



24 July 2019

## **Contribution to the Thematic Report to the United Nations Human Rights Council on Private Debt and Human Rights**

### **1 Introduction**

As a member of the global community, South Africa has also experienced a marked increase in all forms of private debt. Recklessly extending credit frequently entraps debtors in poverty, exposing them to various human rights abuses. This phenomenon is not only evident on a microeconomic scale, but manifests itself in macroeconomic issues.<sup>1</sup> This contribution will comment on local human rights concerns relating to private debt. The use of emoluments attachment orders (“EOs”) will be discussed as an example of one area of debt-related abuse in South Africa, in order to illuminate the contemporary challenges facing debtors. Thereafter, recent judicial developments will be considered in order to evaluate the present tensions as well as to identify certain unresolved issues.

### **2 Factual background: the implications of private debt on macroeconomic conditions and public debt**

#### **2.1 South Africa as one of the most unequal societies**

South Africa suffers from one of the greatest wealth gaps in the world. The World Bank recently reported that the top 1 percent of South Africans own 70.9 percent of the nation's wealth, while the bottom 60 percent collectively control only 7 percent.<sup>2</sup> Due

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<sup>1</sup> <https://www.iol.co.za/business-report/economy/lenders-prey-on-miners-davies-1401402> (accessed 24-07-2019).

<sup>2</sup> <https://www.npr.org/sections/goatsandsoda/2018/04/02/598864666/the-country-with-the-worlds-worst-inequality-is> (accessed 24-07-2019).

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to its extensive client base, legal aid organisations like university law clinics are often confronted with aspects of the law that are quite alien to those faced by private practice. Private law firms will seldom get involved in these so-called “poverty law” cases because such clients would be unable to pay their fees.

One area of the law that most law clinics are eventually called to respond to, is that of assisting judgment debtors who have fallen foul of disreputable and often immoral money lenders and other judgment creditors. As is the case with the unemployed, the refugee and the evicted, debtors seldom have the financial means to afford the services of powerful private attorneys to protect their rights. As they are prone to having their human rights abused, it is crucial that the clinical law movement properly assists these persons.<sup>3</sup>

## 2.2 The proliferation of private debt in South Africa

The last two decades have witnessed a massive credit explosion in South Africa. The end of apartheid with its economic segregation meant that the overwhelming majority of society, who previously had no access to credit, were suddenly granted credit. Thousands of poor, vulnerable and financially illiterate people were exposed to almost unlimited, inadequately regulated, credit. Consequently, incurring debt has become commonplace in South African society. Due to the high percentage of the adult population (55,5 percent) living below the poverty line (R992 per person per month),<sup>4</sup> individuals tend to incur debts in the form of micro-loans in order to make ends meet. It has been reported that 73 percent of all disposable household income is spent on debt and South Africa’s total store and credit card debt amounts to R18 billion.<sup>5</sup> This obviously has a significant impact on the economy of the country.

<sup>3</sup> S van der Merwe “Failure to discharge. A discussion of the insufficient legal recourse afforded to judgment debtors in the South African context” (2008) special issue *JJS* 71 73.

<sup>4</sup> <http://www.statssa.gov.za/?p=10334> Statistics South Africa Report number 03-10-2014/2015 “Men, Women and Children: Findings of Living Conditions Survey, 2014/15” (accessed 24-07-2019).

<sup>5</sup> <https://www.iol.co.za/personal-finance/reviewing-your-credit-profile-makes-sense-22685757> (accessed 24-07-2019)

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## 2.3 Bad debt means big business in South Africa

The collection of debt has evolved into a major industry in South Africa. During the month of May 2019 alone, 18 973 judgments for debt with a total value of R342,1 million were granted by our courts. A staggering 47 360 summonses were issued for debt during this short period.<sup>6</sup> The involvement of collection agencies in the judicial recovery of bad debt, frequently leads to exorbitant and unlawful fees charged against overburdened debtors, further fuelling the negative cycle of indebtedness.<sup>7</sup>

## 2.4 Brief examples of Stellenbosch University Law Clinic (“the Clinic”) involvement

### 2.4.1 *Checkers employees - Kuilsriver Court*

During 2001, six employees of Checkers, a large chain store in South Africa, approached the Clinic. These employees were shelf-packers, having been schooled to 8<sup>th</sup> grade level and earning R2100 per month. Their instructions were that two agents who offered them immediate cash in exchange for signing various contracts and blank documents had approached them at work. They were not informed about the content or allowed to read these contracts, which were not written in their native language. They were told that they would have to pay back twice the amount that they borrowed, which were amounts of between R500 and R800. The monthly instalment would be ten percent of the initial loan, collected personally by these agents at their place of work. The agents were never seen again.<sup>8</sup> By the time these clients approached the Clinic, it had transpired that two separate judgments had been entered against each of them based on the same loan. Amounts ranging from R4487 to R7360 had already been deducted from each of their salaries by means of two EAOs amounting to between R710 and R900 per month. When the creditor was initially

<sup>6</sup> <http://www.statssa.gov.za/publications/P0041/P0041May2019.pdf> (accessed on 24-07-2019).

<sup>7</sup> <https://businesstech.co.za/news/business/265057/court-action-will-expose-south-african-debt-industrys-dirty-little-secret-expert/> (accessed on 24-07-2019).

<sup>8</sup> Van der Merwe (2008) *JJS* 74.

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approached on the matter he indicated that amounts of approximately R3200 were still due and payable on each account.<sup>9</sup>

#### 2.4.2 *Berco employees - Bloemfontein Court*

During 2004, ten employees of Berco cleaning services approached the Clinic. Their monthly salaries as cleaners were approximately R1400 per month. It transpired that they were all approached by an agent offering cash loans and were induced to sign contracts in a language that was not familiar to them. Again, these persons had very little schooling and educational training. Amounts of between R820 and R1820 were paid to each person. EAOs were then issued from the Bloemfontein court, where the creditor resided, even though the debtors were employed more than a thousand kilometres away in Stellenbosch.<sup>10</sup> Amounts ranging from R4000 to R7000 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 monthly deductions. The effect was that these loans would never be extinguished.<sup>11</sup>

#### 2.5 Unintended results of unregulated rapid private debt growth

It is the Clinic's experience that people faced with financial difficulty tend to borrow money, often from unscrupulous lenders who charge them unreasonable and unlawful fees and interest. In some cases, clients were granted loans that were practically impossible to repay due to the lending agent withholding information from the debtors or relocating their offices without informing the debtor accordingly.<sup>12</sup> These judgments and resulting EAOs were often entered against debtors from magistrates' courts thousands of kilometres away from their residence and place of employment.<sup>13</sup> A

<sup>9</sup> Van der Merwe (2008) *JJS* 74.

<sup>10</sup> According to section 65J(1)(a) of the *Magistrate's Court Act* 32/1944, an EAO should only be issued by the court where the judgment debtor resides, carries on business or is employed.

<sup>11</sup> Van der Merwe (2008) *JJS* 74.

<sup>12</sup> S van der Merwe "Traversing the South African emolument attachment order legal landscape post 2016: Quo Vadis?" (2019) 1 *Stell LR* 77 79.

<sup>13</sup> Van der Merwe (2008) *JJS* 74 – 75.

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further recurring issue was that the applicable legislation<sup>14</sup> allowed these orders to be granted by clerks of the court who merely rubberstamped the creditor's version and biddings, without proper judicial oversight.<sup>15</sup> The Clinic assisted clients whose salaries had already been garnished in excess of ten times the initial loan amount, while the creditors were adamant that the debtor then still owed seven times the initial loan amount.<sup>16</sup> Because of the limited access to proficient legal aid, debtors were seldom informed enough to lodge their complaints in a manner as to force the creditor and courts to properly attend to it.

When the debt industry is poorly regulated, overburdened debtors fall into the negative cycle of indebtedness, which could potentially lead to serious macroeconomic problems. This is what happened in the situation of the infamous Marikana massacre.<sup>17</sup> This tragic event took place when South African police forces shot and killed 34 striking mineworkers outside the Lonmin platinum mine in the North West province of South Africa on 16 August 2012. The strike and ensuing violence was a direct result of the miners' desperation to have their economic needs, and that of their families, properly considered.<sup>18</sup> They were adamant that their net salaries were insufficient to cater to their basic needs, and in the investigations that followed, it became clear that there were, in fact, strong linkages to reckless lending:

"Many of these miners are left with scarcely enough money to cover their basic living expenses, after their monthly instalments have been deducted from their accounts. In fact, miner indebtedness has been quoted as one of the key causal factors of the notoriously violent Marikana strikes in 2012."<sup>19</sup>

### **3 Human rights concerns which arise in connection with private debt as emphasized in recent judgements**

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<sup>14</sup> Section 65J of the Magistrates' Court Act 32 of 1944.

<sup>15</sup> Van der Merwe (2008) *JJS* 76 – 77.

<sup>16</sup> Van der Merwe (2008) *JJS* 74.

<sup>17</sup> Van der Merwe (2019) *Stell LR* 81.

<sup>18</sup> <http://www.sahistory.org.za/article/marikana-massacre-16-august-2012> (accessed 24-07-2019).

<sup>19</sup> Van der Merwe (2019) *Stell LR* 81.

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By 2014, the Clinic identified that its various *ad hoc* interventions, including rescinding hundreds of illegal EAOs and judgments, as well as publicising the abuses within the micro-lending industry, fell short of effecting the radical changes that were required. The Clinic therefore approached the court for a declaratory order to bring EAO legislation in line with the South African Bill of Human Rights. On 8 July 2015, Desai J delivered judgment on case 16703/2014 in the Western Cape Division of the High Court of South Africa.<sup>20</sup> The applicants had been the University of Stellenbosch Legal Aid Clinic (as it was known then) and fifteen clients of the Clinic who brought the application, with the South African Human Rights Commission joining as *amicus curiae*.<sup>21</sup>

In considering the facts, the court considered the validity of the initial loan agreements and held that these transactions were conducted in breach of the National Credit Act,<sup>22</sup> and therefore constituted reckless credit.<sup>23</sup> More importantly, the judge opined that the consequences of EAOs have a “direct impact” on several constitutionally enshrined human rights, including the right to dignity:

“For debtors who work in low paid and vulnerable occupations, their salaries or wages are invariably their only asset and means of survival. A substantial reduction of this asset has the potential of reducing human dignity. The ability of people to earn an income and support themselves and their families is central to the right to human dignity (See: Section 10 of the Constitution). Any court order or legislation which deprives a person of their means of support or impairs the ability of people to access their socio-economic rights constitutes a limitation of their right to dignity.”<sup>24</sup>

Other human rights impacted by unscrupulous lending practices included debtors’ rights to access to healthcare, food, education and housing,<sup>25</sup> as well as the right to

<sup>20</sup> *University of Stellenbosch Legal Aid Clinic v Minister of Justice* 2015 5 SA 221 (WCC).

<sup>21</sup> *University of Stellenbosch Legal Aid Clinic v Minister of Justice* 2015 5 SA 221 (WCC).

<sup>22</sup> Section 81 of Act 34 of 2005.

<sup>23</sup> Paras 34-38.

<sup>24</sup> Para 41.

<sup>25</sup> Para 80.

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access to courts,<sup>26</sup> which was impaired due to the lack of judicial oversight in awarding judgments and resulting EAOs.

In reaching this conclusion, the court relied on various previous judgments but also international human rights instruments, like The International Labour Organisations' Protection of Wages Convention, the UN Guiding Principles on Business and Human Rights and the UN General Assembly and Human Rights Council resolution 26/22 of 15 July 2014.<sup>27</sup>

Because the High Court pronounced on constitutional matters, its judgment was referred to the South African Constitutional Court, which court confirmed its agreement with the main findings of the court *a quo* on 13 September 2016.<sup>28</sup> The court ordered a change in the wording of section 65J of the Magistrates' Court Act, to effect an interpretation consistent with the Constitution.<sup>29</sup> The Constitutional Court however indicated that its judgment would only operate prospectively.<sup>30</sup>

As a direct result of the above judgments, the President of the country signed and assented to the Courts of Law Amendment Act<sup>31</sup> on 31 July 2017, which Act came into operation on 2 August 2018.<sup>32</sup> The provisions of this legislation leave no doubt that a magistrate, and not a clerk, will only issue an EAO after considering a debtor's circumstances and determining the monthly deductions to be "appropriate" and the order to be "just and equitable".<sup>33</sup> Importantly, it inserts a new section,<sup>34</sup> which will limit

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<sup>26</sup> In para 51 Desai J states that this right "is fundamental to the rule of Law in a constitutional state".

<sup>27</sup> Paras 67-73.

<sup>28</sup> *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).

<sup>29</sup> Van der Merwe (2019) *STELL LR* 87.

<sup>30</sup> Para 159.

<sup>31</sup> Act 7 of 2017.

<sup>32</sup> Van der Merwe (2019) *STELL LR* 88.

<sup>33</sup> The Act confirms repeatedly that enquiries should be made in order to only award EAOs "after satisfying itself that it is just and equitable that an emoluments attachment order be issued and that the amount is appropriate". See sec 7-9.

<sup>34</sup> Section 65J(1A) of the MCA.

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the total instalment amount that can be deducted in terms of one or more EAOs to 25 percent of the debtor's basic gross monthly salary.

#### 4 Evaluation and unresolved issues

Although the University of Stellenbosch Legal Aid Clinic judgments made important strides in combatting debt-related human rights abuses, the matter is by no means resolved. There are still several problems that need to be addressed. One of the main concerns is the *lacuna* that has been created as a result of the exclusively prospective nature of the Constitutional Court's order. This means that there are hundreds of thousands of existing, illegal EAOs that are still being abused to the detriment of debtors and the economy at large.

On 8 August 2018, an application was filed with the Western Cape High Court in which the Clinic, Summit Financial Partners, and 10 of their clients request judicial intervention, which has the potential to further impact on the South African financial landscape relating to debt collection practices.<sup>35</sup> This new case attempts to address the unilateral, unregulated manner in which creditors and collection agents add costs, including legal fees, to debtor's accounts both before and after judgment. As a result of this commonplace practice, which the Clinic alleges is illegal, financial experts at Summit have estimated that unscrupulous credit providers have over-deducted more than a billion rand from thousands of distressed debtors. In the case of just one of these debtors, who is also one of the applicants in this matter, an amount of R5 100 has been collected on an initial debt of R600. The fact that 49 respondents, including all the main banks and major lending institutions, have been joined to the application, is indicative of the impact that this case could have on the South African credit market. If the applicants are successful, the case could be used as basis to recover these illegal deductions on behalf of distressed borrowers.

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<sup>35</sup> University of Stellenbosch Law Clinic & 11 others v The National Credit Regulator & 48 others, Western Cape High Court case no: 14203/18.

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## 5 Conclusion

It would probably be impossible to ever measure the full social and economic impact of unlawful collections on the lives of debtors and their families.<sup>36</sup> Because of the stigma associated with debt, most people carry this burden with silent shame. Yet people find themselves in this situation not only due to their own irresponsibility, but due to a combination of factors, for example desperation to meet basic needs such as food and clothing, as was the case in the Marikana tragedy.

It is a sad reality that the legal aid interventions discussed above have been occasioned as a result of the state's failure to honour its obligation to use maximum available resources to progressively realize human rights. One has to question the political will to bring about real change in these poverty law matters. Many indigent members of society therefore rely on organisations like the Clinic to recover money illegally misappropriated from them. However, one should be hopeful that the judicial and legislative influence of the past few years would contribute to dismantling the negative image of exploitation associated with the South African credit industry.<sup>37</sup>

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<sup>36</sup> Van der Merwe (2008) *JJS* 84.

<sup>37</sup> See, eg, H Coetzee & M Roestoff "Consumer debt relief in South-Africa – Should the insolvency system provide for NINA debtors? Lessons from New Zealand" (2013) 22 3 *Int Insol Rev* 188 where the authors state that "despite international trends to accommodate overburdened debtors, South Africa has yet to provide adequate relief to debtors and the law remains largely creditor orientated."

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