RESEARCH ARTICLE

Stephan van der Merwe

Senior Attorney and Lecturer, Stellenbosch University Law Clinic
ORCID: https://orcid.org/0000-0002-2434-6554

DOI: https://doi.org/10.38140/jjs.v48i1.7344

ISSN 0258-252X (Print)
ISSN 2415-0517 (Online)

Journal for Juridical Science
2023:48(1):1-15

Date Published:
30 June 2023

EVALUATING THE ROLE OF JUDICIAL OVERSIGHT IN THE CONTEXT OF THE POST-2018 EMOLUMENT ATTACHMENT ORDER LEGAL FRAMEWORK: REVISITING UNIVERSITY OF STELLENBOSCH LEGAL AID CLINIC V MINISTER OF JUSTICE 2015 5 SA 221 (WCC)[1]

SUMMARY

Following the Constitutional Court's landmark 2016 judgment in *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services*, significant legal reforms aimed at combatting abuses in the emolument attachment order ("EAO") process were introduced in 2018. These reforms were, however, exclusively prospective in nature. This contribution uses the lens of judicial oversight to consider whether the applicable amendments have been successful in assisting embattled EAO debtors. It first defines and delineates judicial oversight in the context of EAOs, before analysing the historic, contemporary, and comparative situation to identify the prevailing EAO-related challenges. Ultimately, the contribution argues that debtors who suffer from the undisputed devastation wrought by past and continuing EAO abuse remain vulnerable to creditor exploitation.

1. INTRODUCTION

Historically, mechanisms facilitating civil debt collection and its broader discipline of civil procedure have been an unpopular legal research area, not only in South Africa,

Published by the UFS
http://journals.ufs.ac.za/index.php/jjs

1 This contribution is based on research done for the author's LLD dissertation, entitled *Developing a procedural framework for advanced debtor protection: The case of emolument attachment orders*.

but also abroad.[2] In recent years, one civil debt collection mechanism has, however, attracted some academic attention.[3] This attention has resulted from relatively rapid legal developments to counteract widespread debtor exploitation resulting from systemic abuses.[4] The emolument attachment order (hereafter, "EAO") mechanism, sometimes also referred to as garnishee orders,[5] functions as a civil debt collection instrument, usually following the granting of a default judgment,[6] where the debtors are judged to be legally liable to their creditor.[7] Through the application of EAOs, debtors' property, specifically their wages, are exposed to execution, in order to satisfy the creditors' expectations of performance. In this manner, a portion of workers' wages are withheld from them by the debtors' employers (the garnishees) after being legally requested or reserved by creditors. The EAO mechanism is a popular debt-collection instrument affecting the lives of potentially millions of people.[8] Creditors favour debt collection through the EAO mechanism, as it offers a relatively convenient and secure form of debt enforcement.[9]

Following the Constitutional Court's landmark 2016 judgment in *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic; Mavava Trading 279 (Pty) Ltd v University of Stellenbosch Legal Aid Clinic*[10] (hereafter, "*USLAC* Constitutional Court"), significant legal reforms were introduced to the South African debt-collection landscape in 2018. Amendments to the *Magistrates' Courts Act*[11] were aimed at combatting

2 De Vos 2002:236-237.
3 See, for example, Coetzee & Van Sittert 2018; Van der Merwe 2019.
4 Van der Merwe 2019:87-90.
5 There is a slight, but important difference between garnishee orders, a term used to describe an order that empowers the creditor to attach any debt owed to the debtor by any third party, and EAOs, which are specific forms of garnishee orders applicable to the employer-employee relationship. See Van der Merwe 2019:78.
6 Van der Merwe 2008:78.
7 The definition of EAOs is apparent from their function, which is explained in sec. 65J(1)(*b*) of the *Magistrates' Courts Act* 32/1944.
8 As far as the author can ascertain, there are no statistics available on the exact number of EAOs currently in circulation. Haupt *et al*. 2008:85-104 experienced a similar challenge and relied on estimates to provide some indication of the extent of EAO use at the time. The author's estimation of the number of lives affected by EAOs, including extended family members, is aligned with available data regarding the extreme scale of South African indebtedness (see, for example, Coetzee & Van Sittert 2018:110) and earlier indications of the prevalence of EAOs in circulation. See, for example, Van der Merwe 2019:80 at fn. 26, referring to an audit of a portion of the 1,75 million EAOs in existence in 2007.
9 South African labour laws are relatively protective of employees and EAO debtors are specifically safeguarded from employer retaliation as a result of EAO deductions. See Smit & Van Eck 2010:47, 65-66. In terms of sec. 185 of the *Labour Relations Act* 66/1995, every employee has the right not to be unfairly dismissed.
10 *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic; Mavava Trading 279 (Pty) Ltd v University of Stellenbosch Legal Aid Clinic* 2016 6 SA 596 (CC).
11 *Magistrates' Courts Act*.

abuses in the EAO process, where EAO debtors had suffered significant exploitation at the hands of unscrupulous creditors and their collection agents.[12] These important amendments were primarily aimed at introducing mandatory judicial oversight during the issuing of *new* EAOs.[13] Regrettably, due to the exclusively prospective nature of the amendments, correcting the undisputed devastation wrought by *past and continuing* EAO abuse remains the responsibility of individual debtors.[14]

Considering the extent and impact of abuse resulting from the previous lack of sufficient judicial oversight in EAO cases, this contribution considers whether the applicable amendments have been successful in assisting embattled EAO debtors. To facilitate this examination, the contribution first delineates the scope of the study, by exploring the concept of judicial oversight. It then summarises the relevant historic and contemporary context, before describing the prevailing EAO-related challenges. Next, although a detailed comparative analysis falls outside its scope, this contribution briefly outlines how selected comparative approaches manage these challenges. Finally, the contribution concludes with recommendations based on the research findings.

Continued research related to the field of consumer debt collection, including by means of the EAO mechanism, is important and valuable, since EAO deductions are an important socio-economic issue. Even small improvements in the framework could make a substantial difference, due to the widespread use of wage garnishment as civil debt collection method.[15] EAOs could arguably become even more popular in future as an option for the enforcement of civil judgments, due to the waning popularity of alternative collection methods.[16]

12 Van der Merwe 2019:87-90.

13 Van der Merwe 2019:90.

14 *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic; Mavava Trading 279 (Pty) Ltd v University of Stellenbosch Legal Aid Clinic*:paras. 159, 211.

15 Willborn 2019:859: "[Wage] garnishment is mass justice with millions of cases each year."

16 See, for example, Mullen 2019:193 who notes that the practice of attaching a debtor's property to sell to pay debts has lost popularity in the USA because of practical issues with attachment and storage. It is also deemed humiliating and harsh for strangers to enter a citizen's home to take their belongings. In fn. 15, the author refers to the case of *Rothschild v Boelter* 18 Minn 361 (1872), in which the court found that wage garnishment was a less humiliating option for attachment. The author correctly argues that wage garnishment is, however, potentially more ruinous. Due to, *inter alia*, the disproportionate legal costs and sheriff's fees associated with the attachment and storage of property for relatively small debts, it is arguable that the same conclusions hold true for the South African context.

2. DELINEATION

Over the past two decades, South Africa's apex court has consistently reaffirmed the need for judicial oversight over the execution of civil judgments.[17] Crucially, according to Mokgoro J in *Jaftha v Schoeman*,[18] judicial oversight should invariably occur without prompting by the debtor, even in the case of default judgments.[19] This statement highlights the value and import of judicial oversight, especially in the context of defending the rights of those who, through a dearth of skill or resources, which is generally the case in South Africa, lack the ability to help themselves.[20] Judicial oversight also forces judicial officers to engage with the causal factors[21] underpinning judgments and it alleviates, albeit to a limited extent, the challenge of providing access to justice to distressed debtors.

Mokgoro J stated further that "[j]udicial oversight permits a magistrate to consider *all the relevant circumstances* of a case to determine whether there is good cause to order execution".[22] She held that it would be unwise to attempt to qualify which factors would be relevant to these enquiries, further emphasising the wide powers that are afforded to magistrates in this regard.[23] Mokgoro J did, however, find that a court should at least consider the extent of compliance with procedure according to the applicable rules as well as the issue of proportionality.[24] The issue of proportionality entails considering whether "the interests of the judgment creditor in obtaining payment are significantly less than the interests of the judgment debtor" in forfeiting his or her and his or her dependant's home.[25] Although this judgment was rendered in the context of the execution of immovable property, subsequent judgments have confirmed its application to movable and incorporeal property.[26]

It is argued below that the required judicial oversight, however inclusive and vigorous it may be, remains gravely inadequate if limited to the process

17 See, for example, *Lesapo v The North West Agricultural Bank* 2000 1 SA 409 (CC); *Jaftha v Schoeman* 2005 2 SA 140 (CC); *Gundwana v Steko Development CC* 2011 3 SA 608 (CC).

18 *Jaftha v Schoeman*.

19 *Jaftha v Schoeman*:par. 55.

20 The opportunities for exploitation are compounded by the general financial illiteracy and naiveness among consumers regarding the associated risks. In 2019, 4,4 million adults in South Africa were illiterate and 12,1 per cent of persons in the population aged 20 years and older had not completed Grade 7. The percentage of individuals aged 20 years and older, who had attained at least Grade 12, was estimated at only 46,7 per cent of the population. See Khuluvhe 2021:6.

21 In other words, the facts in support of the cause of action.

22 *Jaftha v Schoeman*:par. 55 [own emphasis].

23 *Jaftha v Schoeman*:par. 56.

24 *Jaftha v Schoeman*:par. 56.

25 *Jaftha v Schoeman*:par. 56.

26 See, for example, *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic; Mavava Trading 279 (Pty) Ltd v University of Stellenbosch Legal Aid Clinic* and *Booysen v Absa Bank Ltd* ZAGPJHC 11 September 2020 case no 25718/2018.

up to the stage of the granting of the judgment. Within the context of the EAO mechanism, meaningful judicial oversight can only be achieved if extended to the *entire* process, including the steps taken after the awarding of the judgment and resulting EAO.[27] Therefore, judicial participation should be compulsory in the granting, maintenance, and discharge of EAOs. This implies judicial oversight over issues such as the responsibility for verifying and record-keeping to monitor reducing debt balances.

3. SUMMARY OF THE HISTORIC AND CONTEMPORARY CONTEXT

The English common law strongly influenced the civil procedural system in the former Union of South Africa.[28] Although there were material differences in the EAO practices of the various provinces within the Union,[29] EAOs could generally only be awarded subject to judicial oversight based on the inherent jurisdiction of the Superior Courts.[30] This situation changed with the 1917 enactment of the *Magistrates' Courts Act*.[31] This was followed by the 1944 implementation of the *Act* which, in its amended form, is still the primary legislative source for EAOs.[32] In terms of this legislation, clerks of the Magistrates' Courts could grant EAOs, without the need for judicial oversight.[33] Creditors were able to manipulate the system to achieve this, by producing debtor consents to EAOs,[34] or by filing "*with the clerk of the court* an affidavit or an affirmation by the judgment creditor or a certificate by his or her attorney".[35] The contents of these documents were intended to constitute evidence of debtors' agreement with the issuing of the EAO and the quantum of the overall debt and monthly deductions.

Prior to the amendments brought about by the *USLAC* Constitutional Court case,[36] the lack of judicial oversight in the awarding of EAOs created enormous scope for abuse. The Constitutional Court agreed with the relevant findings of Desai J in the preceding judgment of the *USLAC* High Court case.[37] In many instances, the consents, affidavits, and certificates used to facilitate the circumvention of judicial attention were falsified or produced

27 As argued by the applicants in *University of Stellenbosch Law Clinic v National Credit Regulator* 2020 3 SA 307 (WCC).
28 Hahlo & Kahn 1960:205.
29 Select Committee 10-1913 *Report of the Select Committee on Garnisheeing Wages*:iii-iv.
30 *Van Wyk v Van Rensburg* 1930 TPD 109:par. 111.
31 *Magistrates' Courts Act* 32/1917.
32 See *Magistrates' Courts Act*:sec. 65J.
33 Sec. 65J(2) of the *Magistrates' Courts Act* prior to the implementation of the *Courts of Law Amendment Act* 7/2017.
34 *Magistrates' Courts Act*:sec. 65J(2)(*a*).
35 *Magistrates' Courts Act*:sec. 65J(2)(*b*) [own emphasis].
36 The amendments to the *Magistrates' Courts Act* inspired by the *Courts of Law Amendment Act*.
37 *University of Stellenbosch Legal Aid Clinic v Minister of Justice* 2015 5 SA 221 (WCC).

through fraud, misrepresentation, or coercion.[38] The results of this malleable legislation, which relied on the subjective opinion of clerks of the court, were atrocious and have been documented elsewhere.[39] Public outcry against these abuses eventually necessitated intervention in the form of compulsory judicial oversight.[40]

The continued malpractice involving EAO deductions was undoubtedly impeded by the constitutionally directed amendments to the *Magistrates' Courts Act* that were brought about by the enactment of the *Courts of Law Amendment Act*.[41] This amendment, *inter alia*, ostensibly guarantees judicial oversight:

> An emoluments attachment order may only be issued if the court has so authorised, after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate, whether on application to the court or otherwise, and such authorisation has not been suspended.[42]

In addition, the *Courts of Law Amendment Act* has extended the ambit of the court's judicial oversight, by increasing the number of factors that the court must consider in awarding EAOs.[43] Crucially, mandating and expanding judicial oversight are nevertheless only relevant to the *issuing* of EAOs. There are no provisions in the *Magistrates' Courts Act* that oblige courts to have *mero motu* input in the monitoring or eventual discharge of EAOs.

4. CHALLENGES

This complete lack of compulsory judicial oversight throughout the process, after the issuing of EAOs, presents one of the most serious challenges to debtor security. While the court is obliged to concern itself with the debtor's situation during the granting of an EAO, the process prescribed by the revamped sec. 65J of the *Magistrates' Courts Act* suggests this concern is disregarded as soon as the order is awarded. After the court issues an EAO, the sheriff must serve it on the debtor's employer,[44] who will then commence with the deduction and transfer of monthly payments to the creditor.[45] Should the employer fail in this duty, the EAO could be executed, as if it were a judgment against the employer.[46] The creditor is supposed to furnish the debtor and their employer with a quarterly statement detailing particulars of

38 *University of Stellenbosch Legal Aid Clinic v Minister of Justice*:par. 32.
39 See, for example, Haupt *et al*. 2008; Van der Merwe 2019.
40 See James 2014:77.
41 *Courts of Law Amendment Act*.
42 *Magistrates' Courts Act*:sec. 65J(2).
43 *Magistrates' Courts Act*:sec. 55A. These factors include the size and history of the debt, the debtor's personal circumstances, as well as broad social justice considerations.
44 *Magistrates' Courts Act*:sec. 65J(3)(*c*).
45 *Magistrates' Courts Act*:sec. 65J(4)(*a*).
46 *Magistrates' Courts Act*:sec. 65J(5).

the payments received and the outstanding balance to date.[47] The creditors, their collection agent, or their legal representative, are therefore tasked and trusted with the record-keeping and accounting involved in calculating the remaining balance in terms of the EAO.

The courts will not interfere in this process, unless the debtor's employer raises a concern with EAO deductions[48] as a possible precursor to an application by the debtors, their employer, or other interested parties.[49] The court's ability to suspend, amend, or rescind an EAO is, therefore, contingent on various factors, including:

- whether creditors provide statements;
- whether these statements are clear and transparent;
- whether debtors' employers are capable of, and invested in verifying these statements for accuracy;
- whether debtors and their employers are able to cooperate, in order to raise and discuss concerns, and
- whether the relevant employer, debtor or other interested party possesses the means to raise these concerns with a court in terms of the appropriate court processes.

Arguably, the current legislative framework, therefore, effectively leaves the responsibility of monitoring EAOs in the hands of creditors. This is cause for concern when research points to the skewed power relationship which ensures that debtors simply are no match for shrewd creditors.[50] It suggests that debtors are often incapable of resisting experienced and unscrupulous creditors, especially when the former are unrepresented.[51] In addition, employers are unlikely to risk personal liability and expend their own resources to combat debtor abuse on behalf of their employees.[52] No one else will come to the aid

47 *Magistrates' Courts Act*:sec. 65J(4)(*b*).
48 As was the case in the run-up to *University of Stellenbosch Legal Aid Clinic v Minister of Justice*, where the relevant employer became concerned with the well-being of her employees whose wages were devastated by EAO deductions.
49 *Magistrates' Courts Act*:sec. 65J(6).
50 Pearson *et al.* 2017:33.
51 See, for example, James 2014:72, 76-77, 198.
52 Haupt *et al.* 2008:121. While this is the general experience, there are exceptions as mentioned in fn. 48.

of these debtors.[53] The tragic results of the courts' indifference to the further execution of EAOs, including the events that led to the Marikana massacre, have been discussed elsewhere.[54] The latter research demonstrated that it is not uncommon to find that no discharge occurs on paid-up EAOs, resulting in continued deductions of exorbitant amounts, several times the initial debt. Lack of judicial oversight also encourages unscrupulous creditors to run up exorbitant, unilaterally charged costs, fees, and interest which are simply added to the debtors' liability, to be deducted from future earnings.[55] This concern is aggravated by the fact that the majority of legal charges typically result after the issuing of an EAO.[56]

5. OVERVIEW OF SELECTED COMPARATIVE APPROACHES

As mentioned earlier, it is not the purpose of this contribution to engage in a comparative analysis of the South African wage garnishment mechanism, but to investigate the impact and success of the legislative requirement of judicial oversight. A brief reference to appropriate comparative wage garnishment systems may, however, aid this investigation, since more established systems may present solutions to assist further development related to EAO challenges. In this regard, this contribution considers relevant aspects of the English and United States of America (hereafter, "USA") systems. The references to these two systems are appropriate, due to their important EAO-related similarities to South Africa in terms of their political, social, and legal landscapes. These systems also share South Africa's procedural law heritage of mainly English common-law roots.

English attachment of earnings orders are regulated by the *Attachment of Earnings Act*[57] and the *Civil Procedure Rules*.[58] These sources allow for periodic deductions of debtor earnings[59] and direct courts to be active participants in

53 It should be noted that, in addition to the judicial intervention advocated in this contribution, EAO debtors could approach the statutory bodies appointed in terms of various regulations related to the collection of debt. These would include, *inter alia*, the National Credit Regulator and the Legal Practice Council. Unfortunately, it appears that there are serious concerns about the efficacy of this assistance on a practical level. See, for example, Van der Merwe 2019:92; James 2014: 30. See also *Legal Practice Council v Van Wyk* (3920/2013) [2021] ZAWCHC 223 (4 November 2021):par. 3, where Sher J castigates "the regulatory bodies responsible for the control and governance of the profession [for their failure] to properly carry out their duties". The author argues that, even to the extent that these bodies may offer some form of assistance to embattled EAO debtors, the implementation of this assistance would ultimately still remain subject to the authority of courts. In addition, the responsibility to lodge complaints with these regulatory bodies still rests on debtors and their employers. Consequently, the barriers to judicial oversight discussed above remain valid and relevant.

54 See, for example, Van der Merwe 2019:81, 93.

55 Van der Merwe 2019:93.

56 *University of Stellenbosch Law Clinic v National Credit Regulator*, applicants' founding affidavit:par. 225.

57 *Attachment of Earnings Act* 1971 c.32.

58 *Civil Procedure Rules* 1998 No 3132 (L 17).

59 *Attachment of Earnings Act*:sec. 6(1)(a).

the process of case management.[60] English attachment of earnings orders can be issued by the court or by the relevant fines officer, but only in cases where the officer is presented with sufficient information to make such order,[61] including the debtor's reply form to the notice of application for an attachment of earnings order.[62] Contrary to the position in South Africa, judicial oversight is also extended to the process after the issuing of the initial order.

This extended court participation is achieved in numerous ways. Deductions from earnings are transferred from the debtor's employer to the collecting officer of the court,[63] or, alternatively, to the Centralised Attachment of Earnings Payments System (hereafter, "CAPS") office.[64] The collecting officer or CAPS office will issue receipts, record, and transfer the payments to the relevant creditors.[65] The court is also directly involved in the procurement of evidentiary documents and information related to the debtor's earnings.[66] In this capacity, judicial oversight is extended to include verification of the payment history and the reducing balance of debt collected through attachment of earnings orders.[67] This monitoring function enables courts to vary and discharge attachment of earnings orders *mero motu*.[68] The courts also have the power, of their own volition, to constitute a consolidated attachment of earnings order[69] and issue an administration order[70] based on their assessment of the debtor's attachment of earnings order responsibilities.

In the USA, every state's wage garnishment mechanism is subject to federal statute, specifically *The Federal Wage Garnishment Law*,[71] as well as the applicable state laws.[72] The consequence of this dual-governance system is that each state's wage garnishment system is unique. Despite these differences, federal governance requires states to abide by minimum standards.[73] In the wake of the judgment of the Supreme Court in *Sniadach v Family Finance Loan Corp*,[74] these standards have included the need for judicial oversight in the granting of wage garnishment orders.[75] Various states such as Nebraska have enacted additional requirements to safeguard debtor

60 *Civil Procedure Rules*:part 1.4(1).
61 *Civil Procedure Rules*:part 89.4(1) and (2).
62 *Attachment of Earnings Act*:sec. 6(1) and *Civil Procedure Rules*:part 89.7(1).
63 *Attachment of Earnings Act*:sec. 6(1)(b).
64 HM Courts & Tribunals Service 2020:2-3.
65 Wilson *et al.* 1992:365; HM Courts & Tribunals Service 2020:2-3.
66 *Attachment of Earnings Act*:secs. 14 and 15; *Civil Procedure Rules*:part 89.6.
67 Government of the United Kingdom 2022.
68 *Attachment of Earnings Act*:secs. 9(3)(a) and 10; *Civil Procedure Rules*:part 89.14.
69 *Civil Procedure Rules*:part 89.20.
70 *Attachment of Earnings Act*:sec. 4(1)(a).
71 *The Federal Wage Garnishment Law* 15 USC 1671 (1968).
72 See, for example, Justia 2022.
73 Wood 1970:372; Mullen 2019:194 fn. 21, where the author refers to the case of *Marshall v Safeway, Inc.* 88 A.3d 735, 738 (Md. 2014), in which state statutes were found to contradict federal standards.
74 *Sniadach v Family Finance Loan Corp* 395 US 337 (1969).
75 See, for example, Justia 2022.

interests before a wage garnishment order is instituted, requiring detailed consideration of debtors' personal circumstances during court hearings.[76]

In addition to the need for judicial oversight at the commencement of the wage garnishment process, a common requirement of the USA wage garnishment system is the imposition of a duty on the debtor's employer to transfer the amount deducted from the debtor's earnings to the court, which records the payments before forwarding it to the creditor.[77] In this manner, the court can determine when to terminate the order.[78] In some states, including, for example, New York and Idaho, this accounting duty to record, administer, and distribute garnished wages is imposed on the sheriff of the court.[79] Another common occurrence among state wage garnishment practices is that garnishment orders are not enforced in perpetuity.[80] Creditors are required to renew orders for garnishment at regulated intervals.[81] Suggestions to remove this need for wage garnishment order renewal and the oversight of courts from the accounting process involved in tracking garnished funds and the discharge of garnishment orders[82] have met with stern opposition.[83]

6. RECOMMENDATION

In the *USLAC* High Court case, Desai J emphasised the court's constitutional prerogative[84] to consider foreign law.[85] In so doing, he highlighted the shortcomings of the South African EAO mechanism in comparison to the foreign jurisdictions considered, which include, as above, England and the USA.[86] Desai J confirmed that these jurisdictions also acknowledge the concerns arising from wage garnishment abuse by unscrupulous creditors.[87] In his analysis of how foreign jurisdictions address these concerns, the judge held that "[t]hese jurisdictions address the problem by employing protective measures at the time *when the attachment order is issued*",[88] and:

> These provisions place restrictions upon the officials who *issue* the EAOs and do not require a debtor to subsequently initiate a review or challenge.

76 Willborn 2019:862. These hearings are conducted to determine if debtors are heads of families.
77 Willborn 2019:867; Mullen 2019:223. For an example of state legislature regulating this process, see Justia 2022.
78 Willborn 2019:867.
79 Mullen 2019:224.
80 Mullen 2019:226-228.
81 North Dakota State Government 2022. This extension must be agreed to in writing by the creditor and debtor or ordered by the court.
82 By implication, the resulting reduction of debtor responsibility.
83 Mullen 2019:225, 228.
84 *Constitution of the Republic of South Africa* 1996:sec. 39(1)(a).
85 *University of Stellenbosch Legal Aid Clinic v Minister of Justice*:par. 42.
86 *University of Stellenbosch Legal Aid Clinic v Minister of Justice*:paras. 42-49.
87 *University of Stellenbosch Legal Aid Clinic v Minister of Justice*:par. 42.
88 *University of Stellenbosch Legal Aid Clinic v Minister of Justice*:par. 42 [own emphasis].

Rather, the needs of the debtor are considered *from the beginning*. The same result is achieved by requiring judicial oversight *when each EAO is issued*.[89]

Regrettably, the above passages of the judgment in the *USLAC* High Court case do not expressly recognise the fact that the considered jurisdictions extended judicial oversight to *after* the issuing of the appropriate earnings attachment order. It is accordingly questionable whether the court gave proper consideration, if any, to this aspect. This may be attributable to the court's strong reliance on several seminal Constitutional Court cases,[90] emphasising the need for judicial oversight in anticipation of the seizure of property in the execution of civil judgments. Such reliance may have been made at the expense of an emphasis on judicial oversight post-issuing.[91] Desai J correctly held that the principles of these cases, involving sales in execution of immovable property, were applicable to EAOs.[92] While reliance on this authority should, therefore, not be criticised *per se*, the court may have been misguided, in that it failed to recognise or sufficiently address the difference between the once-off attachment of immovable property and the continual attachment of periodic earnings. It can be argued that each of these periodic deductions constitutes a separate attachment that should, as such, attract dedicated judicial oversight. In some respects, the attachment of future income is more far-reaching than attachments limited to existing property.[93] If the court's attention was directed at this subtle, but important difference, it may not have limited its judgment to enforcing judicial oversight to the stage when an EAO is issued.[94] Had this been the case, the ensuing judgment in the *USLAC* Constitutional Court case and the consequential *Courts of Law Amendment Act* may have recognised the need to include additional checks and balances in the remaining process.

It is perplexing that creditors are considered untrustworthy, in many cases justifiably so, to establish EAOs without judicial oversight, but that they are then expected to accurately maintain EAOs with virtual autonomy.[95]

Subsequent efforts to extend judicial oversight to aspects of the post-issued EAO mechanism have mainly focused on creditors' unilateral accumulation of collection costs as a means of extending debtor liability.[96]

89 *University of Stellenbosch Legal Aid Clinic v Minister of Justice*:par. 49 [own emphasis].

90 *Lesapo v The North-West Agricultural Bank*; *Jaftha v Schoeman*; *Gundwana v Steko Development*.

91 *University of Stellenbosch Legal Aid Clinic v Minister of Justice*:paras. 76-84.

92 *University of Stellenbosch Legal Aid Clinic v Minister of Justice*:par. 80. The requirement of judicial oversight has been expanded to cases for the attachment of sums of money (*Members of the Executive Council for Health and Social Development v DZ* obo WZ 2018 1 SA 335 (CC)) and bank accounts (*Booysen v ABSA Bank Ltd*).

93 Schraten 2020:67.

94 *University of Stellenbosch Legal Aid Clinic v Minister of Justice*:par. 84.

95 Willborn 2019:867. The analogy of "foxes and henhouses" is also apt in this regard.

96 *Lonmin Ltd v CG Steyn Inc t/a Steyn* NWHC case no M619/2016 of 26 April 2018; *University of Stellenbosch Law Clinic v National Credit Regulator*.

One of the arguments for these efforts has been that the court must consider costs in deciding if it would be just and equitable to grant an EAO, and that the main costs only accrue after an EAO is issued.[97] While these efforts to increase judicial oversight, by addressing collection costs, are commendable, they have been largely unsuccessful and have not included other relevant considerations such as the challenge of monitoring EAOs.

Those who are sceptical about extending judicial oversight tend to argue that complete oversight over the entire EAO process will be too costly and burdensome on the judiciary.[98] The applicants in the *USLAC* High Court case addressed this contention in their heads of argument after it was raised by the respondents in that matter.[99] The applicants argued that a plea of lack of capacity was no defence to a claim based on constitutional rights.[100] In support of their argument, the applicants referred[101] to the following passage from the judgment of Van der Westhuizen J in the case of *S v Jaipal*:[102]

> As far as upholding fundamental rights and the other imperatives of the Constitution is concerned, we must guard against popularizing a lame acceptance that things do not work as they ought to, and that one should simply get used to it. Naturally the relevant authorities must attempt to see to it that facilities are provided as far as possible. Furthermore, all those concerned with and involved in the administration of justice − including administrative officials, judges, magistrates, assessors and prosecutors − must purposefully take all reasonable steps to ensure maximum compliance with constitutional obligations, even under difficult circumstances. Responsible, careful and creative measures, born out of a consciousness of the values and requirements of our Constitution, could go a long way to avoid undesirable situations.[103]

Despite being canvassed in the court papers, the issue of the capacity of courts to deal with EAO oversight did not feature in Desai J's judgment in the *USLAC* High Court case. The judgment in the *USLAC* Constitutional Court case mentioned that the expedient process for debt collection originated in the 1970s,[104] due to a lack of capacity of courts to deal with these matters

97 *University of Stellenbosch Law Clinic v National Credit Regulator*, applicants' founding affidavit:par. 225.

98 This argument was raised in Parliamentary Monitoring Group 2017:24.

99 See applicants' heads of argument in the *University of Stellenbosch Legal Aid Clinic v Minister of Justice*:paras. 161-163.

100 *University of Stellenbosch Legal Aid Clinic v Minister of Justice*:par. 162.

101 *University of Stellenbosch Legal Aid Clinic v Minister of Justice*:par. 163.

102 *S v Jaipal* 2005 4 SA 581 (CC).

103 *S v Jaipal*:par. 56.

104 This process enabled certain debtors to consent to judgment and payment in instalments, thereby reducing the judicial burden to provide oversight. See *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic; Mavava Trading 279 (Pty) Ltd v University of Stellenbosch Legal Aid Clinic*:paras. 10-13.

in the normal manner.[105] Cameron J was brisk in his assessment that, under the constitutional dispensation, EAOs could only be issued after judicial oversight.[106] Exactly how this judicial oversight should function, was a matter left for future legal development.[107] Although this directive was aimed at judicial oversight when EAOs are issued, it is argued that the reasoning also applies to the remainder of the EAO process.

The author agrees with the manner in which the applicants in the *USLAC* High Court case, Van der Westhuizen J in *S v Jaipal*, and Cameron J in the *USLAC* Constitutional Court case dealt with the issue of the capacity of courts to deal with EAO oversight. If constitutionally enshrined rights are infringed, as is the case with unlawful EAO deductions, contemporary practical limitations should not prohibit legal developments to safeguard basic human rights. The author, therefore, recommends that, as is the situation in England and the USA, legislation be enacted to extend judicial oversight over the EAO mechanism to include the entire process, from the issuing of the order up to and including its final discharge. This step will undoubtedly result in the advancement of debtor protection in the case of EAOs.

7. CONCLUSION

The discussion in this contribution focused on one of the main concerns with the contemporary EAO mechanism. South Africa's wage garnishment mechanism suffers from deficient judicial oversight during the full extent of the process, leaving the mechanism vulnerable to the dangers of creditor dominance. Debtors, therefore, remain at risk, as creditors have generally proven untrustworthy in accurately recording and discharging EAOs.[108] The seriousness of this concern is demonstrated in the many examples of the negative consequences of EAO debtor exploitation, including individual hardship, industrial action, strikes, and even violent economic upheaval.[109] It is regrettable that the opportunity presented by the recent amendments to the *Magistrates' Courts Act*, which presented the legislature with an ideal chance to make drastic improvements to the EAO regulatory framework, was not properly utilised.

---

105 *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic; Mavava Trading 279 (Pty) Ltd v University of Stellenbosch Legal Aid Clinic*:paras. 8-10.

106 *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic; Mavava Trading 279 (Pty) Ltd v University of Stellenbosch Legal Aid Clinic*:par. 154. This robust approach was previously followed in *Minter NO v Baker* 2001 3 SA 175 (W).

107 *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic; Mavava Trading 279 (Pty) Ltd v University of Stellenbosch Legal Aid Clinic*:par. 154.

108 See, for example, Van der Merwe 2008:74-76.

109 Van der Merwe 2019:81.

BIBLIOGRAPHY

COETZEE H & VAN SITTERT C
2018. Reflections on recent developments regarding wage garnishment in South Africa. *International Journal of Private Law* 9(1/2):107-123. https://doi.org/10.1504/IJPL.2018.097326

DE VOS WL
2002. South African civil procedural law in historical and social context. *Stellenbosch Law Review* 13(2):236-251.

GOVERNMENT OF THE UNITED KINGDOM
2022. *Make debt deductions from an employee's pay*. https://www.gov.uk/debt-payments-from-your-wages/check-debt-amount (accessed on 17 August 2022).

HAHLO H & KAHN E
1960. *The Union of South Africa: The development of its laws and constitution*. London: Stevens & Sons.

HAUPT F, COETZEE H, DE VILLIERS D & FOUCHÉ J
2008. The incidence of and the undesirable practices relating to garnishee orders in South Africa. https://bit.ly/3oc8Y2q (accessed on 17 August 2022).

HM COURTS & TRIBUNALS SERVICE
2020. EX323: Attachment of Earnings. https://bit.ly/41E2UgP (accessed on 17 August 2022).

JAMES D
2014. *Money from nothing: Indebtedness and aspiration in South Africa*. Johannesburg: Wits University Press.

JUSTIA
2022. Nebraska Revised Statutes Chapter 25 – Courts; Civil Procedure 25-1056(2). https://bit.ly/3Muslx6 (accessed on 17 August 2022).

KHULUVHE M
2021. Fact sheet: Adult illiteracy in South Africa. https://bit.ly/3IdyMBX (accessed on 17 August 2022).

MULLEN F
2019. Fifty years after the *Consumer Credit Protection Act*: The high price of wage garnishments. *Mitchell Hamline Law Review* 45(1):191-236.

NORTH DAKOTA STATE GOVERNMENT
2022. North Dakota Century Code Title 32-09. https://www.legis.nd.gov/cencode/t32c09-1.pdf#nameddest=32-09p1-20 (accessed on 17 August 2022).

PARLIAMENTARY MONITORING GROUP
2017. *Courts of Law Amendment Bill (B8-2016)* Summary and analysis. https://pmg.org.za/bill/643/ (accessed on 17 August 2022).

PEARSON G, STOOP PN & KELLY-LOUW M
2017. Balancing responsibilities – Financial literacy. *Potchefstroom Electronic Law Journal* 20(1):1-55. https://doi.org/10.17159/1727-3781/2017/v20i0a1378

SCHRATEN J
2020. *Credit and debt in an unequal society: Establishing a consumer credit market in South Africa*. New York: Berghahn Book. https://doi.org/10.2307/j.ctv1k3nqm7

SMIT P & VAN ECK BPS
2010. International perspectives on South Africa's unfair dismissal law. *The Comparative and International Law Journal of Southern Africa* 43(1):46-67.

VAN DER MERWE S
2008. Failure to discharge: A discussion of the insufficient legal recourse afforded to judgment debtors in the South African context. *Journal of Juridical Science Special Issue*:71-86.

2019. Traversing the South African emolument attachment order legal landscape post-2016: Quo vadis? *Stellenbosch Law Review* 30(1):77-96.

WILLBORN S
2019. Wage garnishment: Efficiency, fairness, and the *Uniform Act*. *Seton Hall Law Review* 49(4):847-870.

WILSON M, FORD J & HUGHES M
1992. Recovering debt: The effectiveness of attachment of earnings? *Civil Justice Quarterly* 11(Oct):363-383.

WOOD D
1970. Wage garnishment under the *Consumer Credit Protection Act*: An examination of the effects on existing state law. *William and Mary Law Review* 12(2):357-395.