

# The incidence of and the undesirable practices relating to garnishee orders in South Africa



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# The incidence of and the undesirable practices relating to garnishee orders in South Africa

## **Erratum: Inserted 7 December 2022**

Pages 75 - 78, paragraph 3.1.6 of this report contains a discussion of several cases instituted on behalf of debtors in the Bloemfontein Magistrate's Court by the Stellenbosch University Legal Aid Clinic (now SU Law Clinic). The relevant text was copied from a conference paper delivered by one of the attorneys who worked on these cases. The paper was subsequently published in an academic journal. This report, 'The incidence of and the undesirable practices relating to garnishee orders in South Africa', failed to properly acknowledge and cite this source and to credit its author for its production. The publishers of this report wish to apologise for this oversight and have now included the relevant source in the bibliography.

The detail of the source material is as follows:

Van der Merwe, S 2008 'Failure to discharge. A discussion of the insufficient legal recourse afforded to judgment debtors in the South African context'. Paper delivered at the 5th International Journal of Clinical Legal Education Conference, held at the University of the Witwatersrand in Johannesburg on 9 to 11 July 2007. The paper was subsequently published in the 2008 Journal for Juridical Science Special Issue 71-86.

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### Gauteng

- |   |  |   |
|---|--|---|
| <ul style="list-style-type: none"> <li>• Kempton Park</li> <li>• Krugersdorp</li> </ul> | <ul style="list-style-type: none"> <li>• Pretoria</li> <li>• Soshanguve</li> </ul> | <ul style="list-style-type: none"> <li>• Vereeniging</li> <li>• Wonderboom</li> </ul> |
|---|--|---|

### North-West

- |  |   |  |
|--|---|--|
| <ul style="list-style-type: none"> <li>• Bafokeng</li> <li>• Ditsobotla</li> <li>• Kudumane</li> </ul> | <ul style="list-style-type: none"> <li>• Madikwe</li> <li>• Mankwe</li> <li>• Molopo</li> </ul> | <ul style="list-style-type: none"> <li>• Taung</li> <li>• Temba</li> </ul> |
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### Mpumalanga

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| <ul style="list-style-type: none"> <li>• Gamarotha</li> <li>• Kwamhlanga</li> <li>• Mbibane</li> </ul> | <ul style="list-style-type: none"> <li>• Mdudjane</li> <li>• Mkobola</li> <li>• Nkomazi</li> </ul> | <ul style="list-style-type: none"> <li>• Nsikazi</li> <li>• Nutsi</li> </ul> |
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### Western Cape

- |   |  |   |
|---|--|---|
| <ul style="list-style-type: none"> <li>• Atlantis</li> <li>• Beaufort-West</li> <li>• Bonnievale</li> <li>• Bredasdorp</li> <li>• Caledon</li> <li>• Ceres</li> <li>• Heidelberg</li> <li>• Hermanus</li> </ul> | <ul style="list-style-type: none"> <li>• Knysna</li> <li>• Kuilsrivier</li> <li>• Ladismith</li> <li>• Malmesbury</li> <li>• Moorreesburg</li> <li>• Piketberg</li> <li>• Porterville</li> <li>• Robbertson</li> </ul> | <ul style="list-style-type: none"> <li>• Stellenbosch</li> <li>• Swellendam</li> <li>• Uniondale</li> <li>• Vredenburg</li> <li>• Vredendal</li> <li>• Wellington</li> <li>• Wolseley</li> <li>• Worcester</li> </ul> |
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### Kwazulu Natal

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| <ul style="list-style-type: none"> <li>• Bergville</li> <li>• Dukuza</li> <li>• Dundee</li> <li>• Durban</li> <li>• Ekuvukeni</li> <li>• Emlazi</li> </ul> | <ul style="list-style-type: none"> <li>• Estcourt</li> <li>• Glencoe</li> <li>• Harding</li> <li>• Himeville</li> <li>• Hlabisa</li> <li>• Hlanganani</li> </ul> | <ul style="list-style-type: none"> <li>• Ingwavuma</li> <li>• Ixopo</li> <li>• Magudu</li> <li>• Mtunzini</li> <li>• Nqutu</li> <li>• Vulindlela</li> </ul> |
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### Eastern Cape

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|--|---|---|
| <ul style="list-style-type: none"> <li>• Aberdeen</li> <li>• Alexandria</li> <li>• Burgersdorp</li> <li>• Cala</li> <li>• Cathcart</li> <li>• Cradock</li> <li>• Centane</li> <li>• East London</li> </ul> | <ul style="list-style-type: none"> <li>• Elliot</li> <li>• Elliotsdale</li> <li>• Encobo</li> <li>• Flagstaff</li> <li>• Fort-Beaufort</li> <li>• Grahamstown</li> <li>• Hankey</li> <li>• Hofmeyr</li> </ul> | <ul style="list-style-type: none"> <li>• Seymour</li> <li>• Sterkstroom</li> <li>• Steynsburg</li> <li>• Ngqeleni</li> <li>• Nqamakwe</li> <li>• Queenstown</li> <li>• Qumbu</li> </ul> |
|--|---|---|

### Free State

- |   |  |  |
|---|--|--|
| <ul style="list-style-type: none"> <li>• Bethlehem</li> <li>• Bothaville</li> <li>• Botshabelo</li> <li>• Bultfontein</li> <li>• Excelsior</li> </ul> | <ul style="list-style-type: none"> <li>• Ficksburg</li> <li>• Fouriesburg</li> <li>• Frankfort</li> <li>• Harrismith</li> <li>• Kestell</li> </ul> | <ul style="list-style-type: none"> <li>• Phuthaditjhaba</li> <li>• Thaba Nchu</li> <li>• Wepener</li> <li>• Zastron</li> </ul> |
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### Limpopo

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| <ul style="list-style-type: none"> <li>• Bochum</li> <li>• Bolebedu</li> <li>• Dzanani</li> </ul> | <ul style="list-style-type: none"> <li>• Gakgapane</li> <li>• Giyani</li> <li>• Hlanganani</li> </ul> | <ul style="list-style-type: none"> <li>• Lulekani</li> <li>• Malamulele</li> </ul> |
|---|---|--|

### Northern Cape

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| <ul style="list-style-type: none"> <li>• Barkly West</li> <li>• Calvinia</li> <li>• Carnarvon</li> <li>• Douglas</li> </ul> | <ul style="list-style-type: none"> <li>• Fraserburg</li> <li>• Hopetown</li> <li>• Kimberley</li> <li>• Port Nolloth</li> </ul> | <ul style="list-style-type: none"> <li>• Springbok</li> <li>• Sutherland</li> <li>• Victoria-West</li> </ul> |
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## EXECUTIVE SUMMARY

### 1. INTRODUCTION

#### 1.1 Background

Personal credit extension has more than doubled in the last five years exceeding R1 trillion in 2008. There were 16.9 million credit active consumers at the end of September 2007. Of these, 6.38 million or 37.7% had an impaired credit record. In May 2008 alone, 105 427 summonses were issued for debt and 54 755 judgments granted.

Over-indebtedness and the causes thereof have become an increasingly important social challenge to individuals employed in both the private and public sectors. The National Credit Act plays a major part in ensuring that responsible credit be extended in future and further provides a remedy in the form of Debt Review (or commonly know as Debt Counselling) in the event that a consumer finds him / herself to be over-extended. However, Debt Review in terms of the National Credit Act only pertains to credit agreements (not all debts) and then only where no legal action has commenced.

Anecdotal evidence and complaints regarding the irregularities in the obtaining, serving and applying of emoluments attachment orders and thus the exploitation of debtors abound. A research team of the Law Clinic of the University of Pretoria commissioned by BE @ UP in terms of an agreement with GTZ, conducted investigative research into the incidence of garnishee orders in South Africa, focusing on undesirable processes, practices and possible remedies.

#### 1.2 Objectives of the investigation

The objectives of the investigation were:

- To develop a comprehensive report on the legal framework governing the garnishment of wages, including a detailed analysis of the processes for obtaining and dispersing garnishee orders and potential risk areas for irregularities; identification of gaps and recommendations;
- To conduct survey(s) and interviews on the scale of the garnishment of wages and its potential irregularities in South Africa, and to report on the type of irregularities that occur with regard to the garnishment of wages; and
- To report on the management and payroll processes, as well as costs in the business sector with regard to the garnishment of wages.

### **1.3 Project approach**

The legal framework of garnishee orders (emolument attachment orders) was reviewed, taking into account the relevant legislation, case law and the processes employed by the civil courts.

Numerous case studies of instances in which employees' salaries were attached were undertaken and some of these were included in the report. These case studies best illustrate the exploitation of debtors by credit providers, attorneys and debt collectors.

The research team also interviewed employers in order to access the level of knowledge of the process to be followed.

Data sets were obtained within the private sector, from which certain statistical inferences were drawn- including the average percentage of wage attached by means of emoluments attachment orders as well as the average number of emoluments attachment orders per individual. Possible contributors to the results were also tested and reported on.

The Public Servants Commission reported on the gravity of emoluments attachment orders within the public sector which results were incorporated within this report as far as these were applicable.

The research team further facilitated interviews with clerks of court attached to more than 20% of all civil departments within Magistrate's Courts nationally in order to obtain input from them. In the process, their knowledge of the jurisdictional aspects of emoluments attachment orders was assessed.

Certain recommendations, mostly relating to legislative change, are proposed by the research team.

#### **1.4 Limitations**

The following limitations were experienced:

- Data set sizes
- Confidentiality issues
- Unwillingness by employers to participate
- Incompatibility of payroll systems with investigation requirements
- Time and budget constraints

The results did however point in certain directions which at the very least can be regarded as indicative of most important aspects pertaining to the impact and extent of emoluments attachment orders.

#### **1.5 Analysis and recommendations**

Appropriate analysis and evaluation of the findings are done throughout the study. Finally, certain recommendations are made.

### **2. LEGISLATIVE FRAMEWORK**

The legislative framework was researched with reference to relevant legislation, rules of court, reported and some unreported court cases as well as academic publications. In this regard, the team focused on the Magistrate's Court Act 32, 1944 and the Magistrate Court Rules as well as the National Credit Act 34, 2005. In the process, certain problem areas in the legislation or in the enforcement thereof were identified:

- **Jurisdiction**

Although section 65J(1)(a) of the Magistrate's Court Act clearly states that the emoluments attachment order must be issued from the jurisdiction in which the employer of the 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, this is often not applied. It is agreed that this provision was made for the benefit and convenience of the employer and or employee who wishes to apply to court for amendment, suspension or rescission of such order.

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

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

- **Requirements for obtaining emoluments attachment orders**

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 65J(2)(b)

The second and third instances create problems. In the case of a written consent, the clerk of court has no way of verifying the authenticity of the signature of the debtor or the reasonableness of the instalments consented to or even the circumstances under which the consent was obtained.



In the third instance, the judgement creditor or his attorneys 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 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 by 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 affected.

There is no enquiry into the financial affairs of the debtor and the creditor often decides unilaterally on the amount of the instalment. Neither the creditor nor the clerk of court granting the emoluments attachment order is aware of the existence or not of other garnishee orders.

- **Consent to judgement**

Although the research team has come across gross irregularities concerning consent to judgment and has referred to this in the case studies and elsewhere, this issue strictly speaking falls outside the scope of the investigation. The nature, incidence and scope of these irregular practices should be investigated further.

- **Service**

Section 65J(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.

Service is often affected at the head office of the employer whilst the employee could be working at a branch office in a different province. The opposite also happens: 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 and incurring of further legal costs when a warrant of execution is served on the employer.

- **Judicial oversight**

As referred to above, the exclusion of the discretion and supervision of presiding officers in the granting of and determination of the deductions to be made comes at a heavy price. In many instances, clerks of the court lack the necessary knowledge and skill to effectively and efficiently administer these orders.

- **Letter of demand**

Unlike the National Credit Act, the Magistrate's Court Act does not prescribe a given format for letters of demand. Some of the letters are misleading and are styled and formulated in such a manner that it resembles a summons or court process.

- **Statement of account**

Section 65J only provides for the furnishing of a statement at the request of the employer and does not compel creditors and/or their attorneys to render statements on a regular basis.

- **Lack of statutory cap on amount to be attached**

While regulation 23.3.6 in terms of the Public Finance Management Act 1 of 1999 caps the emoluments attachment to 40% of the state employee's salary, no such cap exists for debtors employed in the private sector. In most European jurisdictions, caps are applicable. The same applies to the United States of America.

### **3 SELECTED CASE STUDIES**

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

- **Consent**

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

- **Obtaining, issuing and service**

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

- **Overcharging**

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

- **Lack of communication**

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

- **Alterations effected after issuing**

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

- **Duplication of orders on same debt**

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

#### **4. SURVEYS AND INTERVIEWS**

##### **4.1 Data Set A: Employees**

A data set consisting of 86 459 employees both with and without emoluments attachments orders against their salaries were obtained from employers operating in six different industries namely healthcare–finance, health services, security, retail, insurance and tertiary education. These employees are employed in both urban and rural areas in all nine provinces. Administration and maintenance orders paid by means of emoluments attachment orders formed part of this data set.

- **Percentage of employees subject to emoluments attachment orders**

○ Healthcare – Finance	1.86%
○ Health	8.39%
○ Security	5.15%
○ Tertiary	1.23%
○ Retail	13.60%
○ Insurance	3.82%

- **Percentage of employees subject to administration orders**

○ Healthcare – Finance	0.14%
○ Health	1.45%

○ Security	1.06%
○ Tertiary	0.12%
○ Retail	3.57%
○ Insurance	0.13%

- **Average number of emoluments attachment orders per employee**

○ Healthcare – Finance	1.51
○ Health	1.46
○ Security	1.18
○ Tertiary	1.47
○ Retail	1.55
○ Insurance	1.37

- **Subset: Credit providers**

A subset of 4 305 cases was analysed and the three major role players making use of emoluments attachment orders were micro lenders, banks and retailers. Micro lenders issued 28% of emoluments attachment orders followed by banks with 27%. Retail issued 24% of the emoluments attachment orders.

#### **4.2 Data Set B: Employees with emoluments attachment orders**

In light of the limitations experienced regarding Data Set A, a data set consisting of 670 individual employees whose salaries were subject to garnishment were identified and data pertaining to these consumers and the attachment against their salaries were scrutinised. These employees were mainly resident or employed within the northern parts of Kwazulu Natal, the Eastern Cape, Gauteng, and Mpumalanga. Administration and maintenance orders were excluded from this study.

- **Variables considered**

Age, gender and salary level were used as variables.

Only salary level was identified to significantly influence the percentage gross income attached as well as the average number of emoluments attachment order per judgment debtor. Age and gender did not have any significant influence.

It was found that the percentage of salary attached through emoluments attachment orders generally decreases as the income increases. On the other hand, the average number of emoluments attachment orders per judgment debtor generally increase as the income increases.

- **Average percentage of gross salary attached**

The average percentage of the gross salary attached was 11%.

- **Average number of emoluments orders per employee**

The average number of orders per employee was 1.86.

#### **4.3 Data Set C: Public sector**

The Public Service Commission (PSC) released a report on the indebtedness of public servants during November 2007.

The report covered all national and provincial departments within the public service and focused on information for the 2006/2007 financial year. Information was acquired from PERSAL. The PERSAL system did not provide sufficiently detailed information to enable the compilers of the report to distinguish between the total number of garnishee orders and the total number of public servants subject to garnishee orders. These numbers were regarded as being the same not taking into account that one public servant could have been served with more than one garnishee order.

A further limitation is that the number of public servants or the percentages of public servants in different age, categories and salary levels were not

provided. This makes the references to percentage of public servants subject to garnishee orders as per these different categories of limited value.

Bearing this limitation in mind, the following conclusions were drawn in the report:

#### **4.3.1 The total cost of garnishee orders paid by public servants**

According to data provided by PERSAL, the total cost of payments as a result of garnishee orders that were issued to public servants amounted to R1.01 billion during the 2006/2007 financial year. Of the R1.01 billion, about R235 million (23%) is attributed to the garnishee debt of public servants based in National departments. The balance of about R776 million (77%) is attributed to the debt of public servants based in Provincial departments. This roughly corresponds with the percentage of public servants employed at national and provincial level.

- **Distribution of garnishee debt, reflected according to gender at National and Provincial level**

Female public servants paid R473 million (46%) of the total amount for garnishee orders through PERSAL during 2006/2007. Males paid R538 million (54%) of the total figure.

- **Garnishee debt paid, reflected according to salary level**

Public servants on salary level 7 accounted for the largest amount of payments towards garnishee debt, namely R269 million. While level 16 accounted for the lowest payments (R21 000), it is of concern that a head of department who is the accounting officer in terms of the Public Finance Management Act, 1999, and therefore entrusted with the financial soundness of a department, should have received a garnishee order.

- **Garnishee debt, reflected according to age-group**

Public servants within the age-group 40 – 49 were responsible for the highest amount (R482 million) of garnishee related cost, followed by the age-group 30 – 39 (R280 million), and those in the age-group 50 – 59 (R206 million).

#### **4.3.2 Number of public servants who made garnishee related payments**

This section of the executive summary provides information on the number of public servants who made garnishee related payments.

- **Total number of public servants who made payments**

During 2006/2007 there were 216 857 public servants who made garnishee related payments through PERSAL. This figure amounts to a staggering 20% of the total number of public servants employed within the Public Service.

- **The number of public servants who made garnishee related payments, reflected according to gender**

Of the 216 857 public servants who made garnishee related payments, 101 000 (47%) were females and the remaining 115 857 (53%) were males.

- **The number of public servants who made garnishee related payments, reflected according to race**

It was also found that most public servants who made garnishee related payments during the 2006/2007 financial year were African (86%) followed by Coloured (9%), Whites (4%) and Indians (1%). The percentages of the different race groups employed in the public service were African (77%), Whites (11%), Coloured (9%) and Indians (3%).

- **The number of public servants who made garnishee related payments, reflected according to salary level**



In total 25% of public servants who made garnishee related payments were on salary level 7. This correlates with the fact that the cost associated with garnishee payments at this level was the highest and the fact that public servants at this level made the most payments to micro-lenders. In addition to the number of garnishee order payments made by public servants at salary level 7, the second highest number of payments were made by public servants at salary levels 6 (33 999) followed by those at salary level 8 (30 486).

- **The number of public servants who made garnishee related payments, reflected according to age-group**

It was found that the majority of public servants who made garnishee related payments (98 407), that is, 45% were within the age-group 40 – 49. The second highest number of public servants to make such payments was in the age-group 30 – 39, followed by those in the age-group 50 – 59.

#### **4.4 Data Set D: Magistrate's Court**

The knowledge and understanding amongst clerks of civil courts regarding jurisdictional issues were tested. Interviews were conducted both telephonically and in person. These interviews were conducted nationally and represent more than 20% of all the courts from the nine provinces. Both rural and urban courts were consulted.

- **Assessment of knowledge on jurisdiction**

The following percentages clerks provided the correct answers to the question posed per province:

○ Gauteng	83%
○ Mpumalanga	63%
○ Free State	58%
○ Western Cape	50%
○ Limpopo	38%
○ Eastern Cape	28%
○ Northern Cape	27%
○ North West	25%

The national average recorded was 44%.

#### **4.5 Data Set E: Employers**

Investigative interviews were conducted with two large garnishee order administrators representing the employers of more than 300 000 employees. In addition thereto interviews were conducted with accountants, bookkeepers and payroll administrators of twelve smaller employers who manage emoluments attachment orders in house. Some of the observations made were:

- After ensuring that the specific employee is on their payroll, most employers (75%) accepted the orders as correct and process them without any further query.
- Most orders are duly served on the employer by the sheriff accompanied by a letter from the collecting attorneys, but some employers (25%) indicated that orders are sometimes delivered by private persons or agents of debt collection agencies.
- Some employers (75%) feel that the deductions are not reasonable and contact the issuing lawyer. In many of these cases the latter agrees to a smaller amount be deducted monthly, but this arrangement is normally not formally recorded.
- Most employers did not know about the 5% allowance and in other instances (17%) employers were under the impression that the deduction would be to the detriment of the employee and therefore did not claim it.
- All the employers would welcome guidelines, especially on how the total debt is constituted (principal debt, costs, interest).
- The larger companies use the 5% administrative commission that the garnishee employer is entitled to fund outsourcing of the administration of garnishee orders whilst the smaller employers could not indicate the cost to company of administering these orders themselves.

#### **5. Recommendations**

The recommendations made are divided into those of a general nature and those regarding legislative reform i.e. proposed amendments to the Magistrate's Court Act and Rules. These are contained in the Chapter 5 of this report.

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# Report on the incidence of and the undesirable practices relating to garnishee orders in South Africa

## CHAPTER 1 : INTRODUCTION

### 1.1 BACKGROUND

The Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), known in South Africa as the German Development Cooperation and Business Enterprises at University of Pretoria (BE at UP), entered into an agreement in terms of which investigative research into the incidence of and undesirable practices relating to emoluments attachment orders, commonly referred to as garnishee orders were to be conducted. The Law Clinic of the University of Pretoria (UP Law Clinic) acting as project leader, collaborated with the Bureau for Statistical and Survey Methodology (Statomet) in compiling this report.

**GTZ** is an international cooperation agency for sustainable development with worldwide operations. Its corporate objective is to improve the living conditions of people on a sustainable basis. GTZ has operated in South Africa on behalf of the German Federal Ministry for Economic Cooperation and Development since 1993. GTZ's assistance in South Africa continuously focuses on certain cross cutting themes such as poverty alleviation, social development, protection of natural resources, gender equality and the fight against HIV/AIDS.

**BE at UP (Pty) Ltd** is an enterprise established by the University of Pretoria in 2000 as a structure for the development of campus enterprises acting as the intermediary between the business world and the pool of multidisciplinary resources at the University, providing consultative and commercial contract research services to the private and public sector.

**UP Law Clinic**, comprising of 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. Since 2001, the Law Clinic has also participated in various debt relief projects with the primary objective of assisting over-indebted consumers. The Law Clinic is the principal accredited training provider of the National Credit Regulator and is responsible for the training of aspirant debt counsellors. Clinic personnel were assisted in this research project by academic staff members of the University of Pretoria.

**Statomet** is a bureau at the University of Pretoria that focuses on the scientific design and management of research.

## **1.2 OBJECTIVES OF THE INVESTIGATION**

The objectives of the investigation were to:

- Develop a comprehensive report on the legal framework governing the garnishment of wages, including a detailed analysis of the processes used for the obtaining of garnishee orders; the dispersing thereof; identifying potential risk areas for irregularities; identifying loopholes; finding solutions and making recommendations.
- Conduct a survey of the magnitude of garnishment of wages and its potential irregularities common in South Africa and develop a comprehensive and detailed report on the types of irregularities which occur.
- Analyse management and payroll processes, as well as the cost implications to the business sector with regard to the garnishment of wages.

### **1.3 PROJECT APPROACH**

The project is divided into the following sections:

#### **1.3.1 Literature and case law review**

A literature study of the legislative framework and procedural requirements for obtaining an emoluments attachment order on behalf of the creditor at court, including competencies of courts and court officials was conducted. Furthermore, the procedures used for the enforcement of an emoluments attachment were examined. This involved the studying of the legal requirements, duties and responsibilities, including legal relationships, of all stakeholders involved in the process. In the process, the relevant sections of the Magistrate's Court Act, 1944 (as amended), the National Credit Act, 2005, the Basic Conditions of Employment Act, 1997 (as amended), and the Public Service Act, 1994 (as amended) were examined as well as the Treasury Regulations, 2001.

A number of relevant reported and unreported court cases, academic articles, textbooks and sources from the internet were examined. Interviews were conducted with practitioners and academics.

#### **1.3.2 Selected case studies**

A number of case studies highlighting the irregularities and problems associated with emoluments attachment orders are reported on. These cases were drawn from various courts or tribunals involving different credit providers, consumers and legal practitioners.

#### **1.3.3 Surveys and interviews**

Nationwide surveys were conducted and the data obtained processed. Four data sets were used as well as the results of a study conducted by the Public Service Commission. The first two data sets dealt with the position of employees in the private sector whilst the third dealt with knowledge levels amongst clerks of court regarding emoluments attachment orders. The Public Service Commission's report dealt exclusively with employees in the public

sector. The fourth data set dealt with employers and their attitudes towards emoluments attachment orders.

In the process the following were investigated:

- **Data Set A: Employees**

The payroll particulars of 86 459 employees throughout South Africa and employed in a number of industries were processed in order to obtain the following results:

- %PSC            The total number emoluments attachment orders as a percentage of the number of employees
- %Incl           Percentage of employees with emoluments attachment orders
- %Other          Percentage of employees with emoluments attachment orders exclusive of administration and maintenance orders
- %Admin        Percentage of employees subject to administration orders
- %Maint         Percentage of employees subject to maintenance orders
- AEAO           Average number of emoluments attachment orders per employee
- AAmount       Average monthly monetary value of emoluments attachment orders

- **Data Set B: Employees with emoluments attachment orders**

In the light of certain limitations regarding the data contained in data set A, the records of a smaller group of employees consisting of 670 individuals were scrutinised and processed. Data was summarised according to the following variables:

- Age
- Gender
- Salary level

- %Gross: The percentage of gross salary attached per judgment debtor
- EAO: Number of emoluments attachment orders per judgment debtor

- **Data Set C: Public sector**

A nationwide survey of all state employees was conducted by the Public Servants Commission for the financial year 2006/2007. Results pertaining to garnishee orders forms part of the survey and were recorded in a report released in November 2007. Some of these results were incorporated into our report. Because of different methodologies employed scientific comparison proved to be impossible.

- **Data Set D: Magistrate's Courts**

More than 20% of all clerks of the civil courts in all nine provinces were interviewed to determine their knowledge on jurisdictional aspects pertaining to emoluments attachment orders.

- **Data Set E: Employers**

Investigative interviews were conducted, representing a number of larger employers representing a workforce of more than 300 000 employees. In addition hereto 12 smaller employers were interviewed. Questions relating to processing, delivery and verification of orders were addressed.

## **1.4 RECOMMENDATIONS**

On the basis of literature studies, case law reviews and survey results, a detailed analysis and evaluation of the situation was compiled. A number of recommendations are suggested in the Chapter 5.

## **1.5 METHODOLOGY AND LIMITATIONS**

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

## CHAPTER 2 : LEGISLATIVE FRAMEWORK

The term “garnishee order” has caused some confusion and is often used incorrectly to describe an emoluments attachment order.

### 2.1 EMOLUMENTS ATTACHMENT AND GARNISHEE ORDERS

It is a common misconception that no distinction can be drawn between an emoluments attachment order and a garnishee order. This confusion arose as 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. This misconception often leads to the false idea that the effects of, and granting of such orders are achieved through the same procedures, and that the same requirements are needed in order to obtain both orders. There is a substantial difference between the two abovementioned orders and different requirements need to be satisfied in each instance. Therefore it is necessary to shed some light upon the differences between the two.

### 2.2 EMOLUMENTS ATTACHMENT ORDER

The word “emoluments” basically refer to a wage or salary. 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 by the judgment debtor’s employer before the judgment debtor receives such wage or salary. The debtor’s employer is obligated 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. attorney.

### **2.3 GARNISHEE ORDER**

The Garnishee order on the other hand is dealt with in terms of Section 72 of the Magistrate's Court Act, which authorises an application by a judgment creditor to attach 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 whom 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.

### **2.4 DIFFERENCES BETWEEN EMOLUMENTS ATTACHMENT ORDERS AND GARNISHEE ORDERS**

**Table 1: Differences between emoluments attachment orders and garnishee orders**

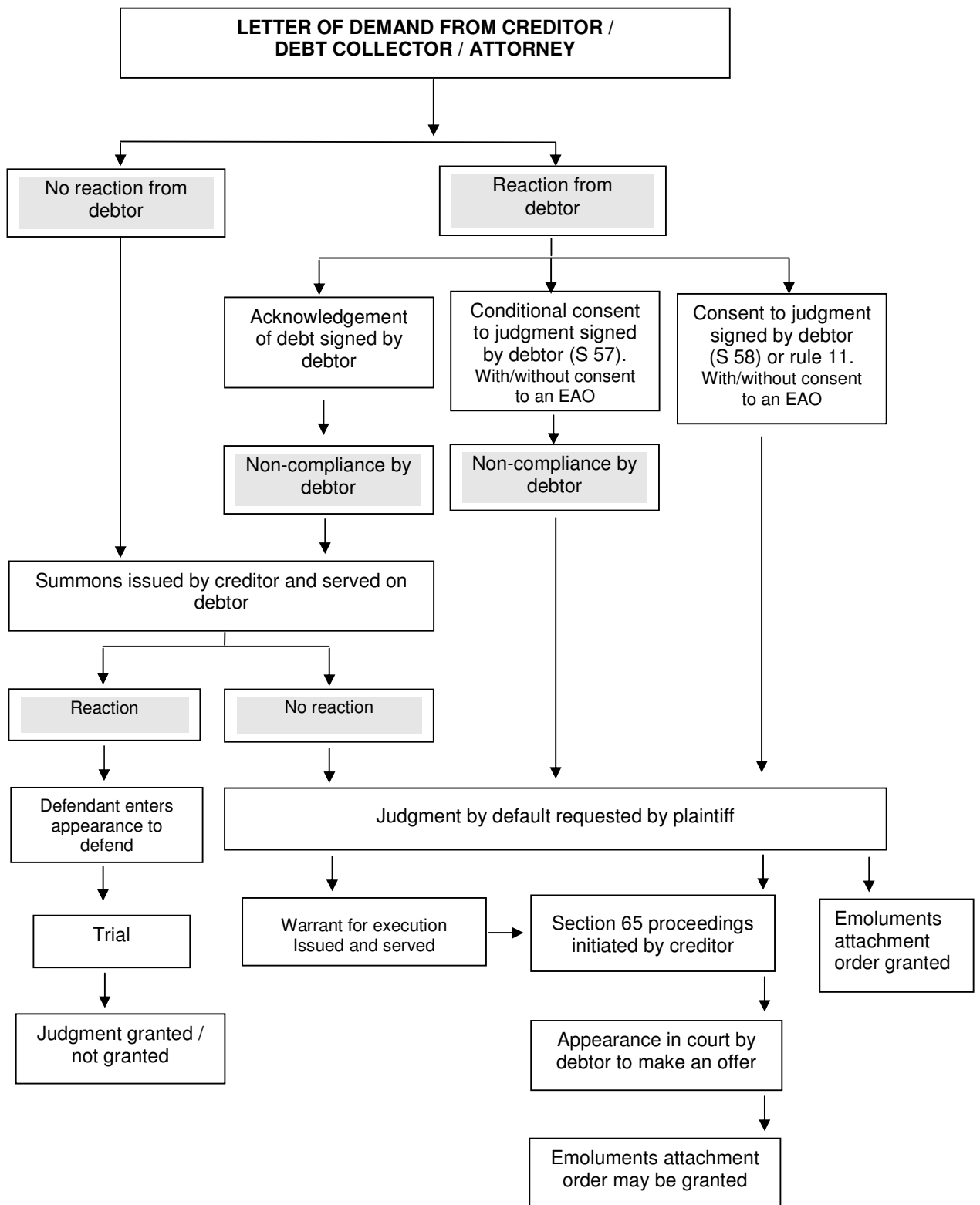
<b>GARNISHEE ORDER</b>	<b>EMOLUMENTS ATTACHMENT ORDER</b>
A third party is the garnishee	The judgment debtor's employer is the garnishee
Debt paid to judgment creditor by the third party quite often by way of a single payment	Debt paid to judgment creditor by judgment debtor's employer in monthly or weekly instalments
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 garnishee and debtor	Served only on garnishee

As the terms garnishee order and emoluments attachment order are used interchangeably within the South African context, a similar approach will be



adopted in this report. The focus of this report will be on emoluments attachment orders.

**Diagram 1: Diagram of the debt collection process**



## **2.5 THE EMOLUMENTS ATTACHMENT ORDER AND THE DEBT COLLECTION PROCESS**

The emoluments attachment order forms part of the debt collection process and is one of the methods used to extinguish debt. The debt collection process can be described as those steps, judicial and extra judicial taken by the creditor for the collection of debt.

The issuing of an emoluments attachment order as part of the judicial debt collection process usually follows upon a default judgment, where to the debtor has consented in terms of section 57 or 58 of the Magistrate's Court Act 32 of 1944. An order may also be granted after a formal financial inquiry has been conducted in terms of section 65(A) of the Magistrate's Court Act 32 of 1944. A court order for the payment of debt in instalments can be seen as a forerunner to the emoluments attachment order (s 65J), but mostly an emoluments attachment order is directly requested by the creditor as part of the same court process, primarily because it is a more effective and speedy method to execute judgment.

Other related execution methods are: an attachment order for the execution of property, an attachment order for due debt owed by a third party to the debtor, and a compulsory sequestration order.

### **2.5.1 Letter of demand**

The formal debt collection process normally starts with a letter of demand or a summons. A letter of demand is a prerequisite to complete the creditor's cause of action in the following circumstances:

- Where the parties have agreed expressly or implicitly that the creditor will not take any further steps until a written demand has been made to the debtor to comply with his obligation, for example in contracts.
- Where a statutory provision requires that prescribed notice be given to the debtor before a summons or other court process can be issued.

Examples of such statutory requirements can be found in sections 129 and 130 of the National Credit Act 34 of 2005 with regards to credit agreements, as well as in the provisions contained in the Institution of Legal Proceedings against Certain State Organs Act 40 of 2002 with regards to actions instituted against the State and its Organs.

In certain instances a letter of demand is not necessary, e.g. in claims based on a delict. In practice, however, a letter of demand is almost without exception sent out.

### **2.5.2 Summons**

Following upon the letter of demand, is a summons which is normally issued and served upon the debtor except for those instances where the debtor immediately settles the outstanding debt upon receipt of the letter of demand or alternatively where the debtor arranges for periodic payments (in instalments) or consents to judgment in terms of section 57 or 58 of the Magistrate's Court Act. In addition to these instances the debtor may also apply for debt review in terms of section 86 of the National Credit Act. A summons can be described as a judicial document through which an action is commenced and which calls upon the defendant to enter an appearance to defend such action within a specific period of time. It also informs the defendant of the consequences of failing to defend the action, namely that default judgment may be granted against him.

The summons is issued by the clerk of court who provides a unique case number. The issued summons is sent to the sheriff of court who serves it on the defendant.

In terms of rule 9 of the Magistrate's Court rules a copy of the summons instituting such action may be served on the defendant in the following ways by the sheriff of court:

- On the defendant himself or his duly authorised agent.

- At the defendant's place of residence or place of business, to a person apparently not less than 16 years of age and apparently residing or employed there.
- At the defendant's place of employment, to a person apparently not less than 16 years of age and apparently in authority or in charge.
- If the defendant has chosen a *domicilium citandi et executandi* (place agreed to by defendant for such service of such summons), at such *domicilium* chosen.
- by way of registered post if the plaintiff gives instructions to that effect.

In the vast majority of cases, defendants do not enter appearance to defend the matter. In these circumstances the plaintiff may request a default judgment against the defendant in terms of rule 12(1)(a). Therefore a brief summary of the process and requirements for obtaining a default judgment will follow.

### **2.5.3 Grounds for granting default judgment in the Magistrate's Court:**

- **Defendant fails to serve notice of intention to defend**

The plaintiff is entitled to request default judgment should the defendant fail to give notice of his intention to defend within the prescribed period of five court days.

The clerk of the court may grant default judgment if the claim is for a liquidated amount, for example claims for the purchase price of goods sold and delivered. If the claim is for an unliquidated amount, for example claims for damages, the matter is referred to a magistrate for judgment. In the proceedings before the magistrate the plaintiff has to provide oral or written evidence in the form of an affidavit stipulating the quantum of the claim.

- **A defective notice of intention to defend was served**

Should the defendant's notice of intention to defend be defective in any of the following ways, the clerk may ask the plaintiff to request in writing to the defendant to rectify the notice within a certain period:

- notice of intention to defend was not served properly
- notice of intention to defend was not signed properly
- notice of intention to defend does not provide the postal address of the person who signed the notice; or alternatively no address as provided for in rule 13 for the serving of pleadings was provided
- any two or more of above defects occur

- **Defendant fails to serve plea within the prescribed period**

This situation occurs when the defendant served his notice of intention to defend but failed to serve his plea within the prescribed period. Before the plaintiff can request default judgment he is required to serve a notice of bar in terms of rule 12(1)(b) on the defendant granting him five days to serve his plea. The plaintiff will have leave to request default judgment once said five day period has expired. After the expiry of such a period the normal court procedure for default judgment, as set out above, will apply.

- **A party fails to appear at the hearing**

In terms of rule 32(1) and (2) default judgment can be granted against a party should he fail to attend a hearing or any other court proceedings personally or by way of legal representation.

Judgment by default may also be granted in the following circumstances:

- **Where the defendant consents to judgment in terms of rule 11 of the Magistrate's Court rules**

This can be done by the Defendant in the prescribed form upon receipt of summons or after entry of appearance in order to settle the claim or part thereof. Defendant files the consent to judgment with the clerk of the court who then records the judgment in accordance with the defendant's consent.

- **Consent to judgment in terms of section 58**

Upon receipt of a letter of demand or summons claiming an outstanding debt, the defendant may give an unconditional written consent for judgment in favour of the judgment creditor. This is known as a section 58 procedure (Magistrate's Court Act 32 of 1944). In this instance the judgment debtor provides his unconditional consent to judgment. Should the judgment creditor receive the abovementioned consent, an application may be brought to the clerk of the court, by the creditor himself or his lawyer, requesting judgment for the debt amount and the cost of the summons or letter of demand. A copy of the demand, if there is no summons, should be brought with the application, along with the written consent of the judgment debtor. The judgment debtor may also consent to judgment for the repayment of the debt and agreed costs in specified instalments. The debtor may also at this stage consent to an emoluments attachment order. This method namely the letter of demand followed by obtaining consent to judgment by the debtor and consent to an emoluments attachment order is frequently used.

Should judgment be granted in the judgment debtor's absence, the creditor or his lawyer should immediately inform the debtor of the specifics of such order by way of registered mail.

- **Consent to judgment in terms of section 57**

There is however, also a section 57 procedure whereby the judgment debtor can give his conditional consent to judgment. In terms of this procedure the debtor may after receipt of a letter of demand or a summons admit liability to

the plaintiff for the amount of the debt and costs claimed in the letter of demand or summons or for any other amount. This includes an offer to pay the amount plus collection fees in instalments. In the event of the debtor failing to pay, the creditor may without further notice to the debtor apply for default judgment. Such request for default judgment is accompanied by an affidavit from the creditor, alternatively a certificate by his attorney confirming non-payment.

#### **2.5.4 Default judgment in the High Court**

Similar but also further grounds for the granting of default judgments apply to the high court. It is unnecessary to dwell on these for purposes of this report.

Section 65M of the Magistrate's Court Act provides that any high court judgment for a claim sounding in money can be prosecuted in the Magistrate's Court that has jurisdiction over the person of the judgment debtor. A certified copy of the high court judgment with an affidavit by the creditor or a certificate by his attorney stating the balance owing in terms of the judgment and how it is computed, must be attached. A case file is then opened in the relevant Magistrate's Court and further steps in execution of the judgment taken from there.

### **2.6 RESCISSION OR AMENDMENT OF DEFAULT JUDGMENT**

#### **2.6.1 High Court**

The party against whom default judgment was granted may apply in terms of rule 31(2)(a) of the High Court rules to the court which granted the judgment for the rescission or amendment of such judgment, within 21 days from the date he became aware of said judgment. The applicant is obligated to send



notice of intention to apply for rescission of judgment to the judgment creditor's attorney.

The court may grant rescission on following grounds:

- Where the applicant has a reasonable explanation as to why he was in default
- Where the applicant has a *bona fide* argument which, based upon the facts, has a reasonable chance of success

### **2.6.2 Magistrate's Court**

Section 36 states that this court can rescind or amend judgments granted against a party in his absence. A party wishing to rescind or amend said judgment should apply to court in terms of rule 49 with due notice to all parties concerned. A person is deemed to have cognisance of the judgment within ten days after it was granted, unless he / she can prove the opposite and the application must be brought within 20 days of becoming aware of the judgment. Rule 60(5) provides for condonation for late filing of the application if good cause is shown.

In order to convince the court to rescind or amend a judgment, the applicant must prove that he / she was not willfully in default and that he/she has a bona fide defence.

## **2.7 AUTHORITY FOR APPLYING FOR AN EMOLUMENTS ATTACHMENT ORDER**

The Magistrate's Court Act authorises an emoluments attachment order in section 65J:

- (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.

- (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.

In addition to the above section 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 payment of instalments from future emoluments. The Maintenance Act 99 of 1998 also provides for emoluments attachment orders.

## **2.8 JURISDICTION**

In terms of section 65J(1), a judgment creditor may issue an emoluments attachment order in the district where the employer of the judgment debtor resides, carries on business or is employed. If the State is the employer of the judgment debtor, an emoluments attachment order may only be issued from the court in the district where the judgment debtor is employed.

Rule 46(1) of the Magistrate's Court rules provided further that if the judgment creditor issues an emoluments attachment order out of a court other than the court in which 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 that a party to legal proceedings can consent to the jurisdiction of a specific Magistrate's Court subject to the following:

- That such consent cannot grant jurisdiction if the court does not have jurisdiction over the person of the debtor
- Action must have been instituted in that court or is on the verge of being instituted

In two unreported cases *Springs Financial Services CC v Margaret Balakista in haar hoedanigheid as Klerk van die Siviele Hof, Pretoria* (case number 7714/2000) and *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), the Transvaal Provincial Provision considered section 45. It was held that the parties to the proceedings with regards to the issuing of the emoluments attachment orders could consent to the specific Magistrate's Court jurisdiction.

## **2.9 REQUIREMENTS TO BE MET BEFORE AN EMOLUMENTS ATTACHMENT ORDER WILL BE ISSUED**

Section 65J (2) states:

- (2) An emoluments attachment order shall not be issued-
  - (a) unless the judgment debtor has consented thereto in writing or the court has so authorized, whether on application to the court or otherwise, and such authorization 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.

Three instances exist:

### **2.9.1 Where the judgment debtor has consented in writing to the emoluments attachment order**

These consents can legally be obtained when the debtor arranges for payment or consents to judgment conditionally in terms of section 57, unconditionally in terms of section 58 or after judgment in terms of section 65.

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 Magistrate's 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.

### **2.9.2 Where the court authorises it**

An example would be where after judgment, a judgment debtor is by way of a notice in terms of section 65(A)1 required to appear in court where an enquiry into his financial position is held. The court may then make an order for periodic payments and authorise an emoluments attachment order. Similarly a judgment debtor may upon receipt of such notice make an offer of payment by way of periodic instalments, coupled to an emoluments attachment order or

not, and the court may in terms of section 65E(1)(C) grant an emoluments attachment order.

Magistrate's Court Act 32 of 1944 - section 65 E(1)(c) reads:

- (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.

### **2.9.3 Notice in terms of subsection 2**

In the absence of a written consent from the debtor or authorisation by the court, i.e. the two instances mentioned in 2.9.1 and 2.9.2 above, 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 10 days of the date on which the registered letter was posted.

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

## 2.10 DRAFTING, ISSUING AND SERVICE OF AN EMOLUMENTS ATTACHMENT ORDER

Section 65J(3) provides that an emoluments attachment order should be drafted and signed by either the judgment creditor or his attorney as well as signed by the clerk of the court and should be served on the garnishee by the sheriff in terms of rule 9. Form 38 in Annexure 1 to the Magistrate's Court rules may be used for this purpose and should contain sufficient information for the employer (garnishee) to identify the judgment debtor. The said information includes the judgment debtor's identity number, birth date or

salary number. An emoluments attachment order is not served on the judgment debtor, as is the case with a garnishee order.

### **Example 1: An example of an emoluments attachment order (supplied by Du Plessis and Goodey (2003) 153)**

IN THE MAGISTRATE'S COURT OF PRETORIA HELD IN PRETORIA	
CASE NUMBER:	
In the matter between:	
JACK NOMERCY	Judgment Creditor
And	
PETE NOPAY Identity number: 631121 0071 050 234 Moulton Ave, Waverley, Pretoria	Judgment Debtor
PC CONSULTANTS (Pty) Ltd 123 Lynnwood Road, Lynnwood, Pretoria	Garnishee
EMOLUMENTS ATTACHMENT ORDER IN TERMS OF SECTION 65J	
WHEREAS it has been made to appear 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 and those dependant upon him;	
IT HAS BEEN ORDERED-	
(1) that the said emolument be attached;	
(2) that the Garnishee pay to the Judgment Creditor or his attorney of the FIRST of each and every month after this order has been granted the sum of .....(amount) 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 by the Judgment Creditor in the Magistrate's Court of Pretoria on the .....(date) for the amount of .....(amount) (on which the judgment or order the amount of .....(amount) remained unpaid) including judgment costs amounting to .....(amount) and the costs of attachment amounting to .....(amount) as well as	

the fees of the Sheriff serving this order and interest at the rate of 15.5% on the said amounts calculated from (indicate date) until date of payment.

SIGNED at PRETORIA on this the .....(date).

Clerk of the Court

Attorney for the Judgment Creditor

.....(name)

Address and reference

Attention is drawn to the provisions of section 65J(10) of the Magistrate's Court Act that reads as follows:

*"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 percent of all amounts, deducted by him from the Judgment Debtor's emoluments by deducting such commission from amount payable."*

## **2.11 DEDUCTIONS AND PAYMENTS OF AN EMOLUMENTS ATTACHMENT ORDER**

Section 65J of the Magistrate's Court Act 32, 1944 states that:

- 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 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. Payments to the creditors, however, must still be made at the end of each month.

Section 65J(10) determines further that a 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 effectively pays the commission.

In terms of section 65J(5) an emoluments attachment order may be executed against the garnishee as if it were a court order. It is submitted that should the garnishee refuse to make the payments as prescribed in the Act, either the judgment creditor or his attorney may issue a warrant of execution for the arrear payments against the garnishee, provided that the garnishee, judgment debtor or any other interested party may dispute the existence or validity of such an order. The correctness of the judgment on which the emoluments attachment order is based, may however not be disputed.

## **2.12 THE POSITION WHERE THE DEBTOR LEAVES THE SERVICE OF THE GARNISHEE EMPLOYER**

Section 65J (8)(a) and (b) provides for the procedure to be followed should the judgment debtor leave the services of the employer before the debt has been settled. It reads as follows:

- (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.

The certified copy of the emoluments attachment order must therefore be served on the new employer by the sheriff on instruction of the creditor or his



attorney. This procedure clearly presents no problem where the new employer is resident, carries on business or is employed within the same area of jurisdiction i.e. Magistrate Court district as the former employer. However, in the situation where the new employer resides, carries on business or is employed in a different district the position is unclear. Some authors argues that in such an event a fresh emoluments attachment order must be issued from that court as emoluments attachment orders may only be issued from the court where the employer resides, carries on business or is employed. Others argue that section 65J(8) and (9) authorise the transfer to another district of the emoluments attachment order and the provision regarding issuing is not applicable.

## **2.13 THE RESCINDING AND AMENDMENT OF AN EMOLUMENTS ATTACHMENT ORDER**

- (5) An emoluments attachment order may be executed against the garnishee as if it was a court judgment, subject to the right of the judgment debtor, the garnishee or any interested party to dispute the existence or validity of the order and the correctness of the balance claimed.
- (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.

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

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 himself and his dependants. This may result in the order being stopped or the instalment

amounts being lowered. This will have to be done by way of an application to court.

## **2.14 LOST WARRANTS AND ORDERS**

Where a warrant or an emoluments attachment order or a garnishee order becomes lost or misplaced, rule 37(1) provides that the court may, on application of any interested party and after notice to any person affected thereby, authorise the issue of a second or further warrant or emoluments attachment order or garnishee order, as the case may be, on such conditions as the court may determine and may make such order as to costs as the court may deem fit.

It is clear that the interested party in these circumstances should bring a formal application to court in terms of rule 55 of the Magistrate's Court rules. Rule 55(1) provides that notice of such an application should be made no less than ten days prior to the hearing thereof. The said notice of the application may be served by registered post to all the interested parties and need not be delivered by the sheriff.

Rule 37(2) provides further that the reasons for the application should also be stated in the notice. In practice however, the reasons are not contained in the notice but in a supporting affidavit annexed to the notice of the application.

The provisions of rule 36(1) to (6) of the Magistrate's Court rules relating to the process of execution are, *mutatis mutandis* applicable to a second or further warrant or attachment. The following endorsement should be set out clearly on the second or further warrants or attachment order:

### **Example 2: Endorsement on second or further warrants of attachment order**

This further or second warrant (state nature of warrant) or emolument attachment order or garnishee order (as the case may be) was authorised by the court on ..... and replaces any warrant (state nature or warrant) or emolument attachment order or garnishee order (as the case may be) relating to which it was issued or re-issued.

Where a lost warrant that has been replaced, is subsequently found, it should be cancelled immediately by the clerk of the court by effecting an endorsement as prescribed.

The fact that a second or further warrant for a “garnishee” order has been issued as well as the date and amount thereof, should be endorsed upon the record of the case by the clerk of the court.

## 2.15 COSTS OF EMOLUMENTS ATTACHMENT ORDERS

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 Magistrate’s Court rules. VAT may be added to the fees. It is important to note that the prescribed fees for letters, telephone calls and attendance may be recovered on a party-and-party-scale. An attorney may also recover collection commission of 10% on every instalment paid towards the capital and costs of the action, subject to a maximum amount of R300 of every instalment.

The following is or may be applicable:

(e) (i) Emoluments Attachment Order (Form 38)	R75. 00
(ii) Reissue (Certificates included)	R60. 00
(h) Obtaining a certified copy of a judgment	R37. 00
(i) Affidavit or certificate by the judgment creditor or his attorney	R27. 00
(k) Affidavit or affirmation by debtor [Rule 45(7)]	R45. 00
(l) Request for an order under section 65 of the Act	R27. 00
(o) (i) Correspondence: For every necessary letter or telegram written or received, including copy to retain, provided that a fee for perusal shall not be allowed in addition to the fee herein provided for, per folio	R11.00
(ii) Attendances: For each necessary attendance not otherwise provided for, per attendance	R11.00

The following shall be allowed in addition to the fees laid down in the Tariff of this Part:

- (a) All necessary disbursements incurred in connection with the proceedings.
- (b) A fee of 10% on each instalment collected in redemption of the capital and costs of the action, subject to a maximum amount of R300, 00 on every instalment. Where the amount is payable in instalments the collection fees shall be recoverable only on payment of every instalment. Such fees shall be in substitution for and not in addition to the collection fees prescribed in paragraph 13 of Part I of Table A.
- (c) All necessary disbursements incurred in connection with any prior abortive proceedings under section 72, if the court has so ordered.
- (d) Any amount necessarily and actually disbursed in tracing the judgment debtor, where the capital amount of the debt at the time the tracing agent was employed was not less than R187, 00. The total amount to be allowed for each tracing shall not exceed R143, 00.

In addition to these cases the fees charged by the sheriff for service of the order must be added. These costs depend on the distance traveled by the sheriff to the employer to serve the order.

- 2 (a) For the execution of a warrant, interdict or garnishee order, the journey to and the place of execution of the above-mentioned documents-
  - (i) within a distance of 6 kilometers from the court-house of the district for which the sheriff is appointed: [R26.25] R31.00;
  - (ii) within a distance of 12 kilometers but further than 6 kilometers from the court-house of the district for which the sheriff is appointed: [R30.00] R35.00;
  - (iii) within a distance of 20 kilometers but further than 12 kilometers from the court-house for which the sheriff is appointed: [R37.50] R44.00;
  - (iv) where a mandatory instructs the sheriff in writing to execute a document referred to in item 2(a) urgently on the day of receipt of such document or after normal office hours, the cost shall be calculated at double the tariff in item 2(a )(i), (ii) and (iii) respectively, which additional costs shall be paid by the mandatory, save where the court orders otherwise.
- (b) For the attempted execution of the documents mentioned in paragraph (a), the journey to and from the place of attempted execution of the above-mentioned documents-

- (i) within a distance of 6 kilometers from the court-house of the district for which the sheriff is appointed: [R22.50] R26.00;
- (ii) within a distance of 12 kilometers but further than 6 kilometers from the court-house of the district for which the sheriff is appointed: [R26.25] R31.00;
- (iii) within a distance of 20 kilometers but further than 12 kilometers from the court-house of the district for which the sheriff is appointed: [R33.75] R40.00;
- (iv) where a mandatory instructs the sheriff in writing to execute a document referred to in item 2(a) urgently on the day of receipt of such document or after normal office hours, the cost shall be calculated at double the tariff in item 2(a)(i), (ii) and (iii) respectively, which additional costs shall be paid by the mandatory, save where the court orders otherwise.

In terms of section 65(J)(10) of the Magistrate's Court Act the employer (garnishee) may recover from the judgment creditor a commission of up to 5% of all amounts collected on his behalf from the amount payable to him. This subsection has been strongly criticised by attorneys Du Plessis, Hutchinson & Preller (1978) *De Rebus Procuratoriis*, May 228 - 229):

The last subsection of this section is totally unacceptable. This provides that the garnishee (the employer) may recover from the judgment creditor a commission of up to five per cent of all amounts collected on his behalf from the amount payable to him. This means in effect that the judgment creditor now has to pay for the convenience of the debtor having his monthly instalments deducted directly from his salary. Although an emoluments attachment order is to the advantage of the judgment creditor in the sense that the receipt of his monthly instalments is to a lesser extent dependant on the economic ups and downs of the debtor, this procedure is in the first place designed for the convenience of the debtor who is relieved of the responsibility of having to make regular payments. No reason can accordingly be seen why the judgment creditor should lose half his collection commission just because the judgment debtor is saved the inconvenience of having to send a monthly cheque or postal order. Numerous other deductions are regularly made by employers in respect of income tax, insurance premiums, medical benefit fund contributions and the like, without any remuneration therefore.

In practice however, the situation regularly occurs where the employer deducts his 5% over and above the 10% commission collected by the attorney. This causes a commission deduction of 15% instead of 10%.

## **2.16 FREE STATEMENT OF ACCOUNT**

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

- (b) 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.

## **2.17 OFFENCES**

Section 106A & B create a criminal offence. Section 106A 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 Magistrate's Court Act 32 of 1944 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.

These statutory offences created by these subsections are aimed at preventing an employee 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 correct particulars of emoluments at the request of the affected employee, respectively.

## **2.18 NATIONAL CREDIT ACT AND EFFECTS ON CIVIL PROCEDURE**

### **2.18.1 Introduction**

On 1 June 2007 the National Credit Act 34 of 2005 (hereinafter referred to as “the Act”) became fully effective. In terms of section 4, the Act only applies to credit agreements between parties dealing at arm’s length made within or having an effect within the Republic.

Credit agreements are further defined in section 8 of the Act. An agreement constitutes a credit agreement if it qualifies as a credit facility, credit transaction, credit guarantee or a combination.

An agreement will be termed a credit facility if a credit provider supplies goods, services or money to a consumer from time to time and either defers the consumer's obligation to pay any part of the cost of goods or services or money or bill the consumer periodically therefore. A further prerequisite to qualify as a credit facility is that a charge, fee or interest will be charged to the amount deferred or periodically billed to the consumer. This type of credit agreement can generally be described as revolving credit e.g. credit cards, overdrafts or store cards.

An agreement will be classified as a credit transaction if the agreement constitutes a:

- Pawn transaction

- Discount transaction
- Incidental credit agreement
- Instalment agreement
- Mortgage agreement
- Secured loan
- Lease of movable property

Should an agreement not fall within these categories and cannot be classified as revolving credit (credit facility) or suretyship (credit guarantee), it will still be a credit transaction if the agreement is characterised by a deferral of payment and the levying of a charge, fee or interest.

An agreement constitutes a credit guarantee, if a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which this Act applies. This is commonly known as a suretyship.

Certain agreements, as specifically stipulated by section 8(2), are not regarded as credit agreements for purposes of the Act. These agreements are a policy of insurance (or credit extended for maintaining the premiums on an insurance policy), a lease of immovable property and transaction between a stokvel and its members. Other agreements may well be classified as credit agreements but falls outside the ambit of protection of the Act. These include the following agreements:

- Where the consumer is a -
  - juristic person whose asset value or annual turnover exceeds one million rand at date of entering into the agreement.
  - the state or an organ of state.
- Where the consumer is a juristic person with asset value or annual turnover of less than one million rand at date of entering into a large agreement (a mortgage agreement or any other credit transaction or guarantee in excess of R250 000).
- Where the credit provider is the Reserve Bank of South Africa.



- Where the credit provider is situated outside the Republic and the consumer has successfully applied to the Minister to be exempted.

Furthermore, as mentioned above, the Act will not apply to agreements entered into between parties dealing within arm's length, for example:

- a shareholder loan or other credit agreement between a juristic person, as consumer, and a person who has a controlling interest in that juristic person, as credit provider or *vice versa*.
- a credit agreement between natural persons who are in a familial relationship and are co-dependent or where one is dependent on the other.
- that is of a type that has been held in law to be between parties who are not dealing at arm's length.

### **2.18.2 Procedures in terms of the National Credit Act**

Should an agreement qualify as a credit agreement, the general enforcement procedures are expanded in terms of the section 129 and section 130 of the National Credit Act. This effectively means that it is expected that certain extra requirements must be adhered to before a credit provider may commence with enforcement procedures.

- **Section 129 letter of demand**

If a consumer is in default under a credit agreement, section 129(1)(a) states that the credit provider may draw the default to the notice of the consumer in writing and inform the consumer of certain rights that he has in terms of the Act. The credit provider must propose that the consumer refer the matter to a debt counsellor, alternative dispute resolution agent, consumer court or ombud, with the intention that the parties resolve any dispute or agree on a plan to bring the payments up to date.

Even though section 129(1)(a) states that the credit provider “may” bring the default to the notice of the consumer, section 129(1)(b) states that a credit provider may not commence any enforcement proceedings before providing such a notice.

- **Pre-enforcement procedures in terms of section 130**

A credit provider may only approach a court for an order to enforce a credit agreement if the consumer is in default and has been in default for at least 20 business days and at least 10 business days have elapsed since the section 129(1) notice was sent to the consumer. These two periods may run concurrently.

Section 2(5) of the Act describes how business days should be calculated:

When a particular number of business days is provided for between the happening of one event and another, the number of days must be calculated by-

- (a) excluding the day on which the first such event occurs;
- (b) including the day on or by which the second event is to occur; and
- (c) excluding any public holiday, Saturday or Sunday that falls on or between the days contemplated in paragraphs (a) and (b) respectively.

If a consumer does not respond to the section 129(1) notice within the 10 business days provided or responded to the notice by rejecting proposals made by the credit provider, the credit provider may commence enforcement procedures, in other words, may proceed to issue and serve summons.

In the event that a consumer does approach a debt counsellor within the time constraints set out above, and if the consumer is found to be over-indebted, the enforcement of all credit agreements are effectively suspended for a period of 60 business days according to section 86(10). This provides

sufficient time for the debt counsellor to assess the consumer's financial situation and propose a possible solution to the credit providers concerned. If all parties concerned reach *consensus*, the Magistrate's Court or the National Consumer Tribunal may confirm that resolution or agreement as a consent order in terms of section 138. If, however, no agreement could be reached, the debt counsellor may refer the matter to the Magistrate's Court with a recommendation. This process is known as debt review and is a formal debt restructuring procedure. It can be seen as a debt relief measure, but also a collective enforcement mechanism.

In the event that the consumer is still in default after the 60 business days have expired, no *consensus* has been reached and the matter has not been referred to the Magistrate's Court, any credit provider concerned may terminate the debt review. Giving notice of such termination to the consumer, the debt counsellor and the National Credit Regulator terminates the debt review. The credit provider may now enforce the credit agreement. The general civil procedure as set out above will now apply.

## **2.19 IMPACT OF EMOLUMENTS ATTACHMENT ORDERS ON OTHER LEGISLATION AND VICE VERSA**

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, in accordance with the time period and other requirements specified in the agreement, law, court order or arbitration award.

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 Public Finance Management Act 1 of 1999.

## **2.20 SUMMARY**

### **2.20.1 Emoluments attachment and garnishee orders**

A common misconception that a garnishee order and an emoluments attachment order are one and the same exists. This is not the case. An emolument attachment order refers to the process through which the employee's salary is attached. The employers are referred to as the garnishee, as it is his duty to deduct the amount stipulated by the order from the employee's salary.

### **2.20.2 The emoluments attachment order and the debt collection process**

An emoluments attachment order forms part of the debt collection process and is one of the instruments available to enforce a court judgment. In practice the order usually follows upon default judgment obtained in terms of a consent to judgment provided for in sections 57 and 58 of the Magistrate's Court Act 32, 1944. It should be noted that other debt collection methods exist, such as execution against property of the debtor or orders obtained after enquiry into the financial position of a debtor by the court. The issuing of an emoluments attachment order seems to be the preferred collection method especially where the consumer does not have any other attachable assets.

### **2.20.3 Jurisdiction**

The Magistrates' Court Act states that a judgment creditor must issue an emoluments attachment order in the district where the judgment debtor's employer is resident, or carries on business or is employed.

#### **2.20.4 When to apply for an emoluments attachment order**

An emoluments attachment order can only be issued when the judgment debtor has consented to such an order; when the court authorises such order; or in terms of a notice. In the latter instance a notice is sent to the judgment debtor by way of registered mail, informing him of the judgment debt and all unpaid costs. This notice deems to warn the judgment debtor that an emoluments attachment order will be issued against him after 10 days of issuing such a notice.

#### **2.20.5 Drafting, issuing and service of emoluments attachment orders**

An emoluments attachment order should be signed by the judgment creditor or his attorney, and the clerk of the court. It must be served on the judgment debtor's employer by sheriff, and sufficient information needs to be provided in order to enable the employer to identify the employee (judgment debtor).

#### **2.20.6 Deductions and payments of an emoluments attachment order**

The first instalment must be deducted by the employer at the end of the month following the month in which the order was issued. If deductions are to be made on a weekly basis, payment will commence at the end of the second week in the same month in which the order was issued. The garnishee is entitled to 5% commission on the amount payable to the judgment creditor. As an emoluments attachment order is a order of court a warrant of execution may be issued against the garnishee if he fails to abide by such order. Both the garnishee and judgment debtor may dispute the validity of such an order in a court of law.

#### **2.20.7 Where the debtor leaves the service of the garnishee employer**

In the event that the judgment debtor leaves the service of the garnishee employer and thereafter resume employment elsewhere, the judgment creditor or his attorney, must serve a copy of the order on the new employer by sheriff.

#### **2.20.8 The rescinding and amendment of an emoluments attachment order**

Any emoluments attachment order may be amended, rescinded or suspended by order of court if good reason can be shown. Should the judgment debtor prove that he has insufficient funds after deductions were made, the order can be rescinded, or the instalment amounts can be decreased.

#### **2.20.9 Lost warrants and orders**

Should an emoluments attachment order become lost or misplaced, a court may issue a new order upon application to court. All interested parties must be informed by way of registered mail.

#### **2.20.10 Costs of an emoluments attachment order**

Part I of Table B of Schedule 2 to the Magistrate's Court rules sets out the tariffs used to determine the costs of an emoluments attachment order. It should be noted that VAT may be added, and that the prescribed fees for letters, telephone calls and attendance may be charged additionally on a party-and-party-scale. In collection matters the collecting attorney is entitled to a 10% collection commission, capped on an amount of R300.00 of each instalment collected. However when emoluments attachment orders are utilised, the garnishee employer is entitled to a 5% administration fee payable by the creditor, and therefore the collecting attorney may only collect a further 5% from the debtor. Sheriff's fees may also be added. These fees will depend on the distances that were travelled by the sheriff.

### **2.20.11 Free statement of account**

The judgment debtor may obtain a statement of account free of charge.

### **2.20.12 Offences**

It is a statutory offence for an employer to dismiss a judgment debtor due to the service of an emoluments attachment order. It is also a statutory offence if the garnishee does not provide full particulars of the judgment debtor's emoluments upon request of same.

### **2.20.13 National Credit Act and its effect on civil procedure**

The National Credit Act 34 of 2005 amended the civil procedure as far as the enforcement of credit agreements is concerned.

The National Credit Act 34 of 2005 became fully effective on 1 June 2007. The Act only applies to credit agreements between parties dealing at arms length, and made or having an effect within the Republic. Credit agreements are divided into four categories, namely: credit transactions, credit guarantees, credit facilities and a combination of the aforementioned.

Before a creditor may commence enforcement procedures on an agreement qualifying as a credit agreement, certain extra requirements apply. The creditor has to serve a notice on the debtor informing him of the debt owed and of certain rights under the Act. One such right is the right to refer the matter to a debt counsellor. No enforcement measures may commence without first delivering such notice to the consumer. According to the Act a creditor may only approach a court for enforcement of a credit agreement if the consumer is in default, and has been in default for at least 20 business days, and at least ten business days have elapsed since service of the notice. These periods can overlap. Should the consumer approach a debt counsellor and the debt counsellor determine that the consumer is indeed over-indebted, the enforcement period is suspended for a period of sixty business days.

#### **2.20.14 Emoluments attachment orders and other legislation**

The Basic Conditions of Employment Act states that an employer may not deduct any monies from the employee's remuneration unless permitted by law. It further states that an employer should pay said deductions in accordance with the time periods provided by law. State employers may refuse deduction, should it result in more than 40% of the employee's remuneration to be subject to deductions.

#### **2.21 EMOLUMENTS ATTACHMENT ORDERS IN OTHER COUNTRIES: SOME ASPECTS**

The original terms of reference of this investigation did not include a comparative analysis of the position re in respect of garnishees in other countries. Time and costs factors thus understandably limited a thorough investigation. It could however be extremely useful to analyse the position in other countries regarding legal requirements, procedure and limitations.

In the **United States of America** Title III of the Consumer Credit Protection Act (CCPA) governs the garnishment of wages. Title III applies to all employers and individuals who receive earnings for services (including wages, salaries, commissions, bonuses and income from a pension or retirement program).

Wage garnishment occurs when an employer withholds the earning of an individual for the payment of a debt as the result of a court order.

Title III provides certain protective measures to employees. An employer is prohibited from discharging an employee because his or her 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 does not, however, protect an employee from discharge if the employee's earnings have been subject to garnishment for a second or subsequent debt.

Title III further protects employees by limiting the amount of earnings that may be garnished in any workweek or remuneration period to the lesser of 25% of



disposable earnings or the amount by which disposable earnings are greater than 30 times the federal maximum hourly wage prescribed by section 6(a)(1) of the Fair Labor Standards Act of 1938. This limit applies regardless of the number of garnishment orders received. The federal minimum wage is \$5.85 per hour effective 24 July 2007; \$6.55 per hour effective July 24 2008 and \$7.25 per hour effective 24 July 2009. Disposable earnings are the amount left after statutory deductions (e.g. federal, state and local taxes, social security, UIF and state employer retirement systems).

The restrictions do not apply to court orders for payment of federal or state taxes or for child support or alimony. In support (maintenance) cases up to 50% of an employee's disposable earnings may be garnished if the employee is supporting a current spouse or child and up to 60% in cases where the employee is not doing so. An additional 5% may be garnished for child support or alimony payments over 12 weeks in arrears.

If a specific state's garnishment law differs from the provisions of federal law as contained in Title III, the employer must adhere to the law resulting in the smaller garnishment, or prohibiting the discharge of an employee because his or her earnings have been subject to garnishment for more than one debt.

At present four **US States: North Carolina, South Carolina, Pennsylvania and Texas** do not allow wage garnishment at all except for debts related to taxes, child support, federally guaranteed student loans and court-ordered fines of restitution for a crime the debtor committed. Several other States observe maximum thresholds that are lower than the 25% maximum provided for the federal law. In some States garnishment are prohibited in certain circumstances. In **Florida**, for example, the wages of a person who provides more than half the support for a child or other dependant are exempt from garnishment altogether.

While some types of disability are exempt from attachment, only active duty members of the armed forces and disabled veterans are completely “judgment proof”.

The position regarding attachment of wages, salary and income differs between member states of the European Union.

In **Greece**, enforcement action may not be taken against salary, pension or insurance claims at all; whilst the position in the other member states seem to be that wages may be garnished under specific circumstances and conditions normally subject to quantitative restrictions.

In **Finland and Portugal**, as a general rule one third of the debtor’s net wage may be garnished.

A similar restriction exists in **Poland** except that in the case of maintenance payments up to 50% can be seized.

In **Sweden** only a portion in excess of the debtor’s needs may be garnished, prioritising claims under the Marriage and Parents and Children’s Code.

In **France** a proportion of salary fixed according to a sliding scale depending on the amount of income and number of dependants, re-evaluated on an annual basis is exempt from garnishment.

Similarly in the **United Kingdom** an attachment of earning procedure exists. The sum of earnings deducted for enforcement is calculated taken into account the “normal deduction rate” and “the protected earnings rate”. The former is the rate at which the Enforcement of Judgment Office thinks it is reasonable for the debtor’s earnings to be applied to meet his liability under the judgment. The latter is the rate below which the Enforcement of Judgments Office considers the debtors earning should not be reduced having regard to his resources and needs (food, rent or mortgage and essentials – regular bills such as electricity).



## CHAPTER 3 : SELECTED CASE STUDIES

### 3.1 INTRODUCTION

Anecdotal evidence of numerous cases abound where irregularities regarding the consent to emoluments attachment orders, the overcharging of judgment debtors, irregularities in the obtaining, issuing or service of emoluments attachment orders are mentioned.

The approach of the research team has been that it is unnecessary to record in detail large numbers of these cases if they merely prove the same type of irregularity, for example emoluments attachment orders issued from courts without jurisdiction. Cases where allegations of irregularities or fraud could not be verified or have not been proved (despite strong suspicions) have for obvious reasons not been included.

A number of apparent irregularities have also been encountered that still warrants further investigation and could therefore not be included in this report. These include claims by consumers and payroll administrators where they are unwilling to allow their names to be published; cases where court files containing corroboration are missing or where matters are contested and thus sub judice. The team also came across a large number of cases where consumers, as a result of financial and legal illiteracy wrongly believed they had been prejudiced, for example not taking interest or costs into account when claiming accounts have been paid in full.

It was also clear that certain agencies acting on behalf of consumers or employers in managing or attaching emoluments attachment orders were making claims regarding the abuse of the process or the extent of the irregularities (and their own successes) that they could/would not back up with reliable evidence. In some instances some of these service providers were initially very keen to assist the team, but once they realised that there was no immediate benefit for them they became reluctant to share information that they initially claimed to have.

The following cases illustrate various irregularities or apparent irregularities.

**3.1.1 In the matter of:** *JD GROUP (PTY) LTD v JOHN KOKS*  
**Magistrate Court:** District of Johannesburg  
**Case Number:** 0033056/2005

A common irregularity that occurs in the garnishee orders, that is impossible for both the clerk of court from where the emoluments attachment order is issued and the payroll administrator to detect, is the fact that the capital amount claimed is incorrect. This stems from the fact that the emoluments attachment order merely reflects the amount that judgment was granted for. In the case of default judgments these are the amounts that summons was issued for or consent to judgment was signed for.

A practice has developed amongst debt collectors and attorneys to contract with creditors on the basis that a contingency fee or reward of 25% of the amount handed over and collected will be retained by the debt collector or attorney as remuneration in lieu of any fees charged to the creditor.

The advantage to the creditor is that he is not saddled with legal fees in cases where the bad debt cannot be recovered, for example the risk of not recovering fees and disbursements is passed on to the debt collector or attorney acting on behalf of the creditor, who in case of success is entitled to 25% of the amount collected, irrespective of the time or money spent to recover same.

Some debt collectors or attorneys simply add the contingency fee to the capital amount claimed and proceed to claim this in the summons or to include this as part of outstanding capital in the case of consent to judgment. Where debtors query this amount they are simply told either by the creditor or the debt collector that fees and disbursements are included in the amount claimed.

This contingency fee can be, and often is 25% of the original capital amount. It gets even worse – interest and the 10% collection commission are also

claimed on this inflated capital amount, to which further costs and disbursements are added.

This is prevalent in but not limited to the furniture retail sector and some of its debt collectors. In fact FairDebt, estimates this arrangement to be applied to the vast majority of cases investigated by them.

One such case is that of *JD Group (Pty) Ltd trading as Russells v John Koks*. During February 2005, Russells South Gate handed an amount of R34 553.88 to T&J Associates for collecting. A letter of demand was sent to the debtor, who subsequently signed a consent in terms of section 58 for the amount of R43 446.10 for which judgment was obtained and an emoluments attachment order was issued together with R20.00 costs (presumably a revenue stamp). In this was included the amount of R187.00 sheriff's fees (presumably for service of the emoluments attachment order).

The employer deducted R2 655.00 per month for the period 5 May 2005 to 6 September 2006: an amount of R45 135.00. Only R35 815.59 was paid over to Russells.

Upon query the attorneys concerned supplied the following explanatory statement:

Opening balance	R34 553.99
Sheriff fees	<u>187.00</u>
	34 740.88
"All costs"	<u>8 685.22</u>
	43 426.10
Revenue stamp	<u>20.00</u>
	<u>R 43 446.10</u>

When an explanation for how the "All costs" of R8 685.22 was made up (this incidentally is 25% of the amount handed over plus sheriffs fees) the explanation was that this was "customary". FairDebt acting on behalf of the consumer then approached the plaintiff who conceded:

that T&J Associates had no right to add 25% to the capital amount. No instruction to do so was issued to them. Our contract reads that we will pay the attorney 25% on all collections.

They offered to repay this amount.

Further investigation showed that an amount of R4 190.00 was received by Russells directly from the debtor after handover of the account to the attorneys. This was never conveyed to the attorneys and thus not taken into account when the emoluments attachment order was granted.

It also turned out that Russells had at a stage added R888.35 "legal fees" to the account prior to handover, without Russells being entitled to it.

A recalculation was done:

Capital	R34 553.88
Less direct payments	<u>4 190.00</u>
	30 363.88
Less payments by EAO	45 135.00
Less legal costs	888.35
Collection costs	<u>3 632.00 *</u>
Overpaid	R12 027.43

- A refund of R12 017.43 was obtained for the client
- \*10% plus vat
- In fact only 5% could be charged if the employer also deducted 5% as he would be entitled to do

This case study begs serious questions. If the debt collectors and attorneys concerned added 25% to this client's account and claimed that this was customary, it can only be assumed that this was done to all the accounts handed to them.

The same applies to the illegal charging of legal costs by Russels and the lack of communication between creditor and attorney regarding payments made to the creditor after handing the matter over to the attorneys for collection.

**3.1.2 In the matter of:** ***SCORE PRICE & PRICE v NYAWO NEP***  
**Magistrate Court:** **District of Kempton Park**  
**Case Number:** **21824/07**

This case is only used to reflect the huge mistakes that attorneys can and do make regarding outstanding balances as well as the importance of it being checked by the employer/employee or their agents. It should also be checked against the employee salary advices as well as the records kept by the instructing creditor.

On 4 June 2008, A van der Walt Attorneys, acting on behalf of Score Price & Pride, informed the employer that an amount of R5 245.88 was still due by the debtor who had consented to judgement and an emoluments attachment order.

The balance was placed in dispute by FairDebt, who acted on behalf of the debtor, on 23 June 2008. On 24 June 2008 the employer received a letter simply stating:

Abovementioned refers. Please note that the balance has been settled in full. Please note that the emoluments attachment order must be cancelled with immediate effect. We trust you find this in order.

Most employers and employees would leave it at that but in this case the debtor continued the dispute (as payments were made and not credited; illegal costs charged; etc). This resulted in the attorney repaying the debtor R5 178.49 (less R650 + VAT for rescission of judgment) i.e. R4 435.49 on 3 July 2008.

It may also be mentioned that the particular emoluments attachment order was issued from the Kempton Park Magistrate's Court, although the employer and employee both at all relevant times were domiciled in Natal.



The attorney relied upon a consent to judgment which included the following paragraph:

Consent to jurisdiction of the Magistrate's Court.

After Magistrate's Court is then written in Kempton Park.

This is followed by:

Signed at ..... on the  
and once again Kempton Park & 15 February is inserted.

Provision is then made for the signature of the defendant as well as the signatures and addresses of the two witnesses. Both these addresses are in Natal.

The debtor denies that she ever consented to the jurisdiction of the Magistrate's Court Kempton Park; moreover that contrary to the document stating it, she never signed the document in Kempton Park. In fact, she insisted that she never signed the consent at all and never met the debt collector who claimed to have obtained her signature.

It was also apparently acknowledged by the witnesses that they were not present when the debtor allegedly signed the document. One of them allegedly stated that he merely signed the document as witness when it was presented to him by a field agent who claimed to have obtained Ms Nyawo's signature (in Natal!).

Note: During the course of our investigations it was apparent that a huge number of consents to judgment and emoluments attachment orders was obtained in the Magistrate's Court Kempton Park, irrespective of where the debtor resides or is employed or for that matter where the debt arose or even where the creditor or his attorney was situated. It can be argued that a debtor in given circumstance could consent to the jurisdiction of a specific Magistrates' Court for reasons of convenience. However, as the employer also has an interest in the matter it has become custom not to obtain the consent of the employer as well, which apparently is wrong. During the course

of our investigation we could not get an explanation why the specific Magistrates' Court i.e. Kempton Park, featured so prominently in consents to jurisdiction.

<b>3.1.3 In the matter of:</b>	<b><i>RNT NDWANDWE</i></b>
<b>Magistrate Court:</b>	<b>District of Nongoma District of Piet Retief</b>
<b>Case Number:</b>	<b>181/03 (Nongoma) 104/04 (Piet Retief)</b>

Due to poor administration by credit providers, outstanding debt are sometimes handed to more than one collector which results in multiple summonses as well as emoluments attachment orders. Two collectors then collect on the debt and the consumer is held liable for the legal costs. An uninformed consumer will not dispute this practice and even if such consumer directs enquiries to the credit provider, the consumer will generally not be in a position to recalculate or verify the amount due.

Ms Ndwandwe bought furniture from Price & Pride. This account was handed over for collections to AR COLLECTIONS and later also to A van der Walt Attorneys. Two judgments were obtained against the client for the same debt. The first on 5 March 2003 in Nongoma (case number 181/03) and the second on 29 January 2004 in Piet Retief (case number 104/04). The consumer approached FairDebt who insisted on a refund of all monies deducted in terms of the second judgment.

It is quite peculiar that an exact percentage of 25% of instalments received was added to the consumers account under the inscription legal charges (similar to the matter of Mr. Koks discussed above). This is an unlawful practice as a contingency fee negotiated between an attorney and his client, must be deducted from the instalment paid over to the client and not added to the consumer's account. In this case, an amount of more than R13 000.00 was unlawfully charged in this way.

The JD Group offered an amount of R24 844.19 to Mrs. Ndwandwe in full and final settlement which she accepted.

**3.1.4 In the matter of:** *BALBOA FINANCE (PTY) LTD v PETROS*  
**Magistrate Court:** District of Kempton Park  
**Case Number:** 38636/07

This matter illustrates the issuing of an emoluments attachment order despite the fact that the account is up to date. It is a further example of a court issuing such order despite the fact that neither the employer nor the cause of action has any link to the jurisdiction of such court. The consumer further specifically denied any consent to the jurisdiction of this court.

In this instance, Mr Petros obtained a loan with principal debt of R2 000.00 from Balboa Finance. He paid this account in weekly instalments by way of bank deposits and was surprised when an emoluments attachment order was obtained against his salary as the account was not in arrears. A total amount of R2 232.00 was deducted from his salary and he paid an amount of R3 490.50 *via* bank deposits and debit orders. A further irregularity that occurred was the fact that the judgment as well as the emoluments attachment order was obtained in Kempton Park. The consumer resides and is employed in Pietermaritzburg. The consumer denies to have ever consented to the jurisdiction of the Magistrate's Court for the district of Kempton Park.

FairDebt investigated the matter and upon enquiry, Balboa and their attorneys (Landau Inc), responded by refunding the consumer an amount of R1 869.86 and later also a further amount of R1 387.08 pertaining to legal fees and commission wrongly charged to the account.

**3.1.5 In the matter of:** *CREDIT WISE (PTY) LTD V J SMITH*  
**Magistrate Court:** District of Kempton Park  
**Case Number:** 4634/2007

Mr. Smith is a consumer resident in Fochville. Onecor, a micro lender, through De Beer & De Klerk attorneys obtained judgment as well as an emoluments attachment order against his salary in the Magistrate's Court for the district of Kempton Park. The judgment was obtained in terms of a consent to judgment in terms of section 58 of the Magistrate's Court Act. The consumer alleges that he never signed such an acknowledgement of debt and that the signature appearing on the said documentation bears no resemblance to his own. Furthermore the document allegedly signed by the consumer is not completed. There are blank spaces where the consumer should have entered the agreed instalments to be paid on a monthly basis. Also the place and date of this alleged signing of the documentation was left blank. The witnesses (the names of Frederik Basson and Theunis Rossouw appear as witnesses) signed in Johannesburg. The consumer states that he did not travel to Johannesburg and therefore no-one could have witnessed his signature there. When all of this was brought to the attention of the attorneys concerned they investigated the matter and agreed to rescind the judgment and refunded the consumer the amount of R5 734.00.

**3.1.6 In the matters of: (*Vide p.1A & 143*)**

***QUANTUM v CUPIDO; QUANTUM v ADONIS;  
QUANTUM v JOGGEMS; QUANTUM v TSHWANTI;  
QUANTUM v JANSEN; QUANTUM v ORTELL;  
QUANTUM v KOELMAN ; QUANTUM v MATHYSE ;  
QUANTUM v ADAMS***

**Magistrate Court: District of Bloemfontein**  
**Case Numbers: 49528/02; 44954/02; 46029/02; 26424/03;  
50105/02; 16588/02; 47267/02; 47253/02;  
47306/02**

During 2004, the Stellenbosch Legal Aid Clinic was approached by 10 employees of Berco cleaning services. Their average monthly salaries were approximately R1400.00 per month. It transpired that they were all approached during their 45 minute lunch breaks by an agent offering cash

loans and were induced to sign contracts in a language which was not familiar to them. These persons had very little schooling and educational training.

Amounts of between R820.00 and R1 820.00 were paid to each person. Garnishee orders were then issued from the Bloemfontein court, where the creditor resided, even though the debtors were employed (and resided) in Stellenbosch. Amounts ranging from R4 000.00 to R7 000.00 were already garnished against the salaries of each of these persons when they sought legal aid.

Investigation of the matters revealed that the balance of the debt increased dramatically from month to month notwithstanding the garnishee deductions. In one of the debtors, Mrs C's case, her initial loan was R1300.00 in 2002. By March 2003 a garnishee order of R212.00 per month was implemented and the creditor informed the employer that the amount of the total debt was R4251. By January 2004, 11-monthly instalments amounting to R2338.00 had been deducted from Mrs C's salary. At this stage, the creditor indicated that the amount still due was R7 953.00. By July 2004 a further R1 062.00 had been paid over to the creditor, who informed that the balance was now R8 391.00!

In all of above discussed matters, garnishee orders were issued by the Clerk of the court. These orders were rife with various amendments made in pen, and it was impossible to say whether these amendments were made before or after the order was granted. In at least one instance an amendment to the total judgment (debt) was proven to be made unilaterally by the creditor after the order was obtained. All of the orders were issued from the wrong court, where the creditor abused the tactical advantage of going to a court practically inaccessible to the debtor.

The Clinic received instructions to apply for rescission of the default judgments which had to be brought in the Bloemfontein Magistrate's Court where, as pointed out previously, the judgment was granted.

The Magistrate's Court Act is clear on the fact that the court will only entertain applications for the rescission of judgments taken by default where there are merits in such an application and where the application is brought before the court *within 20 days after obtaining knowledge of the judgment*.

The last restriction is highly problematic in the situation at hand. The debtors had knowledge of the judgment against them well in advance of their objection to the continued enforcement thereof. As has been shown in the case-studies, shrewd money lenders can also manipulate the system to make it impossible for debtors to repay the agreed instalments. The debtor realises that judgment has been entered against him when he is informed of this by his employer, who deducts amounts from his salary in accordance with the emoluments attachment order. Initially the debtor reluctantly agrees to this measure, as he realises that he does owe an amount to the creditor.

When, after several months or years of substantial payments, the outstanding balance according to the creditor still increases with every instalment paid, the debtor develops an issue with the current existence, justification and enforceability of the judgment. Unless the creditor grants his consent to the rescission, the debtor now, maybe years after the initial judgment, came to his knowledge, barred from attacking the illegally enforced judgment as 20 days have expired a long time ago.

The court may grant condonation of the time period; but the Bloemfontein court in the Berco matters decided that the fact that the applicants were initially, though reluctantly, *ad idem* with the judgment and that they only much later indicated that they were now no longer so, proved insufficient cause for it to grant condonation.

Should it be impossible to rescind the judgment itself as a result of the 20-day limit, the only further option is to deal with the symptoms of the judgment. By this is meant specifically to tackle the garnishee order issued against the debtor's salary.

The results were that the garnishee order was rescinded, and no more deductions were made from the employer's salary. The threat of the looming impenetrable judgment against them was however not in the least bit diminished. They all remained "black-listed" as a debtor owing an amount of money established by unilateral fabrication by his creditor. The creditor could now still issue a warrant of execution against his debtor's property and also simply return to court with another application for the reinstatement of an emoluments attachment order.

A further practical problem which exists and which has been encountered in this matter has been the ineffectiveness of the human resource departments of the employer of garnishee debtors. In the Berco matter, the emoluments attachment orders of 10 employees of a large cleaning company were set aside. The relevant court orders, ordering the employer to cease deductions from the salaries, were faxed and hand delivered to the employer's human resource department. When the deductions continued in the following month, the relevant employer informed the employees that he could not be held responsible for this as the required administration took more than a month to finalise. Some months after the relevant orders were eventually administrated, debtors returned to the clinic with complaints that deductions had again been made from their salaries. Upon further investigation, it transpired that the creditor and / or his attorney had simply addressed a letter to the employer informing him that a certain amount was still outstanding on the debt and to continue subtracting the garnishee. Human resources acted on these instructions, under the threat that the employer could be directly responsible for payment of these debts if he failed to pay on behalf of his employees.

Although it is clear that the employer and the creditor acted negligently and / or dishonestly in these instances, reimbursing the debtor for these additional amounts subtracted from his salary proved to be a further labour-sapping exercise for Stellenbosch Law Clinic.

<b>3.1.7 In the matter of:</b>	<b><i>FURNITURE CITY v QJ KAROLISIN</i></b>
<b>Magistrate Court:</b>	<b>District of Humansdorp</b>
<b>Case Number:</b>	<b>1295/07</b>

The case of *Furniture City v Queeny Johanna Karolisin* (execution debtor) and Isiuwana Private Hospital (garnishee) provides proof of the onerous position that the employer of the judgment debtor often finds itself in. Ms Karolisin consented to judgment in terms of section 58 of the Magistrate's Court Act. At all relevant times, she was an employee of Life Health Care Group (Pty) Ltd, a company with limited liability and registered address at Oxford Manor 21 Chaplin Road, Illovo. The Life Health Care Group operates a number of private hospitals. Ms. Karolisin was employed at Isiuwana Private Hospital situated in Humansdorp. The payrolls administration is dealt with on a regional basis in Port Elizabeth.

The emoluments attachment order was issued by the court in Humansdorp and served by the sheriff of Humansdorp at the hospital in Humansdorp where she was physically employed. This hospital does not deal with salaries at all. As aforesaid, these are dealt with on a regional basis from Port Elizabeth. To complicate the matter further, the administration of emoluments attachment orders are outsourced to an external service provider, Summit Financial Partners situated at Midrand, Gauteng. It is not clear whether the emoluments attachment order was not forwarded to the payroll administrator in Port Elizabeth or from there to the external service provider or if it was received, why payment in terms of the garnishee order was not made timeously or at all. The unfortunate result was that a warrant for execution against Isiuwana Private Hospital was obtained in terms of s 65J(5) and movables belonging to the hospital attached. This matter was eventually resolved six months later by payment of the outstanding balance as supplied by the judgment creditor's attorney. In the process, additional costs of the attorneys and sheriff as well as further interest had to be paid, although we could not establish whether these extra costs were for the account of the employee, employer or external service provider.

A further practice that deserves to be noted is that the attorney concerned demanded that the employer (in case of payment into the attorney's trust account) should fax to his offices a proof of payment by way of deposit slip. He further demanded that the employer hereafter telephonically contacted the



attorney to ensure receipt of the faxed proof of payment. Failure to adhere to this was followed by a threat that further legal action will be taken.

**3.1.8 In the matter of:** *DB PETERSON v M PETERSON*  
**Magistrate Court:** District of Port Elizabeth  
**Case Number:** 32409/07

In the case of Dr DB Peterson (execution creditor) and Marlous Peterson (execution debtor), employed by Afrox Health Care Hospitals, an emoluments attachment order was served on the “paymaster” on 26 November 2007 for a R100 per month. In terms of section 65J(4)(a) the first deduction is to be made at the end of the month following the month on which the order is served on the garnishee (In case end of December 2007). On 24 January 2008, a warrant of execution was served on the hospital concerned in terms of which payment for 30 November and 31 December 2007 was claimed (R200.00). The costs for the warrant of execution amounted to R51.30 plus the sheriff’s fees for service of the warrant of execution as well as the costs for the upliftment thereof. Again, it was not clear which party was eventually liable for these extra costs incurred.

**3.1.9 In the matter of:** *D MORARA*  
**Magistrate Court:** District of Highveld Ridge  
**Case Number:** 5196/07

The cause of action was a micro loan of R2 000.00 (plus interest of R600.00) entered into on 1 June 2007 repayable on or before 25 June 2007. In the agreement provision was made for interest at 438% per annum as well as further “penalty interest” in case of failure to pay at the same rate. Consent to judgment and to an emoluments attachment order dated 25 June 2007 (i.e. last day for payment) was used in support of judgment. Judgment and emoluments attachment order was granted for R3 401.00 plus further interest at 15.5% i.e. normal *mora* interest payable at R800.00 per month. The reason for the refusal to grant interest at 438% is unclear. When furnishing an account to the garnishee/employer, the creditor however still claimed and charged interest at 438%.

Fortunately for Mr Morara, the payroll administrator noticed the discrepancy and insisted on paying at 15.5% which the creditor had to accept.

**3.1.10 In the matter of: *THE COUNCIL FOR DEBT COLLECTORS v KOCHNEL, BANTJES AND PARTNERS (PTY) LTD***

The Council for Debt Collectors has charged Kochnel, Bantjes and Partners, a major debt collection firm situated in Pretoria, for contravening the Debt Collectors Act. Disciplinary inquiries were instituted and the charges were failure to register personnel conducting debt collection functions, failure to perform duties with care and skill and also the use of unprofessional collection procedures.

The firm allegedly “served” fraudulent court documentation (judgments and emolument attachment orders) on employers. The creditor (plaintiff) in all these matters was ABSA or Unibank ABSA and most of the debtors were government employees.

On face value, all the documentation seems to have been issued from the Magistrate’s Court for the district of Johannesburg.

Evidence was lead on behalf of the Council and the witnesses (most being clerks of the Magistrate’s Court for the district of Johannesburg) testified to the following:

- No correlation could be found between the case numbers on the documents and the physical files at the court itself.
- None of the clerks that testified could identify the signatures on the consent to judgments as their own or could recognise the signatures as belonging to one of the other clerks.
- In some instances no revenue stamps were attached to the consent to judgments.
- Many consent to judgements and emoluments attachment orders had no stamps on it.
- The electronic numbering on some of the documents was not brought about by the court’s franking machine or bar coded franking machine. If the franking machine is out of order the clerk assigns a number by hand, signs and stamps the document. None of these procedures

appeared to have been followed in the documentation under suspicion. On some of the documentation, where the unfamiliar electronic number appeared, the year was not indicated.

- In certain other instances, a date has been stamped on the documents. The witnesses testified that they have never seen such a stamp and that clerks enter the date with a pen.
- Many of the requests for judgments had no signature on behalf of ABSA as required by the Act.
- There is an absence of the bar-coded machine as used by the court and the numbering of the documents was irregular.

The advocate on behalf of Kochnel, Bantjes and Partners closed his case without calling any witnesses. The respondents thus did not provide any explanation for the irregularities as evident from their documentation, although it could have reasonably been expected from them in the circumstances.

The Council stated that it is clear from the evidence of the clerks of the Magistrate's Court for the district of Johannesburg that the documentation was not processed in Johannesburg, that the signatures were not known to them and that the processes generally followed by the court was not adhered to in the documentation. The franking machine or bar-coded franking machine was not used on the documentation. On some of the documentation there was an absence of signatures of the clerks and the numbers on the documentation are unrelated to the physical files at court.

The evidence of the clerks was not contradicted. There is no evidence that the documentation was submitted to the Magistrate's Court for the district of Johannesburg. If the documents were issued it was done irregularly. It was found by the committee that the Council proved its case on a balance of probabilities.

Kochnel, Bantjes and Partners were found guilty in the judgment delivered on 31 January 2008. In July 2008 an order was obtained by the Asset Forfeiture Unit of the National Prosecuting Authority in terms of which assets belonging to the directors of Kochnel Bantjies were seized under the Prevention of Organised Crime Act - the first such case of its kind.

## CHAPTER 4 : SURVEYS AND INTERVIEWS

### 4.1 DATA SET A: EMPLOYEES

#### 4.1.1 Introduction

A data set consisting of the payroll records of 86 459 employees, both with and without emoluments attachments orders against their salaries were obtained. These employees were drawn from employers from the following industries:

- Health Care/Finance
- Health
- Security
- Tertiary
- Retail
- Insurance

They are employed in both urban and rural areas in all nine provinces. Administration and maintenance orders paid by means of emoluments attachment orders formed part of this data set. The data was captured by a single company who administers emoluments attachment orders on behalf of all the above employers.

#### 4.1.2 Limitations

Although the employees' records reflected different industries and different provinces the sample does not purport to represent South Africa as a whole or for that matter the industries included in the data set. Since the underlying weighing structures between the industries are not readily available, it is not possible to calculate a national average over the different industries.

The type of creditors making use of emoluments attachment orders was not available in all cases. In most instances, the name of the collecting agency or the attorney collecting on behalf of the creditors is reflected in the data set.

For 4 305 cases, the type of creditors could generally be established. When interpreting the results, the limited structure of the subset must be kept in mind.

The data set could not be used to accurately ascertain irregularities regarding emoluments attachment orders. The administrators referred those orders containing obvious irregularities back to the creditors or their attorneys for rectification. The remainder were accepted as correct and processed accordingly. It increasingly became clear to the research team that in order to accurately detect irregularities, a variety of investigations would have to be employed including forensic auditing, investigations by the Law Societies, the Debt Collectors Council and personal interviews with individual debtors.

Employers were reluctant to disclose personal particulars of employees, especially their salaries. To overcome this challenge, a further study on which we report under Data Set B was conducted.

#### **4.1.3 Summary of findings**

- **Employees**

The information from the data set was processed and is expressed through the following:

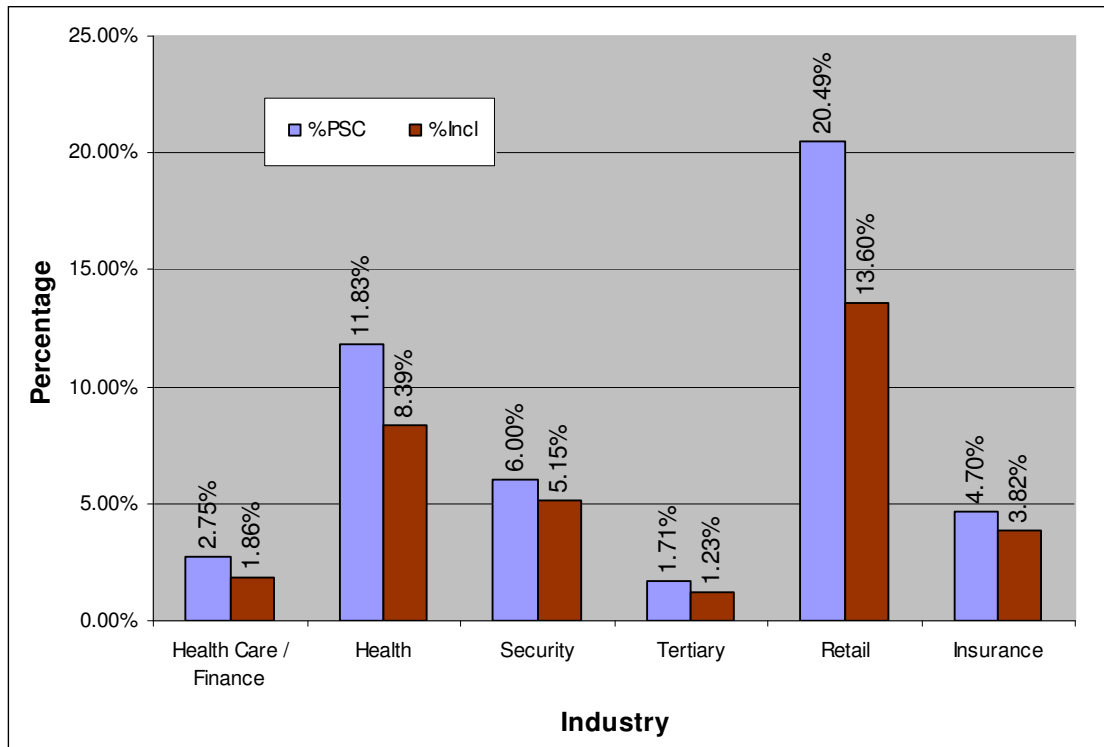
- %PSC            The total number emoluments attachment orders as a percentage of the number of employees
- %Incl           Percentage of employees with emoluments attachment orders
- %Other          Percentage of employees with emoluments attachment orders exclusive of administration and maintenance orders
- %Admin        Percentage of employees subject to administration orders
- %Maint         Percentage of employees subject to maintenance orders
- AEAO           Average number of emoluments attachment orders per employee
- AAmount        Average monthly monetary value of emoluments

**Table 2: Summary statistics per industry**

	Number of employees	PSC	%Incl	%Other	%Admin	%Maint	AEAO	AAmount
<b>Health Care/ Finance</b>	9 460	2.75%	1.86%	1.65%	0.14%	0.08%	1.51	536.29
<b>Health</b>	19 540	11.83%	8.39%	6.66%	1.45%	0.48%	1.46	349.72
<b>Security</b>	9 559	6.00%	5.15%	3.19%	1.06%	1.05%	1.18	287.50
<b>Tertiary</b>	7 304	1.71%	1.23%	0.82%	0.12%	0.30%	1.47	291.60
<b>Retail</b>	39 000	20.49%	13.60%	9.53%	3.57%	1.68%	1.55	311.38
<b>Insurance</b>	1 596	4.70%	3.82%	3.26%	0.13%	0.13%	1.37	516.25
<b>TOTAL</b>	<b>86 459</b>							

The graph below shows the different results obtained for total emoluments attachment orders as a percentage of the number of employees (%PSC), and the percentage of employees with emoluments attachment orders (%Incl).

In respect of emoluments attachment orders, it was not possible for the Public Servants Commission (PSC) to determine the exact number of public servants who made payments by way of emoluments attachment orders. The formula used by the PSC results in an over estimate of the proportion of employees facing salary attachments, as a specific employee may have more than one emoluments attachment order against his salary. For comparative purposes, the graph below represents figures calculated by means of the PSC formula and a formula reflecting the true number.

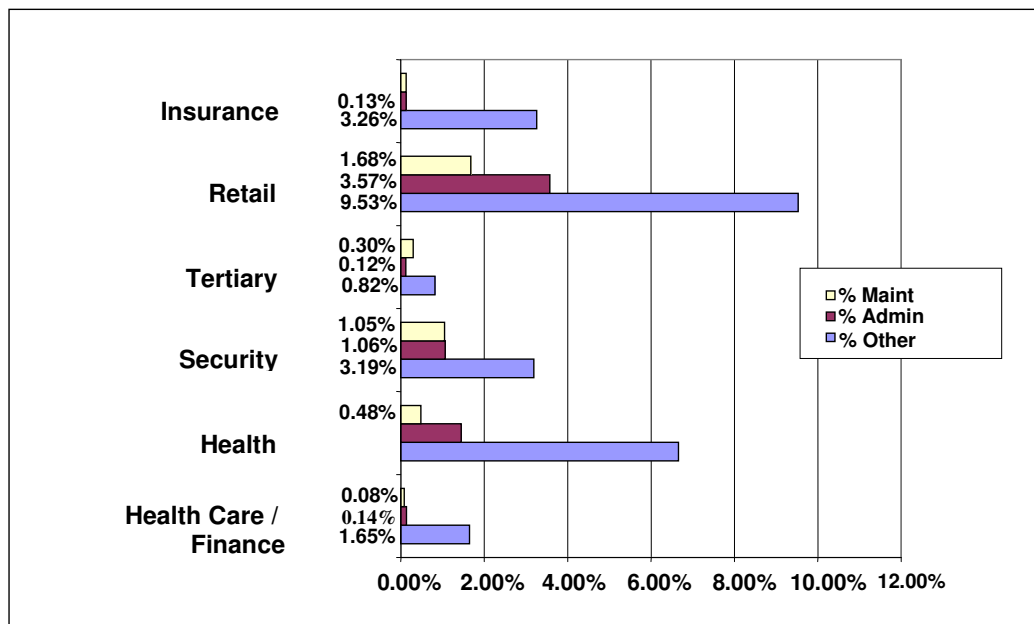


**Figure 1: Percentage employees subject to emoluments attachment orders**

The percentage (%Incl) of employees subject to total emoluments attachment orders varies from 1.23% for the tertiary industry to 13.60% for the retail industry. A marked over estimation can be seen when the calculations are done according to the PSC formula.

The following graph illustrates the results for the percentage of employees with emoluments attachment orders exclusive of administration and maintenance orders (%Other), as well as percentage of employees subject to administration orders (%Admin) and percentage of employees subject to maintenance orders (%Maint) per industry.





**Figure 2: Emoluments attachment orders differentiating between administration orders, maintenance orders and other debt**

Administration orders varied from 0.12% for the tertiary industry to 3.57% for the retail industry. In the same way, emoluments attachment orders relating to individual loans showed that tertiary had the lowest percentage, namely 0.82% and the retail category the highest, 9.53%.

- **Credit providers**

The subset of 4 305 cases was analysed and the following type of creditors and their frequencies were identified:

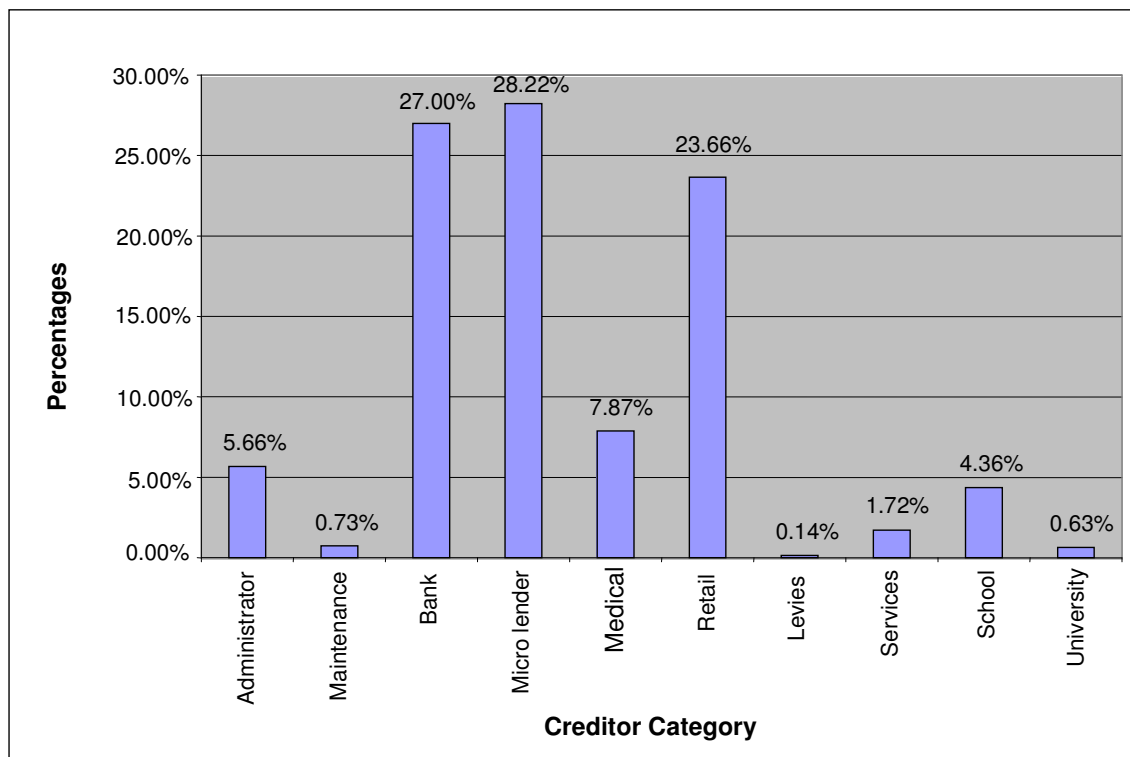
**Table 3: Type of creditors and their frequencies**

Creditor	Number of incidents per type	Total monthly instalment per type R	Average monthly instalment per type R	Percentage of total in number %	Percentage of total in monthly instalments %
Administrator	257	83 539.15	325.06	5.55%	9.01%
Maintenance	29	10 722.08	369.73	0.73%	10.25%
Bank	1 026	398 317.83	388.22	27.00%	10.76%
Micro lender	1 374	416 299.93	302.98	28.22%	8.40%

Medical	312	116 144.20	372.26	7.87%	10.32%
Retail	964	348 938.55	361.97	23.66%	10.03%
Levies	4	2 012.08	503.02	0.14%	13.94%
Services	78	25 375.97	325.33	1.72%	9.02%
School	237	64 357.86	271.55	4.36%	7.53%
University	24	9 298.03	387.42	0.63%	10.47%
<b>Total</b>	<b>4 305</b>	<b>1 475 005.68</b>	<b>3 607.54</b>	<b>100%</b>	<b>100%</b>

The above mentioned results show three major role players, namely micro lenders, banks and retailers. Micro lenders issued 28.22% of emoluments attachment orders followed by banks with 27%. Retail issued 23.66% of the emoluments attachment orders and medical accounts represent 7.87%.

The percentages per creditor type are also graphically presented below.



**Figure 3: Creditors issuing emolument attachment orders**

## **4.2 DATA SET B: EMPLOYEES WITH EMOLUMENTS ATTACHMENT ORDERS**

### **4.2.1 Introduction**

In light of the limitations experienced regarding Data Set A as set out above, a sample of 670 individual employees whose salaries were subject to garnishment were identified and data pertaining to these consumers and the attachment against their salaries scrutinised. The data was obtained from two sources, FairDebt an agency specialising in the verification of emoluments attachment orders as well as from the South African Bureau of Standards (hereinafter termed the SABS). A sample of 590 individuals from FairDebt and 80 individuals from the SABS were obtained. The FairDebt judgment debtors are mainly employed or resident in the northern parts of KwaZulu-Natal as well as the Eastern Cape whereas the SABS judgment debtors were mainly from Gauteng, KwaZulu-Natal and Mpumalanga.

Administration and maintenance orders were excluded from this study. Unlike administration orders, maintenance orders are not strictly to be interpreted as a debt as such but rather as an expense. However, both are also indicative of external judicial control over the employees' finances.

In this data set, gender, age and salary levels could be identified and brought into the equation. In addition to this, the emoluments attachment orders and in many instances, the preceding legal documentation could be perused. In the case of the FairDebt individuals, the research team had the benefit of access to the physical files and consultation notes.

### **4.2.2 Limitations**

The same limitation relating to a national representation as in Data Set A applies. The only other limitation experienced pertained to the irregularities regarding emoluments attachments. In many instances, the cases were still under investigation or sub judice. It must once again be reiterated that whilst emoluments attachment orders and other legal documentation *prima facie* seem to be in order i.e. regular, serious allegations regarding intimidation,

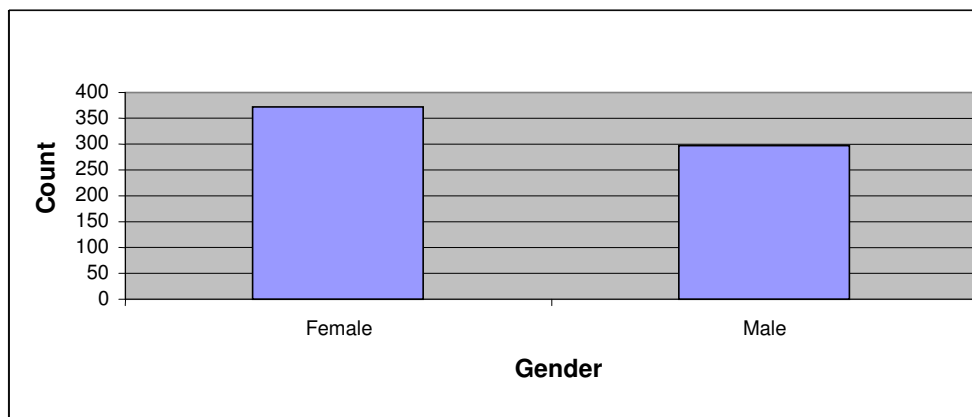
irregularities with regard to blank documentation signed by debtors, forgery of signatures, misrepresentation and fraud are made by consumers.

#### 4.2.3 Summary of findings

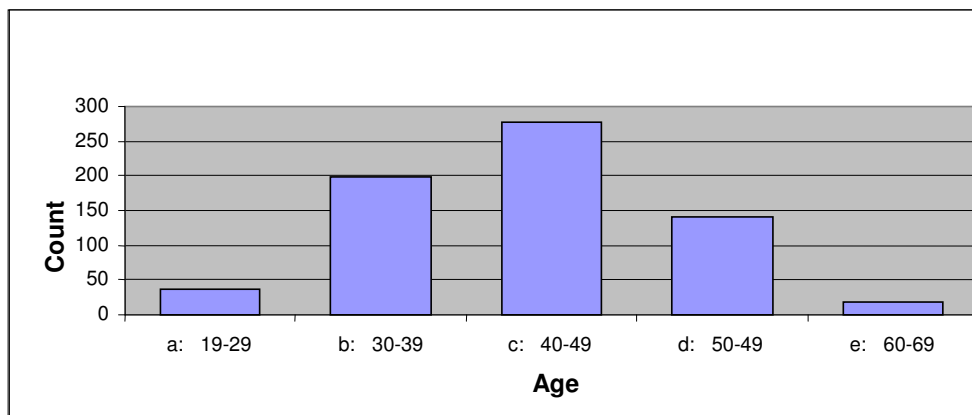
The data was summarised according to the following variables:

- Age
- Gender
- Salary level

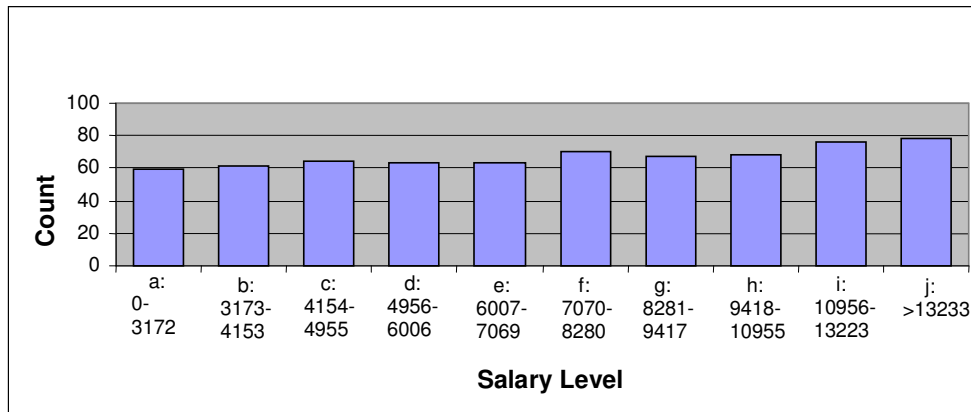
The number of females in the study was 371 and males 298. The average age per judgment debtor was 43 years and the average income per judgment debtor was R8 462. The distribution of these variables is shown in the bar charts below.



**Figure 4: Gender distribution**



**Figure 5: Age distribution**

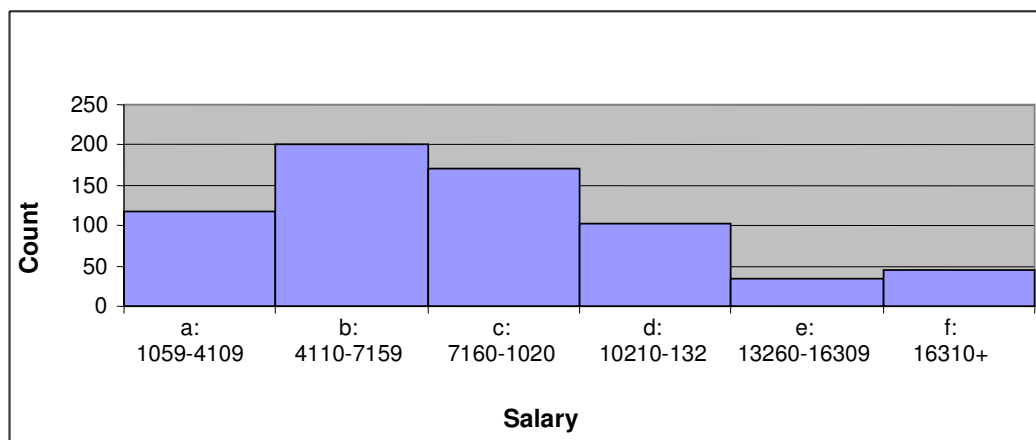


**Figure 6: Salary level composition**

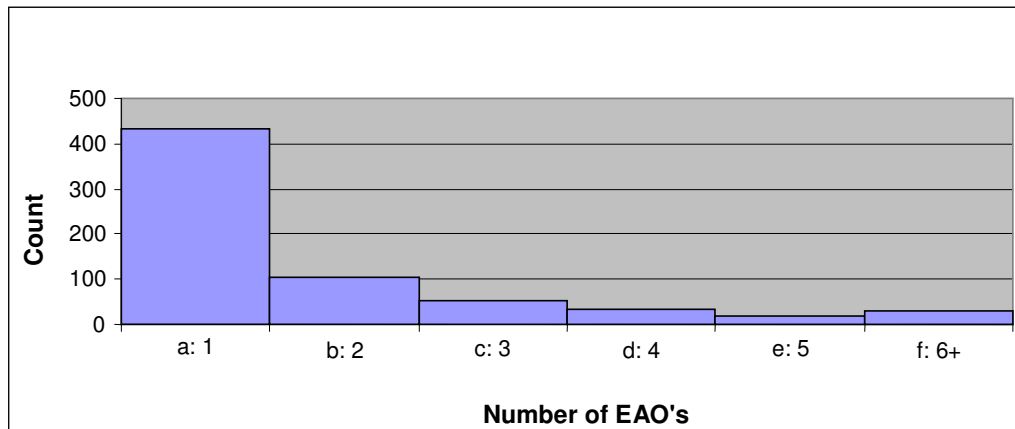
The number of emoluments attachment orders per judgment debtor was quantified in terms of the following variables:

- %Gross: The percentage of gross salary attached per judgment debtor
- EAO: Number of emoluments attachment orders per judgment debtor

The graphs below show the composition of these variables.



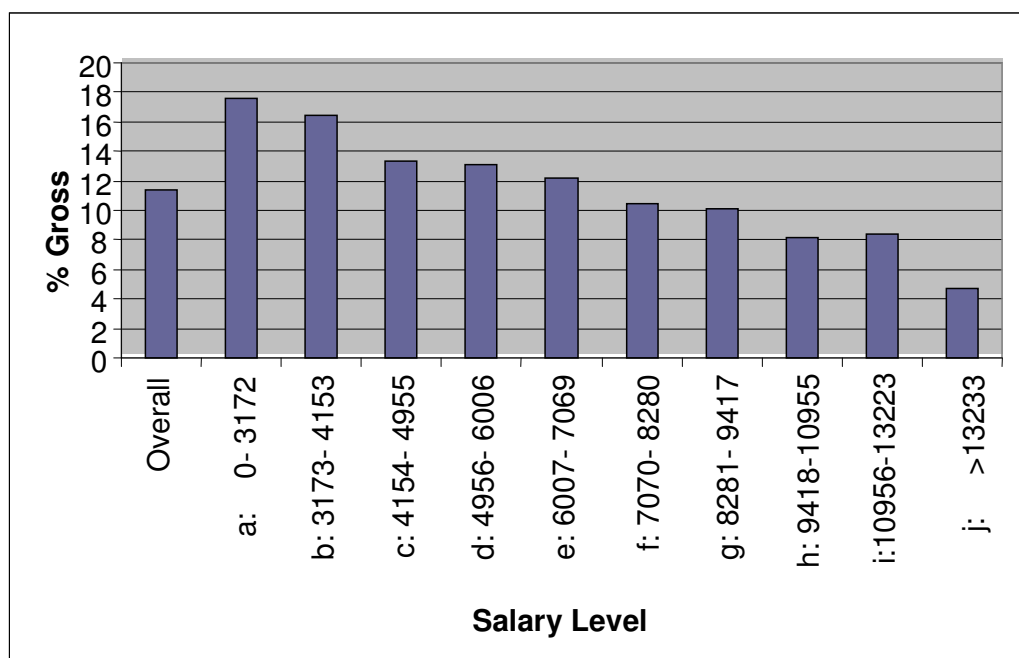
**Figure 7: Salary distribution**



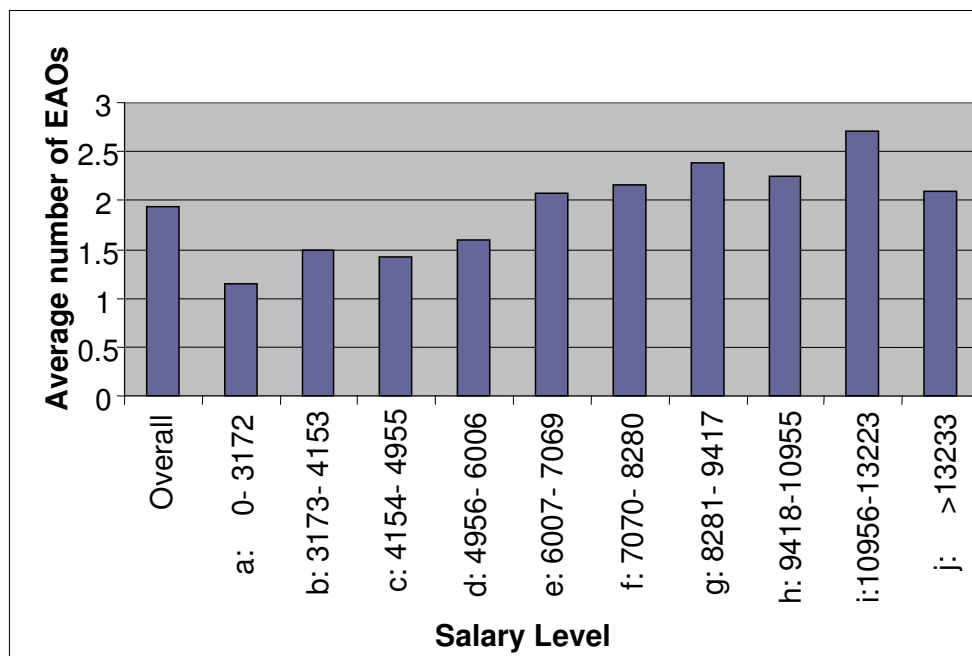
**Figure 8: Number of emoluments attachment orders distribution**

The average percentage of the gross salary attached is 10.97%, and the average number of orders per judgment debtor is 1.86.

Both the percentage of gross salary attached per judgment debtor and the number of emoluments attachment orders per judgment debtor were modelled by means of a general linear model to ascertain whether significant differences in gender, age and salary level exist. Only salary level was identified to significantly influence the percentage gross income attached as well as the average number of emoluments attachment order per judgment debtor. Refer to the bar charts that follow.



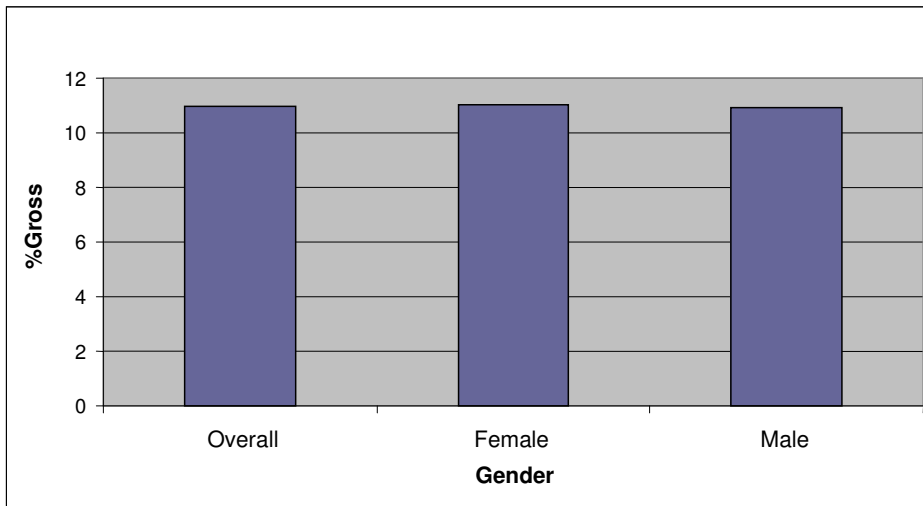
**Figure 9: Percentage gross versus salary level**



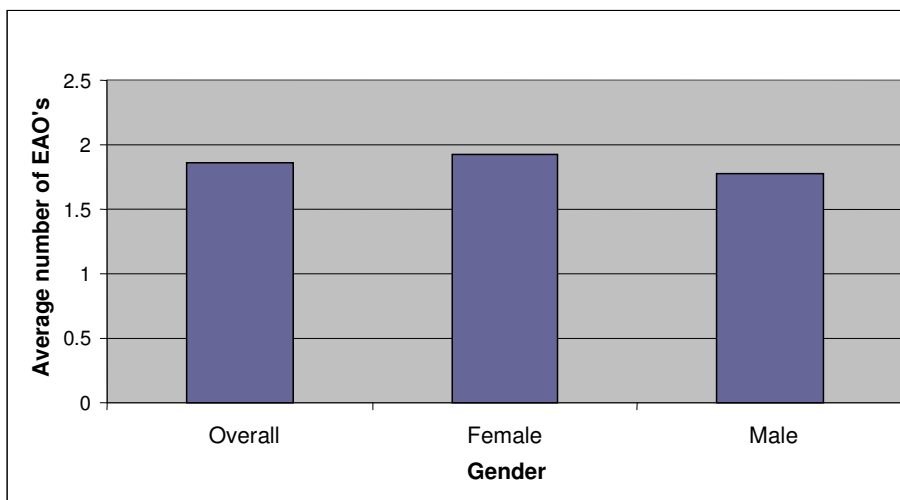
**Figure 10: Average number of emoluments attachment orders versus salary level**

It is clear from these charts that the percentage of salary attached through emoluments attachment orders generally decreases as the income increases. On the other hand, the average number of emoluments attachment orders per judgment debtor generally increase as the income increases.

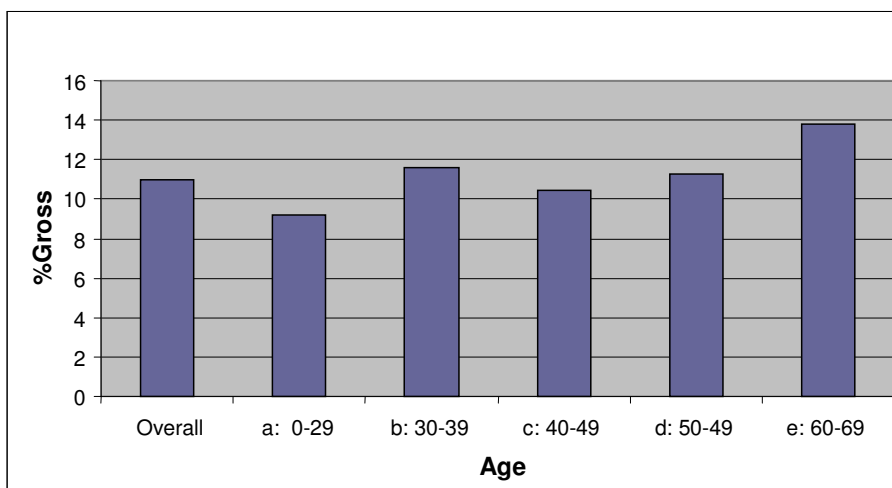
Although there are differences in the percentage of gross salary attached per judgment debtor (%Gross) and the number of emoluments attachment orders per judgment debtor (EAO) for gender and age, as can be seen from the graphs below, these differences are not contributing significantly.



**Figure 11: Percentage gross versus gender**

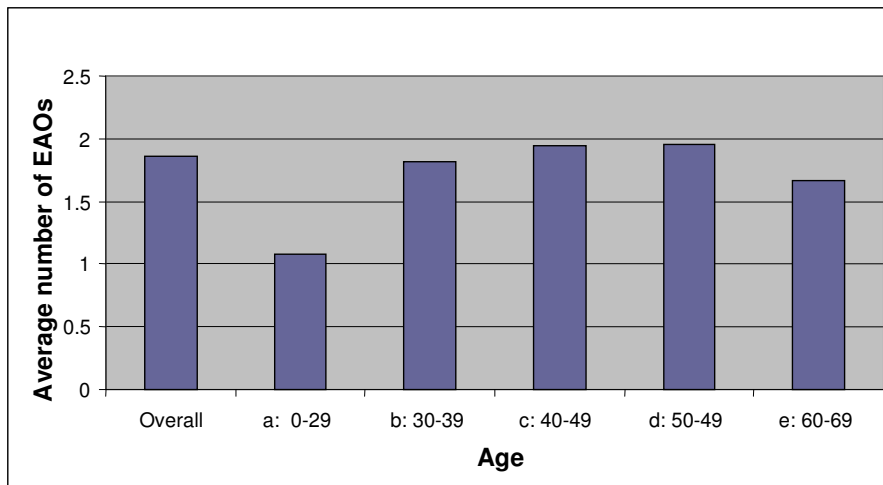


**Figure 12: Average number of emoluments attachment orders versus gender**



**Figure 13: Percentage gross versus age**





**Figure 14: Average number of emoluments attachment orders versus age**

### 4.3 DATA SET C: PUBLIC SECTOR

#### 4.3.1 Introduction

The Public Service Commission (PSC) released a report on the indebtedness of public servants during November 2007. In the report, the term garnishee order is used as a synonym for emoluments attachment order.

#### 4.3.2 Methodology

The report covered all national and provincial departments within the public service and focused on information for the 2006/2007 financial year. Information was acquired from PERSAL (Public Services Payroll namely: The Personnel and Salary Administration System). The data obtained from the PERSAL database was processed according to gender, age, department and component, amount paid to beneficiaries, post level and salary level.

#### 4.3.3 Limitations

The commission noted certain limitations to its research. These included the fact that information provided by PERSAL was based on the data that the various government departments provided to PERSAL. As a result, where

departments failed to update information regarding some of their employees, PERSAL was only able to provide the latest information submitted.

Furthermore, in respect of garnishee orders it was not possible to determine the exact numbers of public servants who made payments as one public servant could have been served with more than one garnishee order.

#### **4.3.4 Summary of findings**

- **Introduction**

Chapter 4 of the PSC report provides a statistical overview and analysis of the impact of garnishee orders on public servants. A number of 216 857 out of the total of 1 100 058 public servants made garnishee related payment through PERSAL i.e. 20% of the total number of public servants.

- **Cost of garnishee orders paid by public servants**

The total cost of payments as a result of garnishee payments that were issued to public servants amounted to 1.01 billion. When measured against the total budget for the compensation of employees in the public service, namely 174, R2 billion, public servants paid a percentage of 0.58% of state salaries to creditors by way of emoluments attachment orders.

- **Garnishee orders according to gender**

Of the 216 857 emoluments attachment orders, and under the assumption that one emoluments attachment order is equivalent to one public servant, 101 000 (47%) were females and the remaining 115 857 (53%) were males. The total population of females in the public service amounts to 57% and males to 43%. It is notable that an unexpected high proportion of males are making payments through emoluments attachment orders.



**Table 4: Number of public servants who made garnishee related payments expressed as a percentage according to gender**

Gender	Number of public servants making payments		Total population of public servants	
	Number	Percentage	Number	Percentage
Female	101 000	47%	623 263	57%
Male	115 857	53%	474 795	43%
<b>TOTAL</b>	<b>216 857</b>	<b>100%</b>	<b>1 100 058</b>	<b>100%</b>

- **Garnishee orders according to salary level**

The salary levels in the public service range from 1 – 16, 1 being the lowest level and 16 the highest. Salary levels 15 and 16 are heads of departments who also act as accounting officers managing the finances of the national or provincial departments respectively. Of the employees making garnishee related payments, the proportional highest number amounting to about 25% were employed at salary level 7 and the proportional lowest number, amounting to about 0.002% were employed at salary level 16. The detailed figures including those for other salary levels, is given in the graph below.



**Figure 15: Number of public servants who make garnishee related payments, reflected according to salary level**

The number of public servants' garnishee orders per salary level are also considered in the report and presented in the graph here below.



**Figure 16:** Amounts paid for garnishee orders by public servants, reflected according to salary level

It seems that salary level 7 represents the highest amount, but that does not reflect the fact that most of the public servants making garnish related payments are also employed within salary level 7. This amount should be normalised according to the number of employees in the salary category, in order to reflect the true position.

In the report, it is indicated that the highest number of financial misconduct occurs at salary level 7. Again, the highest percentage public servants are employed at this level, but there might be a correlation between over-indebtedness and financial misconduct.

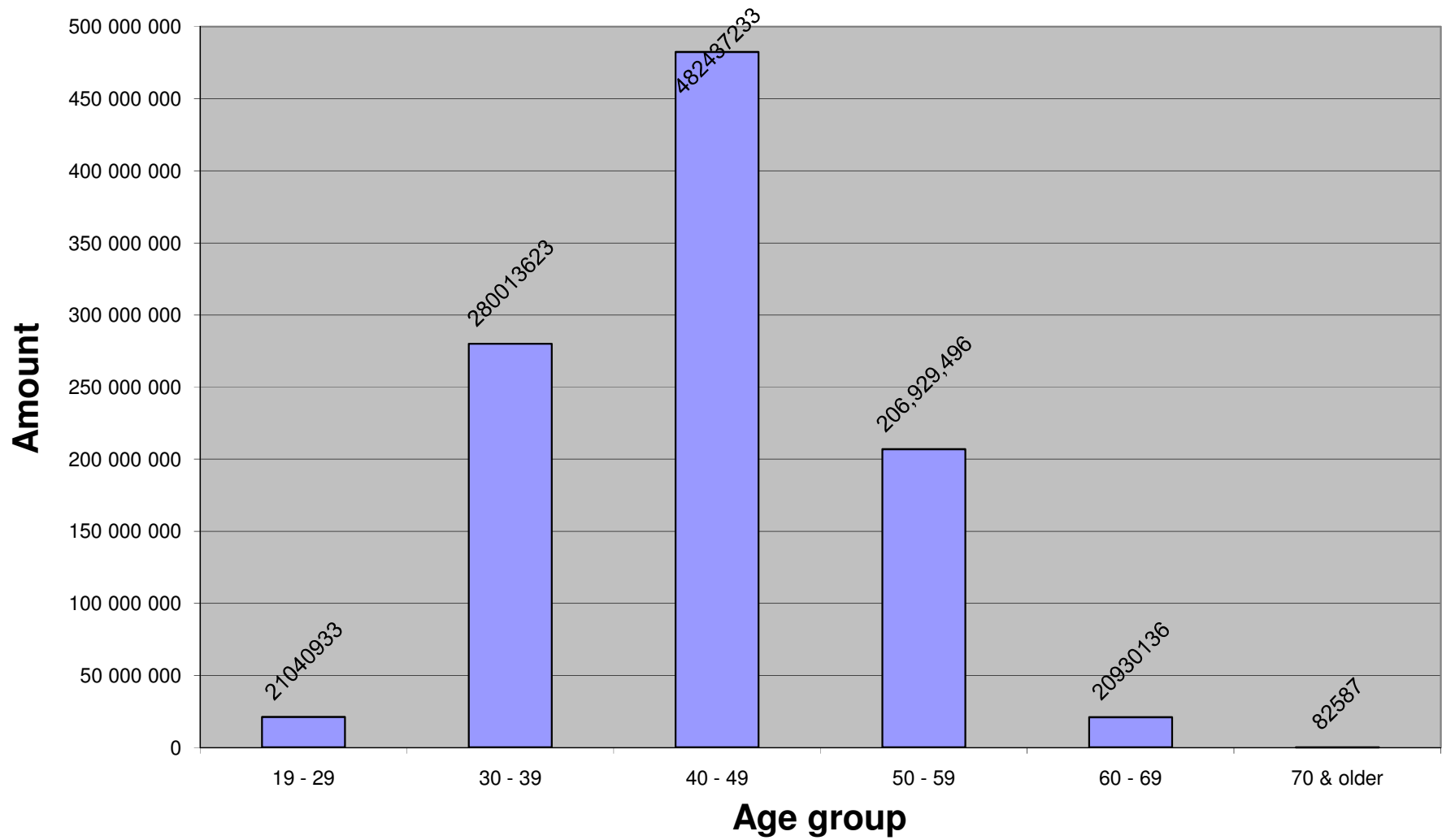
Furthermore, it is reported that 444 public servants at senior management make garnishee related payments inclusive of 25 who are employed at salary levels 15 and 16. It was already mentioned that these employees (salary levels 15 and 16) also act as accounting officers. According to the report this paints a bleak picture of the examples set by senior management within public service.

- **Garnishee orders according to age**

The report indicates that public servants between 40 and 49 years of age show the highest percentage of emoluments attachment orders against their salaries and also account for the highest amount of money being paid through emoluments attachment orders. This age group accounts for 45% of all employees making garnishee related payments. The servants between the ages of 30 and 39 of age are the second highest group and thereafter the age group between 50 and 59.

Once again, it should be kept in mind that the amount paid per age group should be normalised for the number of servants employed within that age group.





**Figure 17: Amount paid as a result of garnishee orders issued to public servants, reflected according to age-group**

## **4.4 DATA SET D: MAGISTRATE'S COURTS**

### **4.4.1 Introduction**

The research team identified the need to interview clerks of the civil courts to assess their knowledge of civil procedure regarding aspects related to emoluments attachment orders.

The Department of Justice and Constitutional Development's website contains on a provincial basis the office names, contact details and physical addresses of all the Magistrate's Courts in South Africa. According to these lists (last updated towards the end of 2007), there existed 453 Magistrate's Courts in South-Africa. A random sample of between 20% and 36% of all clerks of civil courts per province were interviewed.

Two methodologies have been employed, namely personal and telephonic interviews. These interviews can be typified as non-scheduled structured interviews during which specific questions were asked. These questions were presented to every interviewee in exactly the same format.

### **4.4.2 Limitations**

The most important disadvantage was that the personal interviews proved to be extremely time consuming and expensive with huge distances to be covered. Telephonic interviews on the other hand were much cheaper and more time efficient. The disadvantage was that in some instances the clerk of court could not be reached telephonically and the specific court had to be substituted with a different court within the specific province.

### **4.4.2 Summary of findings**

The research team decided to use the responses to only one question for purposes of this report. This question related to the issue of jurisdiction (capacity) of a specific court to issue an emoluments attachment order. The question was posed in the following manner:

I have obtained default judgment against a debtor from the court in whose area the defendant resides. Should the emoluments attachment order be issued from this court or must it be issued from the court in whose area the debtor is employed?

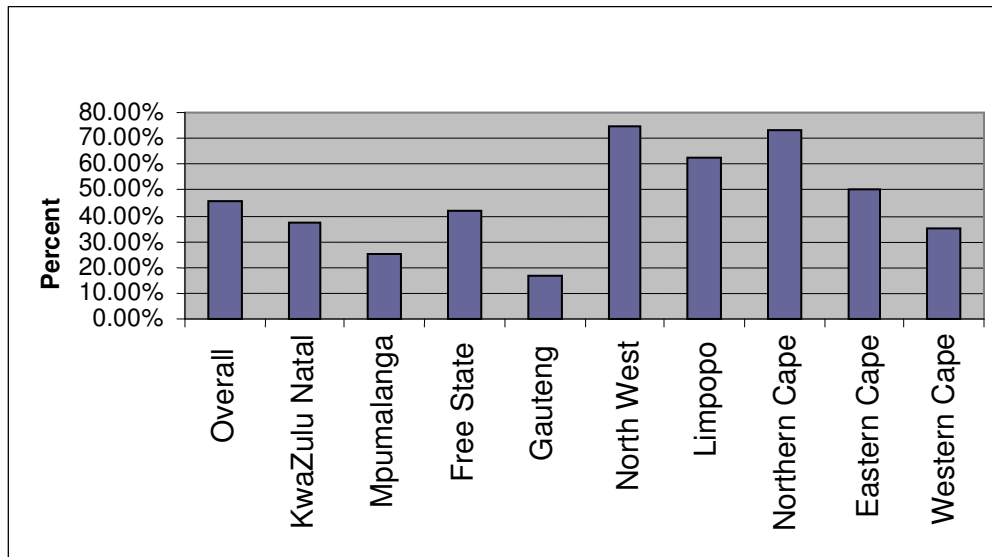
To put it differently, can I obtain judgment and an emoluments attachment order where the defendant resides and then send the emoluments attachment order to the sheriff in another jurisdiction (where the debtor is employed)?

**Table 5: Summary of findings: correct / wrong jurisdiction**

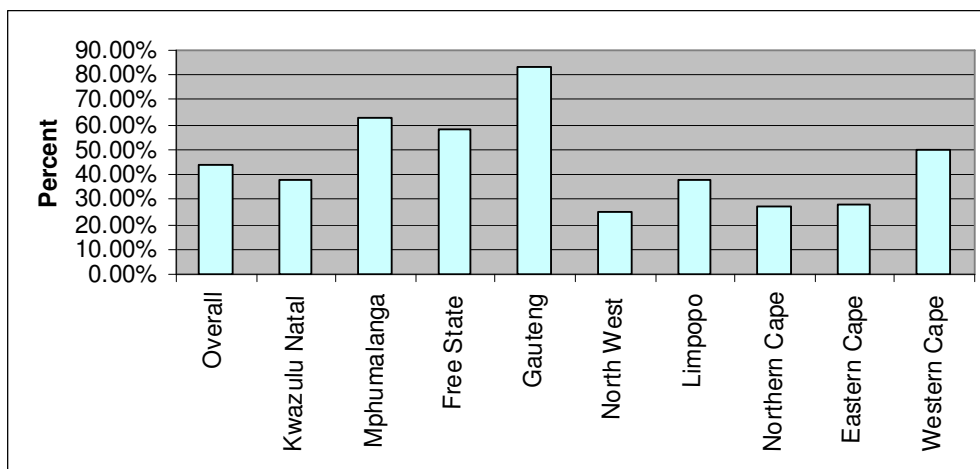
Provinces	Number of courts in province	Number of Clerks of court interviewed	% of courts interviewed	Jurisdiction: Correct	Jurisdiction:	Indicated did not know the answer
					Wrong	
Overall				43.62%	45.37%	11%
KwaZulu Natal	75	16	21.33%	37.50%	37.50%	25.00%
Mpumalanga	39	8	20.51%	62.50%	25.00%	12.50%
Free State	67	14	20.90%	58.40%	41.60%	0%
Gauteng	28	6	21.42%	83.33%	16.66%	0%
North-West	34	8	23.52%	25.00%	75%	0%
Limpopo	39	8	20.50%	37.50%	62.50%	0%
Northern Cape	35	11	31.42%	27.20%	72.80%	0%
Eastern Cape	81	18	22.22%	27.78%	50.00%	22%
Western Cape	55	20	36.36%	50.00%	35.00%	15%

The level of understanding of jurisdiction amongst clerks of the courts is tabled above. Gauteng had the highest percentage of clerks providing the correct answer (83%) followed by Mpumalanga (63%) and Western Cape (50%). North-West scored the lowest (25%) followed by Northern Cape (27%) and Eastern Cape (28%). If these figures are weighed and normalised, the results are as shown in the bar charts below.

In all fairness, the lack of knowledge would not necessarily reflect in practice. In the case where the debtor resides and works in the same area of jurisdiction, which is often the case, the issuing of the emoluments attachment order will be from the correct court by default.



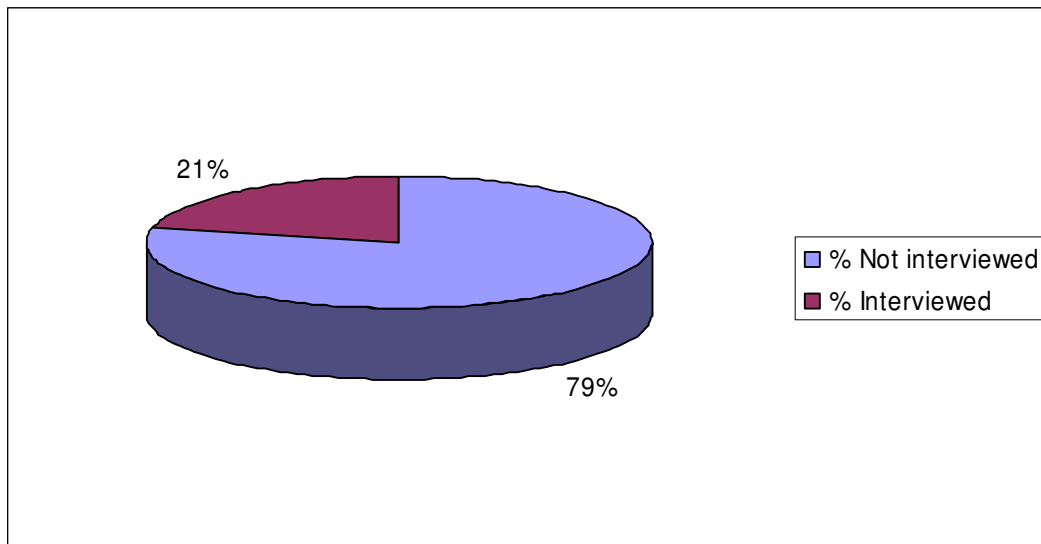
**Figure 18: Jurisdiction wrong**



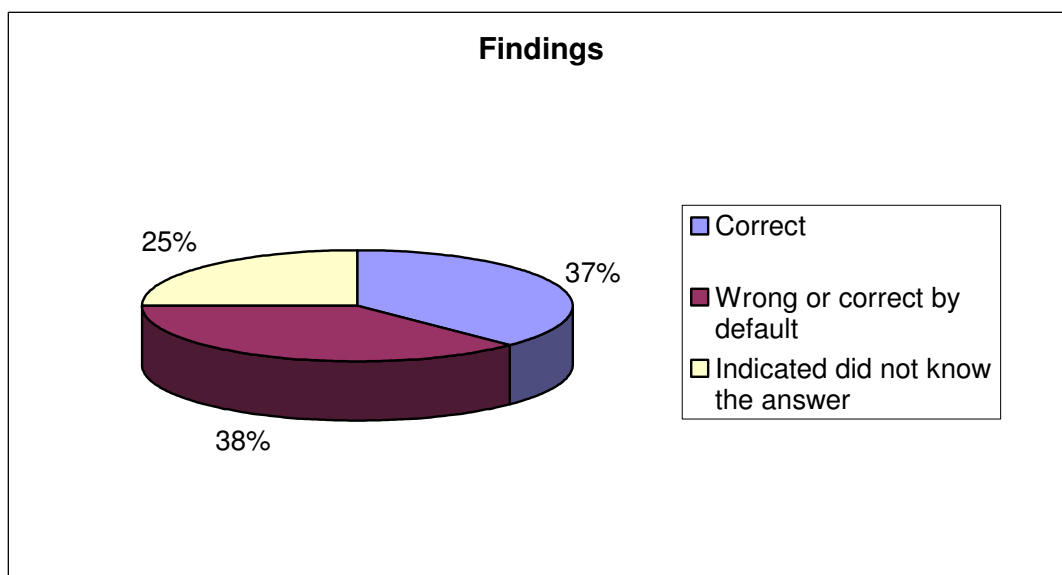
**Figure 19: Jurisdiction correct**

The results on a provincial basis are illustrated as follows:

### Kwazulu Natal Courts



**Figure 20: Kwazulu Natal Courts interviewed / not interviewed**



**Figure 21: Kwazulu Natal Courts findings**

## Mpumalanga Courts

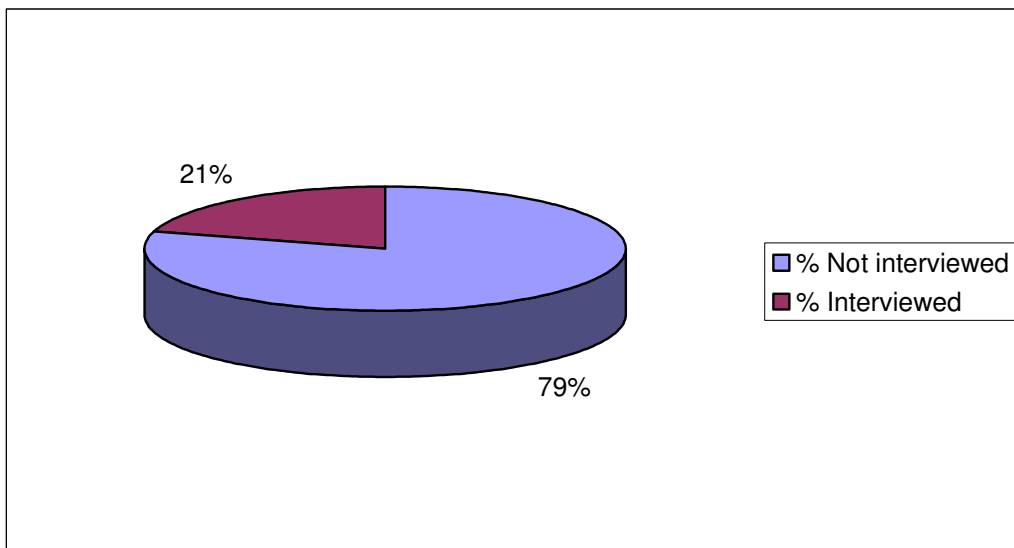


Figure 22: Mpumalanga Courts interviewed / not interviewed

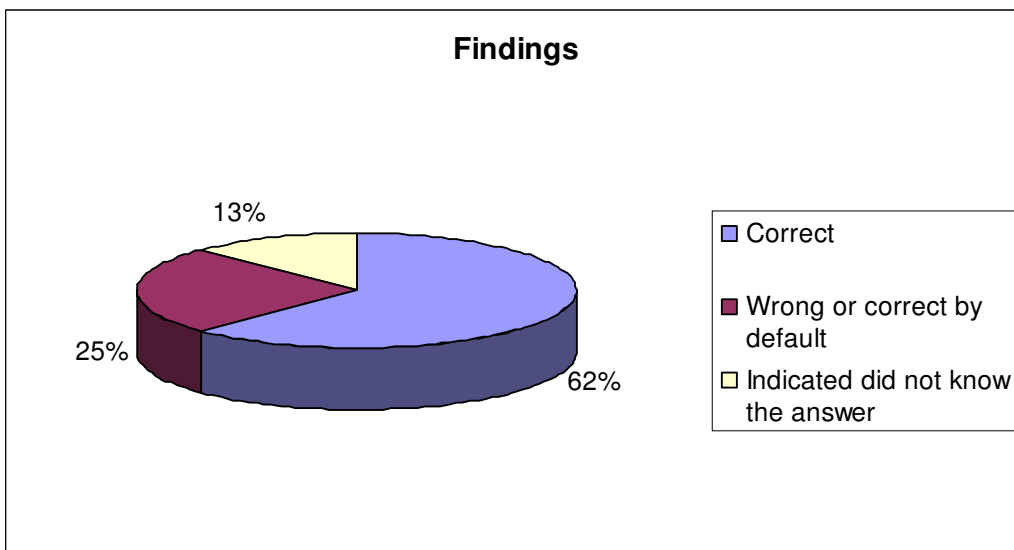
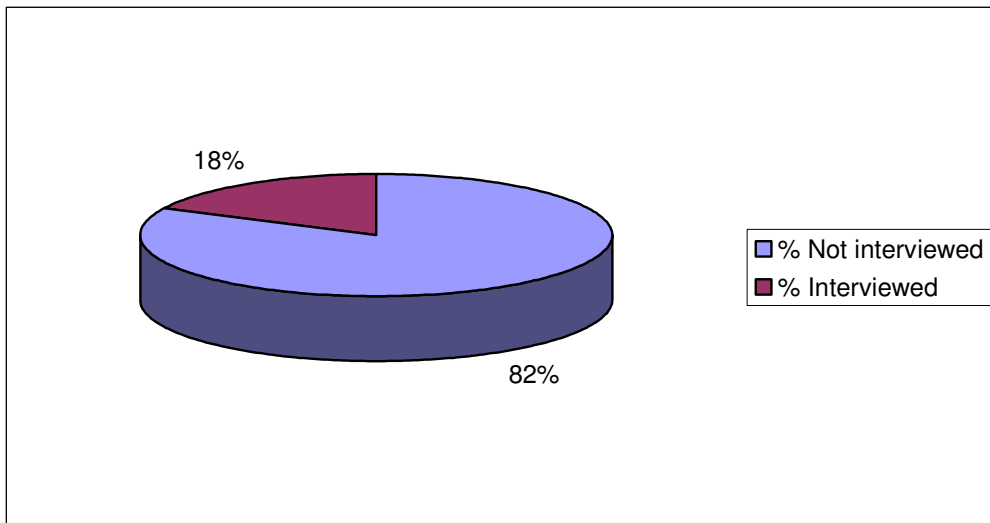
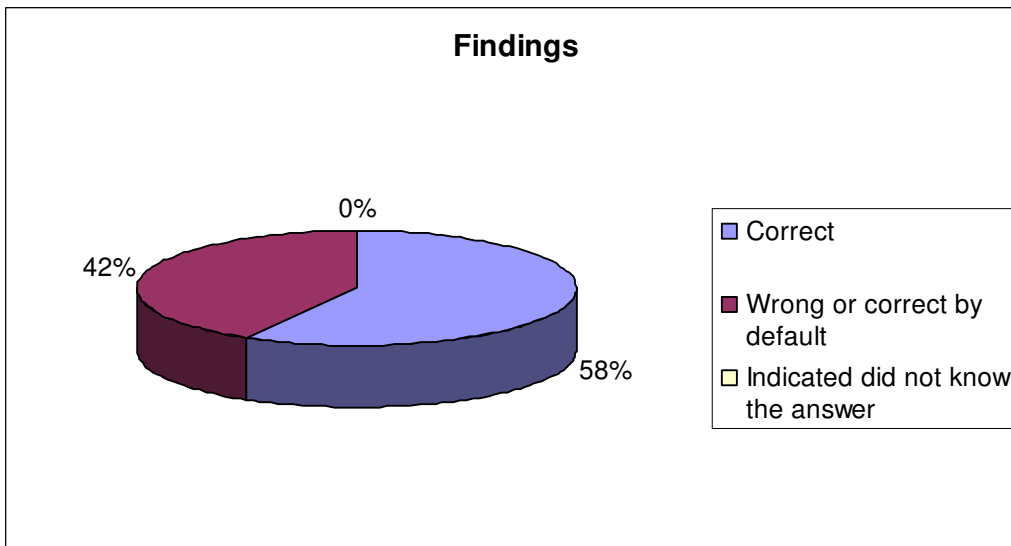


Figure 23: Mpumalanga Courts findings

## Free State Courts

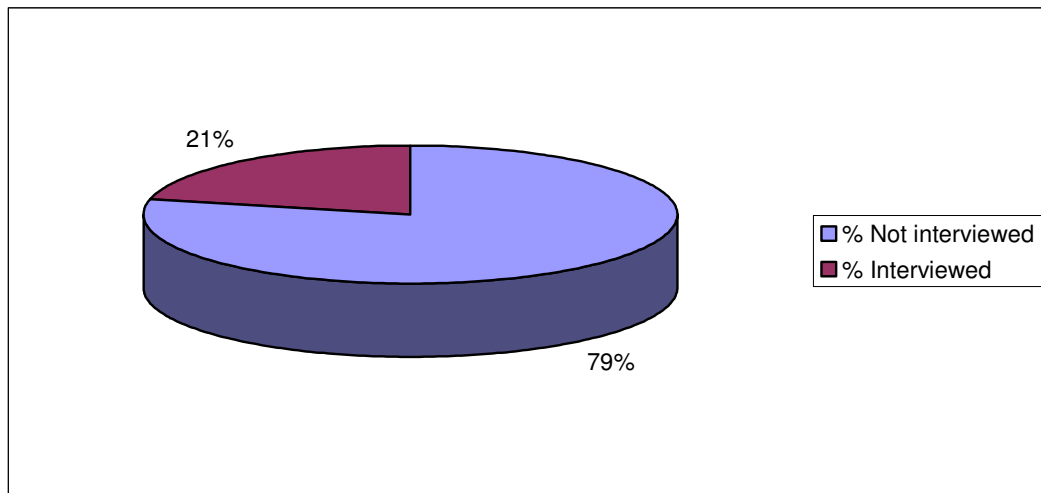


**Figure 24: Free State Courts interviewed / not interviewed**

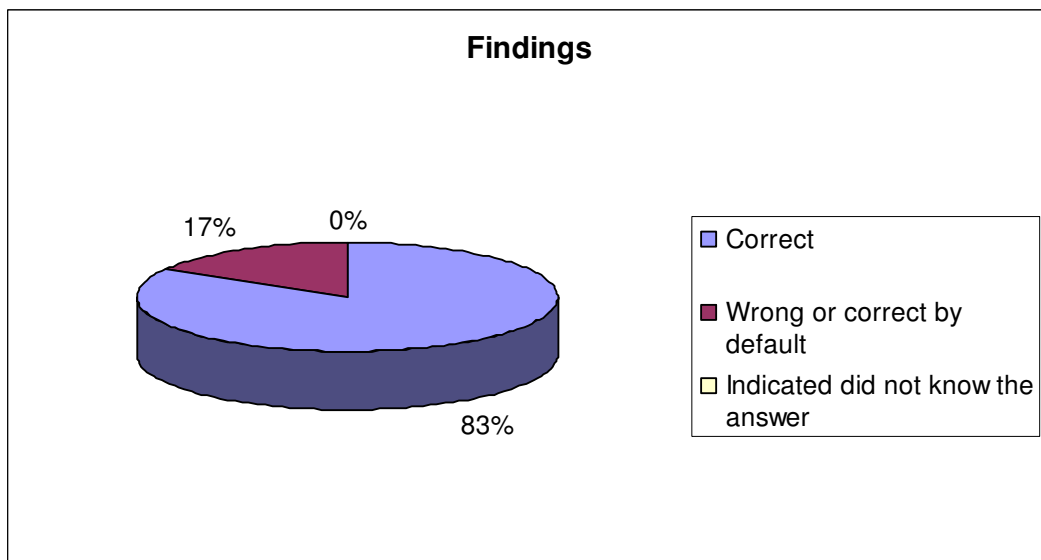


**Figure 25: Free State Courts findings**

## Gauteng Courts



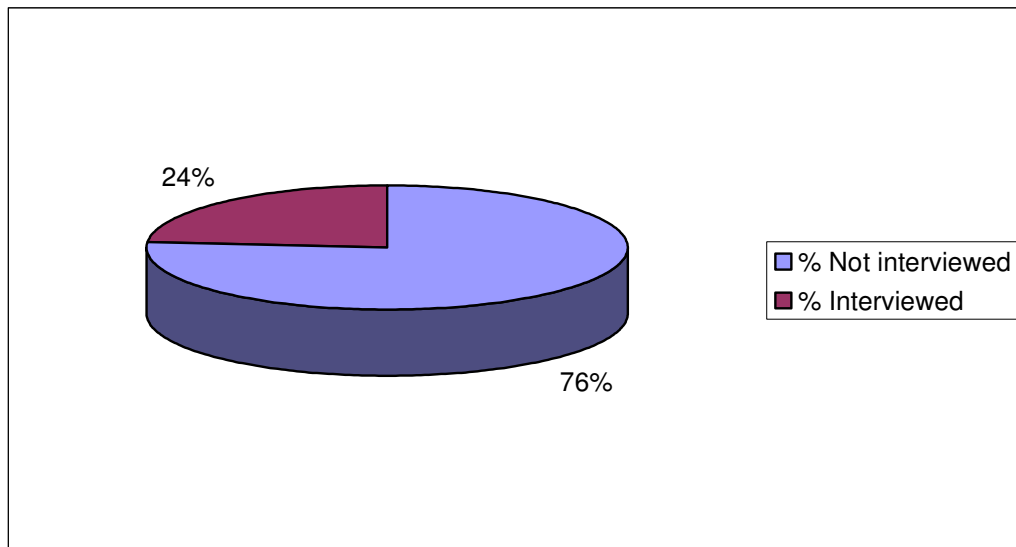
**Figure 26: Gauteng Courts interviewed / not interviewed**



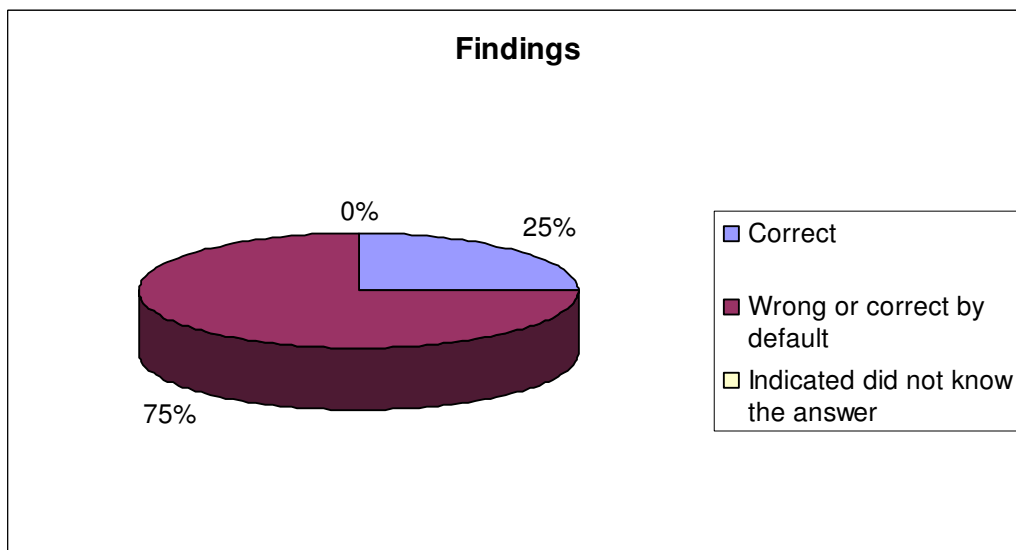
**Figure 27: Gauteng Courts findings**



## North-West Courts

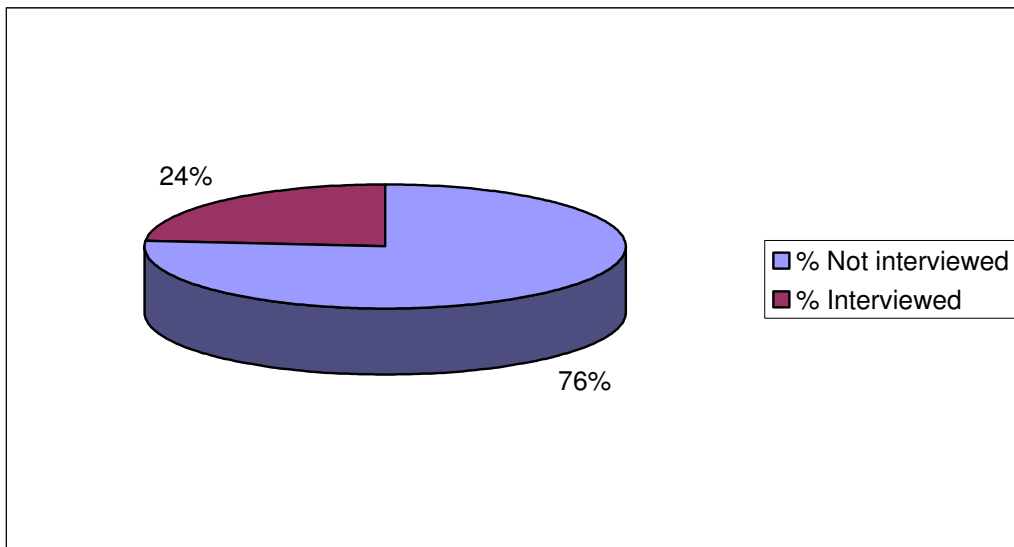


**Figure 28: North-West Courts interviewed / not interviewed**

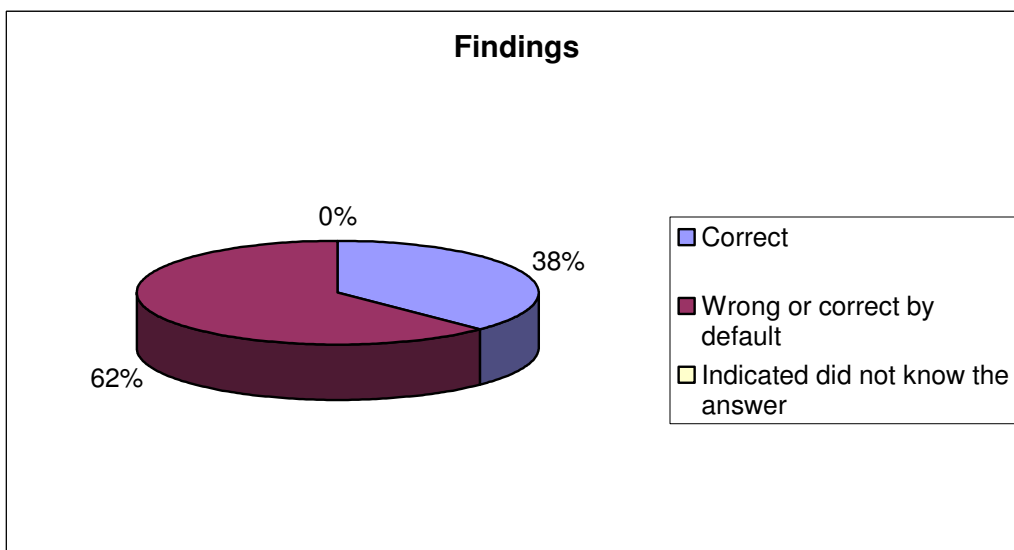


**Figure 29: North-West Courts findings**

## Limpopo Courts

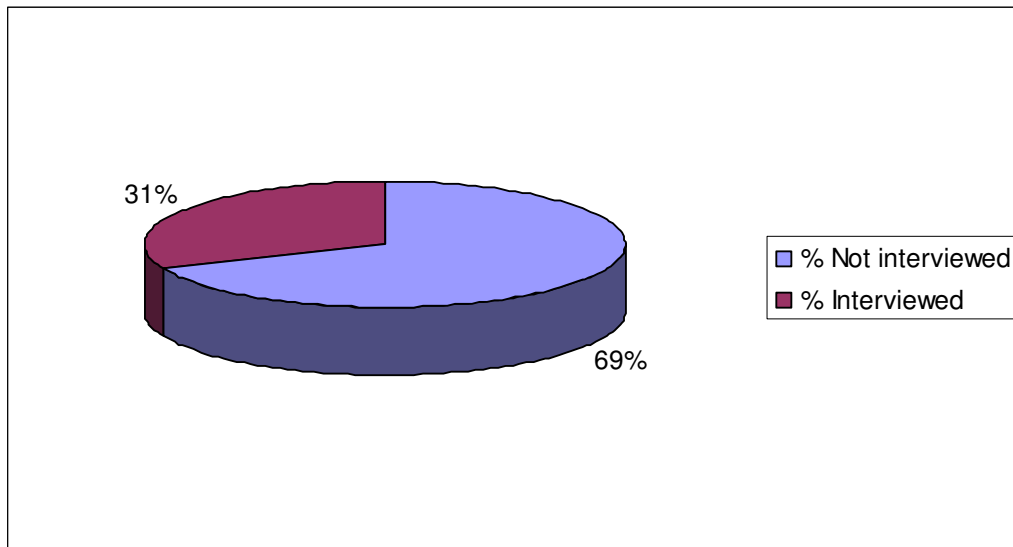


**Figure 30: Limpopo Courts interviewed / not interviewed**

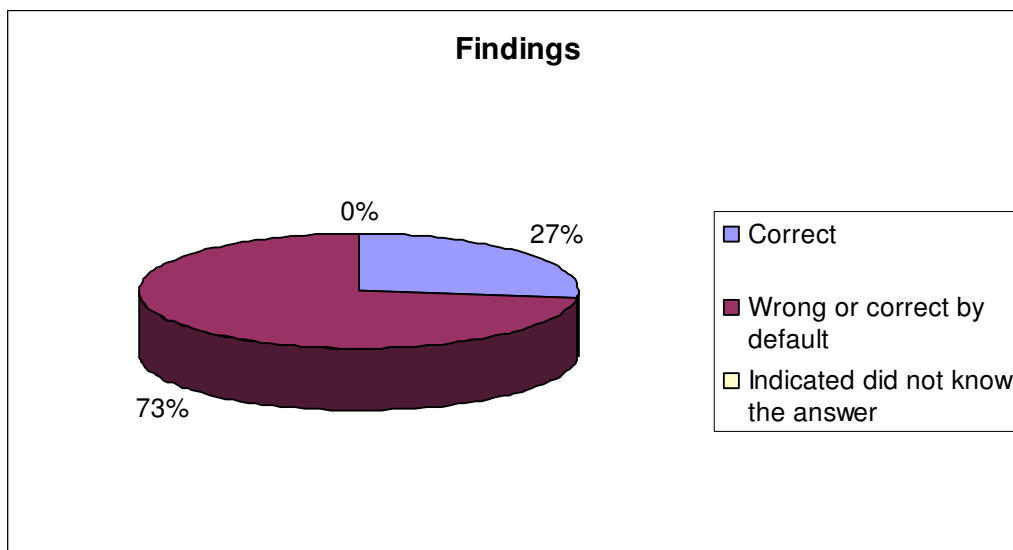


**Figure 31: Limpopo Courts findings**

## Northern Cape Courts

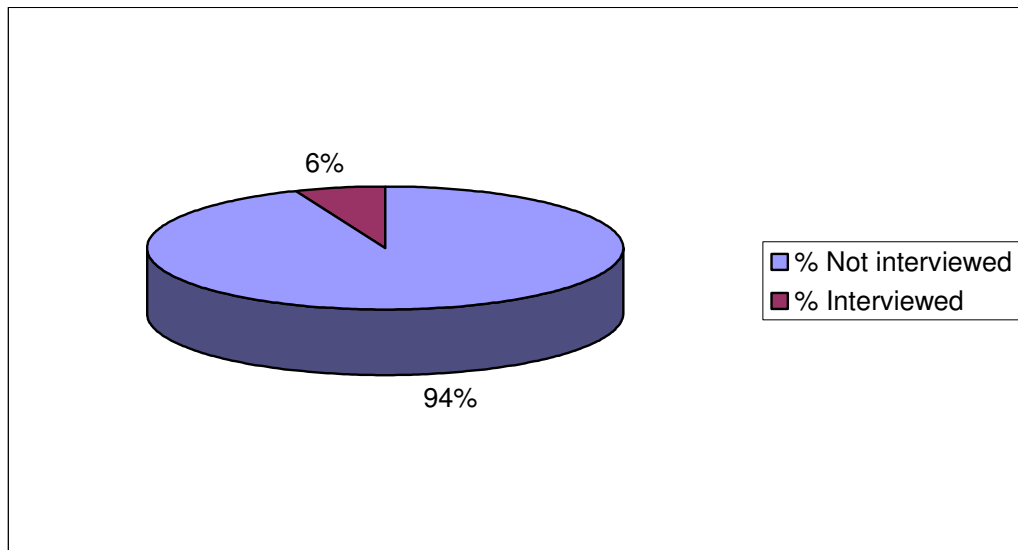


**Figure 32: Northern Cape Courts interviewed / not interviewed**

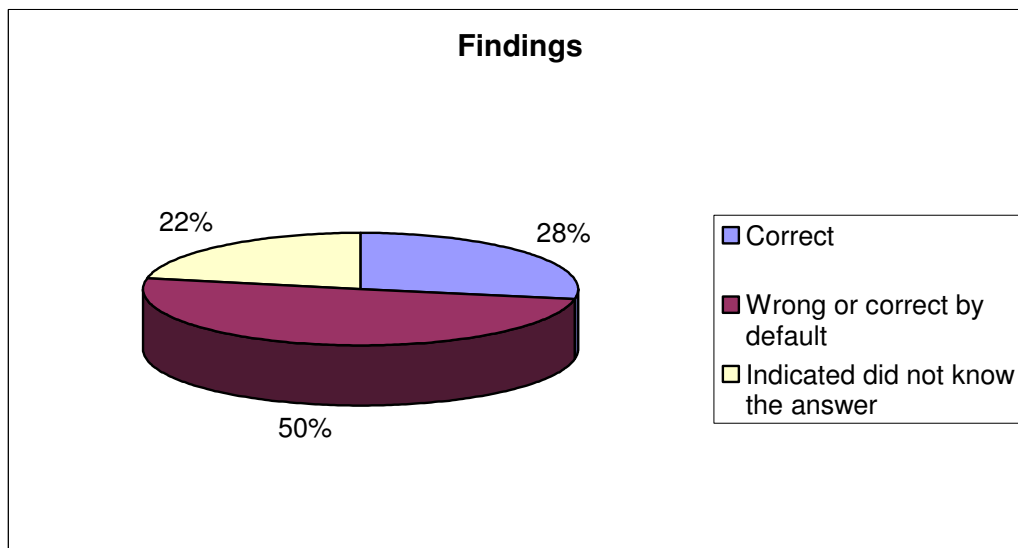


**Figure 33: Northern Cape Courts findings**

## Eastern Cape Courts

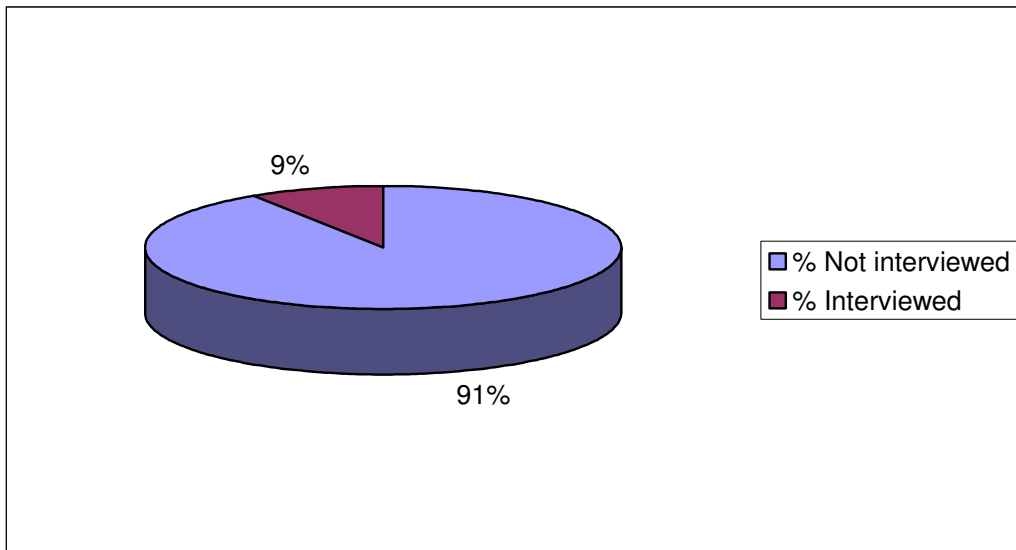


**Figure 34: Eastern Cape Courts interviewed / not interviewed**

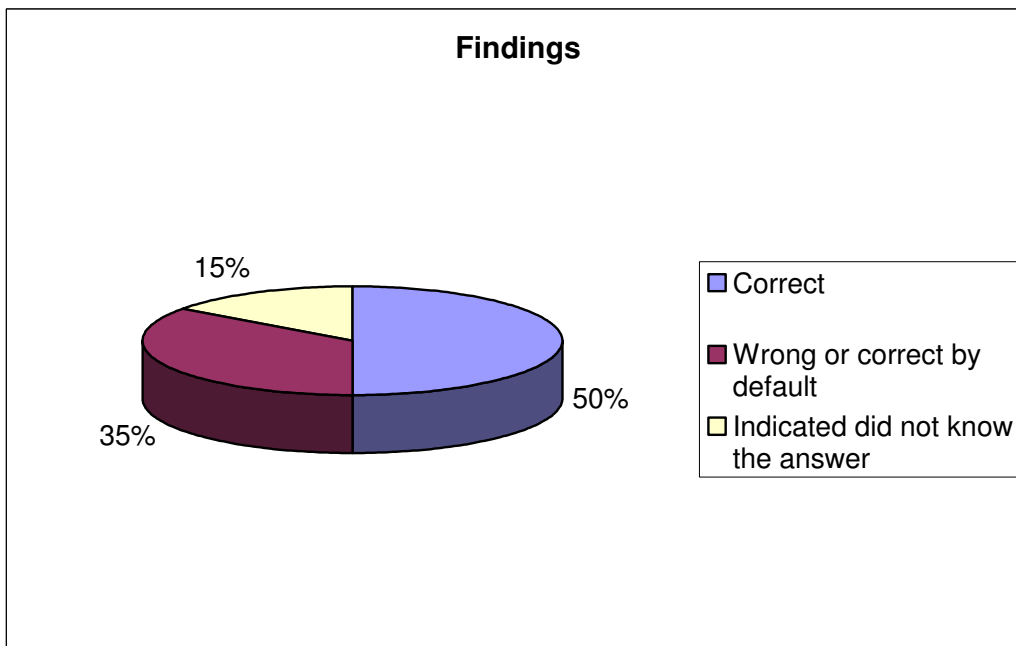


**Figure 35: Eastern Cape Courts findings**

## Western Cape Courts



**Figure 36: Western Cape Courts interviewed / not interviewed**



**Figure 37: Western Cape Courts findings**

## **4.5 DATA SET E : EMPLOYERS**

### **4.5.1 Introduction**

The role of the garnishee employer in the debt collection process via emolument attachment orders is crucial. The employer becomes an intermediary, a garnishee which is compelled by an order of court.

The legal relationship created by garnishee procedure and by the order made under it is not that of debtor and creditor i.e. the judgment creditor does not become a creditor of the garnishee employer – there is no transfer or session of the debt to the judgement creditor. The effect of an emoluments attachment order is that the employer as garnishee is obliged to deduct the amount stipulated from the emoluments accruing to the judgment debtor and pay them to the creditor. Failure on the part of the garnishee to make payment to the judgment creditor is a breach of the obligation to his employee. It also renders him liable for execution against his (the employer's) assets.

It is of paramount importance that the employer understands the process and that the correct implementation thereof is pivotal to properly extinguish debt. The research team obtained input from a number of employers.

### **4.5.2 Methodology**

Using the heuristic method, investigative interviews were conducted with two garnishee orders administrators. These administrators administer garnishee orders on behalf of a number of larger employers representing more than 300 000 employees. In addition thereto, interviews were conducted with 12 smaller employers who handle emoluments attachment orders in-house.

A basic set of specific topics were addressed, e.g. jurisdiction and communication, but the interviews had a free flow to them, allowing related issues to come to the fore.

### **4.5.3 Limitations**

The scope of the study was limited due to time and budget constraints.

This data set cannot be seen as representative. However, most of the researchers' presumptions regarding the experience of garnished employers were clarified and somewhat further investigated. The major problems areas were identified.

### **4.5.4 Summary of findings**

- **The processing of the emoluments attachment orders**

The processing of emoluments attachment orders places a huge burden on the employer. It is precisely for this reason that larger employers chose to outsource this function to payroll and emoluments attachment order administrators.

The following were mentioned as tasks associated with the processing of emoluments attachment orders:

- Attending to and perusing orders
- Notifying employees of garnishee order
- Spending time in discussion with employee
- Writing or printing of cheques
- Faxing through proof of payment to creditors or their attorneys
- Attending on bank to deposit payment
- Creating payment schedules for attorneys
- Faxing or posting of schedules and posting of cheques to attorneys or collectors
- Maintaining outstanding balances on garnishee orders
- Keeping records of payment history
- Reconciling between wage and finance department
- Reconciling discrepancies between attorneys and employer records

- In some cases negotiating with creditors or their attorneys
- In some instances recalculating balances and challenging correctness
- Reinstating garnishee orders after payments have stopped

- **The delivery of emoluments attachment orders**

Most orders are served on the employer by the sheriff accompanied by a letter from the collecting attorneys. However some employers (25%) indicated that orders are sometimes delivered by private persons or agents of debt collection agencies or even received via mail or fax.

- **The verification of the court's jurisdiction**

Most employers (83%) do not know the rules regarding jurisdiction and therefore do not check whether the emoluments attachment order was issued from the correct court. Realising the order is an instruction made by a court inspires respect and therefore no objection is made.

- **The verification of correctness of the order**

Most employers accepted the orders as correct and process them without any further queries.

- **The verification of reasonableness of instalments**

Most of the employers (75%) feel that the deductions often are not reasonable. In many of these cases the creditor or his attorney is contacted and often agrees to a lesser amount to be deducted monthly. These arrangements are normally not put in writing.

- **The start and cessation of deductions**

All of the employers commence with salary deductions on the pay day following service of the emoluments attachment order and stop deducting



instalments once their record shows that the total judgment debt is paid. In 33% of the employers interviewed, it was stated that collection lawyers regularly contact them to inform them that they should continue deducting, since the debt is not yet extinguished. In all of these cases, deductions continued.

- **The 5% allowed fee deduction**

Most employers (74%) did not know about the 5% allowance. In the case of the remaining employers, 17% were under the impression that the deduction would be to the detriment of the employee and therefore did not claim it. The remaining 9% deducted it correctly from the creditor. When section 65J(10) of the Magistrate Court Act, 32 of 1944, was pointed out to those that weren't aware of the fee, they indicated that they did not read or understand it.

- **An employee wellness program and debt counselling service**

A third of the employers indicated that they have some form of counselling program and one employer presents a sustained SETA program named "manage personal finances".

- **Guidelines on how these orders should be handled**

All of the employers indicated that they would welcome guidelines, especially on how the total debt is constituted (principal debt, costs, interest, etc).

- **Communication with the employee concerned**

Most employers (92%) do consult with or at least inform their employees of the pending deduction before the next payday on which the deductions commence.

- **Cost to company**

The twelve smaller companies interviewed could not place a monetary value on the time and effort spent on administering garnishee orders, but indicated that it added to costs and emotional strain. Employers were found to further be irritated and frustrated with the process, since they are drawn into the arena of a court process for the eradication of debt which does not concern them directly.

In the case of larger companies who have outsourced the administration of garnishee orders, the arrangement with the garnishee administrator is that they would receive their 5% administration fee provided for in the Act. These companies clearly felt that it was not worthwhile administering garnishees against payment of 5% of the amounts deducted.

## CHAPTER 5 : RECOMMENDATIONS

### 5.1 INTRODUCTION

Throughout our investigations, serious concerns regarding irregularities associated with the debt collection process and the legislative framework governing it were raised by various parties. These concerns were often corroborated by the evidence collected.

### 5.2 FINDINGS

The most important problems that the research team has come across are the following:

#### 5.2.1 Lack of basic financial and legal literacy skills and knowledge of consumers / employees

The lack of basic financial skills is resulting in consumers making uninformed decisions that could *inter alia* lead to default judgments and subsequent emoluments attachment orders. Some consumers do not understand the full financial risks, costs and obligations of the agreements that they enter into. It was found that consumers sometimes sign blank and undated enforcement documentation in advance which are then dated at a later stage and used to obtain default judgement. Further, consumers are not aware of the maximum interest rates and fees that may be charged.

#### 5.2.2 Irregularities regarding and abuse of processes

Some creditors are requesting consumers to sign blank and/or undated enforcement documentation when applying for credit as discussed above. The research team also came across instances of falsified legal documentation forwarded to employers as well as allegations of clerks accepting bribes from credit providers to ensure that emoluments attachment orders are issued.

The research team further found that in some instances, credit providers and or their agents inflates the principal debt with unlawful charges. Some attorneys or collectors are adding contingency fees arranged amongst themselves and their clients to the principal debt. Judgement is often granted on these inflated amounts.

Sometimes emoluments attachment orders are not duly served on employers and are merely faxed or delivered by lay persons. In other instances, emoluments attachment orders were granted after the consumer was placed under administration.

### **5.2.3 Insufficient communication between creditors and employers**

In numerous instances, emoluments attachment orders are re-implemented due to poor administration and communication between creditors and employers.

In these matters an employer will typically stop deductions after the judgement debt has been paid in full, but do not take cognisance of the interest and legal fees that accrued. A credit provider will then re-implement the order creating hardship for the employee who was under the impression that his debt was extinguished. This situation further creates an administrative burden to both the creditor as well as the employer.

### **5.2.4 Lack of knowledge amongst clerks of court**

It was found that some clerks of court do not check whether the supporting documentation or the draft emoluments attachment order comply with the legal requirements before issuing the emoluments attachment order. In our national interviews with clerks it was noted that some clerks do not know or employ the correct procedures.

### **5.2.5 Lack of knowledge amongst employers**

Employers seldom have the necessary legal and/or financial knowledge to detect irregular processes and or charges. Some employees complained that they were not informed of the emoluments attachment order by their employer and only became aware of the attachment once the first instalment was deducted.

### **5.2.6 Lack of adequate administrative systems**

Many problems arose due to the lack of a centralised national administrative system. The research team came across instances where the judgment creditor obtained emoluments attachment orders under a specific case number whilst an active emoluments attachment order already exists under another case number. A further observation was that in some cases the bulk or even total salary of the consumer was attached, leaving him with no or very little money for necessary living expenses for himself or his dependants.

A centralised national administrative system could be employed by presiding officers and/or clerks of court in order to determine the judgments already entered against the debtor as well as the total amount already attached through garnish orders. Whilst insufficient communication between credit providers and their agents may contribute to this problem, it could be alleviated by a centralised system.

### **5.2.7 Absence of judicial oversight and control**

Many of the above-mentioned challenges can be prevented through proper judicial control.

## **5.3 RECOMMENDATIONS**

### **5.3.1 General**

The research team, after considering the above, recommends as follows:

- Continued research and investigation to be supported and conducted
- Improving the basic financial and legal literacy of consumers / employees
- Utilise employee wellness programs to assist over-indebted consumers, both reactively and proactively
- Increase knowledge regarding emoluments attachment orders amongst Payroll and HR managers and personnel
- Improve communications between creditors and employers by way of regular statements of account
- Proper training and education of clerks of the Magistrate's Court
- Outsourcing by employers of management of emoluments attachment orders
- Improve application of and adherence to existing legislative measures
- Engage credit providers, the attorney's profession and debt collectors organisations
- Lobby for legislative reform, specifically the relevant sections in the Magistrate's Court Act and Rules of Court - see 5.3.2 hereunder
- Identifying, financing and conducting impact / strategic litigation
- Instituting a centralised national administrative system

### **5.3.2 Legislative reform**

Various inputs were made and recommendations were received from employers, consumers, clerks of the courts and consultants. These included:

- Abolition of the consent to judgement as well as the consent to emoluments attachment orders. This would necessitate the issuing of a summons in all cases and obtaining of a default judgement which would at least, so it was argued, entail some scrutiny and control by clerks of the court and/or magistrates.

- Retaining of the consent to judgement, but including the requirement that in cases where the cause of action was based on a preceding written document e.g. a loan agreement or contract, these be filed with the consent and request for judgement.
- Retaining of the consent to judgement, but abolishing consent to or obtaining of emoluments attachment order via the present procedure and replacing it with an *ex parte* application to court for such an order. The order is then granted with a return date on which the employer or employee could oppose the granting of a final order (similar to the procedure currently used in section 72 proceedings for the garnishment of debts). As an alternative to the *ex parte* application, the obtaining of emoluments attachment orders via the existing section 65A(1) procedure (enquiry into the financial affairs of the debtor). It was argued that in both the above procedures, the presiding officer would be in a position to grant a just and fair amount after consideration of all the relevant circumstances.

When considering legislative reform with the aim of consumer protection, two factors have to be taken into account i.e. the costs of the protection and the already heavy work load of clerks and magistrates in the civil section of the Magistrate's Court.

Bearing in mind the additional costs and time involved in requiring a summons to be issued in each and every collection case as well as the fact that the majority of these summonses are undefended, the research team was of the opinion that the consent to judgment be retained with certain provisos, but that the requirements for obtaining an emoluments attachment order be amended.

The research team is of the view that the possible impact of the suggested changes to the legislation be studied and that consultation with all the relevant role players be conducted in order to present a coherent proposal for legislative reform.

The following draft, incorporating the suggested amendments to sections 57, 58 and 65, could serve as a point of departure for further discussion. Note

that the **[bold in brackets]** are suggested deletions and the underlined suggested insertions.

#### Section 57

#### **Admission of liability [and undertaking to pay debt in instalments or otherwise]**

- (1) If any person (in this section called the defendant) has received a letter of demand or has been served with a summons demanding payment of any debt, the defendant may in writing-
  - (a) admit liability to the plaintiff for the amount of the debt and costs claimed in the letter of demand or summons or for any other amount;
  - (b) offer to pay the amount of the debt and costs for which he admits liability, in instalments or otherwise;
  - (c) undertake on payment of any instalment in terms of his offer to pay the collection fees for which the plaintiff is liable respect of the recovery of such instalment; and
  - (d) agree that in the event of his failure to carry out the terms of his offer the plaintiff shall, without notice to the defendant, be entitled to apply for judgment for the amount of the outstanding balance of the debt for which he admits liability, with costs, **[and for an order of court for payment of the judgment debt and costs in instalments or otherwise in accordance with his offer, and if the plaintiff or his attorney accepts the said offer, he shall advise the defendant of such acceptance in writing by registered letter]**.
- (2) If, after having been advised by the plaintiff or his attorney in writing that his offer has been accepted, the defendant fails to carry out the terms of his offer, the clerk of the court shall, upon the written request of the plaintiff of his attorney accompanied by-
  - (a) if no summons has been issued, a copy of the letter of demand;
  - (b) the defendant's written acknowledgment of debt and offer and a copy of the plaintiff's or his attorney's written acceptance of the offer;
  - (c) an affidavit or affirmation by the plaintiff or a certificate by his attorney stating in which respects the defendant has failed to carry out the terms of his offer and, if the defendant has made any payments since the date of the letter of demand or summons, showing how the balance claimed is arrived at-
    - (i) enter judgment in favour of the plaintiff for the amount or the outstanding balance of the amount of the debt for which the defendant has admitted liability, with costs; and
    - [(ii) order the defendant to pay the judgment debt and costs in specified instalments or otherwise in**



**accordance with his offer, and such order shall be deemed to be an order of the court mentioned in section 65A (1).]**

- (3) When the judgment referred to in subsection (2) has been entered and an order made, and if the judgment debtor was not present or represented when the judgment was entered by the clerk of the court and the order made, the judgment creditor or his or her attorney shall forthwith advise the judgment debtor by registered letter of the terms of the judgment **[and order.]**
- (4) Any judgment entered in favour of the plaintiff under subsection (2) shall have the effect of a judgment by default.

#### **Section 58**

#### **Consent to judgment [or to judgment and an order for payment of judgment debt in instalments]**

- (1) If any person (in this section called the defendant), upon receipt of a letter of demand or service upon him of a summons demanding payment of any debt, consents in writing to judgment in favour of the creditor (in this section called the plaintiff) for the amount of the debt and the costs claimed in the letter of demand or summons, or for any other amount, the clerk of the court shall, on the written request of the plaintiff or his attorney accompanied by-
  - (a) if no summons has been issued, a copy of the letter of demand; and
  - (b) the defendant's written consent to judgment-
    - (i) enter judgment in favour of the plaintiff for the amount of the debt and the costs for which the defendant has consented to judgment; and
    - [(ii) if it appears from the defendant's written consent to judgment that he has also consented to an order of court for payment in specified instalments or otherwise of the amount of the debt and costs in respect of which he has consented to judgment, order the defendant to pay the judgment debt and costs in specified instalments or otherwise in accordance with this consent, and such order shall be deemed to be an order of the court mentioned in section 65A (1).]**
- (2) The provisions of section 57 (3) and (4) shall apply in respect of the judgment and court order referred to in subsection (1) of this section.

In order to address the irregularities and unlawful practices associated with emoluments attachment orders, the research team recommends that such an order may only be granted upon a financial enquiry as in terms of section 65A(1) and not by consent or default. The problems that the research team encountered as fully set out under the problem statement above will be indirectly impacted by the proposed legislative amendments that follow.

The following changes could be affected to section 65 in order to obtain the mentioned result:

#### **Section 65**

##### **[Offer by judgment debtor after judgment**

**and before the issue of a notice under section 65A (1), the judgment debtor makes a written offer to the judgment creditor to pay the judgment debt in specified instalments or otherwise and such offer is accepted by the judgment creditor or his attorney, the clerk of the court shall, at the written request of the judgment creditor or his attorney, accompanied by the offer, order the judgment debtor to pay the judgment debt in specified instalments or otherwise in accordance with his offer, and such order shall be deemed to be an order of the court mentioned in section 65A (1).]**

#### **65A Notice to judgment debtor if judgment remains unsatisfied**

- (1) (a) If a court has given judgment for the payment of a sum of money or has ordered the payment in specified instalments or otherwise of such an amount, and such judgment or order has remained unsatisfied for a period of 10 days from the date on which it was given or on which such an amount became payable or from the expiry of the period of suspension ordered in terms of section 48 (e), as the case may be, the judgment creditor may issue, from the court of the district in which the judgment debtor resides, carries on business or is employed, or if the judgment debtor is a juristic person, from the court of the district in which the registered office or main place of business of the juristic person is situate, a notice calling upon the judgment debtor or, if the judgment debtor is a juristic person, a director or officer of the juristic person as representative of the juristic person and in his or her personal capacity, to appear before the court in chambers on a date specified in such notice in order to enable the court to inquire into the financial position of the

judgment debtor and to make such order as the court may deem just and equitable.

- (b) A notice referred to in paragraph (a) shall be drawn up by the judgment creditor or his or her attorney, signed by the judgment creditor or his or her attorney and the clerk of the court, and served by the sheriff, or by the attorney of the judgment creditor or any candidate attorney in his or her employ, on the judgment debtor or, if the judgment debtor is a juristic person, on the director or officer summonsed as the representative of the juristic person and in his or her personal capacity, in the manner prescribed by the rules for the service of process in general and at least ten days before the date fixed in the notice for the appearance before the court.
  - (c) The fees and charges in respect of a notice served by any attorney or candidate attorney shall be determined in accordance with the tariffs prescribed by the rules for the service of process by a sheriff: Provided that no such fees and charges shall be payable unless personal service of the notice has been effected.
- (2) If the minutes of the proceedings do not show that the judgment debtor was present in person or represented by any person when judgment was given and if no warrant of execution pursuant to the judgment has been served on the judgment debtor personally, no notice under subsection (1) shall be issued unless the judgment creditor or his or her attorney provides proof to the satisfaction of the clerk of the court that he or she has advised the judgment debtor by registered letter of the terms of the judgment or of the expiry of the suspension ordered under section 48(e), as the case may be, and a period of 10 days has elapsed since the date on which the said letter was posted.
  - (3) The court may, at any stage of the proceedings, if a director or officer mentioned in subsection (1) ceases to be a director or officer of the juristic person concerned or absconds, at the request of the judgment creditor, from time to time replace such director or officer by any other person who at the time of such replacement may be a director or officer of the juristic person, and the proceedings shall then continue as if there has been no replacement.
  - (4) If the court has given judgment for the payment of an amount of money in instalments, no notice under subsection (1) shall be issued unless the judgment creditor has delivered an affidavit or affirmation or his or her attorney has delivered a certificate to the clerk of the court in which is mentioned the outstanding balance of the judgment debt, in what respects the judgment debtor has failed to comply with the court order, to what extent he or she is in arrear with the payment of the instalments and that the judgment debtor was advised by registered letter of the terms of the judgment.

- (5) If a judgment debtor fails to satisfy an order to pay the judgment debt in instalments or otherwise, or if an emoluments attachment order has not been satisfied, a judgment creditor may issue anew a notice in accordance with subsection (1).
- (6) If the court is satisfied on the ground of sufficient proof or otherwise-
  - (a) that the judgment debtor, director or officer concerned has knowledge of a notice referred to in subsection (1) and that he or she has failed to appear before the court and on the date and at the time specified in the notice;
  - (b) that the judgment debtor, director or officer concerned, in the case where the relevant proceedings were postponed in his or her presence to a date and time determined by the court, has failed to appear before the court on that date and at that time; or
  - (c) that the judgment debtor, director or officer concerned has failed to remain in attendance at the relevant proceedings or at the proceedings as so postponed, the court may, at the request of the judgment creditor or his or her attorney, authorise the issue of a warrant directing a sheriff to arrest the said judgment debtor, director or officer and to bring him or her before a competent court at the earliest possible opportunity in order to enable that court to conduct an inquiry referred to in subsection (1).
- (7) A warrant authorised under subsection (6) shall be prepared by the judgment creditor or his or her attorney, signed by the judgment creditor or his or her attorney and the clerk of the court, and executed by the sheriff.
- (8)
  - (a) Any person arrested under a warrant referred to in subsection (6) shall, in accordance with section 35(1)(d) of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), be brought as soon as reasonably possible before the court within the district of which that person was arrested: Provided that any such person, if it is not possible to bring him or her before the court concerned, may be detained at any police station pending his or her appearance before that court.
  - (b) In lieu of arresting a person contemplated in paragraph (a), the sheriff may, if the judgment creditor or his or her attorney consents thereto, hand to that person a notice in writing which-
    - (i) specifies the name, the residential address and the occupation or status of that person;
    - (ii) calls upon that person to appear before the court and on the date and at the time specified in the notice; and
    - (iii) contains a certificate signed by the sheriff to the effect that he or she has handed the original of the notice to that person and that he or she has explained to that person the import thereof.

- (c) The sheriff shall forthwith forward a duplicate original of the notice to the clerk of the court concerned, and the mere production in the court of such a duplicate original shall be prima facie proof that the original thereof was handed to the person specified therein.
- (d) The provisions of subsection (6) shall mutatis mutandis apply in respect of a notice referred to in paragraph (b).

(9) Any person who-

- (a) is called upon to appear before a court under a notice referred to in subsection (1) or (8)(b) and who wilfully fails to appear before the court and on the date and at the time specified in the notice;
- (b) in the case where the relevant proceedings were postponed in his or her presence to a date and time determined by a court, wilfully fails to appear before the court on that date and at that time;
- (c) wilfully fails to remain in attendance at the relevant proceedings or at the proceedings as so postponed, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three months.

(10) (a) Notwithstanding anything to the contrary contained in this Act-

- (i) the court which authorised the issue of a warrant referred to in subsection (6) and the court contemplated in subsection (8) (a), if the latter court is not the court which authorised the issue of the warrant concerned, shall have jurisdiction to inquire in a summary manner into the commission of an offence referred to in subsection (9), and upon proof beyond reasonable doubt that the person concerned is guilty of such an offence, to so convict him or her and to impose on him or her any penalty provided for in the said subsection (9);
- (ii) the court contemplated in subsection (8)(a), if the court is not the court which authorised the issue of the warrant concerned, shall have jurisdiction to conduct an inquiry referred to in subsection (1) and to perform such other acts as the court which authorised the issue of the warrant concerned could lawfully have performed.
- (b) On the appearance before the court of the judgment debtor, director or officer concerned in pursuance of either his or her arrest under a warrant referred to in subsection (6) or the delivery to him or her of a notice referred to in subsection (8)(b), the court shall inform him or her-
  - (i) that the court intends to inquire in a summary manner into his or her alleged wilful failure to appear before the court and on the date and at the time specified in a notice referred to in

- subsection (1) or (8)(b), or to appear, in the case where the relevant proceedings were postponed in his or her presence to a date and time determined by any court, before that court on that date and at that time, or to remain in attendance at the relevant proceedings or at the proceedings as so postponed, as the case may be;
- (ii) that the court, if the court so convicts him or her, may impose on him or her any penalty provided for in subsection (9); and
  - (iii) that he or she has the right to choose, and be represented by, a legal practitioner.
- (c) A court before which proceedings under paragraph (b) are pending-
- (i) shall have due regard to the following rights, namely-
    - (aa) the right of an accused person to be presumed innocent, to remain silent and not to testify;
    - (bb) the right of an accused person to adduce and to challenge evidence; and
    - (cc) the right of an accused person not to be compelled to give self-incriminating evidence;
  - (ii) may adjourn such proceedings to any date on such conditions not inconsistent with a provision of the Criminal Procedure Act, 1977 (Act 51 of 1977), and as the court may think fit;
  - (iii) if the court is of the opinion that it is in the interests of the administration of justice, may at any time before the judgment debtor, director or officer concerned is acquitted or convicted of an offence referred to in subsection (9) suspend such proceedings and refer the matter to the public prosecutor concerned to take a decision on the prosecution of the said judgment debtor, director or officer for such an offence.
- (11) After the court has dealt with the inquiry referred to in subsection (10) (b), the court shall proceed to the inquiry referred to in subsection (1) and deal with the matter in accordance with the other sections of this Chapter: Provided that the court-
- (a) if the court is not the court which authorised the issue of the warrant concerned; and
  - (b) if the court is of the opinion that it is in the interests of the administration of justice, may transfer the matter to the court which authorised the issue of that warrant.
- (12) (a) If the court before which proceedings under subsections (10)(b) and (11) are pending is not the court which authorised the issue of the warrant concerned, the clerk of the former court shall without any delay notify the clerk of the latter court of the appearance

of the judgment debtor, director or officer concerned before the former court, and shall inform the judgment creditor or his or her attorney accordingly.

- (b) The clerk of the court which authorised the issue of the warrant concerned shall without any delay furnish the court before which proceedings under subsections (10)(b) and (11) are pending with such records or documents relating to such proceedings as the latter court may direct.

## **Section 65C**

### **Joinder of proceedings**

If, under section 65A(1), two or more notices have been served on any judgment debtor or director or officer to appear on the same day as provided in that section, the proceedings in terms of such notices may be heard concurrently.

## **Section 65D**

### **Determination of judgment debtor's financial position**

- (1) On the appearance before the court of the judgment debtor or, if the judgment debtor is a juristic person, the director or officer of the juristic person summonsed as the representative of the juristic person or in his or her personal capacity, on the return day of the notice referred to in section 65A(1) or (8)(b), in pursuance of his or her arrest under a warrant referred to in section 65A(6), or on any date to which the proceedings have been postponed, the court in chambers shall, subject to the provisions of subsection (2) of this section, call upon him or her to give evidence under oath or affirmation on his or her financial position or the financial position of the juristic person, as the case may be, and the court shall permit the examination or cross-examination of the judgment debtor or the said director or officer on all matters relevant to the judgment debtor's financial position and his or her ability to pay the judgment debt, and the court shall receive such further evidence as may be adduced either orally or by affidavit or in such other manner as the court may deem just, by or on behalf of either the judgment debtor or the judgment creditor, as is material to the determination of the judgment debtor's financial position and his or her ability to pay the judgment debt, and for the purposes of such evidence witnesses may be summoned in the manner prescribed in the rules.
- (2) The court may at any time in the presence of the judgment debtor or the said director or officer postpone the proceedings to such date as the court may determine.
- (3) When postponing the proceedings under subsection (2) the court-

- (a) shall inform the judgment debtor or the director or officer concerned of the provisions of section 65E(1)(c);
- (b) may order the judgment debtor or the director or officer to produce such documents as the court may specify at the hearing on the date determined by the court; and
- (c) may determine such conditions as it may deem fit.
- (4) In determining the ability of the judgment debtor to pay the judgment debt in instalments or otherwise the court shall take into consideration-
  - (a) in the case of a judgment debtor who is a natural person, the nature of his income, the amounts needed by him for his necessary expenses and those of the persons dependent on him, and for the making of periodical payments which he is obliged to make in terms of an order of court, agreement or otherwise in respect of his other commitments as disclosed in the evidence presented at the hearing of the proceedings; or
  - (b) in the case of a judgment debtor who is a juristic person, the amounts required by such juristic person to meet its necessary administrative expenses and for the making of periodical payments which it is obliged to make in terms of an order of court, agreement or otherwise in respect of its other commitments as disclosed in the evidence presented at the hearing of the proceedings.
- (5) In determining the ability of the judgment debtor to pay the judgment debt in instalments or otherwise the court may, in its discretion, refuse to take account of the periodical payments that a judgment debtor has undertaken to make in terms of a credit agreement, as defined in section 1 of the National Credit Act, 2005 (Act 34 of 2005) for the purchase of goods which have not been exempted from seizure in terms of section 67 or which cannot, in the opinion of the court, be regarded as the judgment debtor's household requirements.

## **Section 65E**

### **Postponement of proceedings pending execution**

- (1) If at the hearing of the proceedings in terms of a notice under section 65A(1) the court is satisfied-
  - (a) that the judgment debtor has movable or immovable property which may be attached and sold in order to satisfy the judgment debt or any part thereof, the court may-
    - (i) authorize the issue of a warrant of execution against such movable or immovable property or such part thereof as the court may deem fit; or



- (ii) authorize the issue of such a warrant together with an order in terms of section 73; or
- (b) that there is a debt due to the judgment debtor which may be attached in terms of section 72 to satisfy the judgment debt and costs or a part thereof, the court may authorize the attachment of that debt in terms of that section; or
- [(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 the further hearing of the proceedings.**
- (2) Any authorization under subsection (1)(a) shall, pending the execution of the warrant, serve as an interdict against the alienation of the property concerned by the judgment debtor.
- (3) Proceedings postponed under subsection (1) may again be placed on the roll by the judgment creditor or his attorney by notice delivered personally or served by registered letter addressed to the judgment debtor or, if the judgment debtor is a juristic person, to the director or officer summoned as the representative of the juristic person and in his personal capacity and delivered or posted at least 10 days before the day appointed therein for the hearing.
- (4) If the judgment creditor issues or causes to be issued a warrant of execution against movable property belonging to any judgment debtor before the hearing of proceedings in terms of a notice under section 65A (1) and a nulla bona return is made, the judgment creditor shall not be entitled to costs in connection with the issue and execution of such warrant unless the court on good cause shown orders otherwise at the hearing of the proceedings.
- (5) The court may from time to time suspend, amend or rescind an order for the payment of a judgment debt and costs in specified instalments made in terms

of subsection (1) (c) of this section *or* section 65A(1) **[section 57, 58 or 65.]**

- (6) Upon an order referred to in subsection (1) (c) of this section **[or section 57, 58 or 65]** having been made and if the judgment debtor was not present or represented in court when the order was made, the judgment creditor or his or her attorney shall forthwith by registered letter advise the judgment debtor of the terms of the order.

## **Section 65I**

### **Application for administration order has preference**

- (1) If, before or during the hearing of the proceedings in terms of a notice under section 65A (1) a judgment debtor has lodged or lodges with the court an application for an administration order for hearing on a date not later than the earliest date on which such application may be heard and it appears that he has complied with the provisions of section 74, the court shall postpone the hearing of the proceedings until the application for an administration order has been disposed of.
- (2) If a judgment debtor has not lodged or does not lodge with the court an application for an administration order before or during the hearing of such proceedings and it appears at the hearing that the judgment debtor has other debts as well, the court shall consider whether all the judgment debtor's debts should be treated collectively and if it is of opinion that they should be so treated, it may, with a view to granting an administration order, postpone further hearing of the proceedings to a date determined by the court and order the judgment debtor to submit to the court a full statement of his affairs in the form prescribed in the rules, and containing the particulars for which the said rules make provision and to cause a copy thereof to be delivered by registered post to each of his creditors at least 3 days before the date appointed for the further hearing.
- (3) If upon receipt of the statement referred to in subsection (2) it appears that the judgment debtor's total debts do not exceed the amount\* determined by the Minister from time to time by notice in the Gazette, the court may grant an administration order under section 74 in respect of the judgment debtor's estate.
- (4) If the court grants an administration order in respect of the judgment debtor's estate, it shall stay the proceedings in terms of the notice under section 65A(1), but may grant the judgment creditor costs already incurred in connection with such proceedings, and such costs may be added to the judgment debt.

## Section 65J

### Emoluments attachment orders

- (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.
- (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.
- (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 during or after section 65A(1) proceedings, or by way of application, [whether on application to the court or otherwise], and such authorisation has not been suspended; or
  - (b) During the hearing of such application, the court must be satisfied that the judgement debtor will have sufficient means to maintain himself and those dependent upon him, before granting such an emoluments attachment order.
  - [(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.]**

- (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.

- (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 in which it is so 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.

- (b) **[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 the payments received up to the date concerned and the balance owing.]** The judgement creditor or his or her attorney shall, furnish free of charge a monthly statement containing particulars of the payments received up to the date concerned and the balance owing. By agreement between the judgement creditor and the garnishee the requirement of a monthly statement may be substituted with a quarterly statement.

The right to receive such statements or the time periods specified may not be waived.

- (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.
- (6) If, after the service of such an emoluments attachment order on the garnishee, it is shown that the judgment debtor, after satisfaction of the emoluments attachment order, will not have sufficient means for his own and his dependants' maintenance, the court shall rescind the emoluments attachment order or amend it in such a way that it will affect only the balance of the emoluments of the judgment debtor over and above such sufficient means.
- (7) Any emoluments attachment order may at any time on good cause shown be suspended, amended or rescinded by the court, and when suspending any such order the court may impose such conditions as it may deem just and reasonable.
- (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.
- (9)
  - (a) Whenever any judgment debtor to whom an emoluments attachment order relates, leaves the service of the garnishee before the judgment debt has been paid in full and becomes self-employed or is employed by someone else, he or she shall, or shall pending the service of the emoluments attachment order on his or her new employer, again be obliged to comply with the relevant order referred to in subsection (1) (b).
  - (b).....

- (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.

## **Section 65K**

### **Orders as to costs relating to certain proceedings**

- (1) Unless at the hearing of any proceedings in terms of a notice under section 65A(1) it appears to the court that the judgment debtor, after learning of the judgment upon which such proceedings were founded, made an offer to pay the judgment debt in instalments which the court deems reasonable, or notified the judgment creditor that he was not able to make an offer and the court finds this to be true, the court may order the judgment debtor to pay the costs of such proceedings, but if it appears that the judgment creditor refused such offer, the court may order the judgment creditor to pay such costs, including the loss of wages suffered by the judgment debtor through having to appear in court in connection with the proceedings.
- (2) .....
- (3) The provisions of this section shall not preclude the court from making such order regarding costs as it may deem just in any proceedings in terms of a notice under section 65A(1).

## **Section 65M**

### **Enforcement of certain judgments of Supreme Court**

If a judgment for the payment of any amount of money has been given by a division of the Supreme Court of South Africa, the judgment creditor may file with the clerk of the court from which the judgment creditor is required to issue a notice in terms of section 65A(1), a certified copy of such judgment and an affidavit or affirmation by the judgment creditor or a certificate by his attorney specifying the amount still owing under the judgment and how such amount is arrived at, and thereupon such judgment, whether or not the amount of such judgment would otherwise have exceeded the jurisdiction of the court, shall have all the effects of a judgment of such court and any proceedings may be taken thereon as if it were a judgment lawfully given in such court in favour of the judgment creditor for the amount mentioned in the affidavit or affirmation or the certificate as still owing under such judgment, subject however to the right of the judgment debtor to dispute the correctness of the amount specified in the said affidavit or affirmation or certificate.

It is further suggested that no more than 35% of a judgement debtor's gross salary be susceptible of attachment by way of emoluments attachment orders.

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