

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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

In the matter between:-

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

NTOMBOZUKO TONYELA	Fifteenth Applicant
DAWID VAN WYK	Sixteenth Applicant
and	
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	First Respondent
MINISTER OF TRADE AND INDUSTRY	Second Respondent
NATIONAL CREDIT REGULATOR	Third Respondent
MAVAVA TRADING 279	Fourth Respondent
ONECOR (PTY) LIMITED	Fifth Respondent
AMPLISOL (PTY) LIMITED	Sixth Respondent
TRIPLE ADVANCED INVESTMENTS 40	Seventh Respondent
BRIDGE DEBT	Eighth Respondent
LAS MANOS INVESTMENTS 174	Ninth Respondent
POLKADOTS PROPERTIES 172	Tenth Respondent
MONEY BOX INVESTMENTS 232	Eleventh Respondent
MARAVEDI CREDIT SOLUTIONS (PTY) LIMITED	Twelfth Respondent
ICOM (PTY) LIMITED	Thirteenth Respondent
VILLA DES ROSES 168	Fourteenth Respondent

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

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

<u>TABLE OF CONTENTS</u>	<u>Page</u>
I INTRODUCTION	5
II SUMMARY	7

III	THE STRUCTURE OF THE RELEVANT PROCESS CONTAINED IN THE MCA WHICH CULMINATES IN THE ISSUE OF AN EMOLUMENTS ATTACHMENT ORDER IN TERMS OF SECTION 65J OF THE MCA	11
IV	A JUDGMENT DEBTOR'S CONSENT TO PAY IN SPECIFIED INSTALMENTS	17
V	THE PROCESS FOR ACQUIRING JUDGMENTS IN TERMS OF SECTIONS 57 AND 58 OF THE MCA	20
VI	THE PROPER APPLICATION OF THE EXECUTION PROCESS CULMINATING IN AN EAO	29
	(a) SECTION 65J OF THE MCA	29
	(b) SECTION 65A OF THE MCA	31

(c)	SECTION 65J(2) OF THE MCA	32
(d)	SECTION 65J(2)(b) OF THE MCA	38
VII	THE PROPOSED REMEDY IF A CONFIRMATION ORDER IS GRANTED	42
VIII	CONCLUSION	48

INTRODUCTION:

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

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

of the order.

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

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

² Record, Vol 26, pp 2306-2310.

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

SUMMARY:

4. In this written argument:

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

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

4.2.1 there does not exist the lack of judicial

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

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

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

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

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

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

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

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

“On the reasoning in **Gundwana**,⁶ judicial oversight over the

⁴ Record, Vol 24, p 2046, para 34 and p 2061, para 87.

⁵ Record, Vol 24, p 2060, para 84.

⁶ *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC) (“*Gundwana*”).

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

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

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

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

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

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

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

⁷ The “legal framework” is explained in ADRA’s answering affidavit at Vol 11 of the Record, pp 883-899 and the “debt collection process” at Vol 11, pp 899-910.

⁸ At para [54].

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

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

⁹ Record, Vol 24, p 2039, para 8.

12. Section 65J(1)(a) of the MCA provides for the issue of an EAO against a “*judgment debtor*”. Contrary to what was found by the court *a quo*,¹⁰ ADRA does not contend that section 45(1) of the MCA¹¹ allows for the consent by a judgment debtor to any jurisdiction for the issue of an EAO other than that expressly defined in section 65J(1)(a), namely, “*the court of the district in which the employer of the judgment debtor resides, carries on business or is employed, or, if the judgment debtor is employed by the State, in which the judgment debtor is employed.*”

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

¹⁰ Record, Vol 24, p 2016, para 88.

¹¹ Which permits for consent to the jurisdiction of a magistrate’s court in which the judgment debtor neither resides nor is employed.

¹² Section 55 of the MCA defines a “*debt*” to mean “*any liquidated sum of money due*”.

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

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

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

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

¹³ Record, Vol 1, pp 29-41, paras 81-115.

¹⁴ The confirmation applicants' founding affidavit in the court *a quo*: Record, Vol 1, pp 40-41 at paras 114 and 115.

¹⁵ The person respectively defined as “*the defendant*” in both sections 57(1) and 58(1).

debt”), or for any other amount; and

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

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

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

17. Section 58A of the MCA provides that any judgment by default entered by the clerk of the court shall be deemed to be a judgment of the court. The significance of that deeming provision is that it permits a judgment creditor who has acquired a judgment in terms of either section 57 or 58 of the MCA to invoke the execution processes established by section 65 of the MCA. Sections 65, 65A and 65J of the MCA are only of application “*If ... a court has given judgment for the payment of a sum of money*”¹⁷ or there is in existence an “*order of court*”.¹⁸ The different processes regulated by sections 65, section 65A and 65J are dealt with below.
18. Neither the court *a quo* nor the confirmation applicants have given any consideration to the effect or enforceability of a consent to judgment in terms of either sections 57(2) or 58(1) of the MCA and/or the consent by a judgment debtor to an order for payment of the admitted debt in specified

¹⁷ Sections 65 and 65A(1)(a).

¹⁸ Section 65J(1)(b)(ii).

instalments. In their written submissions¹⁹ the confirmation applicants contend:

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

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

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

20. Sections 57(1)(b) and 58(1)(b)(ii) of the MCA make provision for a judgment debtor to agree to satisfy an admitted debt²⁰

¹⁹ Confirmation applicants' written submissions, para 109.

²⁰ A liquidated sum of money due – section 55 of the MCA.

*“in specified instalments.”*²¹

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

22. Section 65 of the MCA provides that, prior to a judgment creditor invoking the provisions of section 65A(1) of the MCA, a judgment debtor²² may make a written offer to the

²¹ The forms prescribed in the MCR’s for use in section 57 and 58 applications for judgment are Forms 5A and 5B, which make provision for an order for payment by instalments.

²² Who has consented to a judgment in terms of either section 57 or 58 of the MCA.

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

23. Once the judgment creditor (or his attorney) has accepted that written offer, the clerk of the court shall, at the written request of the judgment creditor or his attorney (accompanied by the offer),²³ order the judgment debtor to pay the judgment debt in specified instalments or otherwise and *“in accordance with his offer”*.
24. The form of the *“written offer”* contemplated in section 65 of the MCA is regulated by MCR 45(7). That rule requires that the *“written offer”* shall be in affidavit or affirmation form and must include the comprehensive detail recorded in that rule.
25. It is evident from the preceding analysis that any consent to payment in specified instalments either emanates from the judgment debtor in the terms contemplated in sections

²³ And, it is assumed, the acceptance thereof.

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

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

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

27. Requests for judgment brought in terms of sections 57(2) and 58(1) of the MCA are regulated by MCR 4(3) and (4).
28. Until 27 June 2014, MCR 4(4) made no reference to MCR 12(5). It referred pertinently to MCR 12(6), (6A) and (7), but omitted any reference to MCR 12(5).
29. On 27 June 2014²⁴ MCR 4(4) was amended by the inclusion therein of an express reference to MCR 12(5). The amended rule, which came into operation on 28 July 2014, reads as follows:

“(5) The registrar or clerk of the court shall refer to the court any request for judgment on a claim founded on any cause of action arising out of or based on an agreement governed by the National Credit Act, or the Credit Agreements Act, 1980 (Act 75 of 1980), and the court shall thereupon make such order or give such

²⁴ Government Gazette 37769 dated 27 June 2014.

judgment as it may deem fit.”

30. There is no debate that, following the amendment of 28 July 2014 and the incorporation into MCR 4(4) of a direct reference to MCR 12(5), the clerk of the court is not entitled to grant judgments by consent (either given in terms of section 57 of the MCA or section 58 of that Act) which are based on a claim founded on any cause of action arising or based on an agreement governed by the NCA. For those causes of action the clerk of the court is obliged to refer the judgment creditor's request for judgment to a magistrate's court for determination.
31. Once seized with a request for judgment in terms of either section 57 or section 58 of the MCA, the magistrate's court concerned is, in terms of rule 12(5), empowered to make any order or give such judgment it may deem fit and also is clothed with the regulatory powers established by MCR12(7).
32. The confirmation applicants affirmed and, indeed, asserted in

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

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

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

²⁵ Record, Vol 1, p 41, para 115.

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

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

²⁶ Cf *African Bank Ltd v Myambo* NO 2010 (6) SA 298 (GNP) at 315B, 316E-F, 317F-G, 318F-G, 318H-I and 319C-D.

²⁷ As to which, see *Jones and Buckle The Civil Practice of the Magistrates' Courts in South Africa* 10ed Vol I, pp 77-78 and the authorities there referred to.

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

37. In a somewhat striking *volte face* the confirmation applicants depart diametrically in their written submissions in this court from the stance adopted in their founding affidavit in the court *a quo*. In their founding affidavit²⁸ the confirmation applicants readily accepted that section 58 of the MCA, read together with MCR 4(4) and 12(5), requires that the clerk of the court refer to a magistrate any request for judgment on a claim founded on any cause of action arising out of or based on an agreement governed by the NCA. Thereafter “*the court*” shall make such order or give such judgment as it may deem fit, including a judgment for payment in specified instalments.

38. In their written submissions²⁹ the confirmation applicants now

²⁸ Referred to in paras 13 and 14 above.

²⁹ At para 83.

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

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

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

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

³⁰ Confirmation applicants' written submissions, para 69.

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

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

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

39.5 Those rights are accordingly only engaged if it is

³¹ Confirmation applicants’ written submissions, para 66, quoting the Flemix affidavit.

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

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

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

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

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

THE PROPER APPLICATION OF THE EXECUTION PROCESS

CULMINATING IN AN EAO:

(a) SECTION 65J OF THE MCA:

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

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

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

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

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

³² Section 65J(1)(b)(ii) of the MCA.

(b) SECTION 65A OF THE MCA:

43. In the event that a judgment is granted in favour of a judgment creditor in accordance with either section 57(2)(c)(i) or section 58(1)(b)(i) of the MCA (for the judgment debt and costs) without an accompanying consent by the judgment debtor to discharge that debt in instalments, the judgment creditor may have recourse to the provisions of section 65A of the MCA.
44. The process governed by section 65A leads directly to a determination by a magistrate's court of the judgment debtor's financial position. That procedure is regulated by section 65D of the MCA and its application may result in an order for payment in specified instalments in terms of section 65E(1)(c) of the MCA. Those sections of the MCA make express provision for judicial oversight and are unaffected by the declarations of invalidity.

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

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

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

³³ Record, Vol 24, p 2057, para 75.

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

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

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

execution, becoming unnecessarily burdensome;

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

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

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

judicial oversight. In ***Jaftha***³⁴ this court pertinently considered the constitutionality of section 67 of the MCA³⁵ and concluded that the process of execution against movables without judicial oversight was not constitutionally objectionable.³⁶

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

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

³⁴ *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC).

³⁵ Read with MCR 36(1).

³⁶ *Jaftha*, para [51].

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

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

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

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

65J of the MCA, gives meaning to the “*creative alternatives which allow for debt recovery*” referred to by Mokgoro J.³⁷

That process for the payment of instalments establishes a judicially determined method of balancing the interests of both the judgment creditor (to receive payment of the admitted debt) and the judgment debtor (to discharge the admitted debt in an affordable manner).

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

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

³⁷ *Jaftha*, para [59].

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

53. The court *a quo* held:³⁸

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

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

³⁸ Record, Vol 24, p 2060.

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

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

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

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

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

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

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

55.3.2 the balance owing by the judgment debtor;

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

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

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

57. The requirement that a registered letter be sent to the judgment debtor's last known address is not prejudicial to the latter. In analysing a similar requirement in section 129(1)(a) of the NCA, this court concluded³⁹ in **Sebola**⁴⁰ that there existed sufficient safety mechanisms to ensure that a registered letter would come to a recipient's notice.

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

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

³⁹ Per Cameron J .

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

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

THE PROPOSED REMEDY IF A CONFIRMATION ORDER IS GRANTED:

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

61. The two declarators are different.

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

63. The second, which deals with consent to jurisdiction, is not a declaration under section 172(1)(a) of the Constitution. It is not premised on a finding that the law is inconsistent with the Constitution. Instead, it is a declaration of the proper meaning of sections 90(2)(k)(vi)(bb) and 91(2) of the NCA.
64. Despite this difference, however, this court may exercise its remedial powers under section 172(1)(b) of the Constitution to mediate the effect of both declarators.
65. In ***Hoërskool Ermelo***,⁴¹ this court made it clear that the remedial powers under section 172(1)(b) are not only available when the court issues a declaration of invalidity under section 172(1)(a) of the Constitution. Remedial power is flexible and entitles the court to make any order that is just and equitable in constitutional disputes, including an order limiting the retrospective effect of any order granted.⁴²

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

⁴² Para 97.

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

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

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

concerned with the proper interpretation of legislation.

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

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

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

⁴⁴ *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* 2014 (3) SA 106 (CC), para [47].

⁴⁵ *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC), para [106].

of the order of invalidity.⁴⁶

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

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

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

⁴⁶ *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC), para [32].

⁴⁷ *Engelbrecht v Road Accident Fund and Another* 2007 (6) SA 96 (CC), para [45] and *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* 2014 (3) SA 106 (CC).

74. Such an order will not deny effective relief to the second to sixteenth confirmation applicants. In addition to the orders declaring section 65J(2) of the MCA unconstitutional and declaring the proper interpretation of section 45 of the MCA, the court *a quo* also granted an order declaring that the emolument attachment orders issued against the second to sixteenth applicants were unlawful and invalid.⁴⁸
75. No party has sought leave to appeal against that order⁴⁹ and it is not subject to confirmation by this court.
76. That order therefore stands irrespective of what this court does in relation to the other two declarators. This means that the court can limit the retrospective effect of any declarators it grants with the knowledge that this will not have any impact on the rights of the second to sixteenth confirmation applicants to effective relief. Their EAO's have been declared invalid and of no force and effect. That order stands.

⁴⁸ Record, Vol 24, p 2063.

⁴⁹ Record, Vol 25, p 2167, para 6.1.

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

CONCLUSION:

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

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

79.1 that the confirmation application be dismissed;

⁵⁰ Record, Vol 24, pp 2106-2119.

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

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

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

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

79.3.2 No order as to costs.

D N UNTERHALTER SC
D E VAN LOGGERENBERG SC
A R G MUNDELL SC
K S HOFMEYR
Chambers
Sandton/Pretoria
13 November 2015