

‘Garnishee’ challenge: hope to indebted

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Illustration: Colin Daniel

The issuing of an emolument attachment order without judicial oversight (the scrutiny of a magistrate or judge) to satisfy a debt against which a judgment has been made is being challenged as unconstitutional in an application to the Western Cape High Court.

The application is being brought by the University of Stellenbosch Legal Aid Clinic (LAC) along with 15 consumers against a host of credit providers, a firm of attorneys, the Minister of Justice and Correctional Services, the Minister of Trade and Industry and the National Credit Regulator.

An emolument attachment order (EAO), incorrectly referred to as a “garnishee order”, is a court order that compels your employer to deduct from your wages or salary money that you owe a creditor who has obtained judgment against you.

It’s difficult to estimate the number of EAOs in circulation, but Clark Gardner, the chief executive of Summit – a company that does EAO audits – says there are close to three million. He says the growth rate has been reducing year on year as a result of the magistrates courts becoming stricter about issuing them. Lenders, such as the big banks, are also becoming reluctant to use them as a collection mechanism because of potential reputational risk, he says.

“The system of EAOs is a popular way to ensure the repayment of unsecured loans,” Odette Geldenhuys, the attorney for the applicants (the LAC and the consumers). Geldenhuys is a senior associate at law firm Webber Wentzel, says.

The abuse of EAOs is rife, and problems with them are well documented. They include the fact that they can be issued by a clerk of the court and can be issued in a jurisdiction nowhere near where your employer is located – if you consent to this.

The problem with consent is that consumers are woefully uninformed and give consent unwittingly, especially when confronted by a collection agent – which can be intimidating or embarrassing, particularly when you are confronted at work.

The LAC provides free legal services to the unemployed, farm workers and low-income earners in the Cape winelands area.

Kruger van der Walt, the director of the LAC, says in court documents that issues relating to debt relief and exploitative lending practices consume a significant portion of the clinic’s time and resources. It helps more than 200 people a month with advice in respect of EAOs.

The LAC is bringing the application in the public interest in terms of the Constitution, he says.

The LAC’s clients are all vulnerable low-paid workers who are struggling to survive on the vastly diminished wages they receive after the deduction of EAOs, Van der Walt says. “They are people who in most cases have low levels of education and very basic or non-existent levels of financial literacy.”

Consumers such as the LAC’s clients are particularly vulnerable to incurring debt as a result of predatory lending practices and reckless lending by credit providers, Van der Walt says.

“When they are unable to repay the debt, the issuing of EAOs, without judicial oversight and in the absence of a limit on the amount of the deduction that can be made from a debtor’s salary, can trap people in a vicious cycle of debt from which there is little hope of escape.”

The relief sought in the case relates to the constitutionality of the Magistrates’ Courts Act, which does not require a magistrate to authorise the issuing of an EAO against a defaulting debtor who has consented in writing to a judgment. If the EAO is signed by a clerk of the court and served on the debtor’s employer, it is binding.

Gardner says that if the employer does not abide by the order, it becomes their liability and can result in a warrant of execution against the employer.

Any unlawful conduct in respect of EAOs directly affects a number of constitutional rights of the victims of such conduct, including their rights to dignity, access to courts and their right not to be arbitrarily deprived of their property, Van der Walt says.

“The basic socio-economic rights required for a human to survive: shelter, electricity, sufficient food, health care as well as other rights such as access to education for children, are all threatened when a debtor cannot afford the deductions taken from her salary under an EAO and lacks the means to challenge the order in the court which issued it,” Van der Walt says.

Geldenhuys says the irregularities in the current EAO system were identified at least six years ago in a study by the University of Pretoria. In 2012, these problems were confirmed and expanded on in a report by the same institution, which suggested a number of legislative and

industry reforms. However, the report did not result in either legislative amendments or changes in practice, she says.

EAOs have been the subject of a number of initiatives.

One such initiative was a joint agreement between the Banking Association of South Africa (Basa) and the Minister of Finance in November 2012 addressing market conduct behaviour. The agreement states that “Basa members commit not to use garnishee orders against credit defaulters, as the use of such orders for credit is inappropriate”.

This ban on the use of EAOs is not observed by all the banks.

Another initiative was the establishment of an Emoluments Attachment Order Task Team, chaired by the Credit Ombud, which submitted a report to National Treasury in October last year. Credit Ombud Manie van Schalkwyk says that to date he has not received feedback from Treasury.

“The consistent highlighting of irregularities, numerous statements of intent and undertakings have come to nought. Our clients, and others like them, have continued to be exploited, while waiting for one or more of these initiatives to change the EAO system. They are still waiting. Therefore the application by the University of Stellenbosch Legal Aid Clinic and 15 impoverished people with EAOs, was necessary,” Geldenhuys says.

The respondents in the matter have until mid-December to file their answering affidavits. The National Credit Regulator and the Department of Trade and Industry have indicated that they will abide by the decision of the court.

If the applicants succeed in having certain sections of the Magistrates’ Court Act declared unconstitutional, the Act will need to be redrafted.

Geldenhuys says the attachment of wages for the purposes of satisfying a maintenance order is regulated by the Maintenance Act and that amendments to the current EAO system in terms of sections of the Magistrates’ Courts Act will not have an adverse impact on maintenance payments.

In Van der Walt’s founding affidavit, he refers to a 2008 study by the University of Pretoria Law Clinic and a follow-up report. Personal Finance gave extensive coverage to this report in October 2012, highlighting the major problems with EAOs in South Africa.

EMOLUMENT ATTACHMENT ORDERS: HOW TO PROTECT YOURSELF

An emolument attachment order (EAO) stems from a default judgment – so if you want to avoid an EAO, it is imperative to prevent a judgment, Clark Gardner, the chief executive of Summit Financial Partners, says.

Gardner, whose company provides an audit service to employers whose employees have EAOs, is a vociferous critic of EAOs. He offers the following advice to consumers facing a default judgment and those with an EAO:

* **Consent:** Consumers unwittingly give consent to a judgment by signing, sometimes under duress, documents presented by the credit provider or their collection agents. “Whatever you do, do not sign a consent to judgment,” Gardner says. “One should not sign any document from

the credit provider or their collectors. This is like signing a blank cheque and will result in the credit provider collecting a balance and instalment as they deem necessary.”

Before instituting legal action against you, the National Credit Act (NCA) requires that the credit provider sends you a letter of demand. “This is the time to act,” Gardner says. “Communicate with your credit provider and try to come to an agreement – in writing – on a repayment plan you can afford. If not, make sure you defend yourself in court, without an attorney. Such a defence will require you to be in court to determine the affordability of such a deduction.”

* **Court location:** The EAO must be issued from the court closest to the debtor’s employer. But sometimes a debtor consents – usually unwittingly – to a court far from his or her workplace. This creates practical difficulties, as well as costs, for the debtor or employer to challenge the order.

Gardner says the most common transgression in the issuing of an EAO is the consent to jurisdiction, when the court hearing occurs in a place other than where you or your employer reside. “Consenting to a different jurisdiction for an EAO is in breach of the law and, when challenged, should result in all your repayments being paid back to you and the order being rescinded. Remember though, that the debt still exists, so the credit provider will usually attempt to obtain judgment in the correct jurisdiction, but at this stage you can defend it.”

* **Affordability:** When an EAO is issued in terms of the Magistrate’s Court Act, a registered letter is sent to you, the debtor, informing you that the order will follow. But often the letter does not state the instalment amount being applied for, and the creditor is not obliged to serve you or your employer with a certificate of balance confirming the debt, legal costs, interest or the proposed instalment.

This is problematic because at no point in the process are you, the debtor, subject to an enquiry to ascertain your financial position as a whole. Effectively, your creditor and the creditor’s attorney make a decision on the amount of the order, irrespective of your other financial obligations.

There is also no limit set by law on the amount that can be deducted from the debtor’s salary. The Magistrates’ Court Act states only that the deduction “must not cause the employee not to have sufficient means for his own and his dependants’ maintenance”.

Gardner advises that you go to court prepared to show you cannot afford the deduction.

* **Excessive fees:** “The most common transgression with EAOs is inflated balances resulting in over-deductions,” Gardner says. Try to get the collection agent or credit provider to explain or justify the fees. If these are above those prescribed by the NCA, you will need to approach the court to dispute the accuracy of the balance claimed. “This may come at a cost, so be prepared to negotiate a success fee with your attorney,” he says.

Individual consumers can also use Summit’s services via 6cents.co.za on a success-fee basis. You can upload your EAO online for it to be audited and potentially challenged.