



## CONSTITUTIONAL COURT OF SOUTH AFRICA

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

**CCT 127/15**

**Date of hearing: 03 March 2016  
Date of judgment: 13 September 2016**

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### MEDIA SUMMARY

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

Today the Constitutional Court handed down judgment in a matter concerning an application for confirmation of an order of invalidity made by the Western Cape Division of the High Court and an appeal against certain parts of that order that declared certain specified words in section 65J(2) of the Magistrates' Courts Act (Act) inconsistent with the Constitution and invalid to the extent that they fail to provide for judicial oversight over the issuing of an emoluments attachment order against a judgment debtor.

The first applicant is the University of Stellenbosch Legal Aid Clinic (Law Clinic), a law clinic established by the University of Stellenbosch. The second to sixteenth applicants are individual clients of the Law Clinic. They all had emoluments attachment orders issued against them by clerks of the court employed in various Magistrates' offices, many of which are located far away from where the applicants reside and work.

On 8 July 2015 the High Court declared certain provisions of the Act constitutionally invalid, as they allowed for the issuing of an emoluments attachment order without judicial oversight. The High Court further declared that section 45 of the Act, a provision that authorises parties to consent to the jurisdiction of a particular magistrates' court, is limited to courts having jurisdiction over the area where the debtor resides or is employed

in instances where the National Credit Act regulates the relevant credit agreement. The High Court dismissed counter-applications by Flemix as well as the Association of Debt Recovery Agents (ADRA). The applicants applied to this Court for the order of the High Court to be confirmed. Both Flemix and ADRA opposed the application for confirmation. They argued that the High Court erred in holding that the provisions declared invalid did not allow judicial oversight when emoluments attachment orders were issued. They further sought leave to appeal against the other orders granted by the High Court, including the declaration in regard to jurisdiction. The South African Human Rights Commission was admitted as *amicus curiae*.

There were three judgments of the Court: the first by Jafta J; and two majority judgments written by Cameron J (second judgment) and Zondo J (third judgment). Cameron J and Zondo J each concurred in one another's judgment. Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Froneman J, Khampepe J, Madlanga J, Mhlantla J and Nkabinde J concurred in both the second and third judgments.

In the first judgement, Jafta J held that the High Court erred in proceeding from the premise that section 65J(2) did not provide for judicial oversight without interpreting that section. He held that the Court was bound to determine for itself whether indeed the section failed to provide for judicial oversight. The parties' admission in this regard did not and could not relieve the High Court from that duty because it related to a question of law.

Jafta J held further that it should be determined whether the words "from the court" are capable of a meaning that accords with the assumed constitutional guarantee that, whenever execution is sought against one's property – regardless of whether movable or immovable – the execution must be subject to judicial oversight. In doing so it must keep in mind that "court" as defined in the Act is "a magistrate's court for any district or for any regional division". Jafta J then concluded that a court does not mean a clerk of the court or a registrar or messenger of the court. Moreover, in terms of section 12 of the Act only a magistrate "may hold a court".

As a result, Jafta J held that section 65J provides for judicial supervision. Therefore, assuming that the Constitution requires judicial supervision when emoluments attachment orders are issued, the section meets the requirement. Jafta J added that in these circumstances he cannot confirm the order of invalidity made by the High Court.

The second judgment, written by Cameron J, agreed with the High Court that, in principle, seeking an order to execute against or seize the property of another person is part of a judicial process. And an emoluments attachment order is a substantive decision because when a court grants the order, it is determining how the debt will be paid. So judicial oversight is a constitutionally indispensable requisite.

A debtor's personal circumstances are likely to change between when the judgment debt is entered and ordered to be paid and when an emoluments attachment order is sought. So not insisting on judicial oversight may limit debtors' constitutional rights of access to

court. And it may also implicate the debtors' protection against arbitrary deprivation of property in section 25 of the Constitution. Judicial oversight over the emoluments attachment order process will thus alleviate the harsh effects of an emoluments attachment order on distinctly vulnerable low-income debtors' dignity and livelihood.

The second judgment disagreed that it was possible to interpret section 65J as providing for judicial oversight. Section 65J(2) licenses the issuing of an emoluments attachment order in two alternative circumstances. First, the order may be issued if the debtor consents in writing; or if "the court has so authorised". The conjunction "or" seems to make linguistically plain that an emoluments attachment order may be obtained through the debtor's written consent even when the court has not authorised it. Additionally, section 65J(1) posits that a judgment creditor, not a court, causes an emoluments attachment order to be issued from a court. And once issued, section 65J(5) provides that the order may be executed "as if it were a court judgment". This wording, the second judgment found, unpalatably signals the portents of judicially unsanctioned execution.

The second judgment therefore concluded that it would be unreasonable to interpret section 65J as providing for judicial oversight. The plain language of the provision shows it permits judicially unsanctioned enforcement of judgment debts. This is unconstitutional. And the soundest remedy is to strike the offensive legislation down, as the High Court did. The second judgment concurred with the third judgment and its order.

In the third judgment, Zondo J concurred in the second judgment but wrote separately. Zondo J held that in order to determine whether the Act provides for judicial oversight when issuing emoluments attachment orders, it is necessary to inquire into whether it is the court, or someone else, that has the power to issue such orders. In his analysis, Zondo J considered the use of the words "issued from the court" in section 65J(1)(a) in the context of section 65J and the Act as a whole. He took the view that in order for section 65J(1)(a) to be read to mean that it is the court that issues emoluments attachment orders, one would have to read the phrase "issued from the court" to mean "issued by the court". Zondo J held that there is no room for this interpretation. He also said that interpreting the phrase this way would mean that section 65J(1)(a) allows a judgment creditor or his or her attorney to cause the court to issue an emoluments attachment order. That would be a meaning that is inconsistent with the independence of the judiciary as it would mean that the court acts according to the dictates of the judgment creditor or his or her attorney. Zondo J said that the word "issue" when used in relation to court processes is normally used to refer to an administrative function in a court and not to a judicial function. Ultimately, he held that it is not the court itself that has the power to issue an emoluments attachment order, but rather the clerk of the court.

Zondo J also considered section 65J(2)(a). He concluded that the provision does not provide for judicial oversight to the extent that it allows for the granting of an emoluments attachment order without court authorisation in instances where a debtor has consented in writing. Zondo J also referred to section 65J(3). That provision is to the effect that an emoluments attachment order may be executed as if it were a court

judgment. He took the view that there would be no need for this provision if the position was that an emoluments attachment order is always issued by a court since, in such a case, an emoluments attachment order would be a court order.

The remedy adopted by Zondo J is supported by the majority. It is one of a combination of reading-in and severance and not a complete notional severance as adopted by the High Court. Accordingly, Zondo J did not confirm the order of constitutional invalidity made by the High Court, but rather ordered the reading-in, and severance of, certain words in section 65J(2)(a) and (b) in order to remedy the constitutional defect. The effect of the order is that with immediate effect no emoluments attachment order may be issued unless the court has authorised the issuing of such emoluments attachment order after satisfying itself that it is just and equitable and that the amount is appropriate. Zondo J dismissed the appeals with costs. The respondents who opposed the confirmation of the High Court order were also ordered to pay the applicants' costs.