50.00 per month. The sixth applicant's "affordability assessment" (Vol 18: 1506) states that her only expense is also "groceries" of R100.00 per month.

19 The "affordability assessments" in respect of the fourth applicant (Vol. 18: p 1488) and fifteenth applicant (Vol 8: p 632) record that these applicants have no monthly expenses at all.

20 Vol. 18: pp 1571 – 1572.

21 Vol. 18: pp 1589 – 1591.

22 Vol. 18: pp. 1607 – 1608.

21. SA Multiloan recorded the ninth applicant's disposable monthly income to be R4,929.16. She was granted a loan of R7,982.00, repayable in six instalments of R1,985.00 per month.[23]

22. The fourteenth applicant's monthly disposable income at the time of her loan application was R1,221,53. SA Multiloan granted her a loan of R1,842.00, to be repaid in six monthly instalments of R513.00.[24]

23. The individual applicants were unable to repay the loans as required.

24. The individual applicants described, in what follows, the 'modus operandi' or certain common features of the process by which debt collectors arrived at their places of employment and homes to collect payment on the loans on which they had defaulted.[25]

25. An unknown man would arrive unannounced at either the workplace or the home of one of the individual applicants. He would not present himself with a business card and if he did introduce himself, it was done in such a way that the individual applicant cannot recall his

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[23] Vol 18: pp 1528 – 1530.
[24] Vol 18: pp. 1545 - 1547.
[25] Vol 1: pp 45 – 49, para 126 - 135.

details. He would usually be in a hurry and would inform the individual applicant that his visit concerned an outstanding debt and that he did not have time to discuss the matter.[26]

26. 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 applicant would sign the documents without properly reading or understanding their contents. The individuals were not provided with copies of anything they had signed.[27]

27. The individual applicants stated that they did not sign these documents,[28] that the contents of the documents were not explained to them,[29] and that they signed the documents presented to them under pressure from the Flemix debt collectors.[30]

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[26] Vol 1: p 45, para 126.1.

[27] Vol 1: p 46, para 126.2.

[28] Second Applicant (Vol 5: p 337, para 17; p. 338, paras 21 & 22, 26 & 27); Fifth Applicant (Vol 6, p. 430, para 13); Eighth Applicant (Vol. 2, p. 506, para 10); Sixteenth Applicant (Vol. 8: p. 642, para 8).

[29] Sixth Applicant (Vol 6: p. 455, para 7); Fifteenth Applicant (Vol 8: p 621, para 7).

[30] Third Applicant (Vol 5: p. 377, para 8); Fourth Applicant (Vol. 5: p. 390, para 7); Seventh Applicant (Vol. 6: p. 483, para 7); Ninth Applicant (Vol. 7: p. 521, para 6); Tenth Applicant (Vol. 7: p. 537, para 6); Eleventh Applicant (Vol. 7: p. 554, para 9); Twelfth Applicant (Vol 7: p. 571, para 6); Thirteenth Applicant (Vol 7: p. 588, para 7); Fifteenth Applicant (Vol. 8: p. 621, para 7).

28. According to Flemix, the debt collectors would never have acted in the manner alleged by the individual applicants because they have received extensive training as debt collectors, which requires them to "*at all times act scrupulously and honestly*".[31]

29. The Flemix debt collectors "*execute hundreds of instructions annually*" and were remunerated on a success fee basis, which meant that they were not paid for "*negative trace packs*".[32] The High Court found that the debt collectors "*were not independent*" and had a "*vested interest*" in obtaining as many signed consents to judgment as possible from debtors in order to be adequately remunerated.[33]

30. None of the debt collectors who deposed to affidavits in answer to the allegations of the individual applicants were able to actually recall their interactions with the individual applicants.[34] In the case of six written consent to judgments allegedly signed by the individual applicants, the witnesses in whose presence these documents were required to be

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31 Vol 13: p 1070, para 70, line 21.
32 Vol.13: p 1074, para 71.1.5.
33 Judgement: Vol 24: p 2044, para 28
34 Vol 19: pp. 1589, para 9.2.1; p 1609, para 14.2.1; p 16127, para 15.2.1; p 1615; para 16.2.1, p 1618, para 17.2.1; p 1631, para 12.1

signed, were not even physically present at the time when the individual applicants allegedly signed the documents.[35]

31. The Flemix debt collectors and so-called "witnesses" placed their signatures on the consent to judgement documents ex post facto, in breach of Rule 4(3) of the Magistrates Courts Rules.[36]

32. According to Flemix, a "*mini debt review*" in the form of "*a detailed income and expenditure statement"* was completed by the individual applicants during their consultations with the debt collectors.[37]

33. None of these alleged income and expenditure statements or any of the debtors' payslips (which the Flemix debt collector's training manual requires to be obtained from debtors),[38] were ever made available to the Court. No explanation was provided for the failure to do so.

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35 Vol. 19: para 11.2.7; para 13.3.2; p 1614, para 15.3.1.6; p 1617, para 16.3.1.5; p 1633, para 13.2.5; p 1705, para 18.1.5.

36 MC Rule 4(3) states that "*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*."

37 Vol 13: p 1076, para 74.4.

38 Vol 13: p 1076, para 74.4.

34. At a later stage when judgment was applied for and an EAO issued against the individual applicants, the documents submitted in support of the application for judgement include a notice of default purportedly in terms of section 129 of the NCA,[39] a demand purportedly in terms of section 58 of the MCA[40], 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 MCA[41] and a written consent to jurisdiction of a particular magistrates court.[42]

35. Judgements were subsequently granted against the individual applicants and EAOs issued against their earnings by clerks of court. Contrary to the provisions of section 65J(1)(a) of the MCA, none of the judgments and EAOs were granted in the area of jurisdiction of courts of the districts in which the employers of the individual applicants resided or carried on business.[43] The EAOs issued against the individual applicants were all issued by a clerk of court without any form of judicial oversight.

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39 See for example: Vol 5: p 351.

40 See for example: Vol 5: p 352.

41 See for example: Vol 5: p 352.

42 See for example: Vol 5: p 354.

43 Section 65J(1)(a) of the Magistrates Courts Act states that "*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*."

36. The table below details the individual applicants' incomes, the amount for which an EAO was issued and the clerk of court which issued the EAO.[44]

No	Applicant	Applicant's Income	EAO Amount issued[45]	Clerk of Court	Debtor's place of employment and residence
2.	Vusumzi Xekethwana	R2400.00	R807.00 R712.00 **R1519.00**	Kimberley Magistrates' Court	Stellenbosch
3.	Monia Adams	R5000.00	R1015.17	Johannesburg Magistrates' Court	Stellenbosch
6.	Fundiswa Bikitsha	R7000.00	R1000.00 R1200.00 **R2200.00**	Winburg Magistrates' Court	Stellenbosch
7.	Merle Bruintjies	R2600.00	R725.00 R670.89 **R1395, 89**	Kimberley Magistrates' Court	Stellenbosch
9.	Shirly Fortuin	R8000.00	R850.00	Kimberley Magistrates' Court	Stellenbosch
12.	Doreen Jonker	R2500.00	R1200.00	Kimberley Magistrates' Court	Stellenbosch
13.	Bulelani Mehlomakhulu	R3680.00	R670.00	Kimberley Magistrates' Court	Stellenbosch
16.	Dawid Van Wyk	R2600.00	R648.06	Stellenbosch Magistrates' Court	Stellenbosch

[44] Vol 1: p 43 – 44.

[45] The total amount of the EAO's appear in bold.

37. The Legal Aid Clinic and the individual applicants sought relief in the High Court, on their own behalf and in the public interest.[46]

38. The First Respondent, the Minister of Justice and Correctional Services, filed a notice to abide[47] (save insofar as opposing any costs order against him) and an explanatory affidavit dealing principally with the Applicants' constitutional challenge to section 65J(2)(a), section 65J(2)(b)(i) and section 65J(2)(b)(ii) of the MCA.[48]

39. The Second and Third Respondents, the Minister of Trade and Industry and the National Credit Regulator respectively, neither opposed the application nor participated in the proceedings in the High Court in any way.

40. The Flemix Respondents and ADRA, which had intervened in the proceedings, opposed the application and filed answering affidavits.

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46 Vol 1: pp 1 – 7.
47 Vol 20: p 1725 – 1729.
48 Vol 20: p 1730 – 1751.

III THE STATUTORY SCHEME APPLICABLE TO DEBT COLLECTION BY MEANS OF AN EMOLUMENTS ATTACHMENT ORDER

41. Section 57, section 58 and section 65J of the MCA create a civil debt collection and execution system based on a written consent to judgment by the debtor, an offer by the debtor to pay the debt in instalments, and the issuing of an emoluments attachment order executing payment of the debt against the debtor's earnings.

42. The effect of an EAO is to attach emoluments at present or in future owing or accruing to the debtor by his or her employer ("the garnishee"), to the amount necessary to cover the judgment and the costs of the attachment.[49] An EAO may be executed against the garnishee as if it were a court judgment.

43. The EAO obliges the garnishee to pay to the judgment creditor or his or her attorney specific amounts out of the emoluments of the debtor '*in accordance with the order of court laying down the specific instalments payable by the judgment debtor*', until the relevant

[49] Section 65J(1)(b)(i) of the MCA.

judgment debt and costs have been paid in full.[50]

44. The garnishee is obliged by a court order (the EAO) to deduct the amount stipulated from the debtor's earnings. That order stands, and the deductions in terms of an EAO must be made unless the order is set aside or varied by a court in terms of section 65J(6) of the MCA. The order made against the garnishee may, and invariably is, issued to the garnishee without any prior notice to the garnishee.

45. Section 65J(1) requires an EAO 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.'* An EAO may not be issued from any court other than the court of the magisterial district in which the judgment debtor's employer resides, carries on business or is employed.

[50] Section 65J(1)(b)(ii) of the MCA.

46. An EAO may only be issued in three circumstances:

46.1 First, where the debtor has consented to an EAO in writing;[51]

46.2 Second, where the court has so authorised, whether on application to the court or otherwise, and such authorisation has not been suspended;[52]

46.3 Third, where the judgement creditor has complied with the requirements of section 65J(2)(b)(i) and (ii) of the MCA.[53]

47. Section 65J(6) and (7) of the MCA provide for the rescission or amendment of an EAO in certain circumstances.

48. If after service of an EAO it is shown that the debtor, after satisfaction of the EAO, will not have sufficient means for his own and his dependants' maintenance, the court must rescind the EAO or amend it

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51 MCA Section 65(J)(2)(a).
52 MCA Section 65(J)(2)(a).
53 MCA Section 65(J)(2)(b)(i) and (ii).

in such a way that it will affect only the balance of the emoluments of the judgment debtor over and above such sufficient means.[54]

49. Section 65J(7) provides that any EAO 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.

50. The EAO regime set up under section 65J of the MCA does not require a court, as opposed to a clerk of court, to issue an EAO where the judgment debtor has consented thereto in writing or the provisions of section 65J(2)(b) are applicable.

IV POTENTIAL FOR ABUSE OF EAOs

51. Two reports by the University of Pretoria Law Clinic relating to the incidence of an undesirable practices relating to garnishee orders (EAOs) were introduced into evidence in the High Court.[55]

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54 Section 65J(6)

55 Vol 2: p 78 – 143; Vol 3: p 144 – 220; Vol 4: p 221 – 324.

52. The University of Pretoria Law Clinic reports were not relied on to prove the truth of their contents. They were introduced to provide a context to the interpretation of the impugned provisions, to demonstrate that concerns exist in relation abuse, or at the very least, potential abuse of EAO's in South Africa.[56] ADRA opposed the admission of the two reports into evidence and unsuccessfully applied for their striking out.[57]

53. The University of Pretoria reports document shortcomings in the EAO process, alleged abuses of the rights of debtors who are subject to EAOs and the consequences of the exclusion of judicial oversight from the granting of and determination of deductions to be made in terms of an EAO.[58] The reports provide an important context to the interpretation of the impugned provisions, by illustrating the potential impact of these provisions on debtors.

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56 Vol 1: p 51, para 145.

57 Vol 23: p 1972 – 1976.

58 The 2008 UP Law Clinic Report stated at p 9 (Vol 2: p 86, line 3) 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***." (own emphasis).

54. It is submitted that the reports may assist the Court in understanding more fully the factual context against which this case is to be determined. Whether the facts underlying the reports are true or not is not relevant.

55. This Court has repeatedly emphasised the importance of context.[59] This was pivotal in *Alexkor*[60] and *Bhe*.[61] Interpretation *"will often necessitate close attention to the socio-economic and institutional context in which a provision under examination functions. In addition it will be important to pay attention to the specific factual context that triggers the problem requiring solution"*.[62]

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59 Zondi v MEC for Traditional and Local Government Affairs and Others 2005 (3) SA 589 (CC); Dawood and Another v Minister of Home Affairs and Others; Shalabi v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC); Mohlomi v Minister of Defence 1997 (1) SA 124 (CC); Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project and Others v Minister of Home Affairs 2006 (1) SA 524 (CC).

60 In Alexkor Ltd and another v The Richtersveld Community and others 2004 (5) SA 460 (CC) the contextual approach was pivotal to this Court's finding that the Precious Stones Act was discriminatory, notwithstanding its racially neutral language, in the context of a system of registered title for white people and unrecognised indigenous ownership by black people.

61 In Bhe and others v Magistrate, Khayelitsha, and others (Commission for Gender Equality as amicus curiae); Shibi v Sithole and others; South African Human Rights Commission and another v President of the Republic of South Africa and another 2005 (1) SA 580 (CC) at para 61, it was held that in an examination of the provisions of the Black Administration Act, "*section 23 cannot escape the context in which it was conceived"*.

62 South African Police Service v Public Servants Association obo Barnard 2007 (3) SA 521 (CC) at para 20.

56. In *Coetzee*[63], this Court took into account South Africa's context of poverty and illiteracy when declaring civil imprisonment of debtors to be unconstitutional.[64]

57. The context in this case, the potential abuse of EAOs and investigations into allegations of actual abuse of EAOs, is demonstrated by the two University of Pretoria reports. The context is relevant also to the question of remedy.

58. A contextual and purposive approach to statutory interpretation is not limited merely to textual context. In *SAPS*[65], this Court stated that section 39(2) of the Constitution:

> "*must be understood as responding to our painful history and facilitating the transformation of our society so as to heal the divisions of the past, lay the foundations for a democratic and open society, improve the quality of life for all and build a united and democratic South Africa*."

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63 Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth Prison and Others 1995 (4) SA 631 (CC).

64 Kriegler J pointed out in *Coetzee* at para 8 that "***the system at issue is used most often for the collection of small debts usually of those who are poor and either illiterate or uninformed about the law or both. In the nature of things they do not enjoy legal representation***."[64](emphasis added).

65 SAPS at para 19.

59. A court must therefore "*pay close attention to the socio-economic and institutional context in which a provision under examination functions*."[66]

60. In *Abahlali Basemjondolo Movement SA*[67], this Court considered the admissibility of a report by the Centre on Housing Rights and Evictions ("COHRE") documenting unlawful evictions and demolitions of shacks by a municipality. Moseneke DCJ stated:

> *"It is so that in an appropriate case, background material of the kind found in the COHRE Report may provide valuable context within which the interpretive exercise may occur. The lived experiences of claimants that speak to the impact of the impugned legislation may be relevant to its proper interpretation."*[68]

61. Similarly, in *Van De Merwe*[69], Moseneke DCJ explained that:

> *"It is so that ordinarily when a court is invited to decide a legal issue only on an agreed set of facts, it may not depart from the facts. However when the constitutional validity of a law or conduct is challenged by invoking one or more guarantees in the Bill of Rights, contextual analysis is often all important. The validity or otherwise of a law has implications that go well beyond the parties before court. It is a matter of public concern. For that reason a court is obliged, where appropriate, to consider the context, historical or social or textual, in which the*

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66 SAPS at para 20.

67 Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others 2010 (2) BCLR 99 (CC).

68 At para 96.

69 Van der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae) 2006 (4) SA 230 (CC) at para 66.

guarantees should be understood and the impugned law operates."

62. The mere fact that investigations have been conducted into allegations of abuse of EAOs and allegations that Magistrates' Court clerks of court lack the necessary knowledge and skill effectively and efficiently to administer these orders,[70] and that reports of abuse of EAOs have been brought to the attention of the Minister of Justice and Correctional Services,[71] is relevant.[72]

IV CONSTITUTIONALITY OF SECTION 65J(2)(a), SECTION 65(J)(2)(b)(i) AND SECTION 65J(2)(b)(ii) OF THE MCA

63. The enquiry into the constitutional validity of a statute is objective. As explained by this Court in *Ferreira*[73]:

"The answer . . . is that the enquiry is an objective one. A statute is either valid or 'of no force and effect to the extent of its inconsistency'. The subjective positions in which parties to a dispute may find themselves cannot have a bearing on the status of the provisions of a statute under attack. The Constitutional Court, or any other competent Court for that matter, ought not to restrict its enquiry to the position of one of the parties to a dispute in order to

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70 Vol 2: p 86, line 3 – 6.

71 Vol 20: p 1733, para 6

72 Tantoush v Refugee Appeal Board and Others 2008 (1) SA 232 at 240E; Kaunda and Others v President of the Republic of South Africa and Others 2005 (4) SA 235 (CC) at para 123.

73 Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC) at para 26.

determine the validity of a law. The consequence of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach."

64. The Applicants' challenge is directed at the legislative scheme[74] provided for in section 65J(2)(a), section 65J(2)(b)(i) and section 65(J(2)(b)(ii) of the MCA. The complaint is an objective attack on the constitutional validity of the impugned legislative provisions and is not directed at the administrative implementation of EAOs by clerks of court and magistrates in terms of the Magistrates Court Rules.

65. Section 65J(2) of the MCA provides:

"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 sand warning him or her that an emoluments attachment order will be issued if the

[74] The regulations to the legislative scheme may not be used to interpret the scheme. As stated by Cameron J at paragraph 62 of *Sebola, "**And since the Regulations cannot be used to interpret the Act, we are brought back to the provisions of the Act itself.**"*(emphasis added)

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."

66. The Flemix Respondents confirm that "*It is correct that an EAO by consent or through section 65J2(b) does not involve any form of prior enquiry by a court into whether the judgment debtor can afford the deductions to be made from their salaries in terms of the EAO. I have already explained the process that is to be followed in this regard. It is also correct that an EAO obtained through either of these two methods does not occur with any judicial oversight*."[75] (emphasis added).

67. Section 65J(2) of the MCA does not require or even contemplate judicial authorisation of an EAO against a judgment debtor who has consented thereto in writing or falls within the category provided for in

[75] Vol 4: p 1193, para 152.

section 65J(2)(b) of the MCA.

68. The ordinary grammatical meaning of section 65J(2)(a) and section 65J(2)(b) of the MCA and the use of the word "*unless*" means that judicial oversight over the issuing of an EAO against these judgment debtors is not required. There is therefore no legislative requirement provided for in the MCA generally or in the impugned provisions for a magistrate to oversee any part of the process of issuing an EAO at all.

69. The failure of section 65J(2)(a) and section 65J(2)(b) of the MCA to provide for judicial oversight over the issuing of an EAO against a judgement debtor who has consented to an EAO in writing or a judgement debtor who falls within the provisions of section 65J(2)(b) of the MCA, limits the constitutional right of access to courts,[76] the right not to be arbitrarily deprived of property[77] and the right to human dignity.[78]

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[76] Section 34: "*Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum*."

[77] Section 25(1) **"***No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property*."

[78] Section 10: **"***Everyone has inherent dignity and the right to have their dignity respected and protected.*"

Access to courts

70. The salary or wage of persons such as the individual applicants, who work in low paid and vulnerable occupations, is invariably their only asset and means of survival. Indeed, the Flemix Respondents state that "*the only realisable asset of debtor is usually his or her salary and it must be possible for judgment debtors to provide access to their salaries as source for the repayment of the debts."* [79]

71. This Court held in *Chief Lesapo*[80], *Jaftha*[81] and *Gundwana*[82] that the right of access to courts requires judicial control over statutory debt execution procedures against a person's property.[83] In *Chief Lesapo*, Mokgoro J stated:

> *"The judicial process, guaranteed by s 34, also protects the attachment and sale of a debtor's property, even where there is no dispute concerning the underlying obligation of the debtor on the strength of which the attachment and execution takes place. That protection extends to the circumstances in which property may be*

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79 Vol 13: p 1094, para 102.
80 Chief Lesapo v North West Agricultural Bank and Another 2000 (1) SA 409 (CC).
81 Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC).
82 Gundwana v Steko Development CC and Others 2011 (3) SA 608 (CC).

seized and sold in execution and includes the control that is exercised over sales in execution."[84]

72. In *Jafta,*[85] this Court held that section 66(1)(a) of the MCA violated section 26(1) of the Constitution to the extent that it allowed execution against the homes of indigent debtors, thereby resulting in loss of their security of tenure. Mokgoro J said the following:

> *"Judicial oversight permits a magistrate to consider all the relevant circumstances of a case to determine whether there is good cause to order execution. The crucial difference between the provision of judicial oversight as a remedy and the possibility of reliance on ss 62 and 73 of the Act is that the former takes place invariably without prompting by the debtor. Even if the process of execution results from a default judgment the court will need to oversee execution against immovables. This has the effect of preventing the potentially unjustifiable sale in execution of the homes of people who, because of their lack of knowledge of the legal process, are ill-equipped to avail themselves of the remedies currently provided in the Act."*

73. The powers of a Registrar of the High Court to declare the home of a debtor specially executable were declared unconstitutional in *Gundwana.* This Court held that the right of access to courts required

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84 At para 15

85 At para 55

judicial control over execution of a judgment debt against a person's home. Froneman J stated[86]:

> "*An evaluation of the facts of each case is necessary in order to determine whether a declaration that hypothecated property constituting a person's home is specially executable, may be made. It is the kind of evaluation that must be done by a court of law, not the registrar. To the extent that the High Court Rules and practice allow the registrar to do so, they are unconstitutional.*"

74. In *Zondi,*[87] this Court held that the right of access to courts was unjustifiably infringed by provisions of a provincial pounds ordinance. The ordinance had been applied to the impoundment of a herd of livestock belonging to Mrs Zondi, a poor widower. Her livestock were her only form of asset and means of support. The impounding scheme was declared to be unconstitutional, Ngcobo J holding that it denied the livestock owner the protection of the judicial process and supervision exercised by a court through its rules over the process of execution.[88]

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86 At para 49.
87 Zondi v MEC for Traditional and Local Government Affairs and Others 2005 (3) SA 589 (CC).
88 At para 125.

75. It is submitted that for three reasons, the principles established by this Court in *Chief Lesapo*, *Jaftha*, *Gundwana* and *Zondi*, apply with force to the enforcement of a judgement debt by execution against a person's earnings in terms of an EAO.

76. First, execution as a means of enforcement of a judgment debt, whether against a person's home, their property or their earnings, depends upon and directly implicates the judicial process. It could hardly be contended that a debtor's salary, in particular a poor debtor whose salary is their only asset, should enjoy any less protection in the debt execution process than that afforded to their home. Judicial oversight of execution against a debtor's earnings is necessary in order to prevent a debtor becoming impoverished through unjustifiable and excessive amounts being deducted from their earnings. Such oversight by a court of law is necessary notwithstanding that a debtor may have signed, at the instance of a debt collector and in potentially dubious circumstances, a written consent to an EAO.

77. Second, the depletion of a debtor's earnings as a consequence of it being attached under an EAO, may lead to the subsequent loss of other forms of property such as the family home or moveable assets owned by the debtor. The loss of 50% of a person's salary to an EAO, for example in the case of the second applicant,[89] could also result in the loss of one's liberty due to, for example, court ordered maintenance obligations.

78. Third, the depletion of a debtor's income as a result of excessive deductions in terms of an EAO, will most likely affect his or her children and deprive them of access to other socio-economic rights such as their constitutional rights to sufficient food, shelter and health care. The reality of these consequences emerges, for example, from a letter from Monia Adams, the third applicant, a single mother[90], requesting Flemix to reduce her EAO from R1015.00 to R150.00 per month because she had school going children and was looking after

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89 Vol. 2, p.338, para 20.

90 Goldstone J referred to the challenges faced by single mothers in *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1, noting at para 38 that "*there can be no doubt that the task of rearing children is a burdensome one. It requires time, money and emotional energy. For women without skills or financial resources, its challenges are particularly acute. For many South African women, the difficulties of being responsible for the social and economic burdens of child rearing, in circumstances where they have few skills and scant financial resources are immense.*"

her elderly parents. Flemix refused her request. They did however offer to reduce the EAO by R65.00.[91]

79. Flemix and ADRA however, contend that cases such as that of Ms Adams, reflect an "*archaic position*" and that there is in fact judicial oversight of the issuing of EAOs. The contention which they advance is that since 28 July 2014, amended Magistrate Court rules have been in place and there is thus extensive judicial oversight over EAOs, because although section 58 dictates that clerks of the court (not courts) shall issue judgments by consent, the MCA Rules now require clerks to refer National Credit Act cases to the court.[92]

80. ADRA and Flemix contend that it is not necessary for EAOs to enjoy judicial oversight because that function occurs at the section 58 stage (consent to judgment stage). The Flemix respondents argue that as a consequence of the decision in *Myambo*[93] and the July 2014 amendment to the Magistrates Courts Rules, "*there is extensive judicial oversight in the present EAO process.*"

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91 Vol. 2: p. 382.
92 Vol 13: p 1041; Vol 11: pp 895 – 899.
93 African Bank Limited v Additional Magistrate Myambo NO and Others 2010 (6) SA 298 (GNP)

81. It is submitted that the argument is without merit. The Applicants have brought a frontal constitutional challenge to the impugned legislative provisions, not a challenge to "*the present EAO process*".

82. The issue is whether section 65J(2)(a) and section 65J(2)(b) of the MCA require judicial oversight over the issuing of an EAO against a judgment debtor and if not, whether such failure is consistent with the Constitution.

83. Arguments relying on the amendments to the Magistrates Courts Rules in July 2014, are misplaced. Rules, including the Magistrates Courts Rules or regulations may not be used to interpret primary legislation.[94]

84. A further answer is that the right of access to courts is not infringed because section 65J(5), (6), (7) and 8(b) of the MCA contains safeguards for the implementation of an EAO against a judgment

[94] National Lotteries Board v Bruss and Others 2009 (4) SA 362 (SCA) at para 37, Moodley v Minister of Education and Culture 1989 (3) SA 221 (A) at 233E, Sekretaris Binnelandse Sake v Jawoodien 1969 (3) SA 413 (A) at 423C; Head of Department, Department of Education, Free State Province v Welkom High School and Another 2014 (2) SA 228 (CC) at para 65; Sebola and Another v Standard Bank of South Africa Ltd 2012 (5) SA 142 (CC) at para 62 and Rossouw and Another v First Rand Bank 2010 (6) SA 439 (SCA) at para 24

debtor.[95] Similar arguments were advanced in *Jaftha* in relation to provisions of the MCA which permitted a debtor to subsequently set aside or stay a warrant of execution. This Court held that this was insufficient to save the legislative scheme from unconstitutionality, Mokgoro J explaining that:

> "*The crux of section 62, for the purposes of this case, is that it allows a court to set aside or stay a warrant of execution that it has issued on good cause shown. This, however, places a burden on a debtor whose home has been subject to a warrant of execution to approach a court and show good cause why the warrant ought to be set aside. This being the case, the problem with the Minister's argument is that it overlooks the fact that many debtors in the position of the appellants are unaware of the protection offered by this section. Even where there is awareness, it would generally be difficult for indigent people in the position of the appellants to approach a court to claim protection. They are a vulnerable group whose indigence and lack of knowledge prevents them from taking steps to stop the sales in execution, as is demonstrated by the facts of this case*."[96]

Arbitrary deprivation of property

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[95] Vol 11: p 896, para 56.1

[96] At para 47. This finding was affirmed in *Gundwana* (at para 50) where Froneman J stated ***"And the registrar's power to refer the matter to open court, and a party's recourse on getting to know of a default judgment – once the horse has bolted – is a poor substitute for the initial judicial evaluation."*** *(*Emphasis added)

85. The approach towards arbitrary deprivations of property has been set out by this Court in *First National Bank*[97]. The following questions arise:

85.1 Does that which is taken away amount to property for purposes of section 25?

85.2 If so, has there been a deprivation of such property?

85.3 If there has, is that deprivation consistent with the provisions of section 25(1)?

85.4 If not, is such deprivation justified under section 36 of the Constitution?

86. The first two enquiries must be answered in the affirmative. A person's remuneration is a real and enforceable right and has obvious economic value.

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[97] First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC)

87. There can be no doubt that deductions from a judgment debtor's salary constitutes a deprivation of property.

88. A deprivation of property *"is 'arbitrary' as meant by s 25 when the 'law' referred to in s 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair"*.[98] The "*sufficient reason*" test requires that "*there must be an appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve. It is one that is not limited to an enquiry into mere rationality, but is less strict than a full and exacting proportionality examination.*"[99]

89. The failure of the impugned legislative provisions to provide for any form of judicial oversight of the issuing of an EAO against a judgment debtor who has consented in writing and a judgment debtor who falls within the category provided for in section 65J(2)(b) of the MCA, results in an arbitrary deprivation of property in breach of section 25(1) of the Constitution.

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98 First National Bank at para 100

99 First National Bank at para 98

90. With respect to the category of judgment debtors against whom an EAO is obtained in terms of section 65J(2)(b), no provision is made for any form of procedural fairness or prior notice to the debtor other than a registered letter. There is no requirement for the registered letter to actually come to the attention of the debtor, for the creditor to establish that it did or for the clerk of court to refuse to issue an EAO without proof of proper notice to the debtor. The impugned provisions confer far reaching powers on a clerk of court, to issue a court order attaching a debtor's earnings and means of support without any form of judicial oversight. It is submitted that this constitutes procedurally unfair and disproportionate deprivation of property.

Human dignity

91. The ability of people to earn an income and support themselves and their families is central to the right to human dignity.[100] Any legislation which permits the deprivation of means of support or impairs the ability of a person to access their socio-economic rights will constitute a limitation of the right to dignity.

[100] *South African Informal Traders Forum and Others v City of Johannesburg and Others* 2014 (4) SA 371 (CC) at para 31 ; *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA) at para 27.

92. The State has a duty to refrain from enacting law or conduct which results in debtors being left impoverished and facing a life of "*humiliation and degradation*"[101] through disproportionate attachment of their earnings by way of EAOs. This Court has affirmed that the State has a negative obligation imposed by section 7(2)[102] of the Constitution not to interfere with a person's access to existing socio-economic rights.[103]

93. The State must not only itself refrain from interfering with rights but must also take steps to prevent interference by private individuals. As Nkabinde J explained in *Juma Musjid:*[104]

> "*This Court, in Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, made it clear that socio-economic rights may be negatively protected from improper invasion. Breach of this obligation occurs directly when there is a failure to respect the right, or indirectly, when there is a failure to prevent the direct infringement of the right by another or a failure to respect the*

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101 *Watchenuka* at paras 27 – 32.

102 Section 7(2) of the Constitution requires the State to "*respect, protect, promote and fulfil the rights in the Bill of Rights*".

103 *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC) at para 46; *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 34.

104 *Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amici Curiae)* 2011 (8) BCLR 761 (CC) at para 58; *Allpay Consolidated Investment v CEO, SA Social Security Agency* 2014 (4) SA 179 at para 64.

existing protection of the right by taking measures that diminish that protection."

94. We submit that the absence of the requirement of judicial oversight in the impugned provisions, the effect of which is to permit a non-judicial officer to order attachment of a debtor's salary and thereby deplete that a debtor's means of support, intrude profoundly on the rights of debtors to human dignity.

LIMITATION

95. The applicants have established that failure of the impugned legislative provisions to require judicial oversight over the issue of an EAO infringe the right of access to court, the right not to be arbitrarily deprived of property and the right to have one's dignity respected and protected. Having established this infringement of fundamental rights, the onus lies on the parties relying on the impugned legislative provisions to establish, by way of evidence and argument, that the infringement is a justifiable limitation of these rights in terms of section 36 of the Constitution.

96. The Minister's explanatory affidavit[105] does not seek to justify a limitation of constitutional rights due to the absence of judicial oversight from the impugned legislative provisions. The Minister's contention is that EAOs issued by consent do not violate any fundamental right.

97. The Minister refers to statistics regarding the number of EAOs issued and states that the effect of requiring magistrates to be involved in the issuing of all EAOs would "*overburden the court rolls*."[106] The Minister's reference to resource constraints may be relevant to the question of an appropriate remedy following a declaration of constitutional invalidity, it does not however constitute a self-standing basis to justify the impugned provisions limitation of constitutional rights. Notably, the Minister abided and made no attempt in his affidavit to justify the impugned legislative provisions in terms of the criteria set out in section 36 of the Constitution.

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105 Vol 20: pp 1730 - 1751

106 Vol 20: p 1750

98. In any event, a plea of lack of capacity or resources constraints by the State is not a reason to justify the limitation of a fundamental right.[107]

99. The Flemix Respondents rely on a report by Mr Jeffrey ("the Econometrix Report") to support their argument that EAOs are indispensable to the credit industry. The Econometrix Report undertakes an analysis of the "*potential economic cost of abolishing Garnishee Orders*" and concludes *inter-alia* that "***If garnishees are banned*** *and the money is not collected, the annual economic impact is the loss to the GDP of the economy of between R708 million and R1.62 billion*."[108]

100. The conclusions drawn in the Econometrix Report are based on an evaluation of the economic consequences of "banning" or "limiting" EAOs. This is the central premise of the report. The relief sought by the applicants does not seek to abolish or ban EAOs.

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[107] Kiliko v Minister of Home Affairs and Others 2006 (4) SA 114 (C) at 126H; S v Jaipal 2005 (4) SA 581 (CC) at para 56

[108] Vol 15: p 1219 - 1327.H,

101. The Flemix Respondents accept that the relief which the applicants seek is not to abolish EAOs but rather to allow them only when issued by a court.[109]

102. Professor Nicolli Natrass, an internationally recognised expert on South African macroeconomic policy, deposed to an affidavit in which she took issue with the methodology and conclusions underlying the Econometrix Report. Professor Natrass concludes that "*the economic impact estimates in the Econometrix Report lack credibility in that they appear to be based on a limited and one sided model.*" Professor Natrass observes that "*requiring more comprehensive documentation in order to facilitate judicial oversight will generate incentives from microlenders to collect this kind of information from their clients before offering a loan and this is likely to reduce reckless lending. It may even reduce the burden on the Courts because there will be fewer bad debtors and hence fewer applications*."[110]

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109 Vol 14: para 104.

110 Vol 22: pp 1861 - 1893.

103. The Respondents have failed to demonstrate that the limitation of rights arising from the failure of the impugned legislative provisions to provide for judicial oversight, is reasonable and justifiable in terms of section 36 of the Constitution.

VI THE APPROPRIATE REMEDY

104. In *Fose*[111], Ackermann J explained the importance of an effective remedy for a violation of constitutional rights as follows:

> *"Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal."*

111 Fose v Minister of Safety and Security 1997 (3) SA 786 at para 69

105. The mandatory declaratory order which in terms of section 172(1)(1)(a) of the Constitution must be issued is that section 65J(2)(a), section 65J(2)(b)(i) and section 65J(2)(b)(ii) of the MCA unconstitutional and invalid to the extent that they fail to provide for judicial oversight over the issuing of an emolument attachment order against a judgment debtor.

106. In *Coetzee*, Kriegler J explained the following with regard to the remedy of severance:

> "*Although severability in the context of constitutional law may often require special treatment, in the present case the trite test can properly be applied: if the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The test has two parts: first, is it possible to sever the invalid provisions and second, if so, is what remains giving effect to the purpose of the legislative scheme?"*

107. The unconstitutionality of failing to require judicial oversight over the issuing of an EAO against a judgment debtor who has signed a written consent to an EAO, may be cured by the excising from section 65J(2)(a) the words, "*unless the judgment debtor has consented thereto in writing.*" The excision of these words from

section 65J(2)(a) will not undermine the legislative scheme, which in any event already requires court authorisation of an EAO in section 65 proceedings.

108. The provisions of section 65J(2)(b) are not capable of being subject to a surgical excision in the same manner as section 65J(2)(a). It would be appropriate for the Court to employ the remedy of notional severance to section 65J(2)(b), by making judicial authorisation of the issuing of an EAO a condition, in circumstances where a judgment creditor seeks to obtain an EAO against a judgment debtor in terms of section 65J(2)(b) of the MCA.

109. There is no reason to limit the retrospective operation of the declaration of invalidity nor is there evidence of dislocation or uncertainty which will result if the order of invalidity operates retrospectively. The constitutional invalidity of the impugned legislative provisions will not result in preceding judgments against debtors being rendered invalid.

110. No proper case has been made out by any of the Respondents to justify suspending an order of constitutional invalidity in respect of the impugned legislative provisions. The onus of justifying such a suspension order lies on the party who wishes to keep the unconstitutional provision alive.[112] Suspending an order of invalidity would deny relief to a significant numbers of debtors who are at risk of having EAOs issued against their salaries by a clerk of court.

111. The manner in which EAOs were obtained and executed against the individual applicants in this case, demonstrates why suspending an order of invalidity and thereby maintaining the absence of judicial oversight over the issuing of EAOs, would not be just and equitable.

ANTON KATZ SC

SHELDON MAGARDIE

Counsel for the Confirmation Applicants

Chambers, Cape Town

30 October 2015

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[112] Mistry v Interim Medical and Dental Council 1998 (4) SA 1127 (CC) at para 37.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO: 127/15
WCHC CASE NO: 16703/14

In the matter between:-

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

NTOMBOZUKO TONYELA	Fifteenth Applicant
DAWID VAN WYK	Sixteenth Applicant

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	First Respondent
MINISTER OF TRADE AND INDUSTRY	Second Respondent
NATIONAL CREDIT REGULATOR	Third Respondent
MAVAVA TRADING 279	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) LIMITED	Thirteenth Respondent
VILLA DES ROSES 168	Fourteenth Respondent

MONEY BOX INVESTMENTS 251	Fifteenth Respondent
TRIPLE ADVANCE INVESTMENTS 99	Sixteenth Respondent
FLEMIX & ASSOCIATED INCORPORATED	Seventeenth Respondent
ATTORNEYS	
ASSOCIATION OF DEBT RECOVERY AGENTS	Eighteenth Respondent
NPC	
SOUTH AFRICAN HUMAN RIGHTS COMMISSION	*Amicus Curiae* before the Court *a quo*

WRITTEN ARGUMENT ON BEHALF OF THE EIGHTEENTH RESPONDENT IN RESPECT OF THE APPLICANTS' APPLICATION FOR CONFIRMATION OF PARAGRAPH 2 OF THE ORDER MADE BY DESAI J ON 8 JULY 2015 AND IN RESPECT OF THE EIGHTEENTH RESPONDENT'S APPEAL AGAINST PARAGRAPHS 2 AND 7 OF THE SAID ORDER

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INTRODUCTION:

1. The Association of Debt Recovery Agents NPC ("ADRA") is the eighteenth respondent in the applicants' application for confirmation of paragraph 2 of the order made by Desai J ("the court *a quo*") on 8 July 2015. ADRA appeals against paragraph 2 of the order as well as against paragraph 7 thereof.[1] It does not persist in its appeal against paragraph 5

[1] In the alternative to ADRA's notice of appeal to this court against para 7 of the order, ADRA has applied for leave to appeal to this court against that paragraph. ADRA's notice of appeal appears in Vol 24, pp 2106-2120. ADRA's written submissions and supplementary written submissions in compliance with this court's directions dated 27 August 2015 (Vol 26, pp 2211-2215) appear in Vol 26, pp 2216-2227 and 2269-2285.

of the order.

2. Separate written argument which deals with the merits of ADRA's application for leave to appeal in respect of paragraphs 3, 6 and 7 of the order of the court *a quo* will, in compliance with the directions of this court dated 23 September 2015,[2] be filed simultaneously with this written argument.

3. This written argument deals with the confirmation application in respect of paragraph 2 of the order of the court *a quo* and ADRA's contingent appeal and also addresses the issue of retrospectivity of paragraphs 2 and 3 of the order of the court *a quo* in the event of this court confirming paragraph 2 and upholding paragraph 3 of that order.[3]

[2] Record, Vol 26, pp 2306-2310.
[3] Written argument in respect of paragraph 7 of the order of the court *a quo* is included in the separate written argument on behalf of ADRA on the merits of ADRA's application for leave to appeal. In this regard the court is referred to paras 54-61 of the separate written argument s v "Submissions in respect of costs".

SUMMARY:

4. In this written argument:

4.1 submissions will be made on the proper interpretation of the judgment and execution processes established by sections 57, 58 and 65 of the Magistrates' Courts Act 32 of 1944 ("the MCA") with particular emphasis on the scheme regulated by section 65J for the issue of emolument attachment orders ("EAO's") as a method of execution;

4.2 it will be demonstrated that in the issue of an EAO in respect of a judgment debt on a claim founded on any cause of action arising out of or based on an agreement governed by the National Credit Act 34 of 2005 ("the NCA"):

4.2.1 there does not exist the lack of judicial

oversight which formed the basis for the declarations of invalidity made by the court *a quo*;

4.2.2 the clerk of the court (in performing the administrative function of issuing an EAO by signing the document contemplated in section 65J(3) of the MCA), does not exercise a discretion in determining the deductions to be made by the garnishee from the judgment debtor's emoluments.

5. The application in the court *a quo* and the application for confirmation of paragraph 2 of the order of the court *a quo* concern credit agreements as defined in section 8 of the NCA. Those credit agreements require particular treatment in terms of the Magistrates' Courts Rules ("the MCR") for the grant of a judgment by consent. The extensive range of alternative causes of action which may give rise to a

judgment debt do not fall within the ambit of the issues arising in this application.[4]

6. The appropriate enquiry is the legitimacy of the systems which precede the formal issue of an EAO in terms of section 65J(3) of the MCA, namely:

6.1 the consent to judgment for the amount of the debt, and

6.2 the consent by the judgment debtor to an order that the judgment debt be paid *"in specified instalments"*.

7. The court *a quo* accepted the submissions presented to it by the confirmation applicants in concluding:[5]

"On the reasoning in ***Gundwana****,*[6] *judicial oversight over the*

[4] Record, Vol 24, p 2046, para 34 and p 2061, para 87.
[5] Record, Vol 24, p 2060, para 84.
[6] *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC) ("*Gundwana*").

issue of an EAO must be mandatory (rather than being subject to the discretion of the court) and must occur when the execution order is issued (not subsequently, when an attempt might be made to have the execution order varied or set aside).”

8. It will be demonstrated that the aforegoing propositions and the conclusions derived therefrom are incorrect and are based on an erroneous analysis of the relevant provisions of the MCA.

9. In summary, the submissions on behalf of ADRA in opposition to the application for confirmation and in support of its appeal are that both the court *a quo* and the confirmation applicants have failed to properly analyse and interpret the processes regulated by the MCA and the MCRs which precede the issue by the clerk of the court of an EAO in terms of section 65J(3) of the MCA. It warrants emphasis that *“the issue”* of an EAO by the clerk of the court is, in

administrative terms, no more than a formal process regulated by section 65J(3) of the MCA. That section requires that an EAO be prepared by the judgment creditor (or his attorney) and to be signed by both the judgment creditor (or his attorney) and the clerk of the court.

THE STRUCTURE OF THE RELEVANT PROCESS CONTAINED IN THE MCA WHICH CULMINATES IN THE ISSUE OF AN EAO IN TERMS OF SECTION 65J OF THE MCA:[7]

10. The purpose of the provisions of section 65J of the MCA is to permit recovery by a judgment creditor of a judgment debt sounding in money. In ***Gundwana*** it was said:[8]

"It must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality between the means used in

[7] The *"legal framework"* is explained in ADRA's answering affidavit at Vol 11 of the Record, pp 883-899 and the *"debt collection process"* at Vol 11, pp 899-910.
[8] At para [54].

the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided."

11. The premise of the submissions which follow is that there has come into existence a valid and legitimate *"judgment debt"* in favour of the judgment creditor in the terms contemplated in the MCA. Although the court *a quo* concluded that consents to judgment objected to by the confirmation applicants *"were not given voluntarily or on an informed basis"*,[9] there was no challenge by these applicants to the constitutionality of the process by means of which a debtor may consent to judgment in terms of either section 57 or section 58 of the NCA. The declarations of invalidity do not impact on sections 57 and 58 of the MCA.

[9] Record, Vol 24, p 2039, para 8.

12. Section 65J(1)*(a)* of the MCA provides for the issue of an EAO against a *"judgment debtor"*. Contrary to what was found by the court *a quo,*[10] ADRA does not contend that section 45(1) of the MCA[11] allows for the consent by a judgment debtor to any jurisdiction for the issue of an EAO other than that expressly defined in section 65J(1)*(a)*, namely, *"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."*

13. The words *"judgment debtor"* mean a debtor against whom a judgment has legitimately been granted by a magistrate's court.[12] For the purposes of the confirmation application, and the issues which arose in the court *a quo,* the relevant sections of the MCA from which a judgment against a judgment debtor may originate are sections 57 and 58. It is

[10] Record, Vol 24, p 2016, para 88.
[11] Which permits for consent to the jurisdiction of a magistrate's court in which the judgment debtor neither resides nor is employed.
[12] Section 55 of the MCA defines a *"debt"* to mean *"any liquidated sum of money due".*

evident from a reading of the confirmation applicants' founding affidavit in the court *a quo* that the challenge to the relevant provisions of section 65J followed on consents to judgment in terms of section 58 of the MCA.

14. The *"legal framework"* presented by the confirmation applicants in their founding affidavit in the court *a quo*[13] refers only to section 58 of the MCA as the source of a judgment debt against a judgment debtor.[14]

15. Sections 57 and 58 of the MCA establish slightly different regimes, both of which have, as their eventual result, the possibility of two forms of consent by a *"defendant".*[15] Those are:

15.1 a consent to judgment (for the amount of the debt and the costs claimed – collectively *"the judgment*

[13] Record, Vol 1, pp 29-41, paras 81-115.
[14] The confirmation applicants' founding affidavit in the court *a quo*: Record, Vol 1, pp 40-41 at paras 114 and 115.
[15] The person respectively defined as *"the defendant"* in both sections 57(1) and 58(1).

debt"), or for any other amount; and

15.2 a consent to pay, in instalments, the admitted judgment debt.

16. The consent to judgment and a consent to discharge that judgment in instalments may be entered by the clerk of the court in the circumstances prescribed by sections 57(2)*(c)*(ii) and 58(1)*(b)*(ii) of the MCA. It will be demonstrated, however, that this *"entry of judgment"* by the clerk is a purely administrative process which is preceded by a magistrates court's determination of the validity and enforceability of both the consent to judgment and, if provided, the judgment debtor's consent to pay in specified instalments. The effect of the judgment so entered by the clerk of the court is that of a judgment by default.[16]

[16] Sections 57(4) and 58(2) of the MCA.

17. Section 58A of the MCA provides that any judgment by default entered by the clerk of the court shall be deemed to be a judgment of the court. The significance of that deeming provision is that it permits a judgment creditor who has acquired a judgment in terms of either section 57 or 58 of the MCA to invoke the execution processes established by section 65 of the MCA. Sections 65, 65A and 65J of the MCA are only of application *"If … a court has given judgment for the payment of a sum of money"*[17] or there is in existence an *"order of court"*.[18] The different processes regulated by sections 65, section 65A and 65J are dealt with below.

18. Neither the court *a quo* nor the confirmation applicants have given any consideration to the effect or enforceability of a consent to judgment in terms of either sections 57(2) or 58(1) of the MCA and/or the consent by a judgment debtor to an order for payment of the admitted debt in specified

[17] Sections 65 and 65A(1)*(a)*.
[18] Section 65J(1)*(b)*(ii).

instalments. In their written submissions[19] the confirmation applicants contend:

"The Constitutional invalidity of the impugned legislative provisions will not result in preceding judgments against debtors being rendered invalid."

19. As a consequence ADRA presents its written argument on the legitimate assumption that none of the processes or consents regulated by sections 57 or 58 of the MCA are challenged or suggested to be in conflict with the Constitution.

A JUDGMENT DEBTOR'S CONSENT TO PAY IN SPECIFIED INSTALMENTS:

20. Sections 57(1)*(b)* and 58(1)*(b)*(ii) of the MCA make provision for a judgment debtor to agree to satisfy an admitted debt[20]

[19] Confirmation applicants' written submissions, para 109.
[20] A liquidated sum of money due – section 55 of the MCA.

"in specified instalments."[21]

21. A third method by means of which a judgment debtor may consent to payment in specified instalments is established by section 65 of the MCA. That process was not considered by the court *a quo* and was not addressed by the confirmation applicants in their founding affidavit. That section is unaffected by the declarations of invalidity. The provisions of section 65 of the MCA are referred to only to demonstrate that the *"consent"* by the judgment debtor to payment in specified instalments in terms of that section is the only circumstance in which an *"order"* to pay the judgment debt in specified instalments is possible without judicial supervision.

22. Section 65 of the MCA provides that, prior to a judgment creditor invoking the provisions of section 65A(1) of the MCA, a judgment debtor[22] may make a written offer to the

[21] The forms prescribed in the MCR's for use in section 57 and 58 applications for judgment are Forms 5A and 5B, which make provision for an order for payment by instalments.
[22] Who has consented to a judgment in terms of either section 57 or 58 of the MCA.

judgment creditor to pay the judgment debt in specified instalments or otherwise.

23. Once the judgment creditor (or his attorney) has accepted that written offer, the clerk of the court shall, at the written request of the judgment creditor or his attorney (accompanied by the offer),[23] order the judgment debtor to pay the judgment debt in specified instalments or otherwise and *"in accordance with his offer*".

24. The form of the *"written offer"* contemplated in section 65 of the MCA is regulated by MCR 45(7). That rule requires that the *"written offer"* shall be in affidavit or affirmation form and must include the comprehensive detail recorded in that rule.

25. It is evident from the preceding analysis that any consent to payment in specified instalments either emanates from the judgment debtor in the terms contemplated in sections

[23] And, it is assumed, the acceptance thereof.

57(1)*(b)* and 58(1)*(b)*(ii) of the MCA or from that debtor in the form of the *"written offer"* allowed for in section 65 of the MCA read with MCR 45(7).

26. The distinction between sections 57 and 58 of the MCA, on the one hand, and section 65 thereof, on the other hand, for the purposes of this debate is the process that the judgment creditor must follow in order to acquire a judgment against the judgment debtor for payment of the debt by the latter in specified instalments. It will be demonstrated that a judgment for payment in instalments following on the judgment debtor's consent in terms of either section 57(1)*(b)* or section 58(1)*(b)*(ii) of the MCA is preceded by *"judicial oversight".*

THE PROCESS FOR ACQUIRING JUDGMENTS IN INSTALMENTS IN TERMS OF SECTIONS 57 AND 58 OF THE MCA:

27. Requests for judgment brought in terms of sections 57(2) and 58(1) of the MCA are regulated by MCR 4(3) and (4).

28. Until 27 June 2014, MCR 4(4) made no reference to MCR 12(5). It referred pertinently to MCR 12(6), (6A) and (7), but omitted any reference to MCR 12(5).

29. On 27 June 2014[24] MCR 4(4) was amended by the inclusion therein of an express reference to MCR 12(5). The amended rule, which came into operation on 28 July 2014, reads as follows:

> "*(5) 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*

[24] *Government Gazette* 37769 dated 27 June 2014.

judgment as it may deem fit."

30. There is no debate that, following the amendment of 28 July 2014 and the incorporation into MCR 4(4) of a direct reference to MCR 12(5), the clerk of the court is not entitled to grant judgments by consent (either given in terms of section 57 of the MCA or section 58 of that Act) which are based on a claim founded on any cause of action arising or based on an agreement governed by the NCA. For those causes of action the clerk of the court is obliged to refer the judgment creditor's request for judgment to a magistrate's court for determination.

31. Once seized with a request for judgment in terms of either section 57 or section 58 of the MCA, the magistrate's court concerned is, in terms of rule 12(5), empowered to make any order or give such judgment it may deem fit and also is clothed with the regulatory powers established by MCR12(7).

32. The confirmation applicants affirmed and, indeed, asserted in

their founding affidavit in the court *a quo*[25] that any consent to judgment in terms of section 58 of the MCA required reference to the court for a judgment.

33. The consequence of this process is that, following on a judgment by consent in terms of either section 57 or section 58 of the MCA, an *"order of court laying down the specific instalments payable by the judgment debtor"* as contemplated in section 65J(1)(ii) of the MCA (and in sections 65 and 65A(1)(a)) will only come into existence once *the court* has granted that judgment after the appropriate request for judgment by the creditor has been referred to the court.

34. In the result, any order for payment in specified instalments which follows on a section 57 or section 58 request for judgment has, of necessity, been subjected to *"judicial oversight"*.

[25] Record, Vol 1, p 41, para 115.

35. The judicial oversight entails, *inter alia*, that the court must be satisfied that the judgment debtor is financially able to pay the amount of the judgment debt and costs in either the instalments specified in the written consent of the judgment debtor or such other instalments as determined by the court. This entails, further, that the court must be satisfied that sufficient means will be left to the judgment debtor to maintain himself and those dependent upon him after the payment of each instalment.[26]

36. In the alternative, it is submitted that, by necessary implication and on the basis of the implied jurisdiction of magistrates' courts,[27] the court concerned should be so satisfied. It is emphasised that, in terms of MCR 4(2), a written request for judgment and payment in instalments in terms of section 58(1) of the MCA must be supported by an affidavit containing such evidence as is necessary to

[26] Cf *African Bank Ltd v Myambo NO* 2010 (6) SA 298 (GNP) at 315B, 316E-F, 317F-G, 318F-G, 318H-I and 319C-D.
[27] As to which, see *Jones and Buckle The Civil Practice of the Magistrates' Courts in South Africa* 10ed Vol I, pp 77-78 and the authorities there referred to.

establish that all requirements *in law* have been complied with. This includes, it is submitted, the requirement that the sufficient means test has been complied with.

37. In a somewhat striking *volte face* the confirmation applicants depart diametrically in their written submissions in this court from the stance adopted in their founding affidavit in the court *a quo.* In their founding affidavit[28] the confirmation applicants readily accepted that section 58 of the MCA, read together with MCR 4(4) and 12(5), requires that the clerk of the court refer to a magistrate any request for judgment on a claim founded on any cause of action arising out of or based on an agreement governed by the NCA. Thereafter *"the court"* shall make such order or give such judgment as it may deem fit, including a judgment for payment in specified instalments.

38. In their written submissions[29] the confirmation applicants now

[28] Referred to in paras 13 and 14 above.
[29] At para 83.

contend that any reliance on the amendment to MCR 4(4) in July 2014 is misplaced as rules and regulations (including the MCR) may not be used to interpret primary legislation.

39. The contention is fundamentally flawed for the following reasons:

39.1 The confirmation applicants' case is that EAO's can be issued under two of the three methods prescribed in section 65J(2) without judicial oversight.

39.2 Because of this absence of judicial oversight, they argue that section 65J(2) limits judgment debtors' rights of access to courts, not to be deprived arbitrarily of property and the right to human dignity.[30] They claim that these three rights are unjustifiably infringed because EAO's can be granted in circumstances where "*there is no prior enquiry by a*

[30] Confirmation applicants' written submissions, para 69.

court into whether the judgment debtor can afford the deductions to be made from their salaries in terms of the EAO".[31]

39.3 The confirmation applicants' challenge is therefore based on an alleged unconstitutional omission from section 65J(2). Their case is that the section is unconstitutional because it fails to provide for judicial oversight.

39.4 The rights that the confirmation applicants claim are violated are only engaged if the process of issuing an EAO does not involve court oversight. It is the absence of judicial oversight before an EAO is issued that, on their argument, limits the rights of access to courts, dignity and constitutes an arbitrary deprivation of property.

39.5 Those rights are accordingly only engaged if it is

[31] Confirmation applicants' written submissions, para 66, quoting the Flemix affidavit.

correct that EAO's can be issued without judicial oversight.

39.6 However, judicial oversight is located in two places. First, it resides in section 65J(1) which defines an EAO with reference to an order of court laying down the specific instalments payable by the judgment debtor. Secondly, it is located in the provisions of the MCR referred to above which require all requests for judgments based on NCA claims to be referred to a magistrate's court.

39.7 ADRA does not rely on the MCR to interpret section 65J(2). The MCR are relied on to supplement the omission created by the section. The constitutionally relevant question is whether there is judicial oversight in the process of issuing EAO's. That relevance arises from the argument by the confirmation applicants that judicial oversight is required for the

protection of the rights of access to courts, dignity and not to be arbitrarily deprived of property.

39.8 If there is judicial oversight in that process, it matters not where it is located. The rights are only violated if EAO's can be issued in the absence of judicial oversight.

THE PROPER APPLICATION OF THE EXECUTION PROCESS CULMINATING IN AN EAO:

(a) SECTION 65J OF THE MCA:

40. A reading of sections 65J(1)*(b)*(i) and (ii) of the MCA reveals two fundamental requirements which are seminal to the grant of an EAO:

40.1 first, there must be in existence a judgment debt against the judgment debtor; and

40.2 secondly, the amounts to be paid by the garnishee in terms of the EAO must be *"in accordance with the order of court laying down the specific instalments payable by the judgment debtor …"*.[32]

41. Both the court *a quo* and the confirmation applicants have either ignored or failed to give sufficient consideration to the aforequoted excerpt from section 65J*(b)*(ii). Crucially, that requirement carries with it the inevitable conclusion that an EAO may not exceed the instalments expressly directed by *"the order of court"* which authorises the satisfaction of the judgment debt in instalments.

42. Undisputedly, a court order *"laying down the specific instalments payable by the judgment debtor"* emanates from the court itself as described above.

[32] Section 65J(1)*(b)*(ii) of the MCA.

(b) SECTION 65A OF THE MCA:

43. In the event that a judgment is granted in favour of a judgment creditor in accordance with either section 57(2)*(c)*(i) or section 58(1)*(b)*(i) of the MCA (for the judgment debt and costs) without an accompanying consent by the judgment debtor to discharge that debt in instalments, the judgment creditor may have recourse to the provisions of section 65A of the MCA.

44. The process governed by section 65A leads directly to a determination by a magistrate's court of the judgment debtor's financial position. That procedure is regulated by section 65D of the MCA and its application may result in an order for payment in specified instalments in terms of section 65E(1)*(c)* of the MCA. Those sections of the MCA make express provision for judicial oversight and are unaffected by the declarations of invalidity.

(c) SECTION 65J(2) OF THE MCA:

45. The judgment debtor's consent to an EAO as contemplated in section 65J(2) of the MCA does not attract the opprobrium which the confirming applicants seek to visit on that approval. The *"consent"* which is of significance is the consent of the judgment debtor to the payment of *"specified instalments"*, not the consent to the method of paying those, *viz* the EAO. The consent to payment in specified instalments is considered by a magistrate's court (as directed by MCR 4(4) read with MCR 12(5)) before there comes into existence an *"order of court laying down the specific instalments payable by the judgment debtor"*.

46. In the context of judgments by consent in terms of sections 57 and 58 of the MCA, the court *a quo* therefore erred in concluding that *"EAOs may be issued by a clerk of the court without the involvement of a judicial officer."*[33]

[33] Record, Vol 24, p 2057, para 75.

47. A judgment debtor's consent in writing to an EAO is nothing other than an agreement to a particular form of execution. That consent does not determine the instalments to be deducted from the judgment debtor's emoluments. Those instalments are agreed to in the preceding judgment processes which are entirely separated from the application of section 65J and which are subject to the judicial oversight prescribed by MCR 4(2), 4(4) and 12(5).

48. The procedure for the discharge of an admitted debt in instalments, as regulated by sections 57 and 58 (and 65) of the MCA, is clearly of benefit to the judgment debtor. Execution of judgment debts is indispensable to the proper function of our courts. The benefits to the judgment debtor of an entitlement to pay by instalments include:

48.1 an informed decision by the judgment debtor of the instalments he is able to pay on a monthly basis so as to avoid the admitted judgment debt, and its

execution, becoming unnecessarily burdensome;

48.2 execution against movables or, with the consent of the court, immovable property, does not permit for *"partial execution"*. Absent an agreement to pay the admitted debt by instalments, followed by the appropriate court order granted by a court, the judgment debtor will be confronted with either the indiscriminate attachment of his movable assets or the attachment and sale of his residence;

48.3 the sale of movables in execution as contemplated in section 66(1) of the MCA may not discharge the admitted debt which will put at risk any immovable property or residence owned by the judgment debtor;

48.4 the attachment and sale of a judgment debtor's movable assets in terms of section 66(1) of the MCA, read with MCR 36(1), is not accompanied by any

judicial oversight. In ***Jaftha***[34] this court pertinently considered the constitutionality of section 67 of the MCA[35] and concluded that the process of execution against movables without judicial oversight was not constitutionally objectionable.[36]

48.5 a negotiated, informed consent by a judgment debtor to the discharge of an admitted judgment debt in affordable monthly instalments (leaving sufficient means to maintain the debtor and the debtor's dependents) is preferable to a blanket execution against movables. The agreed, consensual payment in specified instalments certainly protects the judgment debtor's right to dignity.

49. The provisions of the MCA which permit for the payment of an admitted debt in instalments are both necessary to the

[34] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC).
[35] Read with MCR 36(1).
[36] *Jaftha,* para [51].

proper administration of justice and of benefit to judgment debtors as a class. It has been demonstrated that the relevant sections of the MCA, read together with the appropriate MCR, provide for an efficient method of determining the instalments to be paid by any judgment debtor. In effect, those instalments are:

49.1 either as expressly agreed to by the judgment debtor and confirmed by the court confronted with an application for judgment by consent in terms of sections 57 and 58 of the MCA; or

49.2 determined by the court following on the investigative process established by section 65A read with sections 65D and 65E of the MCA.

50. The consent to payment of an admitted debt in instalments as regulated by sections 57 and 58 of the MCA, which are given practical effect by section 65 and, in particular, section

65J of the MCA, gives meaning to the *"creative alternatives which allow for debt recovery"* referred to by Mokgoro J.[37] That process for the payment of instalments establishes a judicially determined method of balancing the interests of both the judgment creditor (to receive payment of the admitted debt) and the judgment debtor (to discharge the admitted debt in an affordable manner).

51. The provisions of section 65J(2)*(a)* do not offend the Constitution to the extent that there is a reference in that section to *"the judgment debtor has consented thereto in writing".*

52. In the premises paragraph 2.1 of the order of the court *a quo* should not be confirmed by this court.

[37] *Jaftha*, para [59].

(d) SECTION 65J(2)*(b)* OF THE MCA:

53. The court *a quo* held:[38]

> *"[84] … On the reasoning in* ***Gundwana****, judicial oversight over the issue of an EAO must be mandatory (rather than being subject to the discretion of the clerk of the court) and must occur when the execution order is issued (not subsequently, when an attempt might be made to have the execution order varied or set aside.)"*

> *"[85] Section 65J(2)(b)(i) and section 65J(2)(b)(ii) of the MCA are in the circumstances constitutionally invalid to the extent that they allow for EAOs to be issued by a clerk of the court without judicial oversight. This is so with regard to both international law and the current jurisprudence of the Constitutional Court."* (emphasis added)

[38] Record, Vol 24, p 2060.

54. Both the court *a quo* and the confirmation applicants pertinently ignore the express provisions of section 65J(2)*(b)*(ii).

55. An EAO, as regulated by section 65J(2)*(b)* of the MCA, has a number of significant, obligatory, requirements:

55.1 first, there must be in existence a judgment debt (for the purposes of the current debate, a judgment by consent in terms of either section 57 or section 58 of the MCA);

55.2 secondly, there must be in existence a court order *"laying down the specific instalments"* which are to be paid by the judgment debtor;

55.3 thirdly, there must be a written consent to an EAO or, *alternatively*, by means of either an affidavit, an affirmation or a certificate by the judgment creditor's

attorney, the clerk of the court must be informed of:

55.3.1 the payments which have been received by the judgment creditor since the date of *"the order laying down the specific instalments"* ; and

55.3.2 the balance owing by the judgment debtor;

55.4 only thereafter, the clerk of the court may issue an EAO against the judgment debtor's emoluments in the amount of *"the specific instalments"* previously agreed to by the judgment debtor and affirmed by the order of court *"laying down the specific instalments".*

56. The required judicial oversight occurs at the time of the grant of the order *"laying down the specific instalments".* It is on failure by the judgment debtor to comply with the provisions of that court order that the judgment creditor is entitled to

invoke the alternative administrative process established by section 65J(2)*(b)*(i) and to address a registered letter to the judgment debtor advising of the imminent issue of an EAO.

57. The requirement that a registered letter be sent to the judgment debtor's last known address is not prejudicial to the latter. In analysing a similar requirement in section 129(1)*(a)* of the NCA, this court concluded[39] in ***Sebola***[40] that there existed sufficient safety mechanisms to ensure that a registered letter would come to a recipient's notice.

58. The requirement for a registered letter as formulated in section 65J(2)*(b)*(i) of the MCA, as a matter of procedure, does not render unconstitutional that process for the issue of an EAO.

59. On the basis of the aforegoing analysis, it is submitted that

[39] *Per* Cameron J .
[40] *Sebola and Another v Sandard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC), paras [75] – [81].

paragraph 2.2 of the order of the court *a quo* is legally unfounded. In the premises paragraph 2.1 of the order of the court *a quo* should not be confirmed by this court.

THE PROPOSED REMEDY IF A CONFIRMATION ORDER IS GRANTED:

60. If, notwithstanding what is set out above and in our written submissions in respect of the merits of ADRA's application for leave to appeal, this court confirms the declaration of invalidity granted by the court *a quo* and upholds the court *a quo's* declaratory order in respect of section 45(1) of the MCA, we make the following submissions on remedy.

61. The two declarators are different.

62. The first, which relates to section 65J of the MCA, is a declaration under section 172(1)*(a)* of the Constitution. It is a declaration that the provisions of a law are inconsistent with the Constitution and therefore invalid.

63. The second, which deals with consent to jurisdiction, is not a declaration under section 172(1)*(a)* of the Constitution. It is not premised on a finding that the law is inconsistent with the Constitution. Instead, it is a declaration of the proper meaning of sections 90(2)*(k)*(vi)*(bb)* and 91(2) of the NCA.

64. Despite this difference, however, this court may exercise its remedial powers under section 172(1)*(b)* of the Constitution to mediate the effect of both declarators.

65. In ***Hoërskool Ermelo***,[41] this court made it clear that the remedial powers under section 172(1)*(b)* are not only available when the court issues a declaration of invalidity under section 172(1)*(a)* of the Constitution. Remedial power is flexible and entitles the court to make any order that is just and equitable in constitutional disputes, including an order limiting the retrospective effect of any order granted.[42]

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[41] *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC).
[42] Para 97.

66. Recently, in ***Stratford***,[43] this court has exercised its remedial powers to limit the retrospective effect of an order declaring the proper interpretation of section 9(4A) of the Insolvency Act 24 of 1936. ***Stratford*** did not involve any declaration of invalidity under section 172(1)*(a)* of the Constitution. It concerned the question of whether the reference to *"employees"* in section 9(4A) of the Insolvency Act included domestic employees. This court found that it did and granted a declarator to that effect. However, it limited the retrospective effect of its order as it recognised that many petitioners would have followed the Supreme Court of Appeal's prior ruling that the *"employees"* referred to in the section included only employees of the debtor's business and not domestic employees.

67. ***Stratford*** is therefore authority for the proposition that courts may mediate the effects of declaratory orders that are

[43] *Stratford and Others v Investec Bank Ltd and Others* 2015 (3) SA 1 (CC), para [47].

concerned with the proper interpretation of legislation.

68. The declarators in this case will operate retrospectively unless the court exercises its remedial powers to mediate their effect.[44]

69. The chaos and disruption that could otherwise result, if the retrospectivity of orders is not limited, has repeatedly been recognised by this court. Orders of invalidity and declarators about the proper meaning of statutory provisions have the potential to cause severe dislocation because they have the potential to undo that which was previously done.[45]

70. It is for this reason that it is a general principle of this court's remedial jurisprudence that an order of invalidity should have no effect on cases that have been finalised prior to the date

[44] *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* 2014 (3) SA 106 (CC), para [47].
[45] *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC), para [106].

of the order of invalidity.[46]

71. Although this principle was originally identified in the criminal context, this court has applied it in a civil context as well.[47]

72. ADRA's supplementary affidavit explains the extent of this dislocation. The effect of a retrospective order would be chaotic. If all EAO's issued since 1994 and all consents to jurisdiction for NCA-based claims are invalidated overnight, there is a real prospect of systemic risk to the credit industry as a whole. Such an outcome would have negative implications for the stability of the credit and banking sectors and for the general public welfare.

73. It is therefore incumbent upon this court to guard against this harm and to issue an order declaring that the declaratory orders will only operate prospectively.

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[46] *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC), para [32].
[47] *Engelbrecht v Road Accident Fund and Another* 2007 (6) SA 96 (CC), para [45] and *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* 2014 (3) SA 106 (CC).

74. Such an order will not deny effective relief to the second to sixteenth confirmation applicants. In addition to the orders declaring section 65J(2) of the MCA unconstitutional and declaring the proper interpretation of section 45 of the MCA, the court *a quo* also granted an order declaring that the emolument attachment orders issued against the second to sixteenth applicants were unlawful and invalid.[48]

75. No party has sought leave to appeal against that order[49] and it is not subject to confirmation by this court.

76. That order therefore stands irrespective of what this court does in relation to the other two declarators. This means that the court can limit the retrospective effect of any declarators it grants with the knowledge that this will not have any impact on the rights of the second to sixteenth confirmation applicants to effective relief. Their EAO's have been declared invalid and of no force and effect. That order stands.

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[48] Record, Vol 24, p 2063.
[49] Record, Vol 25, p 2167, para 6.1.

77. In the light of what is set out above, it is submitted that if the court grants an order declaring section 65J(2) of the MCA invalid or grants an order dealing with the proper interpretation of sections 90(2)(k)(vi)(bb) and 91(2) of the NCA, it should grant a further order declaring that these orders will operate only prospectively.

CONCLUSION:

78. In conclusion it is submitted that the court *a quo* erred in granting the declaratory relief contained in paragraph 2 of its order and the costs order against ADRA in paragraph 7 of its order on one or more or all of the grounds set out in paragraphs 1-9, 12, 13 and 14 of ADRA's notice of appeal.[50]

79. ADRA will, accordingly, move an order in the following terms:

79.1 that the confirmation application be dismissed;

[50] Record, Vol 24, pp 2106-2119.

79.2 that paragraph 2 of the order of the court *a quo* be substituted with an order in the following terms:

"The relief sought in paragraph 2 of the notice of motion dated 18 September 2014 is dismissed."

79.3 In the alternative, and in the event of this court granting the confirmation application, the following order will be sought:

79.3.1 Declaring that the declaration of invalidity operates prospectively from the date of this order;

79.3.2 No order as to costs.

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13 November 2015

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO: 127/15
WCHC CASE NO: 16703/14

In the matter between:-

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

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	First Respondent
MINISTER OF TRADE AND INDUSTRY	Second Respondent
NATIONAL CREDIT REGULATOR	Third Respondent
MAVAVA TRADING 279	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) LIMITED	Thirteenth Respondent
VILLA DES ROSES 168	Fourteenth Respondent
MONEY BOX INVESTMENTS 251	Fifteenth Respondent
TRIPLE ADVANCE INVESTMENTS 99	Sixteenth Respondent
FLEMIX & ASSOCIATED INCORPORATED ATTORNEYS	Seventeenth Respondent
ASSOCIATION OF DEBT RECOVERY AGENTS NPC	Eighteenth Respondent
SOUTH AFRICAN HUMAN RIGHTS COMMISSION	*Amicus Curiae* before the Court *a quo*

WRITTEN ARGUMENT ON BEHALF OF THE ASSOCIATION OF DEBT RECOVERY AGENTS NPC IN RESPECT OF THE WRITTEN SUBMISSIONS ON BEHALF OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION

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I INTRODUCTION:

1. The most significant aspect of the SAHRC's submissions lies in the fact that the SAHRC agrees with ADRA and the Flemix confirmation respondents that there is judicial oversight of EAO's in the prevailing magistrate's courts process. This concession supports the position that this court should not confirm the declaration of invalidity made by the court *a quo*.

II THE FATAL CONCESSION:

2. The SAHRC does not deny that MCR 12(5) provides for judicial oversight. It accepts that the MCR are relevant, but then shifts its argument to focus on the alleged inadequacy of the judicial oversight provided by rule 12(5).[1]

3. This shift is impermissible because it introduces an irrelevant aspect, namely whether the judicial oversight which is conceded to be in existence, is adequate or not. This aspect differs materially from the issue at hand, namely, as contended by the confirmation

[1] SAHRC written submissions, para 44.1.

applicants, and found by the court *a quo*, that there is no judicial oversight and so the Court must declare that part of section 65J of the MCA which permits EAO's to be issued without judicial oversight, invalid.

4. The shift is, further, impermissible in the light of the evidence which was presented by ADRA in the court *a quo* regarding the exercise by magistrates' courts of their judicial oversight and which was neither disputed by the confirmation applicants nor by the SAHRC.[2]

5. In paragraphs 48-51 of its written submissions, the SAHRC makes suggestions for the system of (conceded) judicial oversight to be revised to add additional protections. In effect, what the SARHC invites the Court to do, is to read in additional protections to guide magistrates' courts when exercising their discretion in determining the amount of the debtor's monthly instalments which, by virtue of the provisions of section 65J(1)*(b)*(ii) of the MCA, will have a binding effect on the subsequent EAO. Reading in provisions that will guide the judicial oversight of EAO's is simply at odds with an order that is premised on the absence of judicial oversight.

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[2] Vol 11, pp 906-907, para 75.

6. As a matter of logic, therefore, the SAHRC cannot support the confirmation of the order of invalidity once it accepts that there is judicial oversight.

III THE INTERNATIONAL AND FOREIGN LAW:

Foreign Law

7. The foreign law surveyed by the SAHRC provides examples of legislative interventions in various jurisdictions to regulate salary attachment orders.

8. However, the provisions of foreign statutes are not relevant to the interpretation of our domestic legislation. They may be relevant to the content of the right that is alleged to be infringed by our domestic legislation, but the necessary link has to be made from the foreign law to the constitutional right and then to the constitutional invalidity of our legislation. The SAHRC fails to establish such link.

9. There may be many ways to improve the EAO process but that is

a matter for the legislature. The Minister has already informed the Court that the review of the legislation is currently underway.[3] The legislature may be guided by what protections foreign statutes provide to debtors against EAO's when it revises the provisions of the MCA, but the Court cannot engage in that legislative exercise in this case.

International Law

10. The international law surveyed in the SAHRC's written submissions stands on a different footing. That law is relevant to the interpretation of the MCA because section 233 of the Constitution provides that a court must prefer any reasonable interpretation of legislation that is consistent with international law over any other interpretation that is inconsistent with international law.

11. However, the SAHRC has failed to show that there is an interpretation of the MCA that is consistent with international law that must be preferred over one that is not.

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[3] Minister's answering affidavit, Record, Vol 20, p 1747, para 14.

12. At best for the SAHRC, the international law principles highlight additional safeguards that could be added to the EAO process under the MCA, but this court is not in a position to add those safeguards in these proceedings, given the issue at hand.

13. The SAHRC takes issue with the adequacy of that judicial oversight and makes numerous proposals for inventive remedies based on the alleged inadequacy, but it fails to bring those proposals within the rationale for the confirmation of the order of invalidity.

14. The alleged inconsistency with international law is therefore no reason for this court to confirm the order of the court *a quo*.

15. ADRA accepts that the international law principles may be relevant to this court's interpretation of section 58 of the MCA, read with rule 12(5). It therefore takes no issue with the factors set out in paragraph 48 of the SAHRC's heads of argument as to whether an order that a debtor pays a debt in instalments in a given case is appropriate. In fact, the consideration of those factors is consistent with the evidence before this court about the enquiries that have been received from magistrates determining whether to grant an

order for payment of a debt in instalments as alluded to in paragraph 4 above.

16. However, the international law principles cannot be employed to craft a new procedure for magistrates' courts to follow when determining the amount of a debtor's instalments which has no place in the legislative scheme.

17. There is simply no basis for this court to grant a remedy which redesigns the EAO process under the MCA. We address this issue in more detail in the remedy section below.

IV THE PROPOSALS ON REMEDY:

18. In the remedy section of its heads of argument,[4] the SAHRC sets out a proposed process that ought to be followed when an EAO is issued.

19. The following material difficulties arise in respect of the proposal that this court should prescribe these procedures for the grant of EAO's.

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[4] SAHRC written submissions, para IV.

19.1 First, there is no legal basis for such intervention by the Court. The Court is asked to confirm an order of constitutional invalidity which is premised on the absence of judicial oversight in the process of granting EAO's. If there is judicial oversight in that system, then the Court cannot confirm the court *a quo's* order of invalidity and strike out those parts of section 65J(2) that the court *a quo* found did not provide for judicial oversight.

19.2 Secondly, the parties before the Court have not been given an opportunity to place evidence before the Court about the impact of the SAHRC's proposed order. The Court therefore, amongst others, does not know what the Minister's attitude is to a system that will now add a further step to the EAO process where the EAO is not issued immediately after the instalment order is granted. The evidence from the Minister already indicates that magistrates in the existing system are significantly overburdened.[5] The effect of a further layer of oversight on the efficient operation of the magistrates' courts has not been addressed. Moreover, the cost-implications of such

[5] Minister's answering affidavit, Record, Vol 20, p 1750, para 21.

an order on the debt recovery business has not been properly canvassed. Nor is there evidence before the Court about the average time frame between the launching of a request under section 58 of the MCA and the attendance by a magistrate's court to such request. This evidence would be relevant to determining what period of delay between the instalment order and the issuance of an EAO might justify an automatic return to court. None of this evidence is before the Court by reason of the fact that the confirmation applicants did not bring a case about the adequacy of the judicial oversight of EAO's. Its case, and the court *a quo's* order, are based on the *absence* of judicial oversight.

19.3 Thirdly, the proposed procedures are unnecessary. Sections 65J(6) and 65J(7) of the MCA already exist to deal with subsequent changes in circumstance that may negatively impact the debtor. Those two sub-sections permit either the judgment debtor's employer or the judgment debtor to approach a magistrate's court at any time to have an EAO suspended, amended or rescinded if, for example, the debtor *"will not have sufficient means for*

his own and his dependants' maintenance." Sub-section 65J(6) establishes the *"sufficient means"* test.

19.4 The SAHRC expresses concern that the relief afforded by subsections (6) and (7) of section 65J places an unnecessary burden on debtors who may not have knowledge of or access to legal advice or to the relevant court. In those circumstances, the entire burden of challenging an EAO is placed on the debtor.[6]

19.5 The reality is, however, that it is only the judgment debtor (or his/her employer) who will know when a change in personal and/or financial circumstances renders continued deductions against his/her salary oppressive so that they fail the *"sufficient means"* test.

19.6 It is therefore not unreasonable to require a judgment debtor to approach the relevant court for a reconsideration of the monthly deductions when that becomes necessary.

19.7 The same principles apply to an EAO which is only issued

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6 SAHRC written submissions, paras 53.1.1 and 53.1.2.

some time after the grant of the consent to judgment in terms of section 58 of the MCA. Any change in circumstances between the grant of the section 58 judgment and the issue of the EAO will only be known to the debtor. The issue of an EAO in those circumstances would take place in terms of section 65J(2)*(b)* of the MCA as a consequence of which it would be required of the judgment creditor (or his/her attorney) to address a registered letter to the judgment debtor at his/her last-known address advising of the imminent issue of an EAO. That notification will afford the debtor an opportunity to approach the judgment creditor to revisit the terms of the instalments payable or to approach the relevant court for the relief contemplated in sections 65J(6) and (7) of the MCA.

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