



The incidence of and undesirable practices relating to “garnishee orders” – a follow up report



Content

Chapter 1: INTRODUCTION	1
1.1 Background	1
1.2 The Report	5
1.3 Objectives of the report	6
1.4 Approach	7
1.4.1 Literature review	7
1.4.2 Comparative law	7
1.4.3 Shortcomings and irregularities in the emoluments attachment order process	7
1.4.4 Empirical research on emoluments attachment orders in South Africa	7
1.4.5 Recommendations	8
1.5 Methodology and limitations	8
Chapter 2: LEGISLATIVE FRAMEWORK	9
2.1 What is an emoluments attachment order?	9
2.2 The difference between an emoluments attachment order and a garnishee order	10
2.3 When will the emoluments attachment order process be used?	10
2.4 How is the order obtained?	12
2.4.1 The judgment debtor has consented in writing to the emoluments attachment order	12
2.4.2 The court authorised it at a hearing or in chambers	12
2.4.3 A direct request was made to the clerk of the court	13
2.5 Which court will issue the emoluments attachment order?	13
2.6 Who should issue, draft and serve the order?	14
2.7 What is the effect of the order?	16
2.8 When must the garnishee (employer) make the deductions and make payments?	17
2.9 Can the garnishee (employer) deduct commission?	17
2.10 What will happen if the garnishee (employer) fails to deduct?	18
2.11 What will happen if the judgment debtor requests the garnishee (employer) not to pay because he/she disputes the amount claimed in terms of the order?	18
2.12 Is the garnishee (employer) and/ or the judgment debtor entitled to a statement of account?	18
2.13 What will happen if the judgment debtor leaves the employment of the garnishee (employer)?	19
2.14 Is the employee protected from discrimination because of the fact that there is an emoluments attachment order against his salary?	19
2.15 Other legislation providing for the attachment of wages	20
2.15.1 Maintenance Act 99 of 1998	20
2.15.2 Basic Conditions of Employment Act 75 of 1997	20
2.15.3 Public Finance Management Act 1 of 1999	20
2.15.4 Children's Act 38 of 2008	21
2.15.5 Income Tax Act 58 of 1962	21
2.15.6 Section 74(d) of Magistrates' Court Act 32 of 1944	21
2.15.7 Section 65(E)(1)(c) of the Magistrates' Court Act 32 of 1944	22
Chapter 3: COMPARATIVE RESEARCH	23
3.1 International use of attachment of earnings as method of enforcement	23
3.2 Limit to the amount that can be deducted from salary	24
3.3 Enforcement bodies	26
3.4 Priority of orders	27
3.5 Multiple orders	28
3.6 Employee protection	29
3.7 Commissions	30
3.8 Earnings for purposes of attachment	31

Chapter 4: SHORTCOMINGS AND IRREGULARITIES IN THE EMOLUMENTS ATTACHMENT ORDER PROCESS	33
Methodology	33
4.1 Uncertainty regarding the interpretation of:	34
4.1.1 Jurisdiction	34
4.1.2 In duplum	37
4.2 Lack of uniformity in Magistrates' Courts	39
4.3 Shortcomings in the process	40
4.4 Problems with service of emoluments attachment orders	41
4.5 Irregular deductions	41
4.6 Payroll offices stopping deductions too soon or too late	42
4.7 Fees charged for statements of account	43
4.8 No prospect of settlement	44
4.9 Lack of cap on amount that can be deducted	47
4.10 Complaints regarding costs	48
4.10.1 Fees	48
4.10.2 Interest	50
4.10.3 Other	54
4.11 Reckless credit and multiple deductions	55
4.12 5% Commission payable to employer paid by debtor	56
4.13 Lack of knowledge and fraud by clerks of court	58
4.14 Incorrect apportionment of payments	58
Alternatives to emoluments attachment orders	58
4.15 Sales in execution (movables)	59
4.16 Section 65 procedure (enquiries into financial affairs of debtor)	61
Chapter 5: EMPIRICAL RESEARCH ON EMOLUMENTS ATTACHMENT ORDERS IN SOUTH AFRICA	63
5.1 Towards an estimate of the total number of garnished employees in South Africa	64
5.1.1 Introduction	64
5.1.2 Methodology	64
5.1.3 Data	65
5.1.4 Findings	67
5.1.5 Conclusions	78
5.2 The administration of emoluments attachment orders by employers who handle the processing of emoluments attachment orders in-house	79
5.2.1 Introduction	79
5.2.2 Methodology	79
5.2.3 Data	79
5.2.4 Findings	79
5.2.5 Conclusion	85
5.3 Employers outsourcing emoluments attachment orders to garnishee administrators	85
5.3.1 Introduction	85
5.3.2 Methodology and data	86
5.3.3 Findings	86
5.3.4 Conclusion	87
5.4 The use of the guide "garnishee orders: employers guide"	87
5.4.1 Introduction	87
5.4.2 Methodology and data	87
5.4.3 Findings	87
5.4.4 Conclusion	88
Chapter 6: RECOMMENDATIONS	89
6.1 On receipt of the emoluments attachment order	89
6.1.1 Verification of the order	89
6.1.2 Consultation with the employee	90
6.1.3 Processing of the order	91
6.2 On-going management of the emoluments attachment order	91
6.2.1 Statements	92
6.2.2 When the employee resigns	92
6.3 Training of payroll staff	92
6.4 Employee wellness programmes	92
6.5 Where to find assistance	93
Selected bibliography	94

LIST OF DIAGRAMS, EXAMPLES, FORMS, FIGURES AND TABLES

DIAGRAMS

Diagram 1 The debt collection process

EXAMPLES

Example 1 Clause in terms of which the debtor consents to the jurisdiction
Example 2 Complaint re jurisdiction
Example 3 Effect of abuse of in duplum
Example 4 Effect of in duplum
Example 5 Irregular deductions
Example 6 Repayment calculation
Example 7 Fees charged for calculation of balance
Example 8 No prospect of settlement
Example 9 Zero salary slip
Example 10 Statement of account indicating excessive fees
Example 11 Interest charged on interest
Example 12 Interest calculated from incorrect date
Example 13 Interest charged on fees
Example 14 Non-admissible charges and duplication of fees
Example 15 Reckless credit
Example 16 No commission charged
Example 17 Creditor pays 5% commission
Example 18 Debtor pays 5% commission
Example 19 Incorrect apportionment of payment
Example 20 Pro forma statement of account

FORMS

Form 38 Emoluments attachment order

FIGURES

Figure 1 Credit Standing of Consumers
Figure 2 Percentage of employees in formal private sector with emoluments attachment orders
Figure 3 Percentage of employees in mining sector with emoluments attachment orders
Figure 4 Percentage of employees in manufacturing sector with emoluments attachment orders
Figure 5 Percentage of employees in services: financial intermediation, insurance, real estate and business sector with emoluments attachment orders
Figure 6 Comparison between employees with emoluments attachment orders in mining, manufacturing and services: financial intermediation, insurance, real estate and business sector
Figure 7 Percentage of employees in land transport and transport via pipeline sector with emoluments attachment orders
Figure 8 Percentage of employees in post and telecommunication sector with emoluments attachment orders
Figure 9 Comparison between employees with emoluments attachment orders in land transport and transport via pipeline sector and post and telecommunication sector

Figure 10	Percentage of employees in health and social work sector with emoluments attachment orders
Figure 11	Percentage of employees in other educational institutions sector with emoluments attachment orders
Figure 12	Comparison between employees with emoluments attachment orders in Health and social work sector and other educational institutions sector
Figure 13	Percentage of employees in retail sector with emoluments attachment orders
Figure 14	Percentage of employees in national departments with emoluments attachment orders
Figure 15	Percentage of employees in provincial departments with emoluments attachment orders
Figure 16	Comparison between percentage of employees in private and public sectors with emoluments attachment orders
Figure 17	Payroll officers considering the processing of emoluments attachment orders as time consuming
Figure 18	Payroll officers ascertaining whether order was served by sheriff
Figure 19	Payroll officers ascertaining the general correctness of the order
Figure 20	Payroll officers deduction commission for administration of order
Figure 21	Reasons for not deducting commission
Figure 22	Payroll officers not aware commission recoverable from judgment creditor
Figure 23	Respondents using Employers Guide (Data set B)
Figure 24	Respondents using Employers Guide (Data set D)

TABLES

Table 1	Difference between emoluments attachment order and garnishee order
Table 2	Courts allowing consent in terms of section 45
Table 3	Difference between employer address and court with jurisdiction
Table 4	Number of requirements to be met and copies to be attached re emoluments attachment orders in different courts
Table 5	Difference between party and party, attorney and client and attorney and own client costs
Table 6	Inventory
Table 7	Distribution account
Table 8	Data – sample set A
Table 9	Data – mining sector
Table 10	Data – manufacturing sector
Table 11	Data – services: financial intermediation, insurance, real estate and business sector
Table 12	Data – land transport and via pipeline transport sector
Table 13	Data – post and telecommunication sector
Table 14	Data – health and social work sector
Table 15	Data – other educational institutions sector
Table 16	Data – retail sector
Table 17	Data – national departments
Table 18	Data – provincial departments

THE RESEARCH TEAM

Primary researcher:

Charlotte van Sittert, Attorney, University of Pretoria Law Clinic

Fieldwork: research and editing assistance

Aniki van Wyk, Office Manager, University of Pretoria Law Clinic

Helene Davidtsz, Attorney, University of Pretoria Law Clinic

Jeanne Mari Retief, Researcher, J Law Research

Consultants

Frans Haupt, Attorney and Director, University of Pretoria Law Clinic

Dr Frans Kanfer, Senior Lecturer University of Pretoria, Statomet

Sollie Milliard, Senior Lecturer University of Pretoria, Statomet

Acknowledgements

The Department of Research and Innovation Support at the University of Pretoria (DRIS)

John Visagie, Research Contracts Officer, University of Pretoria

Source persons

Anton Viljoen, Chief Executive Officer, DCM Group

Carina Bester, PERSAL

Gerhard Papenfus, CEO, NEASA

Jannene Wessels, Director, Synrec (Pty) Ltd

Kem Westdyk, Summit Garnishee Solutions

Mathilda Rosslee, University of Stellenbosch Law Clinic.

Raleen Jooste, Corporate Relationship Manager, DCM Group

Sanya Heynecke, Corporate IT Administrator, DCM Group

The research team want to thank a number of attorneys, credit providers and employers who provided the team with examples and assistance in the compiling of this report and who preferred to remain anonymous.





Chapter 1

INTRODUCTION

1.1 Background

Emoluments attachment orders, commonly but erroneously referred to as garnishee orders, operate within the broader context of debt enforcement.

In light thereof and by way of introduction it is necessary to contextualise the issue.

The consumer credit policy framework document entitled “Making Credit Markets Work”, developed by the Department of Trade and Industry, stated the following on the role of credit in the economy:

“In a cash economy, or in a society structured on barter only, there would be no need for credit. Credit transactions are necessary where a person seeks to obtain a product or service for which the person cannot, or chooses not to pay in cash or by way of exchange in kind or barter. Credit enables people to have use of a product or service, at a cost represented by an interest rate, prior to their having paid for that product or service or, where an item cannot be afforded from a single month’s salary, to spread the payments over a number of months.

Consumers would generally not be able to purchase items such as houses or cars if it were not possible to obtain finance. In acquiring such items, it is necessary to be able to spread the payments over a number of months. For a huge number of people the same is true in respect of the purchase of a fridge, bed, radio or television. It is also true in respect of the cost of a university education and even true for a great many South Africans in respect of the cost of items such as school fees and school

uniforms, or the equipment or trading stock for a small business. Credit thus unlocks a diverse range of opportunities, some of which are economic, others educational and yet others simply improvement of 'standard of living'."

In the same policy document, credit is described as a double-edged sword:

"Whilst credit allows access to products or services that cannot be acquired out of a single month's income, it can also be a dangerous instrument that can lead to high levels of debt and indebtedness.

The credit market is not a risk-free arena. There is a considerable imbalance of power between consumers and credit providers, consumer education levels are frequently low, consumers are poorly informed about their rights and unable to enforce such rights through either negotiation or legal action. Commission-driven agents, deceptive marketing practices and weak disclosure can easily cause consumers to enter into unaffordable credit contracts.

It is quite easy for credit to lead to financial hardship and destroy a household's wealth. Taking on extra loans in order to pay back existing loans can lead people into a debt spiral out of which it may be difficult to escape. Over-indebtedness has a negative impact on families and has in some extreme cases even led to family suicides. Over-indebtedness further has an impact upon the workplace, can lead to de-motivation, absenteeism and even a propensity to commit theft."

Due to a number of reasons that fall outside of the scope of this research, millions of credit active South Africans are not up to date with payments in terms of the credit agreements that they have entered into. As at the end of June 2013, according to the NCR Credit Bureau Monitor, 20.21 million consumers were credit active of which 9.69 million had impaired records (i.e. were subject to a judgment, under administration or three or more months in arrears with payments on one or more contracts). If the 2.86 million consumers (14.2%) who were in arrears for one or two months are added to this, a staggering 12.55 million consumers (or 62.1%) would fit the definition of over-indebtedness contained in section 79 of the National Credit Act:

"A consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party..."

Credit standing of consumers: June 2013

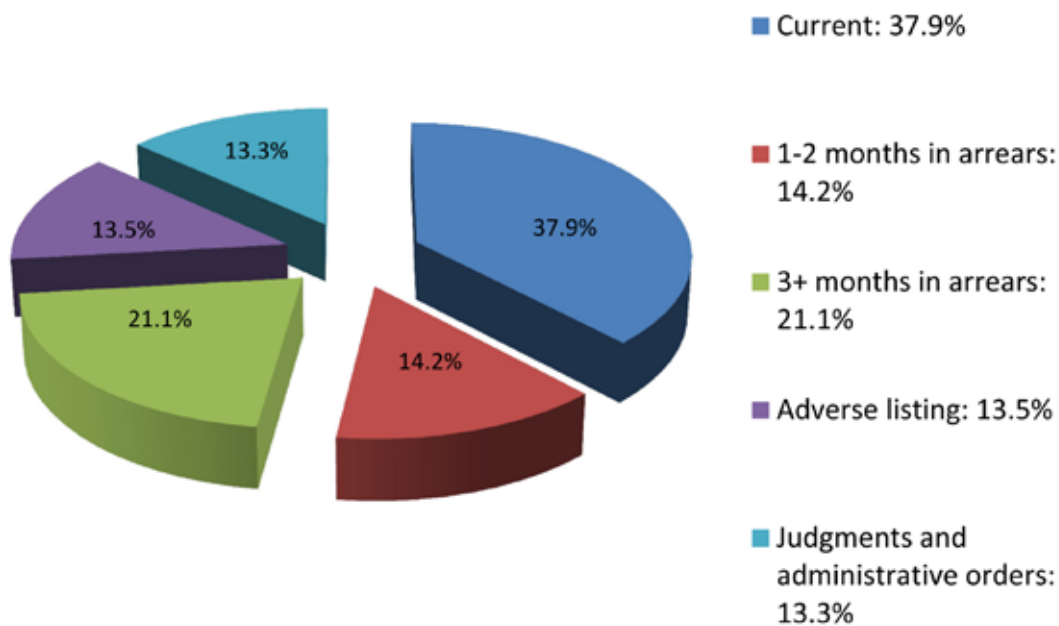


Figure 1: Credit Standing of Consumers

By defaulting, these consumers would also be subject to debt collection.

The importance of effective debt recovery and enforcement is also highlighted in the policy document:

“Effective debt recovery and enforcement are particularly important. Effective debt recovery procedures would assist credit providers by reducing bad debt write-offs, and assist consumers by ensuring that high bad debts of a minority of consumers do not feed through into higher interest rates for the rest.”

Credit providers utilise many mechanisms to recover the debts owed to them by defaulting consumers. These include both judicial and non-judicial methods:

- The non-judicial methods range from unlawful and/ or unethical practices to perfectly legal voluntary arrangements such as a promise to pay, which include for example direct payment, debit orders, AEDOS (Authenticated Early Debit Orders) and NAEDOS (Non-Authenticated Early Debit Orders) , i.e. so - called “soft collections”.
- Judicial methods involve collection via the court system in order to obtain a judgment against a debtor. Collection of judgment debts ranges from section 65 procedures in so -called “debtor’s court”, to warrants of execution against the judgment debtor’s movable and/or immovable property, garnishee orders in terms of section 72 and emoluments attachment orders in terms of section 65 of the Magistrates’ Court Act.

Warrants of execution involve the attachment of the movable and /or immovable assets of the debtor and the subsequent selling of these by way of sales in execution to the highest bidder.

The procedures in terms of section 65 A of the Magistrates’ Courts Act, involve the appearance of the judgment debtor before the court for an enquiry into his/her financial affairs which may result in an order for periodic payments to satisfy the debt obligations.

The garnishee order dealt with in terms of Section 72 of the Magistrate's Court Act, authorises, upon application by a judgment creditor to court, the attachment of any debt owed or to become due to the judgment debtor. Where the attachment of such a debt owing to the judgment debtor is ordered, the garnishee is the person who owes any such debt to the judgment debtor. Examples of debts that can be so attached would include commissions of debtors working on a commission only basis, proceeds of a sale of property held by a conveyancing attorney, money held in bank accounts and money owed for contract work done by the debtor.

An emoluments attachment order grants the judgment creditor the opportunity to receive weekly or monthly instalments from the judgment debtor through a process of monthly deductions made from the judgment debtor's wage or salary (emoluments) by the judgment debtor's employer before the judgment debtor receives such wage or salary. The debtor's employer is obliged by court order to make such deductions, and in this instance is referred to as the garnishee-employer. Deductions made by the garnishee-employer are paid directly to the creditor or his representative, e.g. his attorney.

It is a common misconception that no distinction can be drawn between an emoluments attachment order and a garnishee order. This confusion arose because an emoluments attachment order can be seen as a type of garnishee order. Furthermore, the employer of the employee against whom an emoluments attachment order is issued, is referred to as a garnishee in the Act. The issue is further clouded as a result of the use of the term 'garnishee order' in the popular media, colloquial discussions and even in official presentations where the actual intention is to refer to the emoluments attachment order.

Debtors themselves may employ various debt relief measures that directly or indirectly result in payment or part payment of debt. Examples include debt review (debt counselling) in terms of section 86 of the National Credit Act 34 of 2005, administration orders in terms of section 74 of the Magistrates' Courts Act 32 of 1944 and voluntary surrender of their estates in terms of the Insolvency Act 36 of 1924.

Likewise, sequestration can be seen as a hybrid procedure resulting in payment (collectively to creditors) and debt relief (discharge).

Frans Haupt (director of the University of Pretoria Law Clinic) and Hermie Coetzee (then an attorney working at the Law Clinic) published a report for the then Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) entitled "The incidence of and the undesirable practices relating to 'garnishee orders' in South Africa" in October 2008.

In this report, as the title suggests, a number of abuses in the debt collecting process specifically regarding the emoluments attachment order were identified. In the same document a number of legislative and industry reforms were suggested. The report was released into the public domain and attracted some attention but was overshadowed by a range of other challenges faced by consumers, credit providers and regulators in the credit industry.

The Marikana tragedy which culminated in the death of 34 mine workers in August 2012 and the linking thereof, correctly or incorrectly, to reckless lending practices and the use and abuse of "garnishee orders" led to renewed attention by authorities and the press. The Minister of Trade and Industry, Rob Davies, referred to "outright preying on the vulnerabilities of low income and working people".

Likewise, the Minister of Finance, Pravin Gordhan, expressed his concerns about the garnishment of wages in his budget speech:

"We are concerned by the abuse of emoluments attachment orders that has left many workers without money to live on after they have serviced their debts every month. We are in discussion with the National Credit Regulator, the Department of Justice and banks, to ensure that the lending market remedies its behaviour. In the meanwhile, all employers, including the public sector, can

play a role and assist their workers to manage their finances and to interrogate all emoluments attachment or garnishee orders to ensure that they have been properly issued. I also call on the various law societies to take action against members who abuse the system.”

In October 2012 certain findings in a forensic report authored by Peter Allwright, then attached to the law firm Edward Nathan Sonnenbergs (ENS), were quoted in the popular financial press leading to a number of reports of abusive practices over the following few months, carrying headlines such as:

- “Abuses rife with garnishee orders” - *Personal Finance*, 28 October 2012
- “Garnishee fraud debacle widens” - *The Citizen*, 6 November 2012
- “Ghastly garnishee abuse exposed” - *Mail & Guardian*, 30 November 2012
- “It’s time for a clean-up” - *Financial Mail*, 31 January 2013

The consistent highlighting of irregularities led to the Minister of Finance and the Banking Association of South Africa (BASA) issuing a joint statement in October 2012. The statement included the following undertaking:

“...BASA members commit not to use garnishee orders against credit defaulters, as they believe the use of such orders for credit is inappropriate.”

This document was signed by the Minister of Finance, Pravin Gordhan, and the Chairperson of BASA, Sam Tshabalala. The following banks were also signatories: ABSA, Standard Bank, FirstRand Bank, Nedbank, African Bank and Capitec.

At a meeting dubbed “Safari into garnishment of wages” held on the 13th of February 2013 and attended by most of the major role players in the credit and debt collecting industry, it was resolved that a representative task team, chaired by the Credit Ombud, Manie van Schalkwyk, would investigate the reported abuses and draft a code of conduct in an effort to stamp out abuses. The major banks at the same time, through the offices of BASA set out on a similar venture, in spite of their earlier undertaking to stop using emoluments attachment orders.

The Department of Justice and Constitutional Development at the end of February 2013, released a working document with suggested amendments to the Magistrates’ Court Act, and more specifically emoluments attachment orders, for public comment.

At the time of writing this report, both BASA and the Task Team had presented their reports to their stakeholders and Treasury for further comment. Likewise the Department of Justice and Constitutional Development was processing the comments received on suggested amendments and formulating the final amendments to the Act for submission to the Minister.

1.2 The Report

This report was commissioned by the *Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ)*. The Department of Research and Innovation Support at the University of Pretoria (**DRIS**), and GIZ entered into an agreement in terms of which research into the incidence of “garnishee” orders and the abusive practices to which employees with emoluments attachment orders against their salaries can fall prey, was to be conducted. The Law Clinic of the University of Pretoria (**UP Law Clinic**) acted as project leader. For the purposes of Chapter 5 of this report, the Clinic collaborated with the Bureau for Statistical and Survey Methodology (**Statomet**).

The *Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ)* is a federal enterprise that supports the German Government in achieving its objectives in the field of international cooperation for sustainable development. Since 1993 GIZ has operated in South Africa mainly on behalf of the German Federal Ministry for Economic Cooperation and Development (BMZ). GIZ's assistance in South Africa continuously focuses on three cross-cutting themes: Governance and Administration, Energy and Climate, as well as HIV/AIDS Prevention.

The Department of Research and Innovation Support (**DRIS**) assists UP researchers to improve research productivity and grows the income base by increasing the number of major research funders.

The **UP Law Clinic**, comprising attorneys, candidate attorneys and administrative personnel, forms part of the Law Faculty of the University of Pretoria. The Law Clinic provides clinical legal education and experiential training opportunities to final-year law students as well as to candidate attorneys. The Law Clinic offers legal services to indigent clients. The Law Clinic also has a research section which focuses on all aspects of consumer credit. As such it has authored a number of research reports both for government and its agencies as well as for a number of stakeholders in the credit industry. Amongst these was the 2008 report entitled "The incidence of and the undesirable practices relating to garnishee orders in South Africa".

STATOMET is a bureau at the University of Pretoria that focuses on the scientific design and management of research. STATOMET provides statistical advice on all aspects of research design and management, and aims to improve the quality of research by rendering a multidisciplinary service to public and private organisations. STATOMET undertakes research and consulting on statistical and survey methodology with special emphasis on the application thereof, including:

- Statistical consultation, analysis and advice.
- Training, support and the evaluation of survey methodology.

1.3 Objectives of the report

The objectives of the report were to:

- Provide an overview of the legal framework governing the garnishment of wages introduced by section 65 J of the Magistrates' Courts Act by referring to case law, academic articles, media reports and research projects conducted since the completion of the 2008 report.
- Investigate and report on the attachment of wages in a number of foreign jurisdictions with a view to comparison to the South African position.
- Report on irregularities that still prevail since the 2008 report as well as newly identified abuses of the process.
- Analyse employers in the private sector's implementation of emoluments attachment orders and practices adopted by payroll offices in respect of the implementation of emoluments attachment orders.
- Investigate and report on the practices adopted by Garnishee administrators.
- Assess whether the guide "Garnishee orders: Employers Guide" issued by the former GTZ, has been used by employers and to what extent.
- Assess what the private sector should do to advance responsible business practices as it applies the issue.

1.4 Approach

The report is divided into the following sections:

1.4.1 Literature review

A literature study of the legislative framework and procedural requirements for obtaining an emoluments attachment order was used as a starting point for the report. The procedures used for the enforcement of an emoluments attachment were examined with reference to the Magistrates' Court Act. This involved the studying of the legal requirements, duties and responsibilities of all stakeholders involved in the process. In the process, the relevant sections of the Magistrates' Court Act, 1944 (as amended), as well as applicable sections of the National Credit Act, 2005, the Basic Conditions of Employment Act, 1997 (as amended), the Public Finance Management Act, 1999, the Maintenance Act, 1998, the Children's Act, 2008, the Income Tax Act, 1962, as well as the Treasury Regulations, 2001 were examined. A number of relevant court cases, academic articles, textbooks and research outputs on the topic were also consulted.

1.4.2 Comparative law

The attachment of wages in a number of foreign jurisdictions was investigated and compared to the South African position. The purpose of the exercise was to learn from other jurisdictions and to find solutions to the problems that hamper the proper functioning of emoluments attachment orders in South Africa. A number of jurisdictions including African countries, the USA, England, Wales and Germany were compared to the South African position. This comparison is interesting and useful but it must always be applied and interpreted in the context of our own social, cultural, political and economic reality.

1.4.3 Shortcomings and irregularities in the emoluments attachment order process

Certain shortcomings and irregularities in the emoluments attachment order process were listed and where possible, illustrated by way of practical examples. Some of the issues discussed include: uncertainty regarding the interpretation of jurisdiction and the in duplum rule and/ or Section 103(5) of the National Credit Act; inconsistencies in the court processes followed by different Magistrates' courts when granting orders; shortcomings in the statutory process; non-compliance regarding service of orders and prescribed fees; etc.

In this report, unlike the 2008 report, suggestions for corrective measures or legislative change fell outside the scope of the report.

1.4.4 Empirical research on emoluments attachment orders in South Africa

An estimation of the total number of garnished employees in the formal **private** sector (excluding agriculture) was made. Employment data provided by StatsSA for June 2013 was used as the basis for the data framework.

Data was further sourced from three garnishee administrators who processed emoluments attachment orders on behalf of employers throughout South Africa for the same month. Persal and Persol also provided the team with data for the public sector.

The data was used to determine the percentage of employees whose wages were garnished and the average number of orders per employee employed in the following industries in the private sector namely, Mining, Manufacturing, Services: Financial intermediation, real estate and business, Retail (trade), Post and telecommunications, Health and social work, Land transport and transport via pipeline, as well as Other Educational institutions. The data was then extrapolated to arrive at a figure for the overall private sector.

The exercise was repeated in the **public** sector. Using the data provided by Persal and Persol the percentage of employees with emoluments attachment orders in the National and Provincial departments was estimated as well as the average number of orders per employee. The data was again extrapolated to arrive at a figure for the overall public sector.

Data obtained from employers attending to the processing of emoluments attachment orders in-house was used to analyse the administration of emoluments attachment orders by employers. The practices adopted by garnishee administrators were also reported on.

Lastly, the use of “Garnishee orders: Employers Guide” a guide published by GTZ in October 2008 in order to assist employers with the processing of garnishee orders, was evaluated.

1.4.5

Recommendations

Recommendations were made to employers on how to avoid the pitfalls and loopholes in the emoluments attachment order process which were identified in this report. Recommendations for the proper administration of emoluments attachment orders in the workplace were made and particulars on agencies that could assist aggrieved consumers or employers were given. In terms of the mandate, these recommendations focused on the employer.

1.5

Methodology and limitations

The methodology followed and the limitations experienced are discussed throughout the report where applicable.



Chapter 2

LEGISLATIVE FRAMEWORK

2.1

What is an emoluments attachment order?

Section 61 of the Magistrates' Courts Act describes "emoluments" as:

- (i) salary, wages or any other form of remuneration; and*
 - (ii) any allowances,*
- whether expressed in money or not."*

An emoluments attachment order is a court order made in terms of section 65 J of the Magistrates' Court Act 32 of 1944. It grants the creditor the opportunity to receive weekly or monthly instalments from the debtor through a process of monthly deductions made from the debtor's wage or salary by the debtor's employer before the debtor receives such wage or salary. The debtor's employer is obliged by court order to make such deductions, and in this instance is referred to as the garnishee-employer. Deductions made by the garnishee-employer are paid directly to the creditor or his/her representative, e.g. an attorney or debt collector.

2.2

The difference between an emoluments attachment order and a garnishee order

The term ‘garnishee order’ is often incorrectly used to describe an emoluments attachment order. A true garnishee order refers to the attachment of a debt owed to the employee by a third party, and usually is a once-off arrangement. Examples of debts that can be so attached would include the proceeds of a sale of property held by a conveyancing attorney or money owed for contract work done by the debtor.

An emoluments attachment order is a court order in terms of which the employer is obliged to deduct monthly instalments from the salary of the employee against whom the emoluments attachment order was issued. On the court order the employer who administers the emoluments attachment order is referred to as the ‘garnishee employer’ which may be the reason for the confusion about the terminology.

The differences between these two orders are further illustrated in the table below:

GARNISHEE ORDER	EMOLUMENTS ATTACHMENT ORDER
A third party is the garnishee	The judgment debtor’s employer is the garnishee
Method through which debt is attached	Forms part of procedure for collection of debt
In terms of section 72 and rule 47	In terms of section 65J and rule 46
Served on the garnishee and the debtor	Served only on the garnishee

Table 1 Difference between emoluments attachment order and garnishee order

2.3

When will the emoluments attachment order process be used?

When a judgment was granted in favour of the judgment creditor and the judgment debtor fails to comply with the judgment, credit providers utilise many mechanisms to recover the debts owed to them by defaulting consumers. One of these methods is the emoluments attachment order.

The emoluments attachment order process forms part of the debt collection process (see diagram below) and is one of the methods used to extinguish debt. Debt collectors and collection attorneys favour this method, as it is both time and cost effective. It has also proven to be more effective than debit orders and cash deposits and is easy to implement through the courts. Emoluments attachment orders can be implemented almost immediately if either a section 57 (a conditional consent to judgment) or 58 (consent to judgment) agreement, containing a clause in terms of which the debtor consents to an emoluments attachment order, was obtained from the debtor. A court order for the payment of debt in instalments can be a forerunner to a request for an emoluments attachment order but an emoluments attachment order can also be requested directly by the creditor to obtain satisfaction of the judgment.

The alternatives to emoluments attachment orders are discussed in Chapter 4.

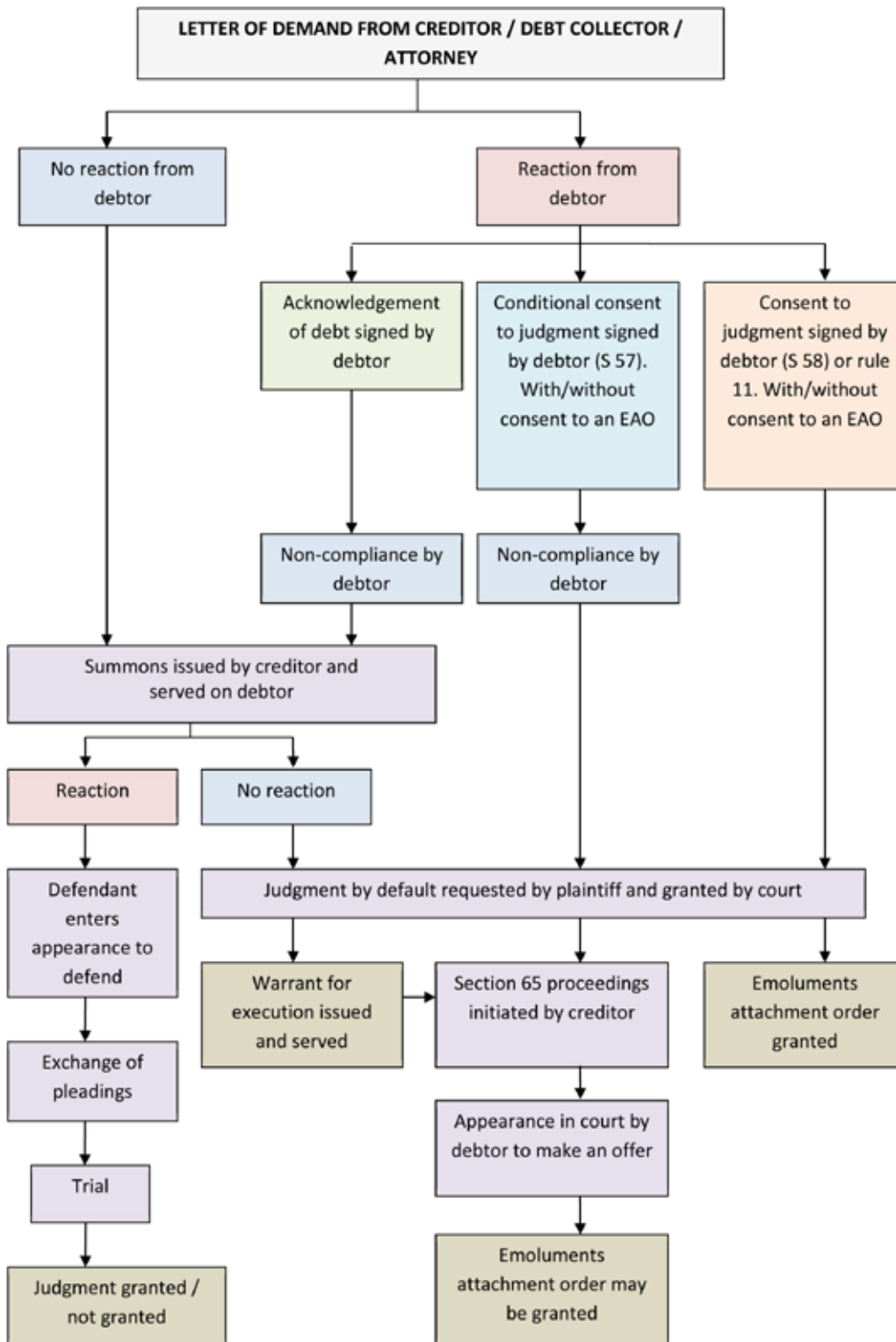


Diagram 1 The debt collection process

2.4 How is the order obtained?

Section 65 J (2):

“An emoluments attachment order shall not be issued—

- (a) unless the judgment debtor has consented thereto in writing or the court has so authorised, whether on application to the court or otherwise, and such authorisation has not been suspended; or*
- (b) unless the judgment creditor or his or her attorney has first—*
 - (i) sent a registered letter to the judgment debtor at his or her last known address advising him or her of the amount of the judgment debt and costs as yet unpaid and warning him or her that an emoluments attachment order will be issued if the said amount is not paid within ten days of the date on which that registered letter was posted; and*
 - (ii) filed with the clerk of the court an affidavit or an affirmation by the judgment creditor or a certificate by his or her attorney setting forth the amount of the judgment debt at the date of the order laying down the specific instalments, the costs, if any, which have accumulated since that date, the payments received since that date and the balance owing and declaring that the provisions of subparagraph (i) have been complied with on the date specified therein.”*

An emoluments attachment order may be issued if one of the following three instances exists:

2.4.1 The judgment debtor has consented in writing to the emoluments attachment order

This consent can legally be obtained when the debtor arranges for payment and consents to judgment conditionally in terms of section 57, or unconditionally in terms of section 58. With a consent to judgment in terms of section 57, the debtor is still in a position to avoid judgment by paying in accordance with his offer. Judgment is only applied for if he/she fails to pay. In the instance of consent to judgment in terms of section 58, judgment is obtained immediately. In practice section 57 is not often used and collection attorneys rely almost exclusively on section 58 consents.

In *Russells (Ceres) v Manyashe en ‘n ander 2005 (4) SA 380 (C)*, the Cape Provincial Division upheld an appeal arising from a consent to judgment in terms of section 58(1) and a consent for the granting of an emoluments attachment order.

The magistrate held that consent to an emoluments attachment order could only validly be granted after judgment had already been granted. On appeal the high court held that the Magistrates’ Court Act did not prohibit the debtor from consenting before judgment to an order for the payment of the future judgment debt in instalments and to the issuing of an emoluments attachment order in terms of section 65J.

2.4.2

The court authorised it at a hearing or in chambers

A judgment debtor can be notified in terms of section 65(A)(1) to appear in court for an enquiry into his/her financial position. The court can then make an order for periodic payments and authorise an emoluments attachment order.

An emoluments attachment order may also be issued in terms of section 74D, where an administration order in terms of section 74(1) provides for the payment of instalments from future emoluments.

The above orders may also be granted in chambers.

2.4.3

A direct request was made to the clerk of the court

In the absence of written consent from the debtor or authorisation by the court, the judgment creditor or his attorney must first send a registered letter to the judgment debtor at his last known address advising him of the amount of the judgment debt and unpaid costs and warn him that an emoluments attachment order will be issued if the said amount is not paid within ten days of the date on which the registered letter was posted.

Thereafter, the judgment creditor must file an affidavit or affirmation or a certificate with his/her attorney confirming the sending of such a registered letter as well as setting out the amount of the judgment debt, the specific instalments due, costs payable from the date of order, payments received and the outstanding amount.

Different interpretations of the procedure to be followed with applications in terms of s 65J(2)(b) exist. Some magistrates follow the procedure prescribed in *University of Natal, Pietermaritzburg v Ziqubu 1999 (2) SA 128 (N)* stating that the onus to oppose the application in toto or the amount of the monthly emolument deduction lies with the debtor.

Other magistrates follow *Minter NO v Baker and Another 2001 (3) SA 175 (W)*, where the court held that the correct procedure for a court application for an emoluments attachment order is to start with s 65A, conduct a financial inquiry and then make an application for an emoluments attachment order in terms of s 65(J)(2)(b).

2.5

Which court will issue the emoluments attachment order?

Section 65 J (1)(a):

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

Rule 46 (1) of the Magistrates' Court Rules states that if the judgment creditor issues an emoluments attachment order from a different court than the court where the judgment or order was obtained, a certified copy of the said judgment or order should be included.

Section 45 of the Magistrate's Court Act makes provision for a party to legal proceedings to consent to the jurisdiction of a specific Magistrate's Court in certain circumstances.

In the unreported matter of *Protea Furnishers SA (Edms) Bpk h/a Barnets Meubeleerders v Margaret Balakista in haar hoedanigheid as Klerk van die Siviele Hof, Pretoria en andere* (case number 1419/2009) Hartzenberg J ruled that with regard to emoluments attachment orders, parties to the proceedings can consent to the jurisdiction of a specific court. It is important to note that in this matter, the employer of the debtor also consented to the jurisdiction of the specific court.

Currently different legal opinions exist as to whether a debtor can consent to the jurisdiction of a court different from the one where the employer is domiciled.

2.6 Who should issue, draft and serve the order?

Section 65 J (3):

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

Section 65J(3) provides that an emoluments attachment order should be drafted and signed by either the judgment creditor or his/her attorney as well as being signed by the clerk of the court, and should be served on the garnishee by the sheriff in terms of rule 9. Take note that the order need not be served on the judgment debtor as is the case with a true garnishee order issued in terms of Section 72. The emoluments attachment order should contain sufficient information for the employer (garnishee) to identify the judgment debtor for example including the judgment debtor’s identity number, birth date or salary number.

The format of the emoluments attachment order is prescribed in terms of The Magistrates’ Court Rules. An order must be drafted in accordance with Form 38. An example of Form 38 is included below.



REPUBLIC OF SOUTH AFRICA

No. 38 - Emoluments Attachment Order - Section 65J of the Magistrates' Courts Act 1944 (Act 32 of 1944)

IMPORTANT NOTICE:

YOUR ATTENTION IS DIRECTED to section 65J(3) of the Magistrates' Courts Act, 1944 (read with section 3(1) of the Sheriffs Act, 1986), which provides that only a sheriff may serve this order on a garnishee in the manner prescribed by rule 9 of the Magistrates' Courts Rules. Service of this order by a person who is not a sheriff appointed in terms of section 2 of the Sheriffs Act, 1986, constitutes a criminal offence in terms of section 60(1)(gA) of the Sheriffs Act, 1986, and renders such service invalid and of no effect. A person who is convicted of an offence in terms of section 60(1)(gA) of the Sheriffs Act, 1986, shall be liable to a fine or to imprisonment for a period not exceeding three years or both such fine and such imprisonment.

YOUR ATTENTION IS FURTHER DIRECTED to section 65J(6) of the Magistrates' Courts Act, 1944, which provides as follows:

"If, after the service of such an emoluments attachment order on the garnishee, it is shown that the judgment debtor, after satisfaction of the emoluments attachment order, will not have sufficient means for his or her own and his or her dependants' maintenance, the court shall rescind the emoluments attachment order or amend it in such a way that it will affect only the balance of the emoluments of the judgment debtor over and above such sufficient means."

IN THE MAGISTRATE'S COURT FOR THE DISTRICT/REGION OF

HELD AT CASE NO:

In the matter between

..... Judgment Creditor.

and

..... Judgment Debtor.

.....

..... (Particulars for the identification of the judgment debtor inclusive of his or her identity or work number or date of birth and address).

..... Garnishee

..... Address of garnishee

Form 38: Emoluments attachment order

Whereas it has been made to appear to the above-mentioned Court that emoluments are at present or in future owing or accruing to the judgment debtor by or from the garnishee and that after satisfaction of the following order sufficient means will be left to the judgment debtor to maintain himself or herself and those dependent upon him or her;

It is ordered:

(1) That the said emoluments are attached;

(2) That the garnishee pay to the judgment creditor or his or her attorney on the day of each and every month/week after this order has been granted the sum of R..... of the emoluments of the said judgment debtor until a sufficient amount has been paid to satisfy a judgment or order obtained against the judgment debtor by the judgment creditor in the Court at on the day of for the amount of R (on which judgment or order the amount of R remains unpaid) with costs amounting to R and the costs of attachment amounting to R as well as R sheriff's fees.

Dated at this day of, 20.....

By Order of the Court,

.....
Registrar/Clerk of the Court.

.....
Judgment Creditor/Attorney for Judgment Creditor.
Address of Judgment Creditor/Attorney for Judgment Creditor.
.....
.....
.....

Attention is directed to the provisions of section 65J (10) of the Magistrates' Courts Act, 1944, which reads as follows:

"Any garnishee may, in respect of the services rendered by him or her in terms of an emoluments attachment order, recover from the judgment creditor a commission of up to 5 per cent of all amounts deducted by him or her from the judgment debtor's emoluments by deducting such commission from the amount payable to the judgment creditor."

Form 38: Emoluments attachment order

2.7 What is the effect of the order?

Section 65J (1) (b):

"An emoluments attachment order—

- (i) shall attach the emoluments at present or in future owing or accruing to the judgment debtor by or from his or her employer (in this section called the garnishee), to the amount necessary to*

cover the judgment and the costs of the attachment, whether that judgment was obtained in the court concerned or in any other court; and

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

The effect of the order is that it obliges the garnishee (the employer) to pay over to the judgment creditor or his/her attorney the amount as specified by the court in the order out of the salary of the judgment debtor, until the judgment debt and costs have been paid in full.

2.8

When must the garnishee (employer) make the deductions and make payments?

Section 65J (4)(a):

“Deductions in terms of an emoluments attachment order shall be made, if the emoluments of the judgment debtor are paid monthly, at the end of the month following the month in which it is served on the garnishee, or, if the emoluments of the judgment debtor are paid weekly, at the end of the second week of the month following the month it is served on the garnishee, and all payments there under to the judgment creditor or his attorney shall be made monthly with effect from the end of the month following the month in which the said order is served on the garnishee.”

If the judgment debtor receives his/her salary on a monthly basis, the first deduction and payment must be made at the end of the month following the month in which the emoluments attachment order was served on the garnishee. If the judgment debtor is paid weekly, the first deduction must be made at the end of the second week of the month in which the emoluments attachment order was served. The garnishee has to make payments to the creditor or his/her attorney at the end of each month, irrespective of whether deductions are made more than once a month from the salary of the debtor.

2.9

Can the garnishee (employer) deduct commission?

Section 65J (10):

“Any garnishee may, in respect of the services rendered by him in terms of an emoluments attachment order, recover from the judgment creditor a commission of up to 5 per cent of all amounts deducted by him from the judgment debtor’s emoluments by deducting such commission from the amount payable to the judgment creditor.”

The garnishee is entitled to commission of 5% of all amounts deducted by him from the judgment debtor’s salary. The commission should be deducted from the amount payable to the judgment creditor who in terms of the Act is responsible for and thus in effect pays the commission.

2.10

What will happen if the garnishee (employer) fails to deduct?

Section 65 J (5):

“An emoluments attachment order may be executed against the garnishee as if it were a court judgment, subject to the right of the judgment debtor, the garnishee or any other interested party to dispute the existence or validity of the order or the correctness of the balance claimed.”

An emoluments attachment order is a court order and the garnishee is obliged to adhere to it. If the garnishee refuses to make the payments as prescribed in the Act, either the judgment creditor or his/her attorney may issue a warrant of execution for the arrear payments against the garnishee and attach property belonging to the garnishee in execution of the order. If the garnishee, judgment debtor or any other interested party disputes the existence or validity of such an order, they may approach the court for relief. The correctness of the judgment on which the emoluments attachment order is based, may however not be disputed when this application is heard.

Should the correctness of the judgment itself be disputed, an application for rescission of the judgment should be launched in terms of Rule 49 read with Section 36 of the Magistrates' Court Act.

2.11

What will happen if the judgment debtor requests the garnishee (employer) not to pay because he/she disputes the amount claimed in terms of the order?

Section 65 J (6):

“If, after the service of such an emolument attachment order on the garnishee, it is shown that the judgment debtor, after satisfaction of the emoluments attachment order, will not have sufficient means for his own and his dependants' maintenance, the court shall rescind the emoluments attachment order or amend it in such a way that it will affect only the balance of the emoluments of the judgment debtor and above such sufficient means.”

An emoluments attachment order may be rescinded or amended if the judgment debtor can prove that the portion of his wages left after the instalment is deducted, is insufficient for purposes of providing for him and his dependants. This may result in the order being stopped or the instalment amounts being lowered. This can be done by way of an application to court in terms of Section 65 J (6).

2.12

Is the garnishee (employer) and/ or the judgment debtor entitled to a statement of account?

Section 65J(4)(b) provides for the garnishee or debtor to obtain a statement free of charge:

“The judgment creditor or his or her attorney shall, at the reasonable request of the garnishee or the judgment debtor, furnish him or her free of charge with a statement containing particulars of payments received up to the date concerned and the balance owing.”

2.13

What will happen if the judgment debtor leaves the employment of the garnishee (employer)?

Section 65J (8)(a) and (b):

“(8) (a) Whenever any judgment debtor to whom an emoluments attachment order relates leaves the service of a garnishee before the judgment debt has been paid in full, such judgment debtor shall forthwith advise the judgment creditor in writing of the name and address of his new employer, and the judgment creditor may cause a certified copy of such emoluments attachment order to be served on the said new employer, together with an affidavit or affirmation by him or a certificate by his attorney specifying the payments received by him since such order was issued, the costs, if any, incurred since the date on which that order was issued and the balance outstanding.

(b) An employer on whom a certified copy referred to in paragraph (a) has been so served, shall thereupon be bound thereby and shall then be deemed to have been substituted for the original garnishee, subject to the right of the judgment debtor, the garnishee or any other interested party to dispute the existence or validity of the order and the correctness of the balance claimed.”

There is an onus on the judgment debtor to inform the judgment creditor or his attorney of the name and details of his new employer when he leaves the employment of the garnishee before the judgment debt has been paid in full. The section further prescribes the procedure to be followed to appoint the new employer as garnishee. It is advised that the “old employer or garnishee” should also advise the credit provider or his attorney when an employee who had a garnishee order against his salary, leaves employment. This will prevent the attorney from proceeding with a warrant when deductions are stopped and if the judgment debtor did not inform them of the fact that he left the employment of the garnishee.

2.14

Is the employee protected from discrimination because of the fact that there is an emoluments attachment order against his salary?

Section 106A & B create a criminal offence. Section 106A:

“Any garnishee who, by reason of an emoluments attachment order having been served on him in respect of the emoluments of a judgment debtor not occupying a position of trust, in which he handles or has at his disposal moneys, securities or other articles of value, dismisses or otherwise terminates the services of such an judgment debtor, shall be guilty of an offence and on conviction liable to a fine not exceeding R300 or, in default of payment, to imprisonment for a period not exceeding three months.”

Section 106B:

“... any employer who, having been requested by an employee to furnish a written statement containing full particulars of such employee’s emoluments, fails or neglects to do so within a reasonable time, or who wilfully or negligently furnishes incorrect relevant particulars shall be guilty of an offence and on conviction liable to a fine not exceeding R300 or, in default of payment, to imprisonment for a period not exceeding three months.”

In terms of the above sections it is a statutory offence to dismiss an employee as a result of an emoluments attachment order being served on the employer (save in specific circumstances). These sections also compel

the employer to furnish complete and correct particulars of emoluments at the request of the affected employee.

2.15

Other legislation providing for the attachment of wages

2.15.1

Maintenance Act 99 of 1998

Section 29(3) of the Maintenance Act 99 of 1998 provides:

“Any employer on whom a notice has been served for the purposes of satisfying a maintenance order shall give priority to the payments specified in that notice over any order of court requiring payments to be made from the emoluments due to the person against whom that maintenance order was made.”

2.15.2

Basic Conditions of Employment Act 75 of 1997

Section 34(1)(b) of the Basic Conditions of Employment Act, 1997 states that:

“... an employer may not make any deduction from an employee’s remuneration unless the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration.”

Section 34(4) of the Basic Conditions of Employment Act, 1997 stipulates that:

“... an employer who deducts an amount from an employee’s remuneration for payment to another person must pay the amount to the person in accordance with the time period and other requirements specified in the agreement, law, court order or arbitration award.”

2.15.3

Public Finance Management Act 1 of 1999

In the previous report of the Law Clinic entitled “The incidence of and undesirable practices related to “garnishee” orders, it was stated in paragraph 2.19 of Chapter 2:

“It should be noted however, that the situation is different when dealing with government employees. The employer can refuse the deduction if the emoluments attachment order would cause more than 40% of the employee’s salary to be subjected to deductions. See regulation 23.3.6 in terms of the Public Finance Management Act 1 of 1999.”

This is not the correct position and it was later rectified by an *erratum* slip.

Regulation 23.3.6 to the same Act deals with discretionary deductions, not garnishee or emoluments attachment orders. Discretionary deductions are those deductions the employee may choose to have deducted from his/her salary, such as insurance premiums. In the case of an emoluments attachment order, the employee has no choice and the deduction is therefore not a discretionary deduction.

Paragraphs 23.2.3 and 23.2.4 of the Regulations deal directly with emoluments attachment orders and set out the procedure to be followed when such orders are instituted against the employee's salary. There is no mention of a limitation on the amount to be deducted in these paragraphs and they are not subject to the validations which apply to discretionary deductions on the Persal payroll system.

2.15.4 Children's Act 38 of 2008

Section 165 of this Act makes provision for the attachment of wages.

“(1) A children's court which has made a contribution order against a respondent may—

- (a) order the employer of the respondent—*
 - (i) to deduct the amount of the contribution which that respondent has been ordered to pay, from the respondent's wages, salary or remuneration; and*
 - (ii) to such person or institution specified in the order; or*
- (b) vary, suspend or rescind such an order or revive the order after it has been rescinded.*

(2) The employer must promptly pay any amount deducted under an order in terms of subsection (1) to such person or institution as may be specified in the order.”

2.15.5 Income Tax Act 58 of 1962

Section 99 of the Income Tax Act 58 of 1962 provides that –

“The Commissioner may, if he thinks necessary, declare any person to be the agent of any other person, and the person so declared an agent shall be the agent for the purposes of this Act and may be required to make payment of any tax, interest or penalty due from any moneys, including pensions, salary, wages or any other remuneration, which may be held by him or due by him to the person whose agent he has been declared to be.”

2.15.6 Section 74(d) of Magistrates' Court Act 32 of 1944

Section 74 D:

“Where the administration order provides for the payment of instalments out of future emoluments or income, the court shall authorize the issue of an emoluments attachment order in terms of section 65J in order to attach emoluments at present or in future owing or accruing to the debtor by or from his employer, or shall authorize the issue of a garnishee order under section 72 in order to attach any debt at present or in future owing or accruing to the debtor by or from any other person (excluding the State), in so far as either of the said sections is applicable, and the court may suspend such an authorization on such conditions as the court may deem just and reasonable.”

2.15.7

Section 65(E)(1)(c) of the Magistrates' Court Act 32 of 1944

Section 65 E (1):

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

(c) that the judgment debtor or, if the judgment debtor is a juristic person, the director or officer summoned as representative of the juristic person, at any time after receipt of a notice referred to in section 65A (1), has made an offer in writing to the judgment creditor or his attorney to pay the judgment debt and costs in specified instalments or otherwise, whether by way of an emoluments attachment order or otherwise, or, if such an offer has not been made, that the judgment debtor is able to pay the judgment debt and costs in reasonable instalments, the court may order the judgment debtor to pay the judgment debt and costs in specified instalments and, if the judgment debtor is employed by any person who resides, carries on business or is employed in the district, or if the judgment debtor is employed by the State in the district, in addition authorize the issue of an emoluments attachment order by virtue of section 65J (1) for the payment of the judgment debt and costs by the employer of the judgment debtor, and postpone any further hearings of the proceedings.”



Chapter 3

COMPARATIVE RESEARCH

In this chapter international legal systems using the attachment of wages as an enforcement mechanism are compared to the South African model.

The purpose of this exercise is to learn from other jurisdictions and to find solutions to the problems that hamper the proper functioning of emoluments attachment orders in South Africa. This comparison might be useful but it must always be applied and interpreted in the context of South Africa's own social, cultural, political and economic realities.

What follows is a selection of certain key features of the systems of wage garnishment in comparable jurisdictions.

3.1

International use of attachment of earnings as method of enforcement

In **South Africa** section 65 J of the Magistrates' Courts Act makes provision for an emoluments attachment order in terms of which a judgment creditor is granted the opportunity to receive weekly or monthly instalments from the judgment debtor through a process of weekly or monthly deductions made from the judgment debtor's salary or wage by the judgment debtor's employer before the salary or wage is paid to the said judgment debtor. The judgment debtor's employer is obliged by court order to make such deductions and these deductions are paid directly to the creditor or his agent, e.g. an attorney.

This method of enforcement is also used in other **African Countries** like Rwanda, Kenya, Namibia, Tanzania, Ghana and Botswana. In Botswana Statutory Instrument No 13 of 2011 of the Rules of the Magistrates Court makes provision in Order 36 for garnishee proceedings in terms of which a portion of the debtor's salary can be attached.

In the **United States of America** the Federal Wage Garnishment Law (Title III of the Consumer Credit Protection Act) makes provision for a similar enforcement method called wage garnishment in Section 302. Garnishment is described as any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt. Of the 50 states in America, only Pennsylvania, North Carolina, South Carolina and Texas do not allow wage garnishment for civil or creditor debt.

In **Germany**, attachment of earnings is regulated by Article 850 of the Civil Law Code. This form of debt enforcement is described as "*Lohnpfändung*" or "*Gehaltspfändung*".

Attachment of earnings as a method of debt collection is used in all the legal systems of **European states** with the exception of Greece, where wages can only be attached in relation to debts owed to the State. Iceland also does not use the attachment of wages as a method of debt collection.

In **Australia**, different forms of garnishee orders exist. An order can be made by court to allow a creditor to recover the judgment debt from the debtor's bank account or the debtor's wages or from people who owe money to the debtor. The most common garnishee order is for the judgment debtor's wages or salary to be attached. The rules about garnishee orders are set out in Rule 39.34 – 39.43 of the Uniform Civil Procedure Rules 2005.

In **England and Wales** the attachment of earnings is regulated by the Attachment of Earnings Act 1971 and the County Court Rules 1981 Rule 27. An attachment of earnings order can be obtained if the creditor obtained a judgment against the debtor, the debtor is in arrears of at least one instalment and the total outstanding amount is £50 or more.

In some **developing countries** wages are declared immune from attachment or seizure rendering a creditor unable to obtain payment directly from an employer of any part of the wages of an employee in fulfilment of a court judgment. In Sri Lanka, the salary or wages of public officers, labourers and domestic servants cannot be attached for the payment of debt. In Brazil, Dominican Republic, Ecuador, Mexico and Uruguay wages are not subject to attachment except for the payment of maintenance.

3.2

Limit to the amount that can be deducted from salary

In **South Africa** an emoluments attachment order can be obtained in one of the following three instances:

- where the court has so authorised;
- where the judgment debtor has consented thereto; or
- in terms of section 65 J (2) (b).

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

Debtors are often unaware of the maximum interest rates and fees that may be charged and do not appreciate the influence these charges may have on the repayment period. Debtors are also not always

honest about their financial situation and either inflate their situation and propose unrealistic instalments that they cannot keep up with or they exaggerate their inability to pay by making equally unrealistically low proposals.

In the third instance, the judgement creditor or his attorney is required to send a registered letter to the judgement debtor, informing him of the judgement and of the fact that an emoluments attachment order will be issued if the outstanding amount is not paid within ten days. No mention is made of the amount of the instalment that will be applied for. The judgment creditor must also file an affidavit or a certificate with his attorney setting forth the debt, costs and proposed instalments. These are not served on the employer or the employee with the result that the employee only becomes aware of the amount to be deducted after service of the emoluments attachment order on his employer or after the deduction has been effected. There is no enquiry into the financial affairs of the debtor and the creditor or his agent often decides unilaterally on the amount of the instalment. Neither the creditor nor his agent nor the clerk of court granting the emoluments attachment order is aware of the existence or not of other garnishee orders.

In South Africa there are no statutory caps for the amount that may be deducted in terms of an emoluments attachment order. Collections using emoluments attachment orders may result in employees going home with a zero or near zero take-home pay. If this happens the judgment debtor can, on the basis that he will not have sufficient means for his own and his dependants' maintenance, apply to the court in terms of section 65 J (7) to have the order suspended, amended or rescinded on good cause shown.

In other **African countries** such as Rwanda, section 44 of the Civil Procedure Act provides that only one third of the salary of the debtor shall be subject to attachment. In Botswana an order nisi will be granted pursuant to an application for a garnishee order. A final order can be opposed on the return day if the debtor can prove that the attachment of his salary will leave him without sufficient means to maintain himself and those dependent on him.

In the **United States of America** certain maximum limits are placed on the collection of debts through the garnishment process. Federal law limits the amount that a creditor can collect from a worker's salary. Thus, 75% of after-tax income is exempt from garnishment, or 30 times the federal minimum wage (\$217.50, as the minimum hourly wage is \$7.25). The purpose of this rule is to protect employees with very low earnings from having more than 25% of their disposable income deducted. There is however nothing to prevent a particular State from introducing its own legislation that provides a more favourable provision than the bottom line provided by Federal Law. For example the State of Illinois' wage garnishment laws specify that that the amount attached cannot exceed the lesser of 15% of the gross wages for each week, or the amount by which disposable earnings per week exceeds 45 times the Federal minimum hourly wage. It is probable that 15% of gross wages for each week under the Illinois tax code would be a lesser sum than 25% of disposable earnings under the US tax code. Otherwise, the Illinois rule would contravene the Federal one. Equally, the rule that only the portion of disposable earnings that exceeds 45 times the Federal hourly minimum wage can be attached is clearly a better arrangement for a low-paid employee. For example, if a person had a disposable income of \$400 per week under the Federal system, the attachment would be 25% of disposable income (\$100). Under the Illinois system, the attachment would be the amount by which disposable income exceeded 45 times the hourly minimum wage - \$400 - \$326.25 ($\$7.25 \times 45$) = \$73.75, which is a lower amount.

In **Europe** two models for the calculation of a minimum income that should be protected against attachment are used. According to the "fixed deduction system" definite tables which are amended regularly are used to indicate what amount may be retained by a debtor who is subject to an attachment of earnings. Even within these fixed deduction systems different models are used.

In **Germany** for example detailed and precise tables, which are revised regularly, dictate the exact amount that can be attached according to the band of income into which the debtor's earnings fall and the number of his/her dependants (if any). The effect of these tables is that more is attached as income rises and less is attached for those debtors with dependants and those earning lower incomes. Some forms of remuneration such as annual bonuses and certain social security payments, cannot be attached. Alimony payments are also given preference as the debtor is only entitled to retain sufficient income necessary to support himself. Special circumstances, like disability, can be taken into account in deviating from the protected earnings tables thus allowing the debtor to retain a larger level of income.

In Luxembourg, however, dependants are not taken into account and rising percentages of deduction within certain bands of income are used to determine the amount available for deduction.

In **Australia** the situation seems to be less complicated. When the judgment creditor gets judgment against the debtor the whole debt becomes due and must be paid immediately. When a wage or salary is garnished the judgment debtor must be left with a minimum amount. Currently it is \$439.50, but it is revised every year in April and October. When judgment is obtained and the debtor is working, the creditor will then apply to have the whole of the judgment amount deducted from the salary of the debtor. The order takes effect from when it is served on the garnishee and will continue to operate until the judgment debt is paid, unless the court orders otherwise. When the debtor is of the opinion that he cannot pay all the debt at once he can make an application to pay the debt in instalments.

In **England and Wales** a Protected Earnings Rate (PER) is provided for under the Attachment of Earnings Act 1971. The PER is the amount of money that the debtor requires to maintain himself and his family. Only if the debtor's earnings exceed the protected earnings rate will an order be made. The protected earnings rate includes expenses like food, rent, mortgage and the usual expenses such as electricity and gas. The PER is determined by a court or court official who has to use their own discretion in deciding what an appropriate PER is. Emphasis is placed on the circumstances of the individual and the court official calculating the PER should exercise his discretion. The PER is then subtracted from the net earnings of the debtor and if anything is left it can be attached subject to a recommendation that the attachment should not be less than 50% and not more than 66% of the attachable amount.

In most **developing countries**, a fixed minimum proportion of the wage is declared immune from attachment or assignment, on the clear understanding that employees should in all cases be allowed to retain a certain cash amount essential for the maintenance of themselves and their dependants. In practice, there are various methods for determining the minimum amount which remains immune from attachment or assignment. It may be a fixed sum expressed in national currency. In the Czech Republic and Slovakia, for instance, the law prescribes a minimum amount of the monthly wage which may not be affected by the execution of court rulings or otherwise be subject to deductions. This amount may be increased by a fixed sum for the spouse and each dependant, but may not exceed a prescribed ceiling above which deductions may be made without restriction.

3.3 Enforcement bodies

In **South Africa** enforcement of debt by means of an emoluments attachment order is a court process. No separate enforcement bodies exist in South African legislation. No record or register for existing emoluments attachment orders exists in South Africa or any of the other **African Countries** studied by the research team.

No separate enforcement bodies exist in any of the 50 states in the **USA**.

In **Sweden** enforcement is carried out by a State authority, the Enforcement Office. It is therefore the Enforcement Office that orders attachment. Overall legal responsibility for enforcement rests with a bailiff, while the enforcement itself is normally carried out by enforcement officers.

An important part of the Enforcement Office's work is gathering information on the debtor and his or her assets. Debtors must provide details of their assets, and must confirm the truth of the information they provide in a written list or at a hearing. Infringement of this obligation is a criminal offence. The Enforcement Office may also require the debtor to provide such information, and failure to comply is punishable by a fine, which will be imposed by the district court on application from the Enforcement Office. Wages, salaries, pensions and the like can also be attached.

In **Denmark** the Public Bailiff administers the enforcement and execution of judgments. This process seems to have similarities to the system used in Sweden.

In **Northern Ireland** an Enforcement of Judgments Office (EJO) is central to debt enforcement. The EJO is a department within the Northern Ireland Courts & Tribunal Service (an agency of the Department of Justice) and is responsible for the enforcement of court judgments in respect of money, goods and property. This office has the power to enforce the payment of debt by deductions made by an employer from a person's wage or salary and sent to the EJO. Payment is made to the EJO and also administered by this office.

In **England and Wales** the County Court Rules (County Court Rules 1981 Rule 27 (2)(1)) provide that an officer of a court shall keep a nominal index of existing attachment of earnings orders relating to debtors residing in the particular district. Theoretically, if a court official becomes aware that a debtor in respect of whom an attachment of earnings order has been made in that particular district has moved to another district, a copy of the order should be sent to the relevant court officer of the other district for entry into the index. It is then open to creditors to request that a search be made of the index of the court and certificates issued accordingly (form N336 is used for this purpose). In practice, however, the index of orders system does not appear to ensure that creditors and court officials become automatically aware of the existence of attachment of earnings orders in other districts, and this system has thus been criticised.

3.4 Priority of orders

In South Africa section 29(3) of the Maintenance Act 99 of 1998 provides:

“Any employer on whom a notice has been served for the purposes of satisfying a maintenance order shall give priority to the payments specified in that notice over any order of court requiring payments to be made from the emoluments due to the person against whom that maintenance order was made.”

In the **USA** the Consumer Credit Protection Act allows for a larger proportion of the debtor's income to be garnished in respect of child support/alimony payments than in respect of judgements obtained for non-payment of civil debt. The rationale for this is clear: orders for the support of a person may be considered of greater significance in law than orders for the payment of a debt to an institution or supplier of goods or services.

Federal law-i.e. the Consumer Credit Protection Act – does not expressly make provision for child support or alimony orders to enjoy priority over existing attachment orders for non-payment of civil debt. It appears that some States have introduced such legislation. For example, in Arizona as a general principle, attachments rank according to priority in time of service. However, attachments that are not for the support of a person are inferior to attachments for the support of a person.

Child or spousal support orders are always given priority over any other wage garnishment. As much as 50% of disposable wages can be garnished for child support or alimony if the employee is supporting another spouse or child; up to 60% can be garnished if the employee is not supporting another spouse or child.

An additional 5% can be garnished for support payments that are 12 or more weeks in arrears. Current family support payments are generally given priority over any payments in arrears.

In most **European** jurisdictions attachments for maintenance are given priority.

In **Australia** child support deductions have priority over any other deductions from an employee's salary.

In **England and Wales** attachment orders are divided into priority and non-priority orders. Priority orders include the payment of maintenance or child support, council tax and community charge levies. Non-priority orders include attachments in respect of judgment debts or failure to pay administration orders. The basic priority between the different types of deductions is as follows:

- All priority orders (maintenance, child support, council tax and community charge) take priority over each other by date order. An important amendment was introduced on 1 October 1998 whereby only two council tax orders can be levied at any one time.
- As with priority orders, all non-priority attachment of earnings orders take priority over each other by date order. Therefore, if respective creditors take legal proceedings in the County Court against a debtor and obtain a judgment for the amount claimed, it is the creditor who first applies for and obtains an attachment of earnings orders who takes priority. The second order can only be deducted from any residual attachable earnings. However, the second creditor may look for a consolidated attachment as explained below under "multiple orders".
- Crucially, all non-priority attachment of earnings orders (i.e. non-payment of civil debt or failure to pay administration orders) give way to priority orders regardless of the date on which they were obtained. Therefore, should a maintenance order or order of child support be made subsequent to an order in respect of a judgment debt, it will replace it.

In **developing countries** like Azerbaijan, Israel and Turkey, the wage amounts declared immune from seizure and the relevant attachment limits established by law are not applicable to any attachment for the payment of maintenance. In Malta, where wages may in principle not be attached, the attachment of wages (including bonuses, allowances, overtime and other emoluments) may exceptionally be ordered by a court if it is intended to ensure the payment of maintenance due to the wife, a minor or incapacitated child or an ascendant of the employee. Similarly, in Brazil, the Dominican Republic and Uruguay, wages are as a general rule not subject to attachment except for the purpose of maintenance payments, in which case up to one-third of the employee's salary may be attached.

3.5 Multiple orders

In **South Africa** multiple emoluments attachment orders are common. The team encountered one instance where one employee had 30 against his salary.

In the **USA** Title III of the Consumer Credit Protection Act (CCPA) prohibits an employer from discharging an employee whose earnings have been subject to garnishment for any one debt, regardless of the number of levies made or proceedings brought to collect it.

Title III protects employees from being discharged by their employers because their wages have been garnished for any one debt and limits the amount of employees' earnings that may be garnished in any one week. It does not, however, protect an employee from discharge if the employee's earnings have been subject to garnishment for a second or subsequent debt.

The position in **Europe** differs from country to country. Although multiple attachments are permitted in the Netherlands, the first creditor to obtain an attachment of earnings order becomes responsible for distribution of the available income to other creditors who obtain subsequent orders. This means that the first creditor is saddled with the administration costs of the exercise. This may be designed to discourage applications. Multiple attachments for non-payment of debt are not allowed in **Germany**, and the entire attachment will go to the one creditor until that debt is paid in full.

When multiple garnishee orders are attached to a person's wages in **Australia**, the orders for civil debt will receive priority according to the order in which they were served. If the orders were served the same day, each is given the same priority with the amount deducted equally distributed to each debtor. The deduction of multiple orders at the same time **is** allowed, as long as the total amount deducted does not exceed the maximum amount allowed to be deducted from the wages of the debtor. An attachment of earnings order for maintenance or a fine, however, always receives precedence over an order for a civil debt.

In **England and Wales** section 17 of the Attachment of Earnings Act, 1971 allows a County and Magistrate's Court to consolidate any number of attachment of earnings orders made in relation to the non-payment of judgment debts into one order. This application can be made either by the debtor or by any person who has obtained or is entitled to apply for an attachment of earnings order. It is argued that the consolidated order saves court time, administrative workload for the debtor's employer and creditors, and most of all, distress for the debtor. The consolidated order is only available in relation to non-payment of judgment debts as opposed to, for example, maintenance or community charges. When this consolidated order is made, the money is distributed pro rata to the creditors according to the amount of the judgment.

3.6 Employee protection

Statutory offences created in **South African** legislation are aimed at preventing employees from being dismissed as a result of an emoluments attachment order being served on the employer (save in specific circumstances) and at compelling an employer to furnish complete and accurate particulars of emoluments at the request of the affected employee.

Section 106A of Magistrates' Courts Act states:

"Any garnishee who, by reason of an emoluments attachment order having been served on him in respect of the emoluments of a judgment debtor not occupying a position of trust, in which he handles or has at his disposal moneys, securities or other articles of value, dismisses or otherwise terminates the services of such an judgment debtor, shall be guilty of an offence and on conviction liable to a fine not exceeding R300 or, in default of payment, to imprisonment for a period not exceeding three months."

Section 106B of the Magistrates' Courts Act provides further:

"... any employer who, having been requested by an employee to furnish a written statement containing full particulars of such employee's emoluments, fails or neglects to do so within a reasonable time, or who wilfully or negligently furnishes incorrect relevant particulars shall be guilty

of an offence and on conviction liable to a fine not exceeding R300 or, in default of payment, to imprisonment for a period not exceeding three months.”

In the **USA** federal law states that no employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for one civil debt alone. Violation of this provision is subject to a fine of not more than \$1 000 or imprisonment of not more than a year, or both. From the wording of the act it appears that if two or more attachments exist, the Consumer Credit Protection Act does not prevent an employer from dismissing an employee on these grounds. In the matter of *Johnson v Pike Corporation of America* (1971) the court restricted an employer's right to dismiss an employee whose wages were subject to multiple garnishment. Although it was agreed that the dismissal of this particular employee was not intentionally based on racial grounds, the court felt that the dismissal was indirectly discriminatory, as multiple garnishments occurred more frequently amongst members of minority groups. However, in the absence of any such indirect discrimination, the decision may have been different in this case. In Ohio, after one creditor has garnished a debtor's wages, another creditor cannot request a wage garnishment until 30 days have passed.

In **Germany** express dismissal of an employee by an employer because of attachment is prohibited. Research enquiries have indicated that although this protection exists in theory, it is difficult to establish that this was the reason for the dismissal and in practice it is not uncommon for an employer to discriminate against an employee on the grounds that his/her income is being attached.

In the state of Victoria in **Australia** it is an offence under section 111(10) of the Magistrates' Court Act 1989 (Vic) for an employer to dismiss or alter an employee's position to their prejudice due to an attachment of earnings order. An employer who does so may be required to reimburse the employee for any lost wages and to reinstate the employee in their former or a similar position.

In Queensland, **Australia**, section 60 of the Maintenance Act 1965 states that:

“any person who dismisses an employee or injures the employee in his or her employment, or alters the employee's position to his or her prejudice, by reason of the circumstances that an attachment of earnings order has been made in relation to the employee or that the person is required to make payments under such an order in relation to the employee shall be guilty of an offence against this Act.”

The maximum penalty for this offence is A\$200 or six months' imprisonment.

In **Switzerland** research enquiries found that attachment may end in unemployment, due to the reluctance of employers to deal with the attachment and a lack of protective employment legislation to counter this.

3.7 Commissions

In **South Africa** section 65 J (10) of the Magistrates' Courts Act states:

“Any garnishee may, in respect of the services rendered by him in terms of an emoluments attachment order, recover from the judgment creditor a commission of up to 5 per cent of all amounts deducted by him from the judgment debtor's emoluments by deducting such commission from the amount payable to the judgment creditor.”

The position in Namibia is the same as in South Africa. No information could be obtained indicating the payment of any compensation to employers in any of the other **African Countries** studied.

In the **USA** processing employee garnishments is part of an employer's cost of doing business and the employer is not entitled to any additional commission.

In **Germany** the employer is also not entitled to any commission or compensation.

In **England and Wales** an employer has the right to deduct £1 from the employee's wages in addition to the normal deduction rate under the attachment of earnings order in respect of his/her administrative costs.

In **Australia** the garnishee is entitled to retain a maximum of \$13.00 to cover his expenses in complying with the garnishee order.

3.8 Earnings for purposes of attachment

In **South Africa** section 61 of the Magistrates' Courts Act describes "emoluments" as:

- "(i) salary, wages or any other form of remuneration; and*
- (ii) any allowances, whether expressed in money or not"*

In **England and Wales** the Attachment of Earnings Act (section 24) (England and Wales) 1971 and The Child Support (Collection and Enforcement) Regulations (England and Wales, Scotland, Northern Ireland) 1992 define earnings as:

- wages or salary (including any fees, bonuses, commission, overtime pay or other emoluments payable in addition to wages, or salary payable under a contract of service);
- pension (including an annuity in respect of past service, whether or not rendered to the person paying the annuity, and including periodical payments by way of compensation for the loss, abolition or relinquishment, or diminution in the emoluments, of any office or employment);
- statutory sick pay.

Excluded from earnings are:

- a tax credit;
- pension or allowances in respect of disablement or disability;
- pay or allowances to the debtor as a member of Her Majesty's forces; unless payable as a special member of a reserve force (within the meaning of the Reserve Forces Act 1996);
- except in relation to a maintenance order, wages payable to a person as a seaman, other than wages payable to him as a seaman of a fishing boat (this provision is excluded from the Child Support (Collection and Enforcement) Regulations 1992 because they relate to maintenance);
- sums payable by any public department of the Government of Northern Ireland or of a territory outside the United Kingdom;
- pension, allowances or benefits payable under any enactment relating to social security (e.g. statutory maternity pay, statutory paternity pay and statutory adoption pay) guaranteed minimum pension (within the meaning of the Pension Schemes Act 1993).

The creditor cannot apply for an attachment order if the debtor is:

- self-employed;

- unemployed;
- in the army, air force or navy;
- in the merchant navy.

In the **USA** in terms of the Federal Wage Garnishment Law “earnings” means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus or otherwise and includes periodic payments pursuant to a pension or retirement programme. Generally, these types of wages can be garnished: wages, salaries, commissions, bonuses, or other income. Pension and retirement income can also be garnished. Generally, tips are not garnished since the wage garnishment law does not consider them to be income. Social Security benefits cannot be garnished, except by the Federal government.

In **Germany** Section 850 of the Code of Civil Procedure describes earned income as the remuneration and pensions of civil servants, wages and service pay, retirement pensions, and similar continuous earnings granted after the person concerned has temporarily or permanently left service or his work relationship. It furthermore consists of pensions paid to surviving dependants as well as other remuneration for services of any kind that make up the debtor’s economic activities either in their entirety or to a significant degree. The attachment of the earned income payable in money covers all forms of remuneration to which the debtor is entitled for the performance of his work or service obligations, regardless of how such remuneration is designated or computed.

In **Australia** amounts due to the employee must be paid to the Court and deductions cannot be made prior to paying the money to the Court, e.g. medical benefits, union dues, etc. Apparently, if the employee has some extra remuneration, e.g. holiday pay, this will also be covered by the garnishee order and will have to be handed over.



Chapter 4

SHORTCOMINGS AND IRREGULARITIES IN THE EMOLUMENTS ATTACHMENT ORDER PROCESS

In what follows certain shortcomings and irregularities in the emoluments attachment order process will be listed, and in some instances these abuses will be illustrated by way of examples.

Methodology

The team conducted primary and secondary research in order to identify the irregularities and shortcomings listed in this Chapter.

Primary research entailed the perusal of court—and attorneys’ files as well as consultations with various stakeholders.

Secondary research was done by consulting media reports and other research outputs on the topic.

These examples are used merely to illustrate irregularities and instances of non-compliance. No inference should be drawn regarding the frequency or not of these irregularities in the industry.

One of the objectives of the report was to report on the irregularities still prevailing since the 2008 report as well as newly identified abuses. Suggestions for legislative reform and other corrective measures fall beyond the scope of this report and will be dealt with by the various task teams and eventually the legislator.

4.1 Uncertainty regarding the interpretation of:

4.1.1 Jurisdiction

Section 65 J (1) (a) of the Magistrate's Court Act states that the emoluments attachment order must be issued from the jurisdiction in which the employer of the judgement debtor resides, carries on business or is employed, or, if the judgement debtor is employed by the State, from the jurisdiction where the judgement debtor is employed.

Rule 46 (1) of the Magistrates' Court Rules states that if the judgment creditor issues an emoluments attachment order from a different court than the court where the judgment or order was obtained, a certified copy of the said judgment or order should be included.

Section 45 of the Magistrate's Court Act makes provision for a party to legal proceedings to consent to the jurisdiction of a specific Magistrate's Court in certain circumstances. In practice, debt collection practitioners use the above-mentioned section 45 to obtain consent to the issuing of an emoluments attachment order from a court which would not have jurisdiction in terms of Section 65 J (1) (a). An example of a clause in terms of which the debtor consents to the jurisdiction of a specific court is given below:

7. Consent to the jurisdiction of the Magistrate's Court of BRITS North West in terms of Section 45 of Act 32 of 1944, specifically with regard to the process that is on the verge of being instituted in the Magistrate's Court of Brits in terms of this document and specifically the request and granting of the judgment and amount, and where the defendant's employer agrees, the request and issuing of the Emoluments Attachment Order.

Example 1: Clause in terms of which the debtor consents to the jurisdiction of a foreign court

Different legal opinions exist as to whether a debtor can consent to the jurisdiction of a court different from the one where the employer is domiciled. There is also no uniformity amongst courts as some magistrates' courts will grant an emoluments attachment order based on a consent to jurisdiction in terms of Section 45 and some courts refuse applications where there is no jurisdictional link. The following table, drawn from a larger sample size obtained from a debt collection attorney, illustrates this:

Court	Allows consent in terms of section 45
Bloemfontein	no
Cape Town	no
Durban	yes
East London	yes
Johannesburg	yes
Kempton Park	no
Kimberley	yes
Kroonstad	no

Port Elizabeth	yes
Pretoria	yes

Table 2: Courts allowing consent in terms of section 45

The main argument against conferring jurisdiction in terms of section 45 in the absence of a jurisdictional link is that it is difficult and costly for the consumer to query the validity or the contents of the order or to rescind an emolument attachment order where the court in which the order was granted is situated far from the jurisdiction of the employer. An application to challenge, rescind or amend the order will in all probability require the services of a local attorney as well as a correspondent attorney in the jurisdiction of the seat of the court that granted the order. The same will apply if the order has to be set aside upon final payment for credit bureau profile purposes. These logistical constraints will result in the parties not enjoying the protection or the benefit of the law. The procedural requirements for rescission of a judgement which specifies that the application has to be brought within a specified period of time, also present challenges in these circumstances. If the application is not brought timeously, the party seeking the rescission has to apply for condonation for non-adherence to the rules of court.

This can be illustrated by the following example sourced from the Hello Peter website:

INDUSTRY Financial
BRANCH / AREA Kimberly (sic) **COUNTRY** South Africa
CUSTOMER TobyM
PROBLEM ***** Garnish
INCIDENT Wed 29 May
HEADLINE ***** Garnish

*Last month I noted on my payslip that a garnish for an amount of 43 000 rands has been implemented by ***. I then queried this with the company and was informed that the garnish is for a 9000 rands debt I owe multi loans who by the way offered me credit when I was already overly committed and blacklisted. The company has never sent me the section 58 forms to sign, when I phoned *** and queried the amount and threatened to take the matter further, the lady sent me a statement saying that the garnish is for 31000 rands. **What makes matters worse is that the court that issued the garnish is in Kimberly (sic) and I'm in Durban, how do you even begin to challenge a case managed so far away.** This company is charging me an interest of 60%, what tells me that the document is *****, is that the statement breaking down the costs talking to the 31000 rands does not talk to the cost break down submitted to my employer which has been implemented at 43000 the documents talk to the same issue but speak different languages. I have taken the matter up to the appropriate structures but I need Peter to expose this company so that this does not happen to anyone else.*

Example 2: Complaint re jurisdiction

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

The tendency at some courts to have long waiting periods for the granting of emoluments attachment orders and their unwillingness to grant emoluments attachment orders, even where the merits of the case warrant same, can potentially obstruct the process to such an extent that the emoluments attachment order process would not be an economically viable option for the recovery of debt any longer. This

explains why debt collectors would utilise Section 45 to obtain emoluments attachment orders from courts other than those mentioned in section 65J.

The research team was inundated with examples of debtors with emoluments attachment orders against their salaries granted in faraway courts. The debtor's consent to the judgment of these courts was always offered as the reason for this. In a survey done by the Law Clinic of the University of Stellenbosch in May 2012, only one out of the 43 emoluments attachment order matters dealt with by the clinic on behalf of debtors at that stage, was issued from the jurisdiction of the court where the employer conducts business.

Employer Address	Court from which emoluments attachment order was issued
Agter-Paarl	Kimberley
Agter-Paarl	Winburg
Ceres	Kimberley
De Doorns	Phuthaditjhaba
De Doorns	Phuthaditjhaba
Elsenburg (STB)	Cape Town
Franschhoek	Pretoria
Franschhoek	Kimberley
Franschhoek	Cape Town
Paarl	Paarl
Stellenbosch	Beaufort West
Stellenbosch	Cape Town
Stellenbosch	Cape Town
Stellenbosch	Johannesburg
Stellenbosch	Kimberley
Stellenbosch	Kimberley
Stellenbosch	Kimberley
Stellenbosch	Kimberley
Stellenbosch	Kimberley
Stellenbosch	Kimberley
Stellenbosch	Kimberley
Stellenbosch	Kimberley
Stellenbosch	Kimberley
Stellenbosch	Kimberley
Stellenbosch	Kimberley
Stellenbosch	Kimberley
Stellenbosch	Kimberley
Stellenbosch	Kimberley
Stellenbosch	Kimberley
Stellenbosch	Kimberley
Stellenbosch	Kimberley
Stellenbosch	Kimberley

Stellenbosch	Kimberley
Stellenbosch	Kimberley
Stellenbosch	Kimberley
Stellenbosch	Kimberley
Stellenbosch	Uitenhage
Stellenbosch	Winburg
Stellenbosch	Winburg
Stellenbosch	Winburg
Stellenbosch	Winburg
Stellenbosch	Winburg
Stellenbosch	Winburg
Stellenbosch	Winburg
Stellenbosch	Winburg
Stellenbosch	Winburg

Table 3 Difference between employer address and court with jurisdiction

4.1.2 In duplum

The common-law in duplum rule, as it is generally known in South African law, provides that interest stops running when unpaid interest equals the outstanding capital amount.

Section 103(5) of the National Credit Act introduced a statutory rule. It provides as follows:

“Despite any provision of the common law or a credit agreement to the contrary, the amounts contemplated in section 101(1)(b) to (g) that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the defaults occurs.”

Thus, the statutory in duplum rule provides that when a consumer is in default, all the combined amounts set out in section 101(1)(b)-(g) (amongst them collection costs) cease to run when they reach the outstanding balance of the consumer’s principal debt at the time of the default.

The difference between the common-law and the statutory in duplum rules lies in the fact that under the common-law rule it is only the interest (contractual and default) that ceases to run if it equals the outstanding capital amount. Under the statutory rule, however, all the amounts set out in section 101 (1) (b) – (g), i.e. initiation fees, service fees, interest (contractual and default), costs of any credit insurance, default administration charges, and collection costs, stop running if they combine to exceed the outstanding principal debt.

Currently there is a difference of opinion as to whether section 103(5) includes the collection costs due to a debt collector or attorney. One interpretation is that the statutory in duplum rule caps the fees lawyers may charge in connection with the collection of a loan. The other interpretation, the one collection attorneys favour, is that the in duplum rule does not include the costs of securing and imposing a legal judgment such as an emoluments attachment order, effectively allowing attorneys to charge defaulters amounts well in excess of the principal amount of the loan.

The effect of the abuse of the application of the in-duplum rule is illustrated by the following example:

PRINCIPLE DEBT	10,776.55	ORIGINAL TERM	30
START DATE	2005/11/18	END DATE	2008/05/31
INSTALMENT	728.75	INSTALMENT FREQUENCY	Monthly

PAYMENTS RECEIVED	FEES LEVIED	INTEREST ACCRUED	INSURANCE COST LEVIED	COLLECTIONS COSTS LEVIED	DEFAULT ADMIN COSTS LEVIED	LEGAL FEES INCURRED	OTHER DEBITS	OTHER CREDITS
30,550.91	0.00	44,583.27	0.00	0.00	0.00	1,529.41	15,151.75	10,083.97

Example 3: Effect of abuse of in duplum

In the above matter the debtor was refunded by the credit provider in the amount of R7 455.50 after the application of the in duplum rule was brought to his attention.

The effect of the in duplum rule can further be illustrated by the following example, from which it appears that in duplum was already reached in September 2008. The attorneys however proceeded with collection steps and the first payment was made in July 2013. At this stage the outstanding balance amounted to R5 012.43. The handover amount was R600.

Date	Opening Balance	Intrest	Payment	Cost	Balance	Description
25/01/2007	R 600.00	R 0.00	R 0.00	R 0.00	R 600.00	OPENING BALANCE
25/01/2007	R 600.00	R 180.00	R 0.00	R 0.00	R 780.00	PENALTY INTEREST CHARGED
01/02/2007	R 780.00	R 15.60	R 0.00	R 0.00	R 795.60	INTEREST CHARGED
01/03/2007	R 795.60	R 15.91	R 0.00	R 0.00	R 811.51	INTEREST CHARGED
01/04/2007	R 811.51	R 16.23	R 0.00	R 0.00	R 827.74	INTEREST CHARGED
01/05/2007	R 827.74	R 16.55	R 0.00	R 0.00	R 844.29	INTEREST CHARGED
15/05/2007	R 844.29	R 0.00	R 0.00	R 6.00	R 850.29	ATTENDING TO CORRESPONDANCE
17/05/2007	R 850.29	R 0.00	R 0.00	R 12.00	R 862.29	TELEPHONE CALLS
01/06/2007	R 862.29	R 17.25	R 0.00	R 0.00	R 879.54	INTEREST CHARGED
12/06/2007	R 879.54	R 0.00	R 0.00	R 6.00	R 885.54	ATTENDING TO CORRESPONDANCE
01/07/2007	R 885.54	R 17.71	R 0.00	R 0.00	R 903.25	INTEREST CHARGED
01/08/2007	R 903.25	R 18.07	R 0.00	R 0.00	R 921.32	INTEREST CHARGED
01/09/2007	R 921.32	R 18.43	R 0.00	R 0.00	R 939.75	INTEREST CHARGED
01/10/2007	R 939.75	R 18.80	R 0.00	R 0.00	R 958.55	INTEREST CHARGED
02/10/2007	R 958.55	R 0.00	R 0.00	R 6.00	R 964.55	ATTENDING TO CORRESPONDANCE
01/11/2007	R 964.55	R 19.29	R 0.00	R 0.00	R 983.84	INTEREST CHARGED
01/12/2007	R 983.84	R 19.68	R 0.00	R 0.00	R 1,003.52	INTEREST CHARGED
01/01/2008	R 1,003.52	R 20.07	R 0.00	R 0.00	R 1,023.59	INTEREST CHARGED
08/01/2008	R 1,023.59	R 0.00	R 0.00	R 6.30	R 1,029.89	ATTENDING TO CORRESPONDANCE
01/02/2008	R 1,029.89	R 20.60	R 0.00	R 0.00	R 1,050.49	INTEREST CHARGED
01/03/2008	R 1,050.49	R 21.01	R 0.00	R 0.00	R 1,071.50	INTEREST CHARGED
28/03/2008	R 1,071.50	R 0.00	R 0.00	R 6.30	R 1,077.80	ATTENDING TO CORRESPONDANCE
01/04/2008	R 1,077.80	R 21.56	R 0.00	R 0.00	R 1,099.36	INTEREST CHARGED
01/05/2008	R 1,099.36	R 21.99	R 0.00	R 0.00	R 1,121.35	INTEREST CHARGED
01/06/2008	R 1,121.35	R 22.43	R 0.00	R 0.00	R 1,143.78	INTEREST CHARGED
01/07/2008	R 1,143.78	R 22.88	R 0.00	R 0.00	R 1,166.66	INTEREST CHARGED
01/08/2008	R 1,166.66	R 23.33	R 0.00	R 0.00	R 1,189.99	INTEREST CHARGED
01/09/2008	R 1,189.99	R 23.80	R 0.00	R 0.00	R 1,213.79	INTEREST CHARGED
01/10/2008	R 1,213.79	R 24.28	R 0.00	R 0.00	R 1,238.07	INTEREST CHARGED
01/11/2008	R 1,238.07	R 24.76	R 0.00	R 0.00	R 1,262.83	INTEREST CHARGED
21/11/2008	R 1,262.83	R 0.00	R 0.00	R 6.30	R 1,269.13	ATTENDING TO CORRESPONDANCE
01/12/2008	R 1,269.13	R 25.38	R 0.00	R 0.00	R 1,294.51	INTEREST CHARGED
01/01/2009	R 1,294.51	R 25.89	R 0.00	R 0.00	R 1,320.40	INTEREST CHARGED
01/02/2009	R 1,320.40	R 26.41	R 0.00	R 0.00	R 1,346.81	INTEREST CHARGED
01/03/2009	R 1,346.81	R 26.94	R 0.00	R 0.00	R 1,373.75	INTEREST CHARGED
01/04/2009	R 1,373.75	R 27.48	R 0.00	R 0.00	R 1,401.23	INTEREST CHARGED
01/05/2009	R 1,401.23	R 28.02	R 0.00	R 0.00	R 1,429.25	INTEREST CHARGED
21/05/2009	R 1,429.25	R 0.00	R 0.00	R 6.30	R 1,435.55	ATTENDING TO CORRESPONDANCE
01/06/2009	R 1,435.55	R 28.71	R 0.00	R 0.00	R 1,464.26	INTEREST CHARGED
30/06/2009	R 1,464.26	R 0.00	R 0.00	R 6.30	R 1,470.56	ATTENDING TO CORRESPONDANCE
01/07/2009	R 1,470.56	R 29.41	R 0.00	R 0.00	R 1,499.97	INTEREST CHARGED
01/08/2009	R 1,499.97	R 30.00	R 0.00	R 0.00	R 1,529.97	INTEREST CHARGED
01/09/2009	R 1,529.97	R 30.60	R 0.00	R 0.00	R 1,560.57	INTEREST CHARGED
01/10/2009	R 1,560.57	R 31.21	R 0.00	R 0.00	R 1,591.78	INTEREST CHARGED
01/11/2009	R 1,591.78	R 31.84	R 0.00	R 0.00	R 1,623.62	INTEREST CHARGED
01/12/2009	R 1,623.62	R 32.47	R 0.00	R 0.00	R 1,656.09	INTEREST CHARGED
01/01/2010	R 1,656.09	R 33.12	R 0.00	R 0.00	R 1,689.21	INTEREST CHARGED

01/02/2010	R 1,689.21	R 33.78	R 0.00	R 0.00	R 1,722.99	INTEREST CHARGED
01/03/2010	R 1,722.99	R 34.46	R 0.00	R 0.00	R 1,757.45	INTEREST CHARGED
01/04/2010	R 1,757.45	R 35.15	R 0.00	R 0.00	R 1,792.60	INTEREST CHARGED
01/05/2010	R 1,792.60	R 35.85	R 0.00	R 0.00	R 1,828.45	INTEREST CHARGED
01/06/2010	R 1,828.45	R 36.57	R 0.00	R 0.00	R 1,865.02	INTEREST CHARGED
01/07/2010	R 1,865.02	R 37.30	R 0.00	R 0.00	R 1,902.32	INTEREST CHARGED
01/08/2010	R 1,902.32	R 38.05	R 0.00	R 0.00	R 1,940.37	INTEREST CHARGED
01/09/2010	R 1,940.37	R 38.81	R 0.00	R 0.00	R 1,979.18	INTEREST CHARGED
01/10/2010	R 1,979.18	R 39.58	R 0.00	R 0.00	R 2,018.76	INTEREST CHARGED
01/11/2010	R 2,018.76	R 40.38	R 0.00	R 0.00	R 2,059.14	INTEREST CHARGED
01/12/2010	R 2,059.14	R 41.18	R 0.00	R 0.00	R 2,100.32	INTEREST CHARGED
01/01/2011	R 2,100.32	R 42.01	R 0.00	R 0.00	R 2,142.33	INTEREST CHARGED
01/02/2011	R 2,142.33	R 42.85	R 0.00	R 0.00	R 2,185.18	INTEREST CHARGED
01/03/2011	R 2,185.18	R 43.70	R 0.00	R 0.00	R 2,228.88	INTEREST CHARGED
01/04/2011	R 2,228.88	R 44.58	R 0.00	R 0.00	R 2,273.46	INTEREST CHARGED
13/04/2011	R 2,273.46	R 0.00	R 0.00	R 7.00	R 2,280.46	ATTENDING TO CORRESPONDANCE
01/05/2011	R 2,280.46	R 45.61	R 0.00	R 0.00	R 2,326.07	INTEREST CHARGED
01/06/2011	R 2,326.07	R 46.52	R 0.00	R 0.00	R 2,372.59	INTEREST CHARGED
01/07/2011	R 2,372.59	R 47.45	R 0.00	R 0.00	R 2,420.04	INTEREST CHARGED
01/08/2011	R 2,420.04	R 48.40	R 0.00	R 0.00	R 2,468.44	INTEREST CHARGED
01/09/2011	R 2,468.44	R 49.37	R 0.00	R 0.00	R 2,517.81	INTEREST CHARGED
01/10/2011	R 2,517.81	R 50.36	R 0.00	R 0.00	R 2,568.17	INTEREST CHARGED
01/11/2011	R 2,568.17	R 51.36	R 0.00	R 0.00	R 2,619.53	INTEREST CHARGED
01/12/2011	R 2,619.53	R 52.39	R 0.00	R 0.00	R 2,671.92	INTEREST CHARGED
01/01/2012	R 2,671.92	R 53.44	R 0.00	R 0.00	R 2,725.36	INTEREST CHARGED
01/02/2012	R 2,725.36	R 54.51	R 0.00	R 0.00	R 2,779.87	INTEREST CHARGED
01/03/2012	R 2,779.87	R 55.60	R 0.00	R 0.00	R 2,835.47	INTEREST CHARGED
01/04/2012	R 2,835.47	R 56.71	R 0.00	R 0.00	R 2,892.18	INTEREST CHARGED
01/05/2012	R 2,892.18	R 57.84	R 0.00	R 0.00	R 2,950.02	INTEREST CHARGED
01/06/2012	R 2,950.02	R 59.00	R 0.00	R 0.00	R 3,009.02	INTEREST CHARGED
01/07/2012	R 3,009.02	R 60.18	R 0.00	R 0.00	R 3,069.20	INTEREST CHARGED
01/08/2012	R 3,069.20	R 61.38	R 0.00	R 0.00	R 3,130.58	INTEREST CHARGED
01/09/2012	R 3,130.58	R 62.61	R 0.00	R 0.00	R 3,193.19	INTEREST CHARGED
01/10/2012	R 3,193.19	R 63.86	R 0.00	R 0.00	R 3,257.05	INTEREST CHARGED
01/11/2012	R 3,257.05	R 65.14	R 0.00	R 0.00	R 3,322.19	INTEREST CHARGED
23/11/2012	R 3,322.19	R 0.00	R 0.00	R 10.00	R 3,332.19	COMPUSCAN
26/11/2012	R 3,332.19	R 0.00	R 0.00	R 15.00	R 3,347.19	TELEPHONE CALLS
01/12/2012	R 3,347.19	R 66.94	R 0.00	R 0.00	R 3,414.13	INTEREST CHARGED
03/12/2012	R 3,414.13	R 0.00	R 0.00	R 15.00	R 3,429.13	TELEPHONE CALLS
03/12/2012	R 3,429.13	R 0.00	R 0.00	R 15.00	R 3,444.13	OTHER NECESSARY EXPENCES
01/01/2013	R 3,444.13	R 68.88	R 0.00	R 0.00	R 3,513.01	INTEREST CHARGED
01/02/2013	R 3,513.01	R 70.26	R 0.00	R 0.00	R 3,583.27	INTEREST CHARGED
27/02/2013	R 3,583.27	R 0.00	R 0.00	R 15.00	R 3,598.27	TELEPHONE CALLS
01/03/2013	R 3,598.27	R 71.97	R 0.00	R 0.00	R 3,670.24	INTEREST CHARGED
01/04/2013	R 3,670.24	R 73.40	R 0.00	R 0.00	R 3,743.64	INTEREST CHARGED
01/05/2013	R 3,743.64	R 74.87	R 0.00	R 0.00	R 3,818.51	INTEREST CHARGED
02/05/2013	R 3,818.51	R 0.00	R 0.00	R 1,030.00	R 4,848.51	ATTORNEY FEES
09/05/2013	R 4,848.51	R 0.00	R 0.00	R 15.00	R 4,863.51	TELEPHONE CALLS
16/05/2013	R 4,863.51	R 0.00	R 0.00	R 36.50	R 4,900.01	COURIERS
01/06/2013	R 4,900.01	R 98.00	R 0.00	R 0.00	R 4,998.01	INTEREST CHARGED
10/06/2013	R 4,998.01	R 0.00	R 0.00	R 180.00	R 5,178.01	SHERRIF FEES
21/06/2013	R 5,178.01	R 0.00	R 0.00	R 17.00	R 5,195.01	TELEPHONE CALLS
01/07/2013	R 5,195.01	R 103.90	R 0.00	R 0.00	R 5,298.91	INTEREST CHARGED
04/07/2013	R 5,298.91	R 0.00	R 337.20	R 33.72	R 4,995.43	10 % COLLECTION COMMISSION
11/07/2013	R 4,995.43	R 0.00	R 0.00	R 17.00	R 5,012.43	FAX CALL OR E-MAIL

Example 4: Effect of in duplum

4.2 Lack of uniformity in Magistrates' Courts

Apart from the different interpretations of the jurisdiction and in duplum issues by courts, credit providers and attorneys, there is also no uniformity amongst the courts with regard to the documentation supporting an application for an emoluments attachment order.

To illustrate this, the following comparison is drawn from a larger sample size obtained from a collections attorney.

Court	Number of requirements to be met before granting of emoluments attachment order	Number of copies attached to application
Johannesburg	6	12
Pretoria	6	13
Kimberley	7	13
Mitchell's Plain	11	17
Boksburg	13	19

Table 4: Number of requirements to be met and copies to be attached re emoluments attachment orders in different courts

Again this will lead to forum shopping as attorneys will prefer to use the courts where it is easier to obtain the emoluments attachment order.

4.3 Shortcomings in the process

An emoluments attachment order can be obtained in one of the following three instances:

1. Where the court has so authorised;
2. Where the judgment debtor has consented thereto; or
3. In terms of section 65J(2)(b).

In respect of (1) above the press reported on an incident where debtors who allegedly appeared in court before a magistrate when an emoluments attachment order was granted in terms of Section 74 D, never attended the hearing but were in fact clocked in at the factory where they work at that time. Similar allegations regarding the attestation of affidavits in the absence of deponents were made. (www.timeslive.co.za/thetimes/2013/08/06/court-officers-in-dock). At the time of writing this report the matter was still being investigated.

In respect of (2) above, i.e. where a debtor consented to an emoluments attachment order, the clerk of court would in many instances have no way of verifying the authenticity of the signature of the debtor. The reasonableness of the instalments consented to or the circumstances under which the consent was obtained are also not known to the clerk of the court. Cases of blank consent forms, incomplete documentation and the alleged forgery of signatures were reported to the research team. In some instances, debtors also alleged duress or misrepresentation.

With regard to (3) above, i.e. where an emoluments attachment order is obtained in terms of section 65 J (2)(b), the judgement creditor or his attorneys are required to send a registered letter to the judgement debtor, informing him of the judgement and of the fact that an emoluments attachment order will be issued if the amount is not paid within ten days. The creditor is not obliged to mention the amount of the instalment that will be applied for in this letter.

The judgment creditor must also file an affidavit or a certificate with his attorney setting forth the debt, costs and proposed instalments. These documents are not served on the employer or the employee with the result that the employee only becomes aware of the amount to be deducted after service of the emoluments attachment order on his employer or after the deduction has been effected.

No affordability test is done and the creditor often decides unilaterally on the amount of the instalment. It is also not possible for the creditor or the clerk of court granting the emoluments attachment order to determine whether or not other orders have already been granted against the debtor.

Court applications in terms of section 65J (2)(b) are further problematic due to the different interpretations of the procedure to be followed. Some magistrates prefer the procedure supported by the court in *University of Natal, Pietermaritzburg v Ziqubu 1999 (2) SA 128 (N)* allowing direct applications for emoluments attachment orders, placing the onus to oppose the application of the amount of the deduction, on the debtor. Other magistrates prefer the interpretation of the court in the matter of *Minter NO v Baker & Another 2001 (3) SA 175 (W)* where it was decided that a court application for an emoluments attachment order should start with section 65 A financial inquiry after which an application in terms of Section 65 J (2)(b) should follow.

4.4 Problems with service of emoluments attachment orders

Section 65 J (3) requires the emoluments attachment order to be served on the employer by the sheriff. The emoluments attachment order is not served on the employee who often only becomes aware of the existence of the order once it has been implemented and the deduction appears on his pay-slip.

In practice it often happens that the payroll office is situated at a different office than where the emoluments attachment order was served, for instance where service was affected at the head office of the employer whilst the employee is working at a branch office in a different province. The opposite is also possible: the order is served on the branch where the employee works whilst the payroll is administered at a provincial or national office or even outsourced. This creates delays in payment as well as increased legal costs when a warrant of execution is served on the employer. The costs associated with the warrant are often eventually for the account of the employee.

4.5 Irregular deductions

Section 65J(b)(ii) requires the employer to pay to the judgment creditor or his or her attorney specific amounts from the salary of the judgment debtor *in accordance with the order of court* laying down the specific instalments payable by the judgment debtor, until the relevant judgment debt and costs have been paid in full.

The employer is therefore obliged to pay the instalments to the creditor or his attorney in accordance with the court order. However, for various reasons, the amounts deducted do not always conform to the specifications of the order. Irregular payments and inconsistencies pertaining to the amounts paid over were observed. These irregular payments had an effect on the repayment period, interest charged, as well as on the costs charged on the file.

02-08-2008	Trec ABSA BANK DT3205 NOMSA DD 31.07.08	0.00	100.00	1,931.31
02-08-2008	Fee Col. com. on R100.00: DT3205/ZF0069	11.40	0.00	1,942.71
25-08-2008	Interest for 23 days @ 15.50% from 02-08-2008	11.39	0.00	1,954.10
29-08-2008	Interest for 4 days @ 15.50% from 25-08-2008	1.98	0.00	1,956.08
29-08-2008	Fee Attend to Correspondent s account & chq	25.08	0.00	1,981.16
01-09-2008	Interest for 3 days @ 15.50% from 29-08-2008	1.49	0.00	1,982.65
01-09-2008	CJnl SHERIFF MIDDELBURG B HOLDER CHRGS 13396/07 NK J	103.05	0.00	2,085.70
29-09-2008	Interest for 28 days @ 15.50% from 01-09-2008	13.86	0.00	2,099.56
29-09-2008	ABSA BANK DT3205 NOMSA DT3205	0.00	200.00	1,899.56
29-09-2008	Col. com. on R200.00 - DT3205/ZF0069	22.80	0.00	1,922.36
30-09-2008	Interest for 1 day @ 15.50% from 29-09-2008	0.50	0.00	1,922.86
03-10-2008	Interest for 3 days @ 15.50% from 30-09-2008	1.49	0.00	1,924.35
03-10-2008	ABSA BANK DT3205 NOMSA DT3205	0.00	100.00	1,824.35
03-10-2008	Col. com. on R100.00 - DT3205/ZF0069	11.40	0.00	1,835.75
24-10-2008	Interest for 21 days @ 15.50% from 03-10-2008	10.40	0.00	1,846.15
06-11-2008	Interest for 13 days @ 15.50% from 24-10-2008	6.44	0.00	1,852.59
06-11-2008	ABSA BANK DT3205 NOMSA DT3205	0.00	100.00	1,752.59
06-11-2008	Col. com. on R100.00 - DT3205/ZF0069	11.40	0.00	1,763.99
25-11-2008	Interest for 19 days @ 15.50% from 06-11-2008	9.41	0.00	1,773.40
13-02-2009	Interest for 80 days @ 15.50% from 25-11-2008	39.61	0.00	1,813.01
13-02-2009	Fee National telephone calls made	26.22	0.00	1,839.23
10-03-2009	Interest for 25 days @ 15.50% from 13-02-2009	12.41	0.00	1,851.64
10-03-2009	Fee Call to employer RE: arrears (national)	26.22	0.00	1,877.86
04-04-2009	Interest for 25 days @ 15.50% from 10-03-2009	12.41	0.00	1,890.27
04-04-2009	ABSA BANK DT3205 NOMSA DD01-04-09 DT3205	0.00	400.00	1,490.27
04-04-2009	Col. com. on R400.00 - DT3205/ZF0069	45.60	0.00	1,535.87
28-04-2009	Interest for 24 days @ 15.50% from 04-04-2009	11.92	0.00	1,547.79
06-05-2009	Interest for 8 days @ 15.50% from 28-04-2009	3.97	0.00	1,551.76
06-05-2009	ABSA BANK DT3205 NOMSA DD02-05-09 DT3205	0.00	100.00	1,451.76
06-05-2009	Col. com. on R100.00 - DT3205/ZF0069	11.40	0.00	1,463.16
25-05-2009	Interest for 19 days @ 15.50% from 06-05-2009	9.43	0.00	1,472.59
25-05-2009	Fee Correspondence Sent	12.54	0.00	1,485.13
02-06-2009	Interest for 8 days @ 15.50% from 25-05-2009	3.97	0.00	1,489.10
02-06-2009	ABSA BANK DT3205 NOMSA DD30-05-09 DT3205	0.00	100.00	1,389.10
02-06-2009	Col. com. on R100.00 - DT3205/ZF0069	11.40	0.00	1,400.50
25-06-2009	Interest for 23 days @ 15.50% from 02-06-2009	11.42	0.00	1,411.92
06-08-2009	Interest for 42 days @ 15.50% from 25-06-2009	20.85	0.00	1,432.77
06-08-2009	ABSA BANK DT3205 NOMSA DD01-08-09 DT3205	0.00	100.00	1,332.77
06-08-2009	Col. com. on R100.00 - DT3205/ZF0069	11.40	0.00	1,344.17

Example 5: Irregular deductions

4.6

Payroll offices stopping deductions too soon or too late

Section 65J (4) (a) of the Magistrate's Court Act 32, 1944 gives clear directions as to when the employer should start deductions in terms of an emoluments attachment order: if the garnishee pays the judgment creditor on a monthly basis, the first deduction and payment must be made at the end of the month following the month in which the emoluments attachment order was served on him. If the garnishee pays the judgment creditor on a weekly basis, the first deduction must be made at the end of the second week of the month in which the emoluments attachment order was served.

The natural assumption would be that deductions have to stop as soon as the debt is paid off. Payroll officers, however, often find it difficult to determine when to stop deductions. This is discussed in more detail in Chapter 5.

When deductions in terms of an emoluments attachment order are stopped prematurely, interest will accrue and legal costs will be incurred when the attorney has to enquire about payment. A warrant of execution may be issued by the court against the employer who fails to give effect to such an emoluments attachment order, resulting in the attachment and eventual sale in execution of their property. The costs occasioned by these proceedings will be for the account of the judgment debtor.

Payments made by the employer in terms of the emoluments attachment order serve as a partial discharge of the employer's obligations towards his employee, the judgement debtor. Failure on the part of the garnishee-employer to make payment to the judgement creditor constitutes a breach of his obligations to his employee, who may take action against him for breach of contract. The employee may also have a legal claim against such an employer based on the negligence relating to non-payment.

In some instances the payroll systems used by employers do not assist payroll officers to properly manage deductions made in terms of emoluments attachment orders. The team were alerted to instances

where the system does not provide for an outstanding amount to be loaded onto payroll systems – effectively creating deductions continuing *ad infinitum*.

To assist payroll offices in deducting the full outstanding amount, some attorneys provide a repayment schedule which is attached to the emoluments attachment order when it is served by the sheriff on the employer. The repayment schedule below indicates the outstanding balance, the number and amount of monthly instalments as well as the amount of the final instalment.

1. **Outstanding Balance**

The outstanding balance as at 27/08/2012 amounts to R12 174.58.

2. **Settlement**

A settlement amount of R12 573.58 is required to settle this account and will be valid up until 06/09/2012

3. **Monthly repayment**

As at 27/08/2012, 20 payments of R750.20 and a final payment of R561088 is required to settle the debt.

4. **Payment method**

a. Electronic funds transfer / direct deposit

Account nr: xxxxxx

Standard Bank

Kempton Park Branch: xxxx

Trust Account: xxxxxx

5. **Contact details**

Tel no: (xxx) xxx xxxx

Fax no: (xxx) xxx xxxx

Please quote XXxxxx as a reference on all queries and proof of payments.

Example 6: Repayment calculation

4.7

Fees charged for statements of account

Section 65J(4)(b) states that the judgment creditor or his attorney shall, at the *reasonable request* of the garnishee or judgment debtor, furnish him or her *free of charge* with a statement containing particulars of the payments received to date and the balance owing.

Nothing however compels the regular delivery of balance statements and collectors have different policies regarding the sending of balance statements – some send free statements every three or six months. The team has encountered instances where collectors charge fees for the rendering of these statements. The team also came across instances where the statement was delivered free of charge, but charges for

disbursements (copies) or correspondence were levied which corresponds with the time when balance statements were sent. In other instances fees were charged for the calculation of the balance as indicated in the extract from a statement below.

13/02/2008	Skedule // Oorplasing	12.00
13/02/2008	Uitwerk Van Balans	45.60
13/02/2008	E-Pos Aan Kliënt	51.30
13/02/2008	BETALING ONTVANG	-285.00
18/03/2008	BETALING ONTVANG	-285.00
19/03/2008	10% Invorderingskommissie	32.49
19/03/2008	Direkte Bankinbetaling - Werkgewer	33.00
19/03/2008	Skedule // Oorplasing	12.00
19/03/2008	Faks Aan Werkgewer - Voorsien U/S Balans	36.00
19/03/2008	Fax Ontvang Vanaf Kliënt	36.00
11/04/2008	BETALING ONTVANG	-285.00
15/04/2008	10% Invorderingskommissie	32.49
15/04/2008	Direkte Bankinbetaling - Werkgewer	33.00
15/04/2008	Skedule // Oorplasing	12.00
16/05/2008	10% Invorderingskommissie	32.49
16/05/2008	Direkte Bankinbetaling - Werkgewer	33.00
16/05/2008	Uitwerk Van Balans	45.60
16/05/2008	Skedule // Oorplasing	12.00
16/05/2008	Faks (gedeelte)	19.00
16/05/2008	BETALING ONTVANG	-285.00

Example 7: Fees charged for calculation of balance

4.8 No prospect of settlement

Debtors often do not understand the full financial risks, costs and obligations of the agreements they enter into. They are also often unaware of the maximum interest rates and fees that may be charged and do not appreciate the influence these charges may have on the repayment period. Examples where the amount being deducted is barely covering the costs and the interest resulting in the debtor paying off very little or nothing on the capital amount were encountered by the team. This creates a situation where the debtor could be paying for a very long time or even never be in a position to settle the outstanding amount as illustrated by the example hereunder. Despite regular payments of R500 per month, the outstanding balance increased from R46 596.22 to R51 454.72 over the period October 2011 to April 2013.

Case Number: C01-015622541	
Name: [REDACTED]	
ID Number: [REDACTED]	
Unit Name: [REDACTED]	
Reference Number: 11326750	
Consent Amount: R 500.00	
Balance: R 51,240.76	

Trans Date	Trans Type	Debit	Credit	Balance
2011-07-28	Take On from Outsource	R 45209.06		R 45209.06
2011-07-31	Outsource Interest	R 57.69		R 45326.75
2011-08-08	Drawing Perusal of Section 129	R 24.00		R 45350.75
2011-08-08	Attendance to posting of Notice in terms of Section 129	R 13.68		R 45364.43
2011-08-08	Drafting, Perusal and Posting of Letter of Demand	R 54.72		R 45419.15
2011-08-08	Perusal and Verification of Consent to Judgement	R 90.06		R 45509.21
2011-08-31	Outsource Interest	R 598.95		R 46108.17
2011-09-30	Outsource Interest	R 588.65		R 46696.82
2011-09-30	Cost Interest	R 3.44		R 46700.26
2011-10-17	Outsource Interest	R 336.91		R 47037.17
2011-10-17	Cost Interest	R 2.05		R 47039.22
2011-10-17	Outsource Commission	R 57.00		R 47096.22
2011-10-17	Payment received via Cosmos		R 500.00	R 46596.22
2011-10-31	Outsource Interest	R 276.65		R 46872.87
2011-10-31	Cost Interest	R 1.76		R 46874.63
2011-11-04	Opening of file and taking of instruction	R 370.50		R 47245.13
2011-11-04	Request letter and Perusal of report ITC / DEED / COMPANY SEARCH	R 29.64		R 47274.77
2011-11-15	Outsource Interest	R 297.87		R 47572.64
2011-11-15	Cost Interest	R 4.85		R 47577.49
2011-11-15	Outsource Commission	R 57.00		R 47634.48
2011-11-15	Payment received via Cosmos		R 500.00	R 47134.48
2011-11-30	Outsource Interest	R 297.31		R 47431.79
2011-11-30	Cost Interest	R 5.78		R 47437.58
2011-12-15	Outsource Interest	R 299.21		R 47736.79
2011-12-15	Cost Interest	R 5.84		R 47742.62
2011-12-15	Outsource Commission	R 57.00		R 47799.62
2011-12-15	Payment received via Cosmos		R 500.00	R 47299.62
2011-12-31	Outsource Interest	R 318.25		R 47617.87
2011-12-31	Cost Interest	R 6.29		R 47624.16
2012-01-31	Outsource Interest	R 622.79		R 48246.94
2012-01-31	Cost Interest	R 12.37		R 48259.32
2012-02-13	Outsource Interest	R 263.62		R 48522.93
2012-02-13	Cost Interest	R 5.63		R 48528.56
2012-02-13	Outsource Commission	R 57.00		R 48585.56
2012-02-13	Payment received via Cosmos		R 500.00	R 48085.56
2012-02-29	Outsource Interest	R 323.44		R 48409.00
2012-02-29	Cost Interest	R 6.99		R 48415.99
2012-03-13	Outsource Interest	R 264.41		R 48680.40
2012-03-13	Cost Interest	R 5.37		R 48685.77
2012-03-13	Outsource Commission	R 57.00		R 48742.77
2012-03-13	Payment received via Cosmos		R 500.00	R 48242.77
2012-03-31	Outsource Interest	R 365.13		R 48607.91
2012-03-31	Cost Interest	R 7.51		R 48615.41
2012-04-16	Outsource Interest	R 326.91		R 48942.33
2012-04-16	Cost Interest	R 6.97		R 48949.30
2012-04-16	Outsource Commission	R 57.00		R 49006.30
2012-04-16	Payment received via Cosmos		R 500.00	R 48506.30
2012-04-30	Outsource Interest	R 285.23		R 48791.53
2012-04-30	Cost Interest	R 6.16		R 48797.70
2012-05-08	Outsource Interest	R 163.75		R 48661.45

2012-05-08	Cost Interest	R	3.43		R	48964.88	
2012-05-08	Outsource Commission	R	57.00		R	49021.88	
2012-05-08	Payment received via Cosmos			R	500.00	R	48521.88
2012-05-31	Outsource Interest	R	469.56			R	48991.44
2012-05-31	Cost Interest	R	9.97			R	49001.41
2012-05-19	Outsource Interest	R	391.37			R	49392.77
2012-06-19	Cost Interest	R	8.63			R	49401.40
2012-06-19	Outsource Commission	R	57.00			R	49458.40
2012-06-19	Payment received via Cosmos			R	500.00	R	48958.40
2012-06-30	Outsource Interest	R	225.95			R	49184.36
2012-06-30	Cost Interest	R	5.04			R	49189.40
2012-07-16	Outsource Interest	R	330.55			R	49519.95
2012-07-16	Cost Interest	R	7.16			R	49527.11
2012-07-16	Outsource Commission	R	57.00			R	49584.11
2012-07-16	Payment received via Cosmos			R	500.00	R	49084.11
2012-07-31	Outsource Interest	R	309.11			R	49393.22
2012-07-31	Cost Interest	R	6.78			R	49400.01
2012-08-13	Outsource Interest	R	269.49			R	49669.50
2012-08-13	Cost Interest	R	5.93			R	49675.43
2012-08-13	Outsource Commission	R	57.00			R	49732.43
2012-08-13	Payment received via Cosmos			R	500.00	R	49232.43
2012-08-31	Outsource Interest	R	372.21			R	49604.63
2012-08-31	Cost Interest	R	8.30			R	49612.93
2012-09-17	Outsource Interest	R	354.15			R	49667.08
2012-09-17	Cost Interest	R	8.19			R	49975.27
2012-09-17	Outsource Commission	R	57.00			R	50032.27
2012-09-17	Payment received via Cosmos			R	500.00	R	49532.27
2012-09-30	Outsource Interest	R	270.10			R	49802.37
2012-09-30	Cost Interest	R	6.33			R	49808.69
2012-10-15	Outsource Interest	R	313.51			R	50122.20
2012-10-15	Cost Interest	R	7.13			R	50129.33
2012-10-15	Outsource Commission	R	57.00			R	50186.33
2012-10-15	Payment received via Cosmos			R	500.00	R	49686.33
2012-10-31	Outsource Interest	R	333.69			R	50019.93
2012-10-31	Cost Interest	R	7.68			R	50027.61
2012-11-19	Outsource Interest	R	399.10			R	50426.71
2012-11-19	Cost Interest	R	9.53			R	50436.24
2012-11-19	Outsource Commission	R	57.00			R	50493.24
2012-11-19	Payment received via Cosmos			R	500.00	R	49993.24
2012-11-30	Outsource Interest	R	230.46			R	50223.71
2012-11-30	Cost Interest	R	5.57			R	50229.28
2012-12-31	Outsource Interest	R	655.30			R	50884.58
2012-12-31	Cost Interest	R	15.41			R	50900.00
2013-01-07	Outsource Interest	R	149.17			R	51049.16
2013-01-07	Cost Interest	R	3.92			R	51052.69
2013-01-07	Outsource Commission	R	57.00			R	51109.69
2013-01-07	Payment received via Cosmos			R	500.00	R	50609.69
2013-01-14	Outsource Interest	R	148.29			R	50757.98
2013-01-14	Cost Interest	R	3.54			R	50761.52
2013-01-14	Outsource Commission	R	57.00			R	50818.52
2013-01-14	Payment received via Cosmos			R	500.00	R	50318.52
2013-01-31	Outsource Interest	R	358.77			R	50677.30
2013-01-31	Cost Interest	R	8.66			R	50685.96
2013-02-20	Outsource Interest	R	425.42			R	51111.37
2013-02-20	Cost Interest	R	7.35			R	51118.73
2013-02-20	Outsource Commission	R	57.00			R	51175.73
2013-02-20	Payment received via Cosmos			R	500.00	R	50675.73
2013-02-28	Outsource Interest	R	169.67			R	50845.40
2013-02-28	Cost Interest	R	2.96			R	50848.36
2013-03-15	Outsource Interest	R	319.69			R	50717.10
2013-03-15	Cost Interest	R	5.04			R	50853.40
2013-03-15	Outsource Commission	R	57.00			R	50910.40
2013-03-15	Payment received via Cosmos			R	500.00	R	50410.40
2013-03-20	Interest Correction			R	12.99	R	50397.41
2013-03-31	Outsource Interest	R	338.16			R	51055.26
2013-04-16	Outsource Interest	R	342.46			R	51397.72
2013-04-16	Outsource Commission	R	57.00			R	51454.72

Example 8: No prospect of settlement

Figures provided to the team by a debt-collecting attorney indicated that from the 85 865 orders they applied for and which were granted in 2012, 10 514 (12,24%) resulted in requests for the reduction of the instalment. These applications were granted by the attorneys on an informal basis. The attorneys indicated that they have formulated a statistical model screening the application for a reduction to determine how the lower payment will affect the repayment term. This ensures that the debtor serves at least the interest component of the debt with the instalment and will not be paying for the rest of his life.

4.9 Lack of cap on amount that can be deducted

While regulation 23.3.6 in terms of the Public Finance Management Act 1 of 1999 caps the voluntary assignment of wages by public servants at 40% of the state employee's salary, no such cap exists in the case of garnishment of wages by way of emoluments attachment orders.

This can result in employees going home with a zero or near zero take-home salary. If this happens, the employee can apply for the rescission or amendment of the order in terms of Section 65 J (6) which states that if the judgment debtor will not have sufficient means for his own and his dependants' maintenance, the court can rescind or amend the order.

Section 65J (7) provides that an order may at any time on good cause shown be suspended, amended or rescinded by the court. It further provides that when suspending any such order the court may impose such conditions as it may deem just and reasonable.

Such suspension, amendment or rescission can lead to further legal costs as it entails an application to court. It however appears that in practice informal arrangements are made for the reduction of instalments if sufficient evidence of the judgment debtor's inability to afford the instalments ordered by the court is provided.

EMPLOYEE NAME : ██████████ COST CODE : WEST OPS METHOD OF PAY : M ACCOUNT NUMBER : ██████████ BRANCH CODE : 00632005 PAYPOINT : WEST OPS DATE ENGAGED : 10/12/2002 DATE DISCHARGED :				EMPLOYEE NUMBER: 1649 PAYMENT DATE : 2011/11/25 OCCUPATION : T/SELLER IDENTITY NUMBER : ██████████ SEX : M TAX REF. NUMBER : ██████████ PERIOD NUMBER : 09 MARITAL STATUS : M DEPENDANTS : 2			
---	--	--	--	--	--	--	--

EARNINGS	QUANTITY	VALUE	P. BEN	DEDUCTIONS	VALUE	BALANCE
AA SALARY	22,00	6580,00		LB STUDY LOAN	1675,00	1675,00
F6 SUNDAY TIME X 0.5	50,00	843,59		██████████	4727,00	4710,00
				DV ██████████	74,24	5465,00
				JA U.Y.F	353,45	
				TX P.A.Y.E.	493,50	
				CQ PROVIDENT FUND	90,00	
				RV UNI SATAWU	10,40	
				HB UNI SARFRAC		
GROSS				DEDUCTIONS		
7423,59				7423,59		
				NETT PAY		
				0,00		

Example 9: Zero salary slip

4.10 Complaints regarding costs

4.10.1 Fees

In South Africa debt can be collected by attorneys and debt collectors. The Attorneys Act 53 of 1979, does not directly deal with attorneys' fees or the collection commission charged by attorneys. Section 69(d) of the Act, however, provides that the council of each law society is empowered to prescribe the tariff of fees payable to any practitioner in respect of professional services rendered by him in cases where no tariff is prescribed by any other law.

The tariffs used to determine the costs of emoluments attachment orders are set out in Part I of Table B of Schedule 2 to the Magistrates' Court rules. VAT may be added to these fees. In terms of the bylaws of the various law societies an attorney may also charge collection commission at a rate of 10% of the amount collected, subject to a maximum amount of R1 000.00 for each payment on instalment. Collection commission covers all attendances and work done in connection with a receipt of a payment and accounting to a client in respect of a payment.

Unlike the fees that can be charged by attorneys, the fees charged by Debt Collectors are capped at a maximum fee of R814. A debtor will also be liable for commission of 10% on each instalment paid, to a maximum of R407 per instalment.

The research team received various complaints from debtors about excessive fees being charged by attorneys. On closer examination it was discovered that the underlying agreements forming the basis for applications for emoluments attachment orders often contain a clause for the payment of attorney-and-client and even attorney-and-own-client fees.

The following example was sourced from an Admission of Liability and Consent in terms of Section 57 and 65J of the Magistrates' Courts Act 32 of 1944 document:

"I agree to the repayment of the monies due and owing by me, interest thereon, Attorneys fees calculated on a scale as between Attorney and Own client and all other costs pertaining thereto (which may include any costs due to the plaintiff as provided for in the Debt Collectors Act 114 of 1998) in monthly instalments of Rx commencing within 30 days of signature hereof."

This can notably increase fees and expose vulnerable consumers to exploitation, because consumers often do not understand the impact of these clauses and how these fees differ from party-and-party fees. It should also be noted that the Magistrates' Court does not have the statutory authority to endorse attorney and own client costs. Judgments can only be for party-and-party costs or attorney-and-client costs. See the table below for the difference between the cost scales:

Party and party costs	Attorney and client costs	Attorney and own client costs
<p>Party and party costs are the costs which are incurred by a party in a case and which the unsuccessful party is ordered to pay him. This does not include all the costs that were incurred to obtain judgment, but only those costs that were necessary or proper for the attainment of justice of for defending the rights of any party. These costs are based on the tariff stipulated in the rules of court. A tariff of costs exists in both the magistrates' courts and the high court. These tariffs contain lists of the many different tasks which are performed before and during litigation, together with the amounts that may be claimed for each task.</p>	<p>Attorney and client costs orders entitle the party in whose favour the cost order was made, to recover more from the opposing party than should have been the case with an ordinary party and party cost order. With this type of cost order, extra correspondence or consultations with a client that are not provided for in the tariff would be permitted on an attorney and client bill, and charged at the normal tariff rate. This type of cost order is thus more punitive in nature.</p>	<p>Attorney and own client costs are the remuneration that an attorney is entitled to in terms of an agreement or mandate with the client. In terms of such a mandate or agreement the attorney is remunerated according to a predetermined rate, for example an hourly rate. An attorney and own client order of costs therefore entitles the party in whose favour it is made to recover even more than could be recovered in terms of an attorney and client costs award. Magistrate's Courts are not authorised to grant attorney and own-client costs.</p>

Table 5 Difference between party and party, attorney and client and attorney and own client costs

In September 2012 Moneyweb published the findings of its investigation into the charges attorneys were imposing on platinum miners in connection with the collection of outstanding debt. Instances where collection attorneys were charging miners between two and 12 times the amount of their initial loan in fees were revealed. In an excessive case one miner paid R11 690 excluding VAT for the collection of a R1 000 loan and still owed R3 085 as can be seen from the statement of account included underneath. This apparent abuse has raised serious questions about the legality and ethics of the debt collection practice in that particular region and in South Africa as a whole.

STATEMENT

Employee:
ID number:
Coy nr:
Our ref:

Capital:	R 1,000.00	} R 1,000.00
Interest @ 5% from 30/11/09 to date:	R 1,000.00	
Initiation fee:	R 0.00	
Service fees (@R50 p/m per loan from _____):	R 0.00	
Debt collectors fees (if applicable):	R 532.38	
Expenses (tracer & sheriff):	R 513.76	
Legal fees (to date):	R 9,934.39	
Collection commission:	R 1,140.75	
VAT:	R 1,550.52	
Payments received by client (if applicable):	R 0.00	
Payments received to date:	R 11,690.57	
5% paymaster commissions	R 896.53	
Total outstanding to date:	<u>R 3,084.70</u>	

Please note that abovementioned outstanding amount EXCLUDES further legal fees, interest (if applicable) and monthly service fees (if applicable).

Example 10: Statement of account indicating excessive fees

4.10.2 Interest

The in duplum rule and the different interpretations thereof by courts, magistrates and debt collectors were already discussed in 4.1.2 above.

The rate at which interest will be charged on the emoluments attachment order will appear from the contents of the judgment and the order itself. If the interest rate on the order differs from the contractual interest rate, the rate set out in the order has to be complied with.

The following problems relating to interest were encountered by the team:

Interest charged on interest

The research team was alerted to the fact that amounts handed over for collection are often not divided into capital and interest components. In the matter of *Standard Bank of SA Ltd v Oeanate Investments (Pty) Ltd (in liquidation) 1998 (1) SA 811 (SCA)* at 828 F – 829 it was decided that interest does not lose its character when it is included in the capital amount outstanding. In cases of ceded or acquired debts, this information can fall outside the collector’s knowledge. However, especially where new debts are concerned, care should be taken to obtain all the necessary and available information from the original creditor. This would include, but is not limited to, the date of default and the capital, interest and costs component.

Interest will be charged on interest where the handover amount includes an interest component but is treated as capital by the collection attorney who then charges interest as part of the collection process.

This is illustrated by the under-mentioned example. The first extract was made from the credit provider’s accounting system and the second from the attorney’s statement. It shows that the amount of R1 169.13, which reflects as capital/balance on the attorney’s statement and upon which interest is levied from 30 April 2006, already includes an interest component as can be observed on the credit provider’s transaction history:

106	01-Mar-2006	31-Jul-2005	TAKEON_INT	Monthly Interest @ 15.50%		13.54	1,041.93	1,041.93
107	01-Mar-2006	31-Aug-2005	TAKEON_INT	Monthly Interest @ 15.50%		13.71	1,055.64	1,055.64
108	01-Mar-2006	30-Sep-2005	TAKEON_INT	Monthly Interest @ 15.50%		13.45	1,069.09	1,069.09
109	01-Mar-2006	31-Oct-2005	TAKEON_INT	Monthly Interest @ 15.50%		14.07	1,083.16	1,083.16
110	01-Mar-2006	30-Nov-2005	TAKEON_INT	Monthly Interest @ 15.50%		13.80	1,096.96	1,096.96
111	01-Mar-2006	31-Dec-2005	TAKEON_INT	Monthly Interest @ 15.50%		14.44	1,111.40	1,111.40
112	01-Mar-2006	31-Jan-2006	TAKEON_INT	Monthly Interest @ 15.50%		14.63	1,126.03	1,126.03
113	01-Mar-2006	28-Feb-2006	TAKEON_INT	Monthly Interest @ 15.50%		13.39	1,139.42	1,139.42
114	04-Apr-2006	31-Mar-2006	INT			15.00	1,154.42	1,139.42
115	06-May-2006	30-Apr-2006	INT			14.71	1,169.13	1,139.42
116	02-Jun-2006	31-May-2006	INT			15.39	1,184.52	1,139.42
117	30-Jun-2006	20-Jun-2006	DCA_DISB_T	Tracing Cost - Fully Signed	Trace Fee Disbursement	100.00	1,284.52	1,139.42
118	30-Jun-2006	20-Jun-2006	DCA_VAT_C	VAT on DCA Costs @14%		14.00	1,298.52	1,139.42

30-04-2006	Capital / Balance		1,169.13	0.00	1,169.13
16-07-2007	Interest for 442 days @ 15.50% from 30-04-2006		219.44	0.00	1,388.57
16-07-2007	Fee Judgment Certificate		-30.78	0.00	1,419.35
16-07-2007	Fee Emoluments Attachment Order		85.50	0.00	1,504.85
16-07-2007	Fee Request for Judgment (R0 < R3000)		63.84	0.00	1,568.69
26-07-2007	Interest for 10 days @ 15.50% from 16-07-2007		4.96	0.00	1,573.65
26-07-2007	Rst REVENUE STAMPS		20.00	0.00	1,593.65

Example 11: Interest charged on interest

Interest calculated from the incorrect date

The example below illustrates an instance where the interest was calculated from the incorrect date. In this matter the request for judgment where the defendant has admitted liability and undertaken to pay the debt in instalments or otherwise – section 57 of the Magistrates’ Courts Act – was granted on **10 August 2010** in the following terms: Judgment in favour of the plaintiff for the amount of R1 113.38 and the amount of R (To be Added/Taxed) costs on attorney and client scale. In the request for judgment, the plaintiff requests interest at 15,5% per annum from judgment date to date of payment, i.e. 10 August 2010. However, on perusal of the file it was discovered that interest was charged on the amount of R1 528.97 from **25 November 2009** and not in accordance with the court order. No corrections on the balance statement could be observed and the attorneys concerned conceded that this was an oversight.

Case No. 12565 of 2010

RM5A - Request for Judgment where the defendant has admitted liability and undertook to pay the debt in installments or otherwise – Section 57 of the Magistrates' Courts Act, 1944 (Act 32 of 1944)

In the Magistrate's Court for the District of East London held at East London

In the matter between: Plaintiff
[REDACTED]
 and Defendant
[REDACTED]

Plaintiff requests that judgment in the above-mentioned matter in terms of Section 57(2) of the Magistrates' Court Act, 1944, be noted in his favour against the defendant as follows:

	Judgment Debt	R	c	Costs	R	c
Outstanding balance of the debt [Section 57(2)(c)(i)]	R	1113.38				
Interest at Per cent per annum accounted from						
Court fees (only when this is the first document in action) (section 59)				(To be Added/Taxed)		
Collection fees [section 57(1)(c)]						
Summons, if any (attorney's charges, court fees, sheriff's fees and sheriff's fees on re-issue) [section 57(1)]				(To be Added/Taxed)		
Cost of affidavit or affirmation by plaintiff/certificate by plaintiff's attorney [section 57(2)(c)]						
Cost of registered letter [section 57(1)]						
Cost of notice in terms of rule 54(1)						
Notice in terms of section 129 (National Credit Act, 34 of 2005)						
Letter of demand (section 56)						
Request for judgment (section 57)						
Admission of liability and undertaking to pay (section 57)						
Totals	R	1113.38		(To be Added/Taxed)		
Totals					R	1113.38

Plus further interest at 15.5% (percent) per annum from judgment date to date of payment, and that payment thereof take place in accordance with defendant's offer.

- The following documents are attached:
- (a) A copy of the notice given to the defendant in terms of Section 129 of the National Credit Act, 34 of 2005.
 - (b) A copy of the letter of demand sent to the defendant in terms of section 56 of the Magistrates' Court Act, 1944.
 - (c) The Defendant's written acknowledgment of liability towards the plaintiff for the amount of the debt and costs claimed (or for any other amount) and his offer.
 - (d) A copy of the plaintiff's or his attorney's written acceptance of the offer.
 - (e) An affidavit (or affirmation) by the plaintiff/a certificate by the plaintiff's attorney in terms of section 57(2)(c) of the Magistrates' Courts Act, 1944.

Dated at Pretoria on the 15 day of January 2010.

ATTORNEY FOR PLAINTIFF
[REDACTED]
[REDACTED] 2010-01-10

Judgment noted on the _____ day of _____, 20____ in favour of the plaintiff for the amount of R 1113.38 and the amount of R (To be Added/Taxed) costs on Attorney & Client scale. The defendant is further ordered to pay the said judgment and costs in the monthly instalments of R 170.00. The first instalment must be paid on or before (Next pay date after month of judgment) and thereafter on or before the 1st day of every succeeding month until the outstanding balance of the judgment debt and costs has been paid full.

2010-01-10
 Clerk of the Court

(Form 5A inserted by GN R2222 of 1976, substituted by GN R1800 of 1981 and by GN R1388 of 1984 and amended by GNs R1261 and R2409 of 1991)

CLERK OF THE DISTRICT COURT 3

000-04397023 CD1-008884640 204857 sch

Trans Date	Trans Type	Debit	Credit	Balance
2009-11-25	Take On from Outsource	R 1528.97		R 1528.97
2009-11-30	Outsource Interest	R 3.25		R 1532.21
2009-12-31	Outsource Interest	R 20.30		R 1552.51
2010-01-31	Outsource Interest	R 20.57		R 1573.08
2010-02-28	Outsource Interest	R 18.81		R 1591.89
2010-03-31	Outsource Interest	R 21.09		R 1612.98
2010-04-30	Outsource Interest	R 20.67		R 1633.65
2010-05-31	Outsource Interest	R 21.84		R 1655.50
2010-06-30	Outsource Interest	R 21.22		R 1676.51
2010-07-31	Outsource Interest	R 22.21		R 1698.72
2010-08-18	Section 57/58 Judgment per tariff	R 81.00		R 1779.72
2010-08-18	Attendance on collecting Judgment from Clerk of Court	R 12.00		R 1791.72
2010-08-18	Perusal for confirmation that Judgment is granted	R 7.00		R 1798.72
2010-08-18	Drawing, Perusal & signature of Notice to Defendant in terms of Section 57 (3)	R 25.00		R 1823.72
2010-08-18	Attendance on posting of Notice in terms of Section 57(3) per registered post	R 12.00		R 1835.72
2010-08-18	Outsource EAO	R 81.00		R 1916.72
2010-08-18	Attendance on making of copies to file and keep (5p x R 2.60)	R 13.00		R 1929.72
2010-08-18	Telephonic attendances	R 10.00		R 1939.72
2010-08-31	Outsource Interest	R 22.43		R 1962.15
2010-09-30	Outsource Interest	R 22.06		R 1984.21
2010-10-31	Outsource Interest	R 23.09		R 2007.31
2010-11-30	Outsource Interest	R 22.64		R 2029.95
2010-12-31	Outsource Interest	R 23.70		R 2053.65
2011-01-31	Outsource Interest	R 24.01		R 2077.66
2011-02-28	Outsource Interest	R 21.96		R 2099.62
2011-03-31	Outsource Interest	R 24.62		R 2124.24
2011-04-30	Outsource Interest	R 24.14		R 2148.38
2011-05-31	Outsource Interest	R 25.27		R 2173.65
2011-06-30	Outsource Interest	R 24.77		R 2198.42
2011-07-31	Outsource Interest	R 25.93		R 2224.35
2011-08-31	Outsource Interest	R 26.27		R 2250.63
2011-09-30	Outsource Interest	R 25.76		R 2276.39
2011-09-30	Cost Interest	R 4.55		R 2280.94
2011-10-31	Outsource Interest	R 26.96		R 2307.90
2011-10-31	Cost Interest	R 5.13		R 2313.02
2011-11-30	Outsource Interest	R 26.43		R 2339.46
2011-11-30	Cost Interest	R 4.90		R 2344.36
2011-12-31	Outsource Interest	R 27.67		R 2372.03
2011-12-31	Cost Interest	R 5.16		R 2377.19
2012-01-31	Outsource Interest	R 28.04		R 2405.23
2012-01-31	Cost Interest	R 5.27		R 2410.49
2012-02-08	Correspondence to debtor	R 19.38		R 2429.87
2012-02-08	Opening of file and taking of instruction	R 356.50		R 2786.37
2012-02-08	Request letter and Perusal of report ITC / DEED / COMPANY SEARCH	R 29.64		R 2816.01
2012-02-08	Telephonic attendances	R 21.66		R 2837.67
2012-02-14	Correspondent attendance	R 13.68		R 2851.35
2012-02-29	Outsource Interest	R 26.46		R 2877.82
2012-02-29	Cost Interest	R 11.69		R 2889.51
2012-03-20	Attendance of delivering Request for Judgment to Clerk of Court	R 67.68		R 2957.19
2012-03-20	Attendance of Messenger/Dawn Wing - Branch office	R 133.68		R 3090.87

Example 12: Interest charged from incorrect date

Interest on fees

It must be noted that incidental credit interest on outstanding legal costs may not be charged unless the legislative provisions relating to incidental credit, such as entering into an agreement and rendering of accounts to the consumer, have been properly complied with.

The team has encountered instances where debt collectors charged a 'cost interest' on files. The 'cost interest' was charged at 2% and explained as interest on arrear legal costs. The legal source for the 2% was not ascertained, at best the assumption was made that this is 2% incidental credit interest charged in terms of the National Credit Act, although the team could not find that the provisions of section 5 of the National Credit Act with regard to issuing of statements and *dies* relating to the charging of the interest, were complied with.

The following extract is from the attorney's statement. It must be mentioned that the said attorney has since April 2013 ceased the practice of charging interest on cost.

2011-07-28	Take On from Outsource	R	45269.06			R	45269.06
2011-07-31	Outsource Interest	R	57.69			R	45326.75
2011-08-08	Drawing Perusal of Section 129	R	24.00			R	45350.75
2011-08-08	Attendance to posting of Notice in terms of Section 129	R	13.68			R	45364.43
2011-08-08	Drafting, Perusal and Posting of Letter of Demand	R	54.72			R	45419.15
2011-08-08	Perusal and Verification of Consent to Judgement	R	90.06			R	45509.21
2011-08-31	Outsource Interest	R	598.95			R	46108.17
2011-09-30	Outsource Interest	R	588.65			R	46696.82
2011-09-30	Cost Interest	R	3.44			R	46700.26
2011-10-17	Outsource Interest	R	336.91			R	47037.17
2011-10-17	Cost Interest	R	2.05			R	47039.22
2011-10-17	Outsource Commission	R	57.00			R	47096.22
2011-10-17	Payment received via Cosmos			R	500.00	R	46596.22
2011-10-31	Outsource Interest	R	276.65			R	46872.87
2011-10-31	Cost Interest	R	1.76			R	46874.63
2011-11-04	Opening of file and taking of instruction	R	370.50			R	47245.13
2011-11-04	Request letter and Perusal of report ITC / DEED / COMPANY SEARCH	R	29.64			R	47274.77
2011-11-15	Outsource Interest	R	297.87			R	47572.64
2011-11-15	Cost Interest	R	4.85			R	47577.48
2011-11-15	Outsource Commission	R	57.00			R	47634.48
2011-11-15	Payment received via Cosmos			R	500.00	R	47134.48
2011-11-30	Outsource Interest	R	297.31			R	47431.79
2011-11-30	Cost Interest	R	5.78			R	47437.58

Example 13: Interest charged on fees

Interest in terms of Regulation 42 of the National Credit Act

In terms of Regulation 42 of the National Credit Act the maximum interest rate applicable to short term credit transactions is 5 %per annum. Short term credit transactions refer to transactions where the loan amount does not exceed R8 000 and where the whole amount is repayable within a period not exceeding six months. When debtors default on these types of credit agreements, some collectors charge interest consistently at 60% over the whole of the repayment period. There are different opinions on whether this is acceptable. This is another example of a lack of clarity and inconsistency in approach.

4.10.3 Other

Instances of non-admissible charges (like ‘attending to copy of documents’) as well as instances where fees were duplicated, attracted the attention of the team and warranted a request for clarification from the attorneys concerned. Explanations ranged from system errors, inaccurate date and action correlations (which were explained as late-capturing) to ‘finger faults’.

DATE	DESCRIPTION	DEBIT	CREDIT	BALANCE
07-04-2011	Col.com. on R200.00 - DT3205/2F0069	22.80	0.00	1,153.06
28-04-2011	Interest for 21 days @ 15.50% from 07-04-2011	10.28	0.00	1,163.34
02-06-2011	Interest for 35 days @ 15.50% from 28-04-2011	17.29	0.00	1,180.63
02-06-2011	Col.com. on R100.00 - DT3205/2F0069	11.40	0.00	1,192.03
02-06-2011	ABSA BANK DT3205 NOMSA DD01-06-11	0.00	100.00	1,092.03
29-06-2011	Interest for 27 days @ 15.50% from 02-06-2011	12.52	0.00	1,104.55
29-06-2011	Foal Report to client	21.66	0.00	1,126.21
24-08-2011	Interest for 56 days @ 15.50% from 29-06-2011	26.78	0.00	1,152.99
24-08-2011	Foal Telephone call - Employer	3.07	0.00	1,156.06
24-08-2011	Foal Telephone call - Employer	2.91	0.00	1,158.97
24-08-2011	Foal Disbursement - Prints	3.00	0.00	1,161.97
07-10-2011	Interest for 44 days @ 15.50% from 24-08-2011	21.71	0.00	1,183.68
07-10-2011	Foal Telephone call - Employer	1.45	0.00	1,185.13
19-10-2011	Interest for 12 days @ 15.50% from 07-10-2011	5.96	0.00	1,191.09
19-10-2011	Foal Disbursement - Prints	1.00	0.00	1,192.09
19-10-2011	Foal Disbursement - Prints	3.00	0.00	1,195.09
20-10-2011	Interest for 1 day @ 15.50% from 19-10-2011	0.50	0.00	1,195.59
20-10-2011	Foal Correspondence Sent	21.66	0.00	1,217.25
20-10-2011	Foal Disbursement - Telefax	0.72	0.00	1,217.97
01-11-2011	Interest for 14 days @ 15.50% from 20-10-2011	6.95	0.00	1,224.92
03-11-2011	Col.com. on R1700.00 - DT3205/2F0069	193.80	0.00	1,418.72
03-11-2011	CHEQUE DEPOSIT/WEBERST DT3205 DD02-11-11	0.00	1,700.00	-281.28
01-02-2012	Foal Attending to copy docs R0 - R12000	12.00	0.00	-269.28
02-03-2012	Col.com. on R100.00 - DT3205/2F0069	11.40	0.00	-257.88
02-03-2012	ABSA BANK DT3205 NOMSA DD01-03-12	0.00	100.00	-357.88
05-04-2012	Foal Telephone call - Debtor	6.14	0.00	-351.74
05-04-2012	Foal Telephone call - Debtor	6.14	0.00	-345.60
10-04-2012	Col.com. on R100.00 - DT3205/2F0069	11.40	0.00	-334.20
10-04-2012	ABSA BANK DT3205 NOMSA DD04-04-12	0.00	100.00	-434.20
03-05-2012	Col.com. on R100.00 - DT3205/2F0069	11.40	0.00	-422.80
03-05-2012	ABSA BANK DT3205 NOMSA DD00-04-12	0.00	100.00	-522.80
07-06-2012	Col.com. on R100.00 - DT3205/2F0069	11.40	0.00	-511.40
07-06-2012	ABSA BANK DT3205 NOMSA DD01-05-12	0.00	100.00	-611.40
03-07-2012	Col.com. on R100.00 - DT3205/2F0069	11.40	0.00	-600.00
03-07-2012	ABSA BANK DT3205 NOMSA DD29-06-12	0.00	100.00	-700.00
03-08-2012	Col.com. on R100.00 - DT3205/2F0069	11.40	0.00	-688.60
03-08-2012	ABSA BANK DT3205 NOMSA DD01-08-12	0.00	100.00	-788.60
04-09-2012	ABSA BANK DT3205 NOMSA DD01-08-12	0.00	100.00	-888.60
04-09-2012	Col.com. on R100.00 - DT3205/2F0069	11.40	0.00	-877.20
02-10-2012	ABSA BANK DT3205 NOMSA DD28-09-12	0.00	100.00	-977.20
03-10-2012	Col.com. on R100.00 - DT3205/2F0069	11.40	0.00	-965.80
02-11-2012	Col.com. on R100.00 - DT3205/2F0069	11.40	0.00	-954.40
02-11-2012	ABSA BANK DT3205 NOMSA DD01-10-12	0.00	100.00	-1,054.40
05-12-2012	Col.com. on R100.00 - DT3205/2F0069	11.40	0.00	-1,043.00
05-12-2012	ABSA BANK DT3205 NOMSA DD00-11-12	0.00	100.00	-1,143.00
11-01-2013	Col.com. on R100.00 - DT3205/2F0069	11.40	0.00	-1,231.60
17-01-2013	ABSA BANK DT3205 NOMSA DD02-01-13	0.00	100.00	-1,231.60
04-02-2013	ABSA BANK DT3205 NOMSA DD00-01-13	0.00	100.00	-1,331.60
04-02-2013	Col.com. on R100.00 - DT3205/2F0069	11.40	0.00	-1,320.20
04-03-2013	Col.com. on R100.00 - DT3205/2F0069	11.40	0.00	-1,308.80
04-03-2013	ABSA BANK DT3205 NOMSA DD28-02-13	0.00	100.00	-1,408.80
08-04-2013	Disbursement - Prints	3.00	0.00	-1,405.80
08-04-2013	Disbursement - Prints	15.00	0.00	-1,390.80
09-04-2013	Col.com. on R100.00 - DT3205/2F0069	11.40	0.00	-1,379.40
09-04-2013	ABSA BANK DT3205 NOMSA DD28-03-13	0.00	100.00	-1,479.40
07-05-2013	Col.com. on R100.00 - DT3205/2F0069	11.40	0.00	-1,468.00
07-05-2013	ABSA BANK DT3205 NOMSA DD00-04-13	0.00	100.00	-1,568.00
22-05-2013	Disbursement - Prints	9.00	0.00	-1,559.00
22-05-2013	Disbursement - Prints	9.00	0.00	-1,550.00
22-05-2013	Disbursement - Prints	15.00	0.00	-1,535.00

Example 14: Non-admissible charges and duplication of fees

The team also encountered instances where debt collectors and attorneys made mistakes when calculating the outstanding balances. In two separate incidences, upon perusal of the balance statement, it was discovered that the collection attorneys did not include certain payments that were made by the payroll office. These oversights affected the outstanding balances dramatically. Proof of these payments was requested from the payroll office and same was forwarded to the attorneys who adjusted the balances accordingly.

4.11 Reckless credit and multiple deductions

Employees often have more than one emoluments attachment order against their salary. Statistics regarding the average number of orders per employee in certain industries in South Africa will be discussed in Chapter 5. The team has encountered instances where 12, 19 and even 30 orders are deducted from the salary of a single employee. In the last instance the employee received three payslips to accommodate all the deductions! This can be an indication of reckless credit.

Through the research conducted by the team credit checks and affordability assessments which point to instances of reckless lending were discovered. This is illustrated by the example below where the applicant lists her bond payment and total other expenses as a mere R11.00 each:

1. Payslip income and deductions		3. Bank Statement Deductions	
1.1. Payslip Income		3.1. Appropriate Credit Provider credit repayments	R 0.00
1.1.1. Basic Salary	R 16,791.00	3.2. Other credit provider repayments	R 0.00
1.1.2. Bonus	R 0.00	3.3. Medical	R 0.00
1.1.3. Overtime	R 0.00	3.4. Insurance	R 0.00
1.1.4. Allowances	R 0.00	3.5. Housing : Rent or Bond	R 11.00
Description:	N/A	Total Bank Deductions	R 11.00
Gross Salary	R 16,791.00	4. Other Expenses	
1.2. Payslip Deduction		4.1. Municipal (Water & Lights)	R 0.00
1.2.1. Employee Tax (PAYE or Site)	R 0.00	4.2. Child Maintenance	R 0.00
1.2.2. Unemployment (UIF)	R 0.00	4.3. Transport	R 0.00
1.2.3. Collective agreements or Union Deductions	R 0.00	4.4. Groceries	R 11.90
1.2.4. Bond Repayments	R 0.00	4.5. Housing: Rent or Bond	R 0.00
1.2.5. Medical	R 0.00	4.6. Total Other Account Repayments	R 0.00
1.2.6. Pension or Provident Fund	R 0.00	4.7. Any other expenses not listed above	R 0.00
1.2.7. Court order or Garnish deductions	R 0.00	Description:	N/A
1.2.8. Employer Loans	R 0.00	Total Other Expenses	R 11.90
1.2.9. General Deductions (for example fee, club)	R 0.00	5. Disposable monthly income	R 11,637.00
Description:	N/A		
Total Payslip Deductions	R 0.00		
Nett Salary	R 11,659.00		
2. Alternative Income			
2.1. Spouse's Nett Salary	R 0.00		
2.2. Other Income	R 0.00		
Description:	N/A		
	R 11,659.00		

6. Declaration

I hereby declare that I, the undersigned, fully and truthfully answered any requests for information made by the credit provider as set out in Act 34 of 2005 and that the above information is true and correct. I fully understand that this information will be used to determine whether I can afford the facility that I have applied for and that the credit provider has fully explained the requirements and my rights with reference to the abovementioned act. I understand that for all purposes of the abovementioned act, it is a complete defence to an allegation that a credit agreement is reckless if I failed to fully and truthfully answer any requests for information. Further to the above, I declare that I am not subject to a debt review at this point in time, nor have I applied for debt review with a debt counsellor.

Example 15: Reckless credit

In cases, borrowers—who have a history of default and who were defaulting on existing debt—have been provided with new unsecured credit facilities.

Indications are that lenders are primarily concerned with the employment status of borrowers. This has the effect that emoluments attachment orders are effectively being used as a form of security in the unsecured lending space.

4.12

5% Commission payable to employer paid by debtor

In terms of section 65(J)(10) of the Magistrate's Court Act, the employer (garnishee) may recover from the judgement creditor (the credit provider) a commission of up to 5% of all amounts collected on his behalf from the amount payable to him.

In practice the 5% commission is however not physically paid over to the employer by the credit provider. What happens is that the employer retains the 5% from the instalment deducted by him in terms of the court order. He then transfers the remainder of the instalment to the account stipulated by the judgment creditor. The credit provider then credits the judgment debtor's account with the full amount of the instalment. This is practically illustrated as follows: if the instalment amount in terms of the court order is R100, the employer deducts R5 as commission and pays an amount of R95 to the judgment creditor, usually via the trust account of the judgment creditor's attorneys. The debtor is however credited with the full R100.

The team has encountered instances where the 5% commission was, in spite of the clear wording of the act, being paid by the debtor. This was achieved by inserting a clause in the admission of liability and consent in terms of Section 57 and 65J which reads as follows:

“I consent to judgment i.t.o Sec 58 of Act 32 of 1944 being granted in favour of the Plaintiff for payment of the sum of Rx, with agreed costs on attorney and client scale in the amount of Rx plus interest calculated at a rate of 15.5% per annum from x to date of final payment, plus 10% collection commission plus the 5% commission which my employer may deduct.”

In terms of this clause the debtor consents to pay the 5% commission himself. This will have the effect that his outstanding balance will not be credited with the whole R100, but only with R95.

Three potential factual scenarios were encountered with regard to the funding of the 5% employer’s commission:

No commission charged

The following illustrates how the debtor is credited for the full amount where the employer has not deducted the 5%. (In this matter the emoluments attachment order was granted for R170 per month.)

2012-11-05	Outsource Commission	R	18.28			R	4103.66
2012-11-05	Garnishee Payment			R	170.00	R	3933.66

Example 16: No commission charged

Creditor pays 5%

The following illustrates how the debtor is credited for the full amount where the employer has deducted the 5%. (In this matter the emoluments attachment order was granted for R150 per month.)

21-01-2011	Col.com. on R142.50 - DT8590/2F0057	16.25	0.00	5,417.76
21-01-2011	NPHLTH 3K 3K PAYMENT 20110131 DD14-01-11 DT8590	0.00	150.00	5,267.76
27-01-2011	Interest for 6 days @ 15.50% from 21-01-2011	6.23	0.00	5,273.99
24-02-2011	Interest for 28 days @ 15.50% from 27-01-2011	29.06	0.00	5,303.05
24-02-2011	Col.com. on R142.50 - DT8590/2F0057	16.25	0.00	5,319.30
24-02-2011	NPHLTH 3K 3K PAYMENT 20110228 DD15-02-11 DT8590	0.00	150.00	5,169.30
27-02-2011	Interest for 3 days @ 15.50% from 24-02-2011	3.11	0.00	5,172.41

Example 17: Creditor pays 5% commission

Debtor pays 5%

The following illustrates how the debtor is not credited for the full amount where the employer has deducted the 5%. (In this matter the emoluments attachment order was granted for R210 per month and the debtor was only credited with R200 (4 x R50).)

02-05-2013	Interest for 2 days @ 15.50% from 30-04-2013	0.94	0.00	2,250.60
02-05-2013	REF 5448 DD25-04-13	0.00	50.00	2,200.60
02-05-2013	Col.com. on R50.00 - RPS448/2F0002	5.70	0.00	2,206.30
03-05-2013	Interest for 1 day @ 15.50% from 02-05-2013	0.47	0.00	2,206.77
08-05-2013	Interest for 5 days @ 15.50% from 03-05-2013	2.34	0.00	2,209.11
08-05-2013	Col.com. on R50.00 - RPS448/2F0002	5.70	0.00	2,214.81
08-05-2013	REF 5448 DD02-05-13	0.00	50.00	2,164.81
15-05-2013	Interest for 7 days @ 15.50% from 08-05-2013	3.28	0.00	2,168.09
15-05-2013	Col.com. on R50.00 - RPS448/2F0002	5.70	0.00	2,173.79
15-05-2013	REF 5448 DD09-05-13	0.00	50.00	2,123.79
20-05-2013	Interest for 5 days @ 15.50% from 15-05-2013	2.34	0.00	2,126.13
20-05-2013	REF 5448 DD16-05-13	0.00	50.00	2,076.13
20-05-2013	Col.com. on R50.00 - RPS448/2F0002	5.70	0.00	2,081.83
22-05-2013	Interest for 2 days @ 15.50% from 20-05-2013	0.94	0.00	2,082.77
22-05-2013	Foot Disbursement - Prints	6.00	0.00	2,088.77
22-05-2013	Foot Disbursement - Prints	6.00	0.00	2,094.77
22-05-2013	Foot Disbursement - Prints	3.00	0.00	2,097.77
22-05-2013	Foot Disbursement - Prints	3.00	0.00	2,100.77
22-05-2013	Foot Disbursement - Prints	3.00	0.00	2,103.77
22-05-2013	Foot Disbursement - Prints	3.00	0.00	2,106.77
29-05-2013	Interest for 7 days @ 15.50% from 22-05-2013	3.28	0.00	2,110.05
29-05-2013	Foot Call received	21.66	0.00	2,131.71
31-05-2013	Interest for 2 days @ 15.50% from 29-05-2013	0.94	0.00	2,132.65

Example 18: Debtor pays 5% commission

4.13

Lack of knowledge and fraud by clerks of court

Clerks of the court often lack knowledge in the proper application of the provisions of the Act relating to emoluments attachment orders. A special investigation unit of the South African Police Service is investigating court officials at two magistrates' courts for the issuing of fraudulent orders. Also see paragraph 4.3 in this regard. At the time of writing of this report, the matter was still under investigation.

4.14

Incorrect apportionment of payments

The research team came upon clauses in Admission of Liability and Consent in terms of sections 57 and 65J of the Magistrates' Court Act 32 of 1994 documents relating to allocation of the monthly instalment which provide as follows:

5. Agree that any amount paid by me in terms hereof shall first be apportioned to the payment of costs, secondly interest and thereafter capital;

Example 19: Incorrect apportionment of payments

The preference provided to the payment of legal costs does not comply with the provisions of section 126 of the National Credit Act. Section 126 reads as follows:

“A credit provider must credit each payment made under a credit agreement to the consumer as of the date of receipt of the payment, as follows: (a) Firstly, to satisfy any due or unpaid interest charges; (b) secondly, to satisfy any due or unpaid fees or charges; and (c) thirdly, to reduce the amount of the principal debt.”

ALTERNATIVES TO EMOLUMENTS ATTACHMENT ORDERS

It is not disputed that the emoluments attachment order process has certain shortcomings and that irregularities exist in the application of this form of debt collection. The obvious available alternatives to emoluments attachment orders include:

- Warrants of execution for the attachment of the movable and immovable assets of the debtor and the subsequent selling of these by way of sales in execution; and
- The procedures provided for in terms of section 65 A of the Magistrates' Courts Act in terms of which the court enquires into the financial affairs of the debtor and subsequently make an order for periodic payments.

While it was not an objective of this report to discuss and value the alternatives to emoluments attachment orders, it is necessary to point out problems with these alternatives:

4.15 Sales in execution (movables)

A warrant of execution is one of the alternatives to an emoluments attachment order. The effect of a warrant of execution is to instruct the sheriff of court to attach the property of the judgment debtor in order to sell it at a public auction. The proceeds of this sale will then be used to pay the money owed to the judgment creditor. Execution by means of a sale in execution is dealt with by Magistrates' Court rules 36 – 43. In practice, the proceeds from sales in execution, however, seldom satisfy the judgment debt as this execution method is expensive and relies heavily on transport, labour and storage space.

The Rules of the Magistrates' Court, Annexure 2, Table C item 12 states that when movables are sold in execution the sheriff is entitled to a commission of 9% for the first R15 000,00 or part thereof and thereafter 6%, with a maximum of R6 483,00. The balance of the distribution account of the sheriff comprises expenses incurred by the sheriff in the execution of the warrant, for example the costs of the removal charged by the contractor. In cases where the earmarked value of the attached goods exceeds R5 000,00, the sale in execution must be advertised – advertising costs range from R400,00 to R4 000,00 depending on the newspaper used and the space needed for the advertisement. The sheriff has to prepare a notice of the sale in execution and affix one copy of this notice on the noticeboard of the Magistrates' Court and one copy as near as possible to the place where the sale will take place.

Storage costs for the period between removal of the goods and the eventual sale in execution will also be charged.

In practice the sheriff is often restricted from gaining access to houses within residential units, resulting in repeated attendances which will increase the costs. Sheriffs are often required to use the services of locksmiths.

When a third party claims that the property attached by the sheriff belongs to them, this process can be protracted. In the event of such a claim by a third party, the sheriff must, in terms of Magistrates' Court rule 44 (2), issue an interpleader summons, calling upon the rival claimant to appear in court and state the nature and particulars of his claim and have his claim adjudicated by the court. This can delay the proceedings and add to the costs as the property that forms the subject of the claim has to remain in storage.

As a result of the high costs and delays associated with the process, both the debtor and creditor seldom reap significant benefits from the sale in execution.

In the example below (received from a sheriff) the contents of an average three bedroom residence were sold in execution. After the sheriff's fees were deducted, the proceeds of the sale amounted to R3 773,34.

Inventory forced sale

1. Living room set	R1 500.00
2. Dining room set	R1 500.00
3. Plasma TV	R1 500.00
4. DVD/ CD player	R 750.00
5. Coffee tables (2)	R 300.00
6. Fridge	R1 200.00
7. Washing machine	R 750.00
8. Various loose items	R 300.00
Total	R7 500.00

Table 6 Inventory

Distribution account

Proceeds of sale in execution	R7 500.00
Sheriff's commission (9%)	R 675.00
Costs of removal (contractor)	R1 000.00
Costs of storage (15 days @R3 per square meter) 12sqm = R36 per day* 15	R 540.00
Attaching of notices to noticeboards (2)	R 32.00
Costs of locksmith	R 400.00
Provision for advertising costs	R 600.00
Copies (8)	R 16.00
Faxes received (3)	R 6.00
VAT on fees set out above	R 457.66
Cheque herewith	R3 773.34

Table 7 Distribution account

Take note that in the above example, the amount of R3 773,34 will be paid over to the attorney. From this amount the attorney's fees still have to be deducted before the actual proceeds of the sale can be deducted from the outstanding capital amount.

To further illustrate this problem, the team requested an attorneys firm specialising in collections, to draft a pro forma statement of account where the debt collection process included a sale in execution. The account was drafted on Scale A, the lowest possible scale (when the amount in dispute is less than or equal to the amount of R12 000,00), and the attorneys' fees amounted to R2 116,41. To this had to be added the sheriff's costs and other disbursements.

23.	<u>Drafting, perusal, copies and attendance to default judgment</u>	R 98.00	
24.	<u>Drafting, perusal, copies and attendance to warrant of execution</u>	R 79.00	
25.	<u>Certificate i.t.o R 38</u>	R 79.00	
26.	<u>Attend to forward default judgment and writ to court</u>	R 19.00	
28.	<u>Receive and peruse granted default judgment and writ</u>	R 14.00	
29.	<u>Instructions to sheriff to attend to inventory</u>	R 38.00	
30.	<u>Attend to deliver instruction to sheriff</u>	R 19.00	
31.	<u>Receive and peruse sheriff's return of service and inventory</u>	R 21.00	
32.	<u>Receive and peruse Interpleader summons (3p)</u>	R 38.00	
33.	<u>Taking instruction to defend Interpleader summons</u>	R 394.00	
34.	<u>Attending to court to defend Interpleader summons (45 min)</u>	R 175.50	
35.	<u>Instruction to sheriff to attend to the attachment</u>	R 38.00	
36.	<u>Attendance on payment of sheriff returns</u>	R 12.00	R 172.90
37.	<u>Attend to pay actual and necessary removal and storage fees</u>	R 12.00	R 5 500.00
38.	<u>Drawing of Notice i.t.o R 41(8)</u>	R 19.00	
39.	<u>Drawing of Notice i.t.o r 43(7)</u>	R 19.00	
40.	<u>Attend to pay advertising costs</u>	R 12.00	R 300.00
41.	<u>Correspondent / Courier attendance</u>	R 12.00	
42.	<u>Instruction to Sheriff</u>	R 19.00	
43.	<u>Correspondence to debtor</u>	R 12.00	
44.	<u>Telephone costs</u>		R 60.00

SUB TOTAL	R 1 858.50	6411.46
Vat @ 14%	R 259.91	
Sub Total	R 2 116.41	
Plus Expenses	R 6 411.46	

TOTAL AMOUNT DUE

R 8 527.87

Example 20: Pro forma statement of account

From the above example it is clear that the first R8 527.87 of the proceeds of the sale in execution will only cover the attorneys' and sheriff's fees and disbursements relating to the sale in execution.

4.16

Section 65 procedure (enquiries into financial affairs of debtor)

The so-called "section 65 procedure" is set out in the Magistrates' Court Act. The intention of section 65 (A) is to set up a court enquiry at which the financial position of the debtor can be evaluated. Once it is clear how much the debtor can afford to pay towards the outstanding debt, the court will make an order to this effect. Payments will usually be made in instalments.

The procedure can only be brought in the court in which the debtor works or resides and the debtor is notified by way of service by the sheriff of the court, calling upon him to appear before a magistrate on a given date and there provide reasons for not being able to comply with the judgment given against him.

The attorney for the credit provider may then, in the presence of a magistrate, solicit an offer of payment by way of monthly instalments from the debtor. Any order made for instalments can be coupled with an emoluments attachment order when authorised by the court.

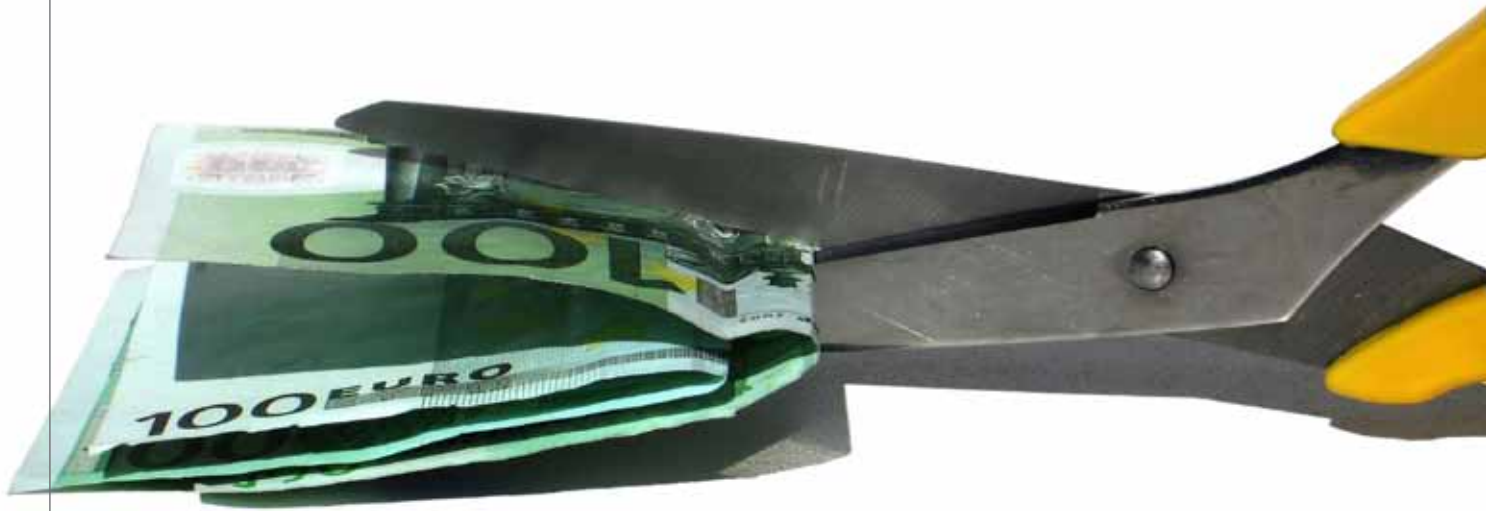
If the debtor, upon whom the section 65 notice was served, fails to attend the hearing, the magistrate may order that a warrant for his arrest be issued. The debtor will then be arrested by the sheriff and brought before the court to explain the reasons for his absence. The court may sanction the debtor for contempt of court and a debtor may be fined or imprisoned for a period not exceeding three months.

This method of debt collection is not very effective because the notices in terms of Section 65 A are not served successfully. In instances where the debtor was served successfully, they often fail to appear in court. Anecdotal evidence from attorneys suggests that only between 10 to 33% of debtors who have been successfully served with a section 65 A notice, eventually appear in court.

A sample of 46 documents, drawn from the files of a sheriff for the purposes of research for a report prepared by the University of Pretoria Law Clinic for Corporate Rebels in February 2013, showed only 15 were successfully served. The reasons for a return of non-service are ample: debtors abscond, are protected by neighbours or family members, or the required time between the service of the notice and the appearance date could not be adhered to as a result of the sheriff only being able to get hold of the debtor after numerous previous unsuccessful attempts.

The warrant of arrest will generally not be issued by a magistrate if the section 65 A notice was not served on the debtor personally. The team consulted with a sheriff who informed them that execution of the warrant of arrest presents various challenges. The sheriff indicated that the police are reluctant to assist with the execution of these warrants and as the sheriff can use no means of force to arrest a debtor, they have to rely on the debtor's co-operation for the arrest.

Both the sale in execution and section 65 procedures can be extremely traumatic for the debtor whose financial trouble will be out in the open when his property are attached by the sheriff or when he has to appear in court for a financial enquiry. In this regard the emoluments attachment procedure provides a certain degree of privacy to the debtor who finds himself in financial difficulty as his affairs are not open for all to see. Further research is necessary to measure the pro's and con's of the different execution methods.



Chapter 5

EMPIRICAL RESEARCH ON EMOLUMENTS ATTACHMENT ORDERS IN SOUTH AFRICA

In this chapter the team made use of data collected from various sources to:

1. Estimate the total number of garnished employees in South Africa;
2. Analyse the administration of emoluments attachment orders by employers conducting the processing of orders in-house;
3. Report on the practices adopted by garnishee administrators;
4. Determine whether the guide “Garnishee orders: Employers Guide” published by GTZ in October 2008 has been used by employers and to what extent.

5.1. Towards an estimate of the total number of garnished employees in South Africa

5.1.1 Introduction

“... there could be as many as 5 million garnishee orders countrywide. Earlier estimates had put the figure at 3 million.”-Business Report, 26 August 2013

Uncertainty exists regarding the true number of active garnishees in South Africa as well as the percentage of the workforce in South Africa affected by these orders. Some media reports on the figure of emoluments attachment orders vary between 3 and 5 million active orders (Fin 24, 6 August 2012). It is however unsure how these figures are calculated.

Other media reports indicate that between 10% and 15% of South Africa's workforce has active emoluments attachment orders effective against their salaries (Moneyweb, 1 October 2012).

The true number of employees with emoluments attachment orders being deducted from their salaries can only be determined if every single employee in the formal sector is surveyed. When resources are limited, this is an almost impossible task. The team compiled and analysed data as discussed below in order to arrive at an estimated figure.

5.1.2 Methodology

1. The aim of the research was to estimate how many employees in the formal sector in South Africa had emolument attachment orders against their salaries. The formal sector is affected by emoluments attachment orders because this form of debt collection can only be used when a debtor is employed.
2. The team made use of a sample (Data set A) to make inferences about the formal sector in South Africa.
3. Employment data provided by StatsSA for June 2013 was used as a framework and a starting point for all calculations. Data was also sourced from three garnishee administrators who process emoluments attachment orders on behalf of employers throughout South Africa. Lastly, Persal and Persol provided the team with data for the public sector.
4. The team was advised that, even though Data set A was not a true random sample in statistical terms, the sample can be considered as representative. The data was considered as representative for the purposes of all calculations.
5. Statistical sampling methodology and statistical inference were applied to analyse the data. Provision was made for sampling error, which is the difference between a result based on a sample and a result which would have been obtained if the total population was studied. 95% confidence intervals were used to present the sampling error. This was taken into account in all calculations.
6. The team used the data provided in the sample to determine the percentage of employees whose wages were garnished and the number of orders per employee in certain sectors in the private sector, namely Mining, Manufacturing, Services: Financial intermediation, real estate and business, Retail (trade), Post and telecommunications, Health and social work, Land transport and transport via pipeline as well as Other educational institutions. A calculation of the estimated average number of emoluments

attachment orders against the salary of an employee was also made per sector. The data was then extrapolated to arrive at a figure for the overall private sector.

7. The same methodology was used for the public sector. Using the data provided by Persal and Persol the percentage of employees with emoluments attachment orders in the National and Provincial departments was estimated as well as the number of orders per employee. The data was then extrapolated to arrive at a figure for the overall public sector.

5.1.3

Data

Data set A was used which consisted of the following:

a. StatsSA

This data was sourced from StatsSA. The data in this set was used as a basis for the data framework and served as a starting point for further calculations.

- a. Comprises the total number of employees in the formal sector in South Africa, excluding agriculture, at the end of June 2013.

- b. It indicates the total number of employees employed in the

- Mining,
- Manufacturing,
- Services: Financial intermediation, insurance, real estate and business sectors;
- Retail - trade,
- Non-governmental Health and social work,
- Land Transport and transport via pipeline,
- Post and Telecommunications and
- Educational Institutions (non-governmental) sectors

in the private sector.

As well as the number of employees employed in the following departments in the public sector:

- National departments
- Provincial departments

in South Africa at the end of June 2013.

b. Three garnishee administrators

The team sourced the following data from three garnishee administrators who process emoluments attachment orders on behalf of employers throughout South Africa. Through well-developed systems and software the administrators had access to the requested data. The data collected represents the situation at the end of June 2013. The data gathered:

- a. Comprises a sample of 947 530 employees, both with and without emoluments attachment orders against their salaries.

- b. Represents employees employed in the following sectors:

- Mining,
- Manufacturing,

- Services: Financial intermediation, insurance, real estate and business sectors;
 - Retail - trade,
 - Non-governmental Health and social work,
 - Land Transport and transport via pipeline,
 - Post and Telecommunications
 - Educational Institutions (non-governmental) sectors
- in the private sector.
- c. Indicates how many of these employees had emoluments attachment orders against their salaries in June 2013.
- d. Indicates how many emoluments attachment orders were processed for these employees in June 2013.

c. Persal and Persol:

The team sourced data from Persal and Persol for the national and provincial departments in the public sector.

d. Sample size:

The sample size for each sector is indicated below, as well as the percentage of the sample as compared to the total number of employees employed in the particular sector according to StatsSA:

Industry	Total number of employees in industry according to StatsSA	Number of employees in sample (Data set A)	Sample size %
Private sector			
Mining	511 106	125 181	24.49%
Manufacturing	1 142 979	103 978	9.09%
Services: Financial intermediation, insurance, real estate and business	1 840 276	406 114	22.06%
Retail (Trade)	732 763	151 491	20.67%
Post and telecommunications	82 741	32 775	39.61%
Health and social work	257 205	48 348	18.79%
Land transport and transport via pipeline	169 770	70 621	41.59%
Other educational	28 363	9 113	32.12%
Public Sector			
National departments	452 261	443 601	98%
Provincial departments	1 093 170	1 084 596	99%

Table 8 Different sectors in Data set A

5.1.4
Findings

1. Findings in respect of identified industries in the private sector

a. Percentage of employees with emoluments attachment orders in the Mining industry

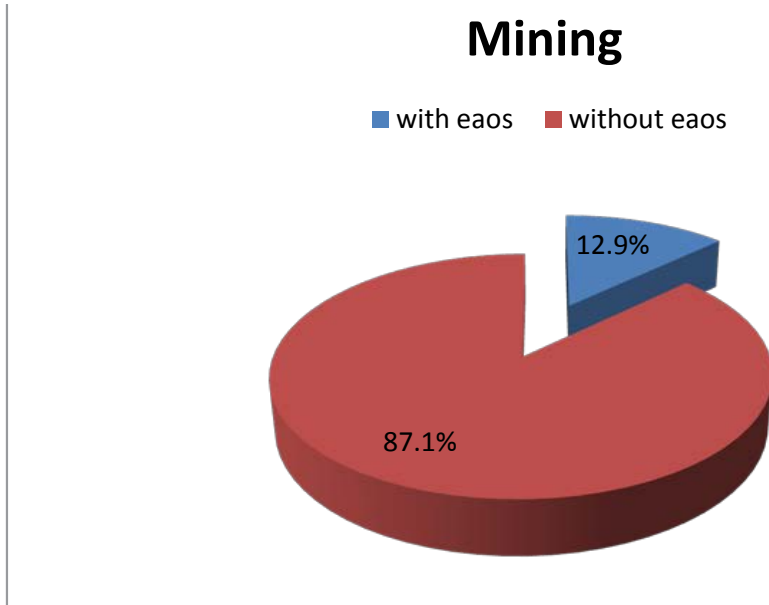


Figure 3: Percentage of employees with emoluments attachment orders in Mining industry

Industry	StatsSA	Data set A	Percentage of employees with EAOs in industry	Standard Error of estimation	Lower bound	Upper bound	Number of EAOs per garnished employee
Mining	511 106	125 181	12.9%	0.0009	12.72%	13.09%	1.43

Table 9: Data – mining sector

Mining:

According to StatsSA’s June 2013 employee numbers, 511 106 employees are employed in the Mining Industry. From the information in Data set A it is estimated that 12.9% of employees in the mining industry have emoluments attachment orders against their salary. It is also estimated at 95% confidence, taking the statistical error of estimation into account, that the percentage will not be below 12.72% or not be more than 13.09%. In this industry it is estimated that garnished employees have an average of 1.43 orders against their salaries.

b. Percentage of employees with emoluments attachment orders in Manufacturing industry

Manufacturing

■ with eaos ■ without eaos

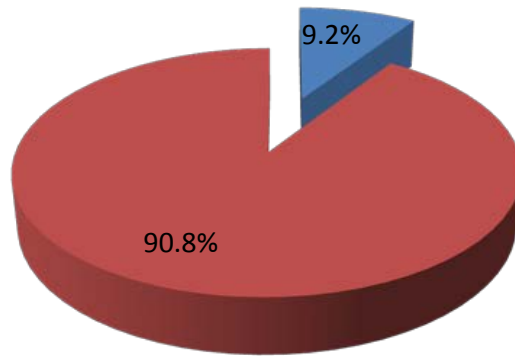


Figure 4: Percentage of employees with emoluments attachment orders in manufacturing industry

Industry	StatsSA	Data set A	Percentage of employees with EAOs in industry	Standard Error of estimation	Lower bound	Upper bound	Number of EAOs per garnished employee
Manufacturing	1 142 979	103 978	9.2%	0,0009	9,05%	9.40%	1.40

Table 10: Data – manufacturing industry

Manufacturing:

In June 2013 the number of employees employed in the Manufacturing Industry was 1 142 979. Using the data from Data set A it is estimated that 9.2% of employees in this sector has emoluments attachment orders against their salaries. A 95% confidence interval for the industry proportions is: lower bound - 9.05, and upper bound - 9.40 implying that with 95% confidence the industry proportion will not be outside the interval bounds. An average of 1.40 emoluments attachment orders exists for every garnished employee in this industry.

c. Percentage of employees with emoluments attachment orders in Services: Financial intermediation, insurance, real estate and business industry

Services: Financial intermediation, insurance, real estate and business

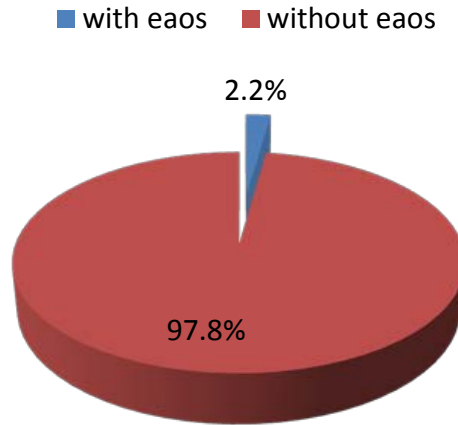


Figure 5: Percentage of employees with emoluments attachment orders in Services: Financial intermediation, insurance, real estate and business industry

Industry	StatsSA	Data set A	Percentage of employees with EAOs in industry	Standard Error of estimation	Lower bound	Upper bound	Number of EAOs per garnished employee
Services: Financial intermediation, insurance, real estate and business industry	1 840 276	406 114	2.28%	0.0002	2.24%	2.33%	1.76

Table 11: data – Services: Financial intermediation, insurance, real estate and business sector

Services: Financial intermediation, insurance, real estate and business

With 1 840 276 employees employed in the Services: financial intermediation, insurance, real estate and business industry at the end of June 2013, the estimated number of garnished employees with reference to the sample, is 2.28%. The average number of orders per garnished employee is 1.76.

d. Comparison between Mining, Manufacturing and Services: Financial intermediation, insurance, real estate and business industries

Employees with emoluments attachment orders in Mining, Manufacturing and Services Industry

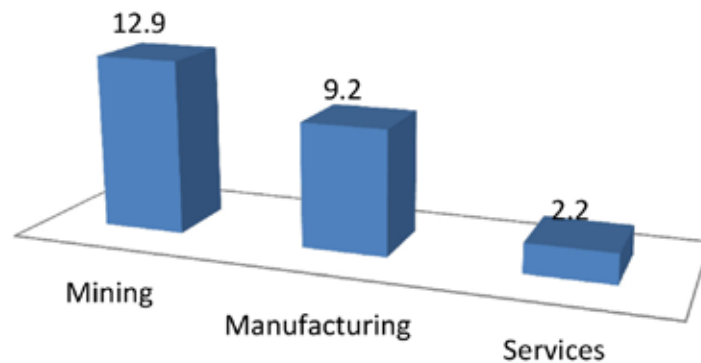


Figure 6: Comparison between percentage of employees in Mining, Manufacturing and Services industries with emoluments attachment orders against their salaries

2. Findings in respect of sub-sectors in the Private sector

a. Percentage of employees with emoluments attachment orders in Land transport and transport via pipeline industry as a sub-sector of the Transport, storage and communication industry

Land transport and transport via pipeline

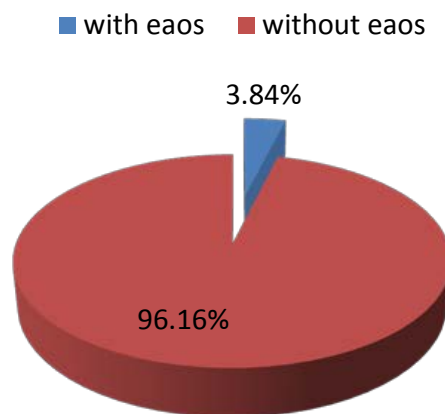


Figure 7: Percentage of employees with emoluments attachment orders in Land transport and transport via pipeline industry

Industry	StatsSA	Data set A	Percentage of employees with EAOs in industry	Standard Error of estimation	Lower bound	Upper bound	Number of EAOs per garnished employee
Land transport and transport via pipeline industry	169 770	70 621	9.43%	0.0011	9.22%	9.65%	1.40

Table 12: data – land transport and transport via pipeline sector

Land transport and via pipeline transport:

In June 2013 the number of employees employed in this industry was 169 770. Using the data from Data set A it is estimated that 9.43% of employees in this industry has emoluments attachment orders against their salaries. A 95% confidence interval for the industry proportions is: lower bound - 9.22%, and upper bound – 9.65% implying that with 95% confidence the industry proportion will not be outside the interval bounds. An average of 1.40 emoluments attachment orders exists for every garnished employee in this industry.

b. Percentage of employees with emoluments attachment orders in Post and telecommunications industry as a sub-sector of the Transport, storage and communication industry

Post and telecommunication

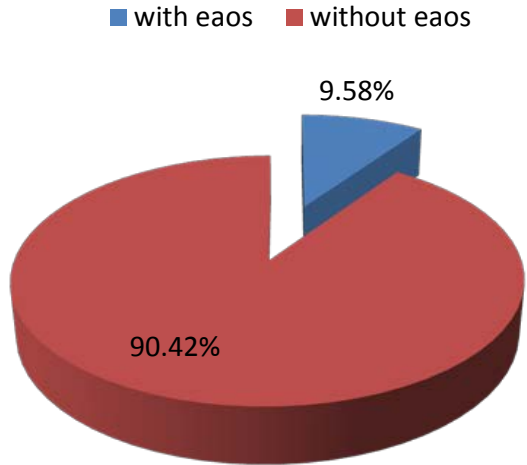


Figure 8: Percentage of employees with emoluments attachment orders in Post and telecommunications industry

Industry	StatsSA	Data set A	Percentage of employees with EAOs in industry	Standard Error of estimation	Lower bound	Upper bound	Number of EAOs per garnished employee
Post and telecommunications industry	82 741	32 775	9.58%	0.0016	9.26%	9.89%	1.67

Table 13: data - Post and telecommunications sector

Post and telecommunications:

With 82 741 employees employed in the Post and telecommunication industry at the end of June 2013, the estimated number of garnished employees with reference to the sample, is 9.58% The average number of orders per garnished employee is 1.67.

c. Percentage of employees with emoluments attachment orders in Health and social work industry as sub-sector of the Community, social and personal services (non-government) industry

Health and social work

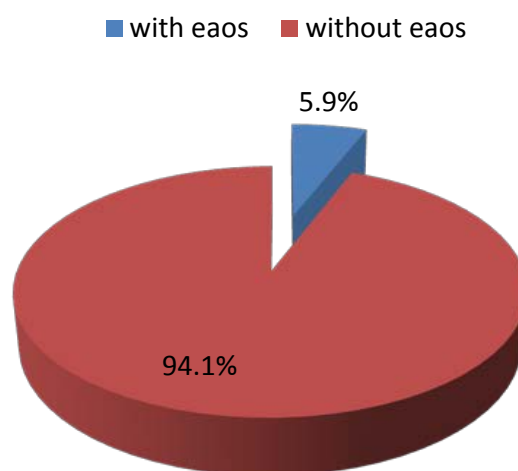


Figure 10: Percentage of employees with emoluments attachment orders in Health and social work sector

Industry	StatsSA	Data set A	Percentage of employees with EAOs in industry	Standard Error of estimation	Lower bound	Upper bound	Number of EAOs per garnished employee
Health and social work industry	257 205	48 348	5.93%	0.0011	5.72%	6.14%	1.42

Table 14: data – Health and social work sector

Health and social work:

According to StatsSA’s June 2013 employee numbers, 257 205 employees are employed in the Health and Social work industry. From the information in Data set A it is estimated that 5.93% of employees in this industry have emoluments attachment orders against their salary. It is also estimated at 95% confidence, taking the statistical error of estimation into account, that the percentage will not be below 5.72% or not be more than 6.14%. In this industry it is estimated that garnished employees have an average of 1.42 orders against their salaries.

d. Percentage of employees with emoluments attachment orders in Other educational institutions Industry as sub-sector of the Community, social and personal services (non-government) industry

Other educational institutions

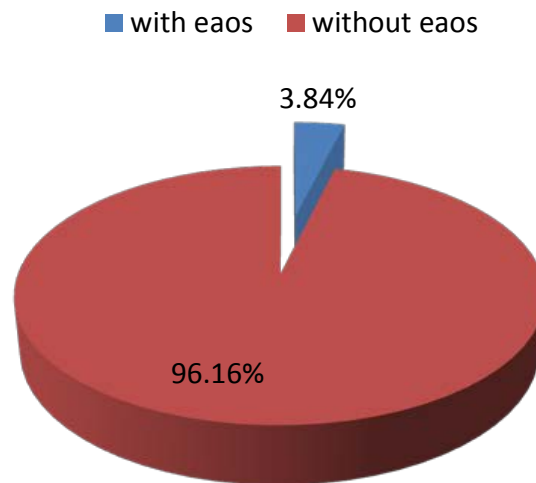


Figure 11: Percentage of employees with emoluments attachment orders in Other educational institutions industry

Industry	StatsSA	Data set A	Percentage of employees with EAOs in industry	Standard Error of estimation	Lower bound	Upper bound	Number of EAOs per garnished employee
Other educational institutions	28 363	9 113	3.84%	0.0020	3.44%	4.23%	1.77

Table 15: data – other educational institutions industry

Other educational institutions:

Considering the fact that 28 363 employees were employed in the Other educational institutions industry at the end of June 2013, the estimated number of garnished employees with reference to the sample, is 3.84% The average number of orders per garnished employee is 1.77.

e. Percentage of employees with emoluments attachment orders in Retail trade industry as sub-sector of the Wholesale, retail and motor trade, hotels and restaurants industry.

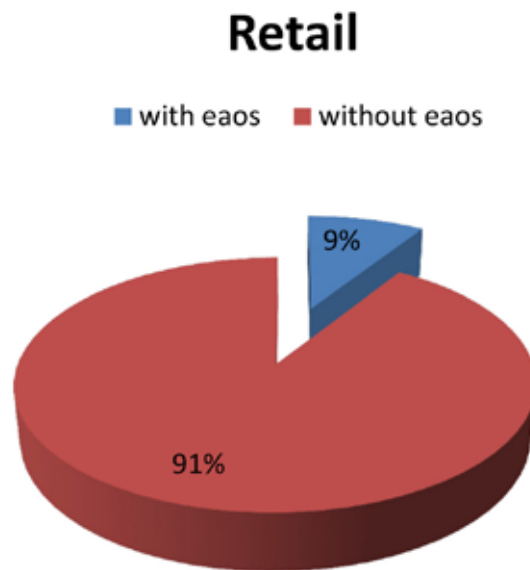


Figure 13: Percentage of employees with emoluments attachment orders in Retail trade sector

Sector	StatsSA	Data set A	Percentage of employees with EAOs in sector	Standard Error of estimation	Lower bound	Upper bound	Number of EAOs per garnished employee
Retail	732 763	151 491	9.06%	0.0007	8.92%	9.21%	1.41

Table 16: data – retail trade industry

Retail:

In June 2013 the total number of employees employed in this industry was 732 763. Using the data from Data set A it is estimated that 9.06% of employees in this industry has emoluments attachment orders against their salaries. A 95% confidence interval for the industry proportions is: lower bound: 8.92%, upper bound: 9.21% implying that with 95% confidence the industry proportion will not be outside the interval bounds. An average of 1.41 emoluments attachment orders exists for every garnished employee in this industry.

f. Percentage of employees with emoluments attachment orders in the overall formal private sector

Employees in formal private sector with emoluments attachment orders against their salaries

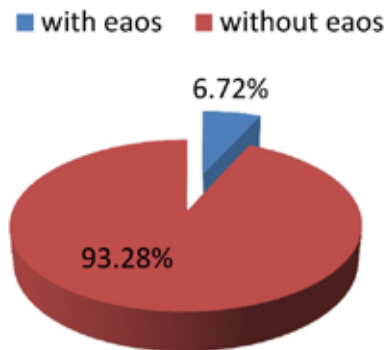


Figure 2: Percentage of employees in formal private sector with emoluments attachment orders against their salaries

The private sector encompasses all for-profit businesses that are not owned or operated by the government. From the StatsSA figures a weighted overall proportion estimate for the combined sectors were obtained. The estimated overall sector proportion is 6.72% (320 019 employees) with a 95% confidence interval of 6.59% (313 872 employees) and 6.84 % (326 165 employees).

3. Findings in respect of certain departments in the Public Sector

a. Percentage of employees with emoluments attachment orders in National departments

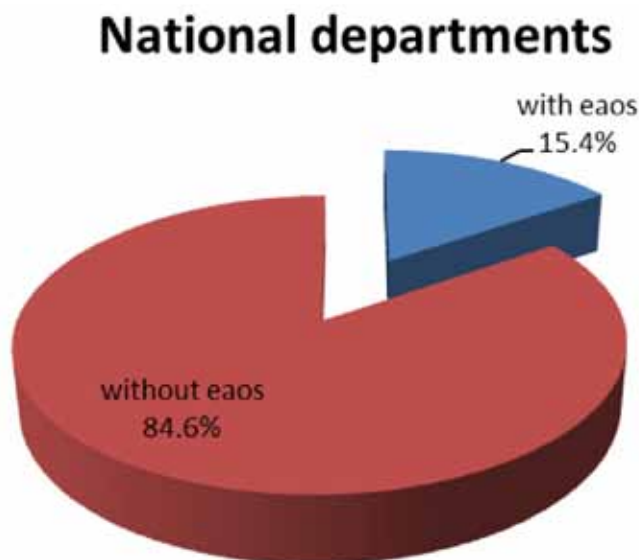


Figure 14: Percentage of employees with emoluments attachment orders in National departments

Sector	StatsSA	Data set A	Percentage of employees with EAOs in sector	Standard Error of estimation	Lower bound	Upper bound	Number of EAOs per garnished employee
National Departments	452 261	443 601	15.95%	0.0005	15.84	16.05	1.60

Table 17: data – national departments

National departments:

According to StatsSA's employee numbers, 452 261 employees are employed in National Departments in June 2013. From the information in Data set A it is estimated that 15.95% of employees in this sector have emoluments attachment orders against their salary. It is also estimated at a level of 95% confidence, taking the statistical error of estimation into account, that this percentage will not be below 15.84% and not be more than 16.05%. In this sector it is estimated that garnished employees have an average of 1.60 orders against their salaries.

b. Percentage of employees with emoluments attachment orders in Provincial departments

Provincial departments

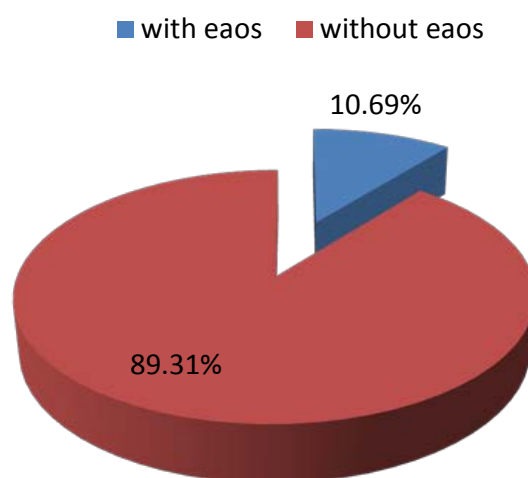


Figure 15: Percentage of employees with emoluments attachment orders in Provincial departments

Sector	StatsSA	Data set A	Percentage of employees with EAOs in sector	Standard error of estimation	Lower bound	Upper bound	Number of EAOs per garnished employee
Provincial Departments	1 093 170	1 084 596	10.70%	0.0003	10.64	10.75	1.57

Table 18: data – provincial departments

Provincial departments:

According to StatsSA's employee numbers, 1 093 170 employees are employed in Provincial Departments in June 2013. From the information in Data set A it is estimated that 10.70% of employees in this sector have emoluments attachment orders against their salary. It is also estimated at 95% confidence, taking the statistical error of estimation into account, that this percentage will not be below 10.64% and not be more than 10.75%. In this sector it is estimated that garnished employees have an average of 1.57 orders against their salaries.

c. Percentage of employees with emoluments attachment orders against their salaries in the overall public sector

Employees in overall public sector with emoluments attachment orders against their salaries

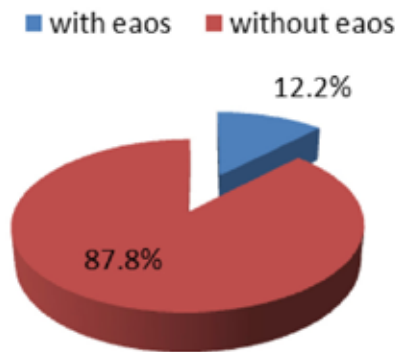


Figure 16: Percentage of employees in public sector with emoluments attachment orders against their salaries

This calculation is based on an estimate of 12.2% for the public sector, obtained as a weighted estimate from the national and provincial department data.

d. Comparison between private and public sector

Percentage of employees in Private and Public sector with emoluments attachment orders

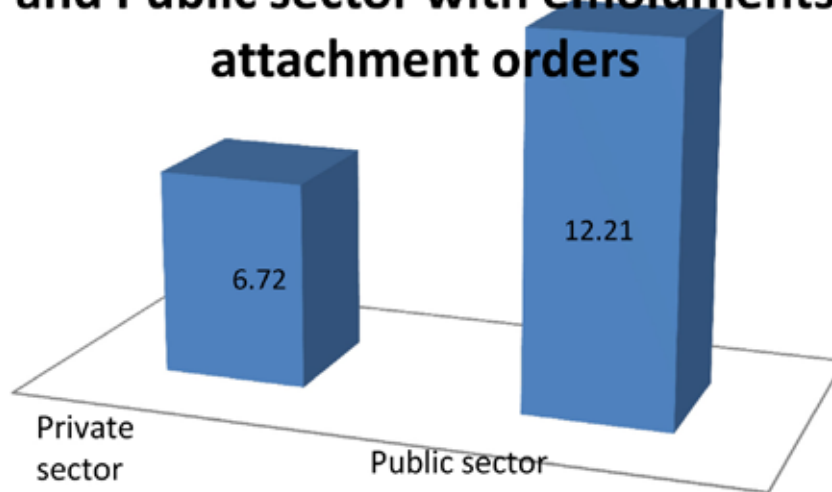


Figure 16: Comparison between private and public sector

5.1.5

Conclusions

1. The number of employees with emoluments attachment orders in the overall formal private sector proved to be lower than was speculated in the media. Based on the sectors used in Data set A 320 019 employees in the formal private sector in South Africa had emoluments attachment orders against their salaries in June 2013. If the remaining sectors identified by StatsSA for which the research team could not obtain a sample, e.g. Electricity, gas and water supply, and construction are included in calculations and it is accepted that a similar trend exists for these sectors, the number of employees in the private sector with emoluments attachment orders against their salaries in June 2013 would be 435 084.
2. The figure for the Mining industry was high. This corresponds with media reports highlighting the Mining sector as one of the sectors experiencing trouble with over-indebtedness and exploitation.
3. The number of employees with emoluments attachment orders against their salaries in June 2013 in the public sector is estimated to be 240 034. This calculation is based on an estimate of 12.2% for the public sector, obtained as a weighted estimate from the national and provincial department data.
4. The percentage of employees with emoluments attachment orders in the public sector (15.9%) is notably lower than the figure released by the Public Service Commission in 2007 (20%). A reason for this could be that employees and their employers are more aware of the abuses relating to emoluments attachment orders. Garnishee administrators administering the orders on behalf of employers also play a role. A further reason may be that the compilers of the Public Service Commission Report did not take into account that an employee can have more than one emoluments attachment order against his or her salary and equalled the total number of emoluments attachment orders to the total number of public servants subject to these orders.

5.2

The administration of emoluments attachment orders by employers who handle the processing of emoluments attachment orders in-house

5.2.1

Introduction

One of the stated objectives of the report was to analyse how employers in the private sector implement emoluments attachment orders and the practices adopted by payroll offices in respect of the implementation of the orders.

5.2.2

Methodology

The research team, through telephonic interviews and questionnaires obtained information from the payroll - and administration managers who are directly involved with the processing of emoluments attachment orders in order to assess their level of knowledge of the process to be followed.

5.2.3

Data

Data set B was used to make inferences. This data set consists of 33 employers who handle the administration of emoluments attachment orders **in-house**. These 33 employers employ a total of 10 752 employees both with and without emoluments attachments orders against their salaries and represent 5 industries, namely:

- Metal & Engineering Industry
- Hospitality
- Education
- Agriculture
- Transport.

These employees are employed in both urban and rural areas in five provinces. Emoluments attachment orders for the payment of administration orders, maintenance orders and debt formed part of this data set.

- Of the 10 752 employees, 1 081 employees had emoluments attachment orders against their salaries. This accounts for a figure of 10.05% of the total number of employees.
- 1 387 emoluments attachment orders were processed in May 2013 which accounts for an average of 1.2 orders per employee.

5.2.4

Findings

From the interviews it was established that:

- 1. The processing of emoluments attachment orders is considered to be a time-consuming process when compared to other administrative tasks**

When asked whether they would describe the processing of emoluments attachment orders as time consuming when compared to other administrative tasks the majority of respondents answered in the affirmative.

Would you consider the processing of garnishee orders as time consuming?

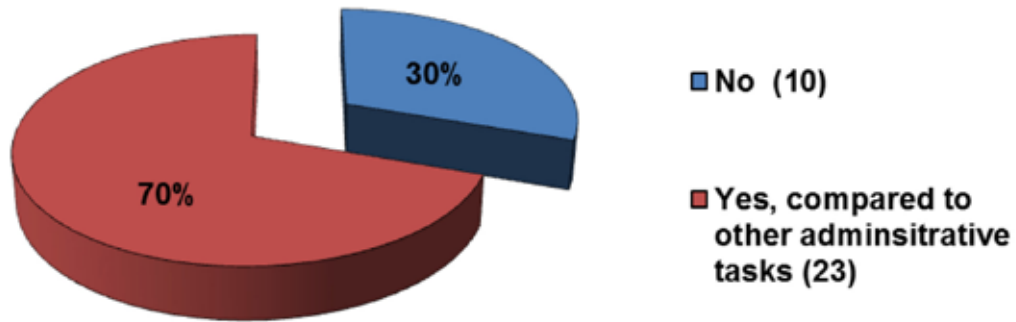


Figure 17: Payroll officers considering the processing of emoluments as time consuming

Further responses included:

- “There are a lot of deductions i.e. pension, PAYE, etc. that are deducted at a certain time of the month, but emoluments attachment orders have to be paid before the 2nd or the 7th of the month, this makes the process difficult because should I forget to pay, interest is charged on the account and then I am responsible for it. Also when he leaves it is my responsibility to let everyone know that he left and the deductions won’t be made anymore – this takes time.”
- “The processing itself is not time-consuming; it is the tasks that come with it. You have regular enquiries from employees about the outstanding balance etc. that takes time.”

2. Payroll officers are unsure when to stop deductions

The majority of the respondents were uncertain when to stop deductions made in terms of emoluments attachment orders. When asked to indicate when they stop deductions in terms of emoluments attachment orders from the salaries of employees, the responses received were:

- “The order usually stipulates the debt and the sheriff fees, but we don’t know how to calculate the interest. Therefore, we import the debt and sheriff fees and then the system makes deductions until these fees have been paid off. We inform the employee that we are not taking the interest into account and we show them that interest will also be owed. Once we stop payments the attorneys will phone and ask why payments have stopped, we explain the situation and they send us an account balance with the interest and we start the deductions again.”
- “We stop the deductions when our system shows that the debt, interest, legal fees and the monthly percentage collection commission is all paid up. This does not necessarily correspond with the attorneys’ account balance.”
- “When our payroll shows a zero balance. This usually doesn’t coincide with the account statement from the attorneys. Therefore, once our system shows that it has been paid up we contact the attorneys and get an updated statement of account and then begin the deductions again.”

- “We input the amount as shown on the order and our system generates a reducing balance. Once our system shows that it has been paid off, we stop payments. We don’t communicate with the debt collectors, they can communicate with us. Once they phone to say that there is still debt outstanding due to the interest we get a new balance from them and start the deductions again.”
- “Not always possible to know when to stop because it seems that the employees incur so many extra penalties and interest. Our system does not correspond with the attorneys’ account balance.”
- “When informed by the attorney.”
- “When the court indicates we need to stop.”
- “Once we receive word from the employee that it’s paid up.”

3. Regular complaints regarding emoluments attachment orders

The respondents listed the three complaints received most often from employees regarding emoluments attachment orders as:

- “They don’t know who the creditor is and say that they do not owe this creditor money.”
 - This can be explained because credit providers often sell the debtors book to collectors. The rights of the credit provider are then ceded to the debt collector and he will replace the original credit provider as the judgment creditor. As the consumer does not know this “new” judgment creditor they will contest the claim as they have never dealt with this credit provider before.
- “They dispute the outstanding amount because they say that payments were made.”
 - Often consumers do not realise that interest and costs have to be added to the outstanding amount.
- “They dispute the repayment period and cannot understand why they must pay for so long.”
 - In some instances, the balances are increasing due to payment of an instalment that is too small to reduce the balance of the debt. The consumer does not appreciate the effect of interest and costs on the repayment period.

4. Service by sheriff

In terms of section 65J(3) of the Magistrates’ Court Act:

“[a]ny emoluments attachment order shall be prepared by the judgment creditor or his attorney, shall be signed by the judgment creditor or his attorney and the clerk of the court, and shall be served on the garnishee by the messenger of the court in the manner prescribed by the rules for the service of process.”

One of the reported abuses of the emoluments attachment order process is that the order is not served on the employer by the sheriff. Respondents were asked to indicate whether they ascertain that the order was served on them by the sheriff in person or by registered mail dispatched by the sheriff.

Do you ascertain whether the eao is served by the messenger of the court (sheriff) in person or by registered mail dispatched by the sheriff?

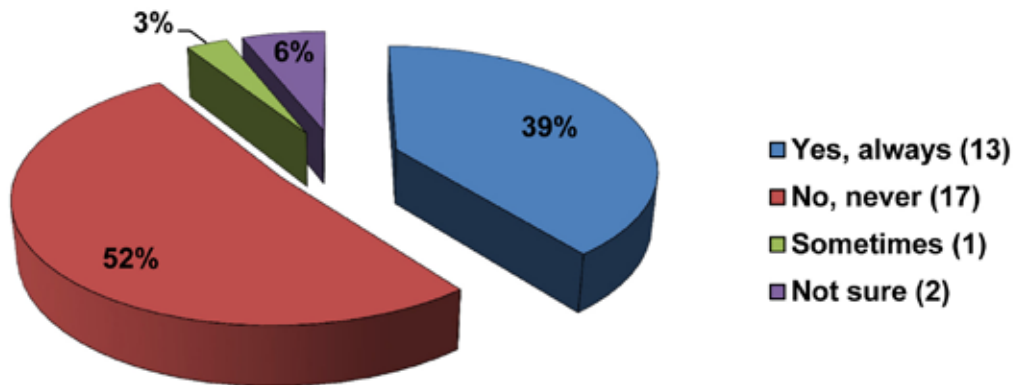


Figure 18: Payroll officers ascertaining whether order was served by sheriff

52% of the respondents indicated that they never check whether the order is served by the sheriff in person or by registered mail dispatched by the sheriff. The sheriff's return serves as proof that the order was served on the employer. If the employer does not proceed with the deductions ordered by court, the judgment creditor can evoke the sanction provided for by Section 65, namely the warrant of execution. Emoluments attachment orders should be delivered by the Sheriff of the Court and not by a tracer or debt collector. A sheriff must be able to identify himself as such. If the order is not served by the sheriff there is no obligation on the employer to implement the order.

5. Duly signed and issued order

Reports of abuse of the emoluments attachment order system also include allegations that some debt collectors use fraudulent orders to recoup debt from consumer's pay cheques.

In terms of section 65J(3) of the Magistrate's Court Act:

*"[a]ny emoluments attachment order shall be prepared by the judgment creditor or his attorney, shall be **signed by the judgment creditor or his attorney and the clerk of the court**, and shall be served on the garnishee by the messenger of the court in the manner prescribed by the rules for the service of process."*

Is the general correctness of the order checked when the eao is received?

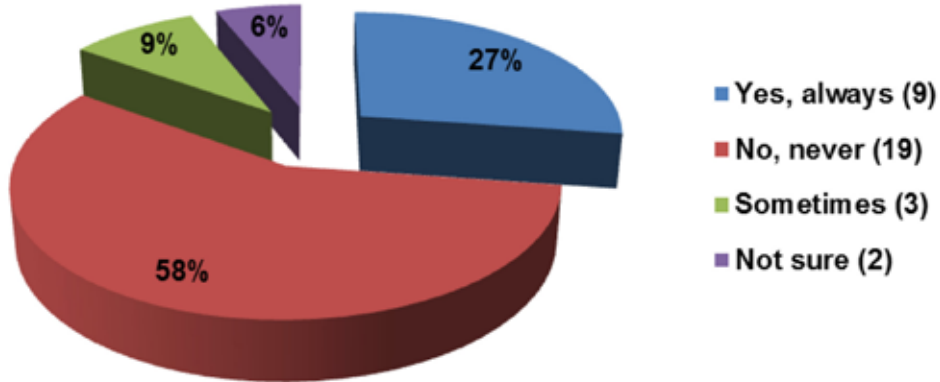


Figure 19: Payroll officers ascertaining the general correctness of the order

58% of the respondents indicated that they never check the orders to establish the general correctness, namely whether it has a case number, whether it was signed by the clerk of the court or whether it has a court stamp on it. If the order is checked for irregularities by the payroll office it will reduce the risk of implementing a fraudulent order against the salary of the employee.

6. 5% Commission due to employer

In terms of section 65 J (10):

“[a]ny garnishee may, in respect of the services rendered by him in terms of an emoluments attachment order, recover from the judgment creditor a commission of up to 5 per cent of all amounts deducted by him from the judgment debtor’s emoluments by deducting such commission from the amount payable to the judgment creditor.”

Do you deduct a commission from the amount paid over to the attorney or debt collector?

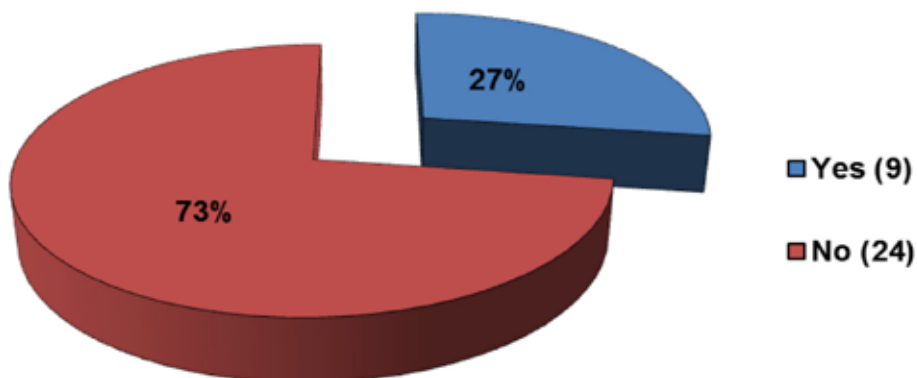


Figure 20: Payroll officers deducting commission for administration of order

The majority of respondents indicated that they do not recover the commission of up to 5% of the amount paid over to the judgment creditor or his attorney, provided for in the Act.

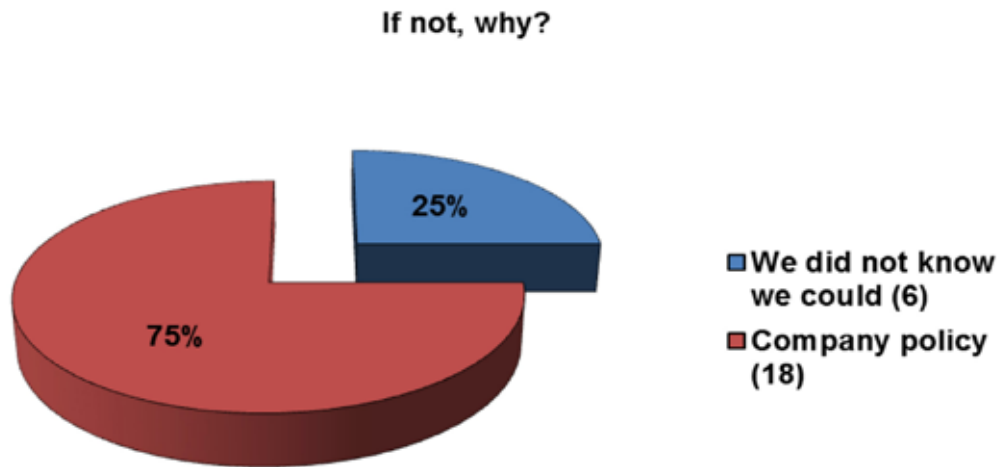


Figure 21: Reasons for not deducting commission

Company policy against the deduction of this commission, was the main reason for refraining from deductions.

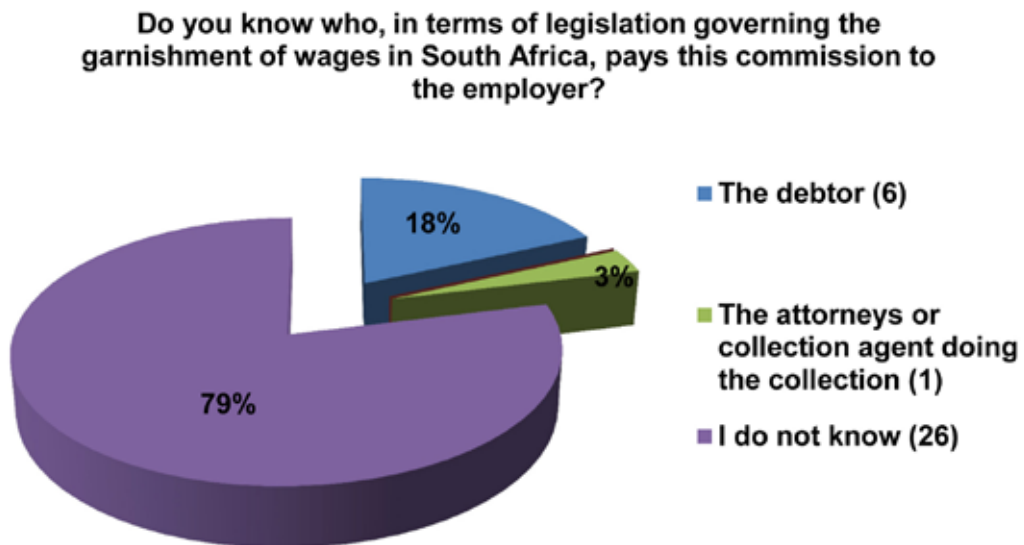


Figure 22: Payroll officers not aware commission recoverable from judgment creditor

79% of the respondents did not know that this commission is recoverable from the judgment creditor. This poses the question whether companies finding the administration of emoluments attachment orders to be a burden on their administrative system, would consider outsourcing to garnishee administrators, as the costs of these administrators would not be for the account of the employer or the employee. This of course would be provided that the administrator would charge the 5% fee provided for in the act.

5.2.5

Conclusion

The minister of finance said in his budget speech in February 2013:

“We are concerned by the abuse of emolument attachment orders that has left many workers without money to live on after they have serviced their debts every month... In the meanwhile, all employers, including the public sector, can play a role and assist their workers to manage their finances and to interrogate all emolument attachment or garnishee orders to ensure that they have been properly issued. I also call on the various law societies to take action against members who abuse the system.”

Responsible employers should protect the interests of their employees. If an employer decides to process the emoluments attachment orders attached to the salaries of his employees in-house, he should ensure that the payroll staff is properly equipped for the task. Payroll systems providing for the correct implementation and administration of emoluments attachment orders should be in place. Provision should also be made for training of and assistance to payroll staff administering emoluments attachment orders.

5.3

Employers outsourcing emoluments attachment orders to garnishee administrators

5.3.1

Introduction

A further objective of the report was to investigate and report on the practices adopted by garnishee administrators. Administering emoluments attachment orders can place a heavy administrative burden on employers, which is the main reason why many larger companies outsource this function. One of the benefits of using a specialist agency is that the company has the assurance that instalments and interest will be monitored properly, to prevent creditors from overcharging debtors – as is often the case.

The following are commonly listed tasks associated with the administration of emoluments attachment orders:

- Attending to and perusing orders
- Notifying employees of emolument attachment orders
- Spending time in discussion with employees
- Writing or printing of cheques
- Faxing through proof of payment to creditors or their attorneys
- Attending on banks to deposit payments
- Creating payment schedules for attorneys
- Faxing or posting of schedules and cheques to attorneys or collectors
- Maintaining outstanding balances on orders
- Keeping records of payment history

- Reconciling between the wage and finance departments
- Reconciling discrepancies between attorneys' and employer records
- (In many cases) negotiating with creditors or their attorneys
- Recalculating balances and, if necessary, challenging the correctness thereof
- Reinstating orders after payments were stopped
- (In certain instances) instructing legal departments or attorneys to negotiate or apply to court for relief for employees
- Training staff members to execute all of the above.

The work done by garnishee administrators is however also sometimes criticised. The main points of criticism identified by the team are the following:

- The administrator has no or limited knowledge or experience of the debt collection process and the legal requirements relating thereto.
- The administrator misinforms the debtor by stating that they can assist them by lowering the monthly instalment. They however fail to advise the debtor of the consequences the lowering of the instalment will have for the repayment period and that costs and interest will accrue as a result thereof.
- They incite debtors or employers to lodge complaints with the Law Society, Council for Debt collectors, the Credit Ombud or the media without proper consideration of the merits of the matter. In certain instances standard forms to lodge a complaint are distributed amongst debtors.
- They are unaware that the bylaws of the various law societies provides for the deduction of collection commission by the attorney acting on behalf of the creditor in the amount of 10% (limited to the amount of R1 000) for every payment on instalment.

5.3.2

Methodology and data

A data set consisting of four large employers with a national footprint who outsource their work to garnishee administrators was obtained. These employers employed a total of 82 378 employees of whom 7 532 had emoluments attachment orders against their salaries in May 2013. The research team, through telephonic interviews and questionnaires obtained information from the payroll - and administration managers of these employers.

5.3.3

Findings

It was established that the main reasons why these employers outsource the orders to administrators are that:

- Garnishee administrators know the law applicable to emoluments attachment orders and
- they have the systems designed for processing large numbers of orders
- Outsourcing emoluments attachment orders relieves the administrative burden on the payroll office.

All four employers had an arrangement with the garnishee administrator that the remuneration for their services would be the 5% administration fee provided for in Section 65 J (10) of the Act. This made the appointment of the administrator not only convenient but also financially viable.

5.3.4 Conclusion

It is clear that employers have to make a policy decision on whether they want to outsource the administration of emoluments attachment orders, or do it in-house. Whatever the decision may be, the interests of the employee should be at the forefront.

5.4 The use of the guide “garnishee orders: employers guide”

5.4.1 Introduction

One of the stated objectives of this project was to determine whether the guide “Garnishee orders: Employers Guide” published by GTZ in October 2008 have been used by employers and to what extent.

5.4.2 Methodology and data

To meet this objective the team made use of two data sets:

Data Set B:

The same data set used in 5.2 above, consisting of the payroll and admin managers of 33 employers handling the administration of emoluments attachment orders in their payroll in-house, was used.

Data Set D:

This data set was provided by GIZ and consisted of 82 key players from business, government, service providers on wellness issues, academia, civil society groups and donor organisations who participated in a seminar hosted by the former GTZ on *Business and employee financial wellness in South Africa: Time for collective action* which took place on November 14, 2008 at the Gallagher Convention Centre in Midrand.

The set received from GIZ was reduced considerably because 39 people on the list provided by GIZ could not be interviewed because either the contact details provided were out-dated or they were no longer employed by the employer listed or they could not be reached via the email address provided.

5.4.3 Findings

The results from Data set B were:

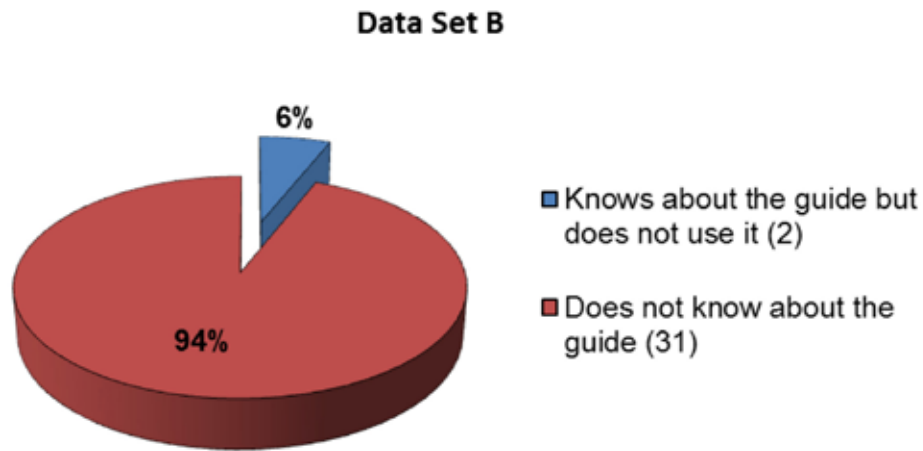


Figure 23: Respondents in Data set B using the guide

The results obtained from the remaining 43 people in data set D who were interviewed are reflected in the pie chart below:

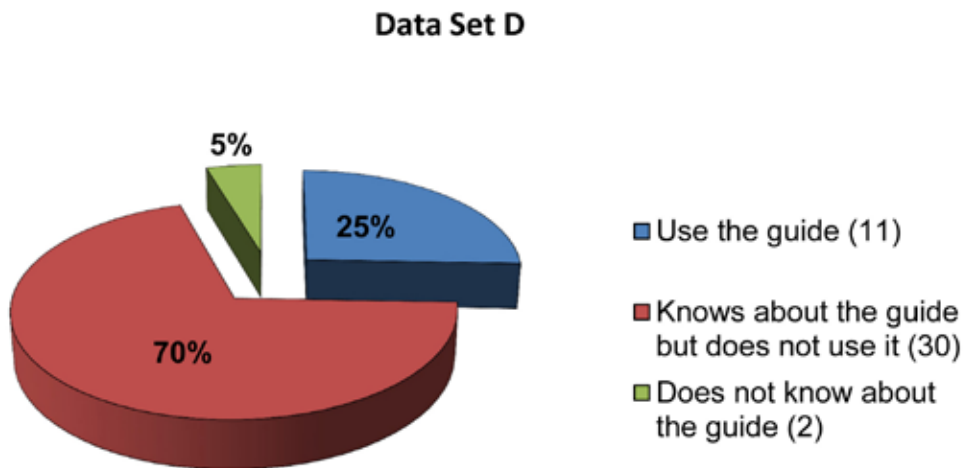


Figure 24: Respondents in Data set D using the guide

5.4.4 Conclusion

The team is confident that the findings of Data set B reflect the true position, namely that people do not use the guide, because they are not aware of the existence thereof. In this sample set, all the respondents were payroll officers or employees directly involved with payroll.

This guide was intended for HR and payroll managers in South Africa and, amongst others, it sheds light on the debt collection process in South Africa; relevant legislation concerning emoluments attachment orders; and common pitfalls and loopholes to be avoided; and it also contains some recommendations for the proper administration of emoluments attachment orders.

As the guide contains valuable material for the training of payroll staff, it is suggested that, on receipt of the task teams' code of conduct or in the event of legislative change, the guide be updated and a more conscious effort be made to circulate it amongst employers.



Chapter 6

RECOMMENDATIONS

In this chapter, certain recommendations will be made to employers on how to avoid the pitfalls and loopholes in the emoluments attachment order process which were identified in this report. Recommendations for the proper administration of emoluments attachment orders in the workplace will also be made. This must not be seen and is not intended to constitute legal advice.

6.1

On receipt of the emoluments attachment order

6.1.1

Verification of the order

- The payroll office should ensure that the emoluments attachment order is served by the sheriff. Emoluments attachment orders should be delivered by the sheriff of the court and not by a tracer or debt collector. If the order is served by the sheriff, there is proper record of the fact that the order was delivered to the garnishee and if no payment is received, the attorney for the credit provider can set in motion the remedy provided for by the Act, namely, the warrant of execution. A sheriff must, in terms of the Sheriffs Act, be able to identify himself as such.
- The emoluments attachment order should be issued by the Clerk of the Court. The dated stamp of the clerk of the court must be on the order and the stamp must reflect the name of the court from whose jurisdiction the order was issued. The order should also be signed by the clerk of the court. If there is no

endorsement by the clerk of the court, the payroll officer should check with the relevant court whether the order was indeed issued from that court. This can be done by contacting the clerk of the civil court indicated at the top of the order, for example “Magistrates’ Court of Randburg” and quoting the case number appearing on the document.

- The order should be issued from a court within whose area of jurisdiction the employer’s place of business is situated. In the case of government employees the court where the debtor is employed will have jurisdiction. If the order was granted in a faraway court, it might be possible that the debtor consented to the jurisdiction of that court. This could be established by consultation with the debtor. The question of whether the jurisdiction is correct or not might be of academic interest only if the employee has no objection against the deduction of the instalments in terms of the emoluments attachment order. However, it might be of importance should the employer or employee at any stage wish to amend, rescind or set aside the order.
- The order should state the amount judgment was granted for. This is the capital amount that is due by the debtor.
- The order should state the amount that has to be deducted by the employer from the salary (emoluments) of the debtor. The payroll office should take note of the fact that the order also provides for the payment of legal fees (costs), interest and collection commission. These fees should be paid in full before the payroll office can stop deductions. Some attorneys firms include a repayment schedule to ensure that the payroll office knows exactly how much and for how long deductions have to be made. An example of a repayment schedule is provided in Chapter 4 (example 6). The schedule will assist the payroll office in determining what the monthly instalments are and how many instalments must be paid. It will also stipulate the final instalment which is often lower than the usual instalment. Using a repayment schedule will prevent the payroll office from terminating payments prematurely and will save unnecessary costs for both the employee and employer. If a repayment schedule is not attached to the order, it is advised that the payroll office should not stop deductions unilaterally. Interest and costs may have accrued which the payroll office is not aware of. It is therefore advisable to contact the attorney acting for the credit provider to confirm whether the outstanding amount was paid in full.

If any of the above does not seem to be in order, the payroll office should seek legal advice on how to proceed.

6.1.2

Consultation with the employee

- The payroll office should inform the employee of the emoluments attachment order and its effect, including the amount that will be deducted from the employee’s salary.
- It is necessary to consult with the employee in order to verify the existence of the debt. When dealing with an emoluments attachment order it should be kept in mind that credit providers can sell a portion of their defaulting book (debts owed to the credit provider in terms of credit agreements) to a debt collector. This means that even though the employee entered into an agreement with a particular credit provider, the name of the credit provider on the emoluments attachment order may be different. The employer, employee or any interested party may dispute the existence or validity of the order or the correctness of the amount claimed in terms of Section 65 J (7). This entails an application to court and it is strongly recommended that an attorney be instructed to bring the application.

- When consulting with the employee the identity number and employee number on the emoluments attachment order should be checked against that of the employee.
- The employee should also confirm that he consented to the emoluments attachment order. Should the employee dispute the existence of the order, the signature of the employee should be verified on the consent to judgment or acknowledgement of debt. The employer, as garnishee, is entitled to query this with the credit provider or his representative.
- Check for duplication, i.e. whether the employee is already paying the debt in terms of another emoluments attachment order or debit order.
- The payroll office should consult with the employee to determine whether the employee can afford the instalment ordered in the emoluments attachment order. Emoluments attachment orders can result in employees receiving a zero or near zero take-home pay. Section 65J (6) of the Magistrates' Court Act states that the amount deducted from the employee's salary must not cause the employee to have insufficient means for his own and his dependants' maintenance. If the payroll officer notices that a particular employee will receive a zero take home pay as a result of deductions made in terms of emoluments attachment orders, it is suggested that a reduction of the instalment be negotiated with the attorney acting for the credit provider. As this will affect the payment period it is also necessary to assist the employee with financial counselling. The Magistrates' Court Act makes provision in Section 65 J (7) for the employee or employer to apply to court for the suspension, amendment or rescission of the instalment on good cause shown. In practice most attorneys will on receipt of proof of the employee's financial position agree to reduce the amount informally.

Communication with the employee should go much further than merely informing him of the deductions on receipt of the order. This presents an opportune moment to discuss the financial situation of the employee, and to offer assistance to the employee. Although the emoluments attachment order cannot be included in debt review, a debt counsellor may be able to counsel the employee and to restructure his other obligations.

6.1.3 Processing of the order

If the emoluments attachment order does not specify when the first instalment must be deducted, the Act requires that the deduction takes place in the month following the serving of the emoluments attachment order, i.e. if the employee is salaried and paid at the end of a month. Thus, if the emoluments attachment order was served on 1 September, the first deduction would be at the end of October. If the order was served on 30 September, the first deduction will also be at the end of October. If the wage of the employee is paid weekly, the first deduction by the employer would normally be at the end of the second week of the date on which it was served. It is however advisable to process the order as soon as possible to avoid unnecessary interest, fees or costs.

6.2 On-going management of the emoluments attachment order

As already mentioned, deductions should be made until the full outstanding debt, plus interest and costs are paid in full. Failure to do so would result in unnecessary costs for the employee. It is also good practice to keep record of payments made to attorneys and debt counsellors as the existence of these payments can be disputed.

6.2.1

Statements

Since an emoluments attachment order will be served only towards the end of the debt enforcement process, the outstanding amount could be higher than the amount of the original debt. The reason for this is the fact that the credit provider charges interest on the outstanding amount, incurs costs in managing the account and also incurs costs to enforce the debt. All of these costs and interest will be added to the original debt. The employer (garnishee) is entitled to a free statement of account from the attorney or debt collector in order to verify whether interest, costs and fees have been calculated correctly. This free statement of account must be rendered on reasonable request. The statement should be perused to verify whether interest, costs and fees were calculated correctly and to check for errors (“finger faults”). The employer is advised to peruse Chapter 4 for a detailed discussion and examples of common irregularities in this regard.

6.2.2

When the employee resigns

If the employee resigns, the payroll office should inform the credit provider or debt collector of the resignation and that the employer is no longer able to comply with the order. Although the responsibility remains with the employee to advise the credit provider when he resigns, it is in the employer’s best interest to keep the credit provider informed. This may prevent unnecessary legal action. Once the credit provider is informed, he would serve a certified copy of the order on the new employer together with the prescribed affidavit, setting out the payments received since the date of the order, the costs incurred since the date of the order and the balance outstanding. The new employer is then bound to comply with the order.

6.3

Training of payroll staff

The recommendations provided in this report merely serve as a starting point for employers from which to work towards better administration of emoluments attachment orders. The research team strongly suggests that employers invest in the training of payroll staff to ensure the proper administration of emoluments attachment orders. If this is not possible or financially viable, outsourcing the administration of emoluments attachment orders, and where necessary the auditing thereof, should be considered. The choice of a garnishee administrator is of the utmost importance and should not depend on the claims made in promotional material alone. Word of mouth can be one of the most credible indications of the value added to a business by garnishee administrators.

6.4

Employee wellness programmes

Employee wellness programmes should include financial wellness programs. Investment into the financial literacy and awareness of employees will eventually be to the benefit of both the employee and the employer.

6.5

Where to find assistance

Debt collectors and attorneys can cause frustration for debtors and payroll personnel by simply ignoring requests for balances and information regarding judgments or emoluments attachment orders. Debtors as well as their employers can also be uncertain where to find assistance when they suspect that they are being subjected to unfair debt collection practices.

In terms of the Attorneys Act, 1979, attorneys fall under the regulatory and disciplinary jurisdiction of the provincial law society where they practise. All attorneys are bound by a strict professional code. It is part of the function of the councils of the law societies to act in the public interest. The law societies are committed to protecting the public against unprofessional and irresponsible conduct by attorneys and are prepared to investigate complaints which are submitted to them in good faith and which fall within their jurisdiction. Complaints about attorneys should therefore, be lodged with the relevant provincial law society. Contact details of the different law societies for each province are available on the website of the Law Society of South Africa. (www.lssa.org.za)

The Debt Collectors Council has been established by the Debt Collectors Act 114 of 1998 to regulate the occupation of debt collectors. Any allegation of improper conduct against a debt collector must be in the form of a written affidavit, stating the date, time and particulars of the incident, the name of the debt collector and the names of any witnesses to the incident, and must be submitted to the Council as soon as practical after the incident, together with any corroborative documents, if any. This complaint form is available on the website of the Debt Collectors Council (www.debtcol-council.co.za).

The Office of the Credit Ombudsman resolves complaints from consumers who are negatively impacted by credit bureau information or when a consumer has a dispute with a credit provider, debt counsellor or payment distribution agent. The Credit Ombudsman deals with three different types of complaints, namely Credit Bureau complaints, Non-Bank Credit complaints and Debt Counselling complaints. For each type, there is a slightly different procedure to follow as set out in the complaints procedure for the different types of complaints. These procedures can be found on the website of the Credit Ombudsman (www.creditombud.org.za).

Selected bibliography

Articles

- Bentley B 'Separating the baby and the bath water – garnishee and emoluments attachment orders.' *De Rebus*, March 2013
- Buchner G & Hartzenberg CJ 'Cashing in on collections' *De Rebus* July 2013
- Gardner C 'The complexity of emoluments attachment orders' *HR Highway* 1:7 October 2007 21- 22
- Kelly – Louw M 'Better consumer protection under the statutory in duplum rule' Vol 11, Number 1 (Fall 2007) *Journal of Consumer & Commercial Law* at 20–24

Books

- Brian A Blum Bankruptcy and Debtor / Creditor Examples & Explanations: Aspen Publishers (1999)
- Cilliers AC, Law of Costs (3rd ed) Lexisnexis Durban (1997)
- Du Plessis, JC & Goodey, J Practical guide to debt collection Durban: Butterworths (2003)
- Harms, LTC & Van der Walt, I & Harms, D & Faris, J & Louw, C & Neukircher, B Civil procedure in the Magistrate's Court Durban: Butterworths (2007)
- Paterson, T Eckard's principles of civil procedure in the Magistrates' Courts Cape Town: Juta (2001)
- Pete, S (ed) Civil procedure: a practical guide Claremont: New Africa Books (2005)
- Theophilopoulos, C & Rowan, AWT & Van Heerden, CM & Boraine A Fundamental principles of civil procedure Durban: LexisNexis (2006)
- Van Loggerenberg, D E (ed) Jones & Buckle: the civil procedure of Magistrate's Court in South Africa (Vol I The Act) Cape Town: Juta (2000)

Cases

- African Bank Limited v Additional Magistrate Myambo NO and Others 2010 (6) SA 298 (GNP)
- Barclays Western Bank Ltd v Creser 1982 (2) SA 104 (T)
- Carleton Auto Centre v Kitching 1994 (2) SA 616 (T)
- Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 765A - C
- Minter NO v Baker and Another 2001 (3) SA 175 (W)
- Protea Furnishers SA (Edms) Bpk h/a Barnets Meubeleerders v Margaret Balakista in haar hoedanigheid as Klerk van die Siviele Hof Pretoria en andere (case number 1419/2003)
- Reichenberg v Röntgen 1983 (3) SA 745 (W)
- Russells (Ceres) v Manyashe and another 2005 (4) SA 380 (C)
- Sniadach v Family Finance Corporation 395 U.S. 337 (1969)
- Stoltz v Ho Kee 1975 (1) SA 100 (E)
- University of Natal, Pietermaritzburg v Ziqubu 1999 (2) SA 128 (N)
- Johnson v Pike Corporation of America C.D. Cal. 1971

Papers

- Hely, CJ 'Prejudgment Wage Garnishment: Notice and hearing Requirements under Sniadach v Family Finance Corp' (1970)
- Van Heerden, C A paper delivered at a seminar on the National Credit Act 34 of 2005, held by "Regslui vir Afrikaans" in Pretoria, February 2007
- Van Sittert, C 'Undesirable practices relating to garnishees' delivered at Joint Credit and Over-Indebtedness Summit on 24 October 2012

Statutes

Attachment of Earnings Act 1971 (England & Wales)
Basic Conditions of Employment Act 75 of 1997
Children's Act 38 of 2008
Civil Procedure Act 9 of 1973 (New South Wales)
County Court Rules 1981 (England & Wales)
Income Tax Act 58 of 1962
Judgment Enforcement Rules (Northern Ireland) 1981
Judgments Enforcement (Northern Ireland) Order 1981
Magistrates' Courts Act 32 of 1944
Magistrates' Courts rules
Maintenance Act 99 of 1998
National Credit Act 34 of 2005
Public Finance Management Act 1 of 1999
Uniform Civil Procedure Rules 2005 (New South Wales)
United States Federal Wage Garnishment Law (Title III of the Consumer Credit Protection Act)

Websites

<http://cclcnsw.org.au>
http://ec.europa.eu/civiljustice/enforce_judgement/enforce_judgement_gen_en.htm
<http://www.garnishmentlaws.org/>
http://www.ccps-africa.org/financialwellness/pdf/Garnishee_Employers_Guide
<http://www.debt-collection-news.co.uk/2013/01/08/attachment-of-earnings-rise-by-15/>
<http://www.fair-debt-collection.com/state-garnishment-laws.html>
<http://www.hmcourts-service.gov.uk>
<http://www.justice.gov.uk>
<http://www.lawlink.nsw.gov.au>
<http://www.ncr.gov.za>
http://www.ohiolegalservices.org/public/legal_problem/consumer-rights/debt-collection/wage-garnishment/garnis.pdf
<http://www.treasury.gov.za/documents/national%20budget/2013/speech/speech.pdf>
<http://www.workplaceinfo.com.au/payroll/deductions/garnishee-order>

Reports / Submissions / Statements

Code of Conduct for Debt Collectors
Credit Industry Code of Conduct to Combat Over-indebtedness in terms of Section 48 (10(b) of the National Credit Act
DEBT – an end based on means? A report on how the legal system in the Republic of Ireland treats uncontested consumer debt cases with an examination of alternatives and proposals for reform. Paul Joyce, Free Legal Advice Centres – May, 2003.
DTI South Africa, 'Making Credit Markets Work: a Policy Framework for Consumer Credit', 2004
Employee financial wellness: a corporate social responsibility GTZ November 2008
Employers guide to garnishee orders – a joint publication by Deloitte and Fihrst
Getting Out of Debt – Attachment of Wage in whose interest? Zaborowski and Zweifel, Working paper no. 9802, University of Zurich: Socio Economic Institute, April 1998
International Labour Conference 91 st Session 2003 – Report III (Part 1B) General Survey of the reports concerning the Protection of Wages Convention (No. 95) and the Protection of Wages Recommendation (No. 85), 1949 – Chapter IV – 2003.
Joint statement by the Minister of Finance and the chairperson of the Banking Association of South Africa ensuring responsible market conduct for bank lending

Safari into Garnishment of Wages. Frans Haupt, Charlotte van Sittert University of Pretoria Law Clinic, 2013

The Abandonment of Civil Enforcement Reform John Baldwin and Ralph Cunnington. Reprinted from Civil Justice Quarterly Issue 2, (Law Publishers)

The incidence of and the undesirable practices relating to garnishee orders in South Africa. Frans Haupt, Hermie Coetzee University of Pretoria Law Clinic, 2008

Media reports

Anonomous 2003 'Workers face avalanche of garnishee orders' 27 SA Labour Bulletin 49

Allwright P 'Garnishee orders: facts and answers' Moneyweb 4 November 2012

Arde A 'Abuses rife' with garnishee orders Personal Finance 28 October 2012

Arde A Banks to stop using garnishee orders Personal Finance 4 November 2012

Arde A There's a limit to what debt collectors can charge you 4 August 2013

Benjamin C, Ghastly garnishee abuse exposed Mail & Guardian 30 November 2012

Bornman J, Court officers in dock Times Live 6 August 2013

Clark J Major retail banks agree not to use garnishees Moneyweb 1 November 2012

Crotty A, Garnishee orders escalate woes for debt-stressed consumers Business Report 26 August 2013

Maake M, Law tighten the noose on debtors Business Times 28 October 2012

Rees M, Garnishee fraud debacle widens The Citizen 6 November 2012

Rees M, Lenders beware Moneyweb 9 April 2013

Rees M, Magistrate to probe garnishee fraud Moneyweb 15 November 2012

Rees M, Top law firm uncovers massive garnishee abuse Moneyweb 21 November 2012

Salie F Adra defends use of garnishee orders Fin 24 19 November 2012

Salie F R3bn stolen from employees – expert Fin 24 6 August 2012

Thomas S, Garnishee orders set to hit debt-strapped consumers -Time for a big clean-up Financial Mail 31 January 2013

Wild E, Cohen M & Bonorchis R Mineworker Debt Mounts as South African Lending Booms 10 January 2013





Published by
University of Pretoria Law Clinic
September 2013