

Protecting the poor

The ConCourt judgment on garnishee orders will ensure that the collection of debt is done in a more just manner

OPINION

George Devenish

THE Constitutional Court has handed down a landmark judgment (University of Stellenbosch Legal Aid Clinic and Others vs Minister of Correctional Services and Others, CCT 127/15), delivered by Judge Raymond Zondo relating to the judicial management of emolument attachment orders (EAO).

This was a majority judgment, concurred in by Judge Edwin Cameron. EAO are called garnishee orders in ordinary legal parlance and a garnishee is a court order that compels a debtor's employer

to pay his or her debt from the employee's salary.

The fundamental change that has been ushered in by the Constitutional Court is that a garnishee order involving compulsory deductions from an employee's salary can no longer be made by a mere clerk of the court, but must be a decision taken by a magistrate.

Also of great significance is that the magistrate is mandated in this regard to apply two tests. Firstly, whether it would be just and equitable to grant the EAO, and secondly, whether the debtor is able to afford it.

In this judgment, the Constitutional Court upheld seven of the eight rulings made by Judge Siraj Desai of the Western Cape High Court at an earlier date in relation to this litigation.

The difference between the two judg-

ments related to section 65J (2) of the Magistrates' Court Act, which was held to be in conflict with the Constitution.

In his high court judgment, Desai called for the relevant legislation to be amended because it did not make provision for judicial oversight to be extended for the granting of a garnishee order to the debtors themselves.

This would require the formal redrafting and amendment of the legislation, which by its nature is time-consuming.

To circumvent this, the Constitutional Court decided to use the mechanism of adding words in, in order to make the legislation constitutional.

The net result of the addition of words was in effect to protect the rights of economically disadvantaged people by giving them access to justice. This important change came into operation imme-

diately on the handing down of the judgment. This meant that it is no longer necessary to refer the problematic provisions of the legislation to Parliament for it to reformulate and redraft them for a legislative amendment to the Magistrates' Court Act.

However, the provisions are not retrospective, which would prejudice the credit providers and as such would be found on review to be unconstitutional.

The judgment does not, however, exonerate the debtors from their debt. What it does is that it determines what amount is just and equitable, in the circumstances, to be paid by the debtor.

Creditors must know that they must not lend recklessly, because they will not be able to recover the owed amounts expeditiously as they were previously able to do, before the Constitutional Court

handed down its landmark judgment.

The Constitutional Court judgment is indeed a singular victory for justice, and particularly for the economically disadvantaged people who, under the old garnishee order dispensation, were being grossly exploited by unscrupulous credit providers.

The Stellenbosch University Law Clinic deserves praise for having initiated the litigation in the Cape high court. This also applies to Odette Geldenhuys of Webber Wentzel Attorneys, who acted as a pro bono attorney for the applicants who initially brought the case in the Western Cape High Court last year.

This important judgment, which will affect tens of thousands of workers, has been widely welcomed as it will ensure that the collection of debt takes place in a more just and equitable manner.

In his judgment, Zondo further ruled that the amount to be deducted has to be appropriate.

It remedies a situation where in the past, mainly illiterate workers found themselves in the invidious situation where most of their salaries were considerably reduced by deductions, which in effect occurred without their real consent or understanding of the amount that was involved.

Workers are now given a meaningful measure of protection since previously they often did not know exactly where their money was going and how much was involved.

There is no doubt that the judgment has set a cogent precedent for indebted people in South Africa.

The previous garnishee system was not only very unjust, but had negative

political consequences impacting on social and economic stability of our country. So, for instance, this unjust system contributed to the grievances of the platinum miners at Marikana, resulting in a catastrophic tragedy.

What is now required is for organisations such as the South African Human Rights Commission, the National Credit Regulator and relevant state departments, to educate members of the public of their rights in terms of the Constitutional Court's judgment.

It is also necessary that the relevant legislation be amended to bring it into line with the changes effected by the Constitutional Court in its judgment.

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