

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA  
CONSTITUTION HILL**

**CCT Case No. 127/15**

**WCHC Case No. 16703/14**

In the matter between:

**ASSOCIATION FOR DEBT RECOVERY  
AGENTS NPC**

**Applicant / Appellant**

And

**THE UNIVERSITY OF STELLENBOSCH  
LEGAL AID CLINIC & 32 OTHERS**

**Respondents**

And in the matter between:

**MAVAVA TRADING 279 (PTY) LTD  
& 12 OTHERS**

**Applicants / Appellants**

And

**THE UNIVERSITY OF STELLENBOSCH  
LEGAL AID CLINIC & 20 OTHERS**

**Respondents**

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**PRACTICE NOTE ON BEHALF OF THE UNIVERSITY OF  
STELLENBOSCH LEGAL AID CLINIC APPLICANTS IN THE  
CONFIRMATION PROCEEDINGS AND THE UNIVERSITY OF  
STELLENBOSCH LEGAL AID CLINIC RESPONDENTS IN THE  
APPEAL PROCEEDINGS**

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**1. NAMES OF THE PARTIES AND CASE NUMBER**

1.1 As above.

**2. NATURE OF THE PROCEEDINGS**

2.1 The proceedings relate to:

2.1.1 an application for confirmation of an order granted by Desai J in the High Court of South Africa (Western Cape Division, Cape Town) on 8 July 2015 declaring the words "*the judgment debtor has consented thereto in writing*" in section 65J(2)(a) of the Magistrates' Act 32 of 1944 ("the MCA") and section 65J(2)(b)(i) and section 65J(2)(b)(ii) of the MCA, to be inconsistent with the Constitution of the Republic of South Africa Act, 1996 ("the Constitution") and invalid to the extent that they fail to provide

for judicial oversight over the issuing of an emolument attachment order against a judgment debtor.

2.1.2 Two applications for leave to appeal against paragraph 3, paragraph 4, paragraph 6, paragraph 7 and paragraph 8 of the orders granted by the High Court.

### **3. DESCRIPTION OF ISSUES**

3.1 The USLC applicants in the confirmation proceedings / respondents in the appeal will contend that:

3.1.1 the absence of judicial oversight from the legislative scheme established by section 65J(2)(a), section 65J(2)(b)(i) and section 65(J(2)(b)(ii) for the issuing of emoluments attachment orders ("EAOs) against judgment debtors, is inconsistent with the Constitution.

3.1.2 in proceedings where a creditor seeks to enforce a credit agreement to which the National Credit Act 34 of 2005 ("NCA") applies, section 45(1) of the MCA does not permit a debtor to consent in writing to the jurisdiction of a court other than that in which the debtor resides or is employed.

#### **4. PORTIONS OF THE RECORD NECESSARY FOR THE DETERMINATION OF THE MATTER**

4.1 Volume 1 to Volume 8

4.2 Volume 12 to Volume 22

4.3 Volume 24 to Volume 25

#### **5. ESTIMATED DURATION OF THE HEARING**

5.1 One day

#### **6. SUMMARY OF ARGUMENT**

6.1 In the confirmation application:

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

6.1.2 The ordinary grammatical meaning of section 65J(2)(a) and section 65J(2)(b) of the MCA and the use of the word “*unless*” means that judicial oversight over the issuing of an EAO against these judgment debtors is not required. There is

therefore no legislative requirement provided for in the MCA generally or in the impugned provisions for a magistrate to oversee any part of the process of issuing an EAO at all;

6.1.3 The failure of section 65J(2)(a) and section 65J(2)(b) of the MCA to provide for judicial oversight over the issuing of an EAO against a judgment debtor who has consented to an EAO in writing or a judgment debtor who falls within the provisions of section 65J(2)(b) of the MCA, unjustifiably limits the constitutional right of access to courts, the right not to be arbitrarily deprived of property and the right to human dignity and is accordingly unconstitutional.

6.2 In the applications for leave to appeal:

6.2.1 A debtor cannot effectively exercise the right of access to a court in order to dispute a judgment or EAO if the court is located hundreds of kilometres away from where the debtor resides or is employed. To the extent that section 45(1) of the MCA when utilised for the purpose of enforcing credit agreements results in this consequence, it must be interpreted in a manner which avoids an unconstitutional violation of the rights of debtors;

6.2.2 Section 90(2)(k)(vi)(bb) and 91(2) of the NCA promote and protect a debtor's right *inter-alia* of access to courts by enabling him or her to access the court in the area in which the consumer resides, works or where the goods in question are kept. The use of section 45 consents to enforce credit agreements in courts other than the court which has jurisdiction over the area in which a debtor resides or is employed, undermines a debtor's right of access to courts and is inconsistent with the purpose of section 90(2)(k)(vi)(bb) and section 91(2) of the NCA;

6.2.3 In circumstances where a creditor seeks to enforce a credit agreement to which the NCA applies, section 45(1) of the MCA and section 91(2) and 90(2)(k)(vi)(bb) of the NCA, interpreted purposively and read in the context of the consumer protection objectives of the NCA, preclude the use of a section 45 consent for the purposes of vesting jurisdiction in a court other than that in which the debtor resides or is employed and which would otherwise not have jurisdiction, but for the section 45 consent.

6.2.4 The High Court exercised a discretion in granting order 4 and order 8. The Appeal Applicants have not provided sufficient justification to warrant this Court interfering with or setting aside orders 4 and 8; and

6.2.5 There is no basis to interfere with the cost order granted by the High Court at order 7. No special circumstances have been shown by the Appeal Applicants to depart from the general rule that costs follow the result.

## **7. AUTHORITIES ON WHICH PARTICULAR RELIANCE WILL BE PLACED**

- (a) *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC)
- (b) *ABSA Bank v Myburgh* 2009 (3) SA 340 (T)
- (c) *MBD Securitisation (Pty) Ltd v Booii* 2015 (5) SA 450 (FB)
- (d) *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC)
- (e) *Gundwana v Steko Development CC and Others* 2011 (3) SA 608 (CC)
- (f) *Jaftha v Schoeman and Other; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC)

- (g) Chief Lesapo v North West Agricultural Bank and Another 2000 (1) SA 409 (CC)
- (h) Zondi v MEC for Traditional and Local Government Affairs and Others 2005 (3) SA 589 (CC).
- (i) First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC)
- (j) African Bank v Myambo NO and Others 2010 (6) SA 298 (GNP)

**ANTON KATZ SC**

**SHELDON MAGARDIE**

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*Seventeenth Appeal Respondents*

Chambers, Cape Town

27 November 2015