Caught in the Crossfire: Employers of Emolument Attachment Order Debtors and the Challenge to Achieve Proportionally Fair Wage Deductions

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Abstract

To provide society with the benefit of an effective emolument attachment order (EAO) environment, several role-players must fulfil essential interconnected functions. The process relies on the cooperation of the garnishee (the employer of the EAO debtor), who is responsible for the periodic deductions from the employees' salary and the transfer of these funds to the creditor(s). Employers therefore carry an administrative burden to maintain the human resource capacity and administrative systems necessary to properly enforce EAOs. In addition to this administrative duty, employers are at risk of incurring personal liability *vis a vis* the creditor as well as the debtor. This article will highlight the risk to employers in the administration of EAOs, specifically arising from the legal uncertainty regarding proportionality in EAO deductions. The article describes the current legislative framework and its relevant frailty. It then delineates the scope of the study by exploring the concept of proportionality within the context of EAOs. This is followed with a summary of the relevant historic and contemporary context, before dealing with the prevailing EAO-related challenges. Although a detailed comparative analysis falls outside the scope of this article, it also contains a brief overview of how these challenges regarding proportionality in wage garnishment are managed in England and the United States of America. The contribution concludes with recommendations based on the research findings. Ultimately, the author submits that employers are currently more at risk from liability for the maladministration of their employees' EAOs than they may generally appreciate and that proactive steps should be taken to address the situation.

Keywords

Emolument attachment orders; wage garnishment; proportionality in debt collection; employer rights and responsibilities; employment relations.

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1 Introduction

The contemporary South African emolument attachment order (EAO) mechanism functions as a debt collection instrument, typically following the granting of a default judgment,[1] where one party (the debtor) is judged (by a court) to be liable to the other (the creditor) pursuant to a legal obligation between the parties. Through the application of EAOs, debtors' property, specifically their wages, are exposed to execution to satisfy the creditors' expectations of performance. In this manner a portion of workers' wages is withheld from them by the debtors' employers (the garnishees) after being legally requested or reserved by the creditors. Wages in the hands of employers are in essence transferred from the debtors' estates to those of their creditors.[2]

From the above description of the EAO mechanism, it is apparent that there are several role-players whose interconnected functions are essential to providing society with the benefit of an effective EAO environment. Society has a reasonable expectation that debtors are held responsible for their debts.[3] Debtors should cooperate with the other role-players to ensure that they honour their reasonable commitments. Creditors rely on the legal framework set by the legislator to facilitate effective debt collection. This framework, along with the function of the courts as the active government agent in control of the process, should seek a fair balance between the creditors' rights of enforcement and the debtors' right not to be caused undue hardship in the process.[4] Finally, the process relies on the cooperation of the employer of the EAO debtor, who is responsible for the periodic deductions from the employees' salary and the transfer of these funds to the creditor(s). Employers therefore carry an administrative burden to maintain the human resource capacity and administrative systems necessary to properly enforce EAOs.[5]

Consideration should be afforded to employer attitudes towards and relations with employees who cause them to be placed under this administrative and financial burden. Understandably, studies have found that employers are:

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1 Van der Merwe 2008 *JJS* 78.

2 See *Magistrates' Courts Act* 32 of 1944 (hereafter the *MCA*) section 65J.

3 Brunn 1965 *Cal L Rev* 1215.

4 Brunn 1965 *Cal L Rev* 1215.

5 See para 2 below.

> irritated and frustrated with the [EAO] process, since they are drawn into the arena of a court process for the eradication of debt which does not concern them directly.[6]

The rights and interests of employers and their employees are at issue when wage garnishment contributes to work-related problems like absenteeism, pilfering, theft, baseless demands for wage increases, the breakdown of the employment relationship,[7] employee discharge,[8] and even violent industrial action.[9] The lack of personal incentive, the prevailing frustration and the administrative burden associated with EAO enforcement undoubtedly serve to promote an environment susceptible to garnishee non-compliance.

Historically non-compliant employers who failed in their EAO-related duties were at risk of creditors executing EAOs against the garnishee, while no comparative obligation or incentive existed to encourage prioritising the interests of their employees.[10] The threat of incurring personal liability for their employees' debt is especially cumbersome to large employers with numerous employees and EAOs under their supervision. Case studies illustrate how employers and their human resource departments have proved ineffective in the performance of their relevant duties.[11] Deductions based on EAOs were typically transferred to the creditor with no concern for ensuring that the debtor was protected from exploitation through the collection of illegal and disproportionate amounts.[12] This occurrence was unsurprising in the light of the threat of creditor retaliation to the employer's finances.

The *Courts of Law Amendment Act* 7 of 2017 (hereafter the *CLA*)-inspired amendment to the *Magistrates' Courts Act* 32 of 1944 (hereafter the *MCA*) in 2018, which created employer liability *vis a vis* the EAO debtor, can

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6 Haupt *et al* 2008 https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf 121.

7 Haupt and Coetzee 2008 *Employee Financial Wellness* 82.

8 Despite the provision of section 106A of the *MCA,* which criminalises employee dismissal due to emolument attachment orders (EAOs) by imposing a sanction of "a fine not exceeding R300 or, in default of payment, to imprisonment for a period not exceeding three months".

9 As transpired in the Marikana massacre in 2012. See e.g. Van der Merwe 2019 *Stell LR* 81.

10 Section 65J of the pre-*Courts of Law Amendment Act* 7 of 2017 (hereafter the *CLA*) influenced the *MCA*.

11 See e.g. Van der Merwe 2008 *JJS* 74-76.

12 See e.g. Van der Merwe 2008 *JJS* 74-76; Van der Merwe 2019 *Stell LR* 79-80. While this is the general experience, there are exceptions where employers are invested in their employees' wellbeing. For example, in the cases of *University of Stellenbosch Legal Aid Clinic v Minister of Justice* 2015 5 SA 221 (WCC) and *Lonmin Ltd v CG Steyn Inc t/a Steyn Attorneys* (NWHC) (unreported) case number M619/2016 of 26 April 2018, the relevant employers either directly or indirectly approached the courts in the interests of their employees.

generally be seen as a positive development in this regard.[13] Errant employers are now at risk of incurring personal liability *vis a vis* the creditor[14] as well as the debtor.[15] Obviously, employers are subsequently much more likely to scrutinise EAOs and to insist on transparency, certainty and proportionality. Employers are also more likely to encourage their employees to seek judicial intervention and recourse against errant creditors.[16] However, this development does place a greater risk on employers and concerns regarding employer administration and the resulting administrative fees and expenses still prevail.

To compensate employers for their services, they are allowed to recover a 5% commission from the creditor.[17] In practice, employers have occasionally outsourced this responsibility and the accompanying fee to administrators.[18] In the process, these employers may have mistakenly believed that they are indemnified from the risks associated with EAO administration. Shortly after the seminal EAO judgment in *University of Stellenbosch Legal Aid Clinic v Minister of Justice*[19] was handed down, the Department of Justice and Constitutional Development (DJCD) encouraged employers to become involved in their employees' financial wellbeing. The DJCD advised employers to approach the clerks of the courts to verify the validity of EAOs and the affordability of deductions.[20] Employers who have ignored this appeal and have continued with indiscriminate deductions in circumstances where EAOs are ostensibly abused could face repercussions. In future, these employers may have to deal with claims that they have acted irresponsibly and negligently.[21] This could, for example, occur where deductions are based on illegal EAOs or have been disproportionate, resulting in the debtor paying much more than what was legally collectable.[22] Employers are therefore at risk, as deficient legal certainty and transparency mean that it will seldom be apparent what fair proportional deductions should amount to.[23] Creditors have generally

13 Section 9 of the *CLA* read with section 65J(10)*(b)* of the *MCA*.
14 Section 65J(5) of the *MCA*.
15 Section 65J(10)*(b)* of the *MCA*.
16 See paras 5 and 7 below.
17 Section 65J(10)*(a)* of the *MCA*.
18 Coetzee and Van Sittert 2018 *IJPL* 112-113.
19 *University of Stellenbosch Legal Aid Clinic v Minister of Justice* 2015 5 SA 221 (WCC).
20 Ministry of Justice and Correctional Services 2015 https://web.archive.org/web/20190912221807/http://www.justice.gov.za/m_statements/2015/20150720-DebtAbuse.html.
21 This claim based on civil liability would be in addition to possible criminal prosecution in terms of section 106 of the *MCA*.
22 See e.g. Van der Merwe 2008 *JJS* 74-76; Van der Merwe 2019 *Stell LR* 79-80.
23 See paras 5 and 7 below.

proven untrustworthy in conveying this information accurately,[24] and the buck could therefore stop with the employer.

This article will highlight the risk to garnishees in the administration of EAOs specifically arising from the legal uncertainty regarding proportionality in EAO deductions. To facilitate this examination, the article will first describe the current legislative framework and its relevant frailty. It will then delineate the scope of the study by exploring the concept of proportionality in the context of EAOs. This will be followed with a summary of the relevant historic and contemporary context, before describing the prevailing EAO-related challenges. Although a detailed comparative analysis falls outside the scope of this article, a brief overview of how these challenges regarding proportionality in wage garnishment are managed in selected comparative jurisdictions will follow. Finally, the contribution will conclude 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 a civil debt collection method.[25] EAOs could potentially become even more popular in future as an option for the enforcement of civil judgments due to the waning popularity of alternative collection methods.[26] This research also involves aspects of

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24 Van der Merwe *Developing a Procedural Framework* 8-9; Willborn 2019 *Seton Hall L Rev* 867. The analogy of "foxes and henhouses" is apt in this regard as well. Also see para 5 below.

25 Willborn 2019 *Seton Hall L Rev* 859: "[Wage] garnishment is mass justice with millions of cases each year." As far as this author can ascertain, there are no statistics available on the exact number of EAOs currently in circulation in South Africa. Haupt *et al* (Haupt *et al* 2008 https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf 85-104) experienced a similar challenge and relied on estimates to provide some indication of the extent of emolument attachment order use at the time. The EAO mechanism is a popular debt collection instrument affecting the lives of potentially millions of people locally. This estimate, which includes extended family members, is aligned with data regarding the extreme scale of South African indebtedness (see e.g. Coetzee and Van Sittert 2018 *IJPL* 110) and earlier indications of the prevalence of emolument attachment orders in circulation. See e.g. Van der Merwe 2019 *Stell LR* 80 n 26 referring to an audit of a portion of the 1,75 million EAOs in existence in 2007.

26 See, for example, Mullen 2019 *Mitchell Hamline Law Review* 193 where the author notes that the practice of attaching a debtor's property to sell to pay debts has lost popularity in the United States of America 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

labour relations, which include important issues like security of employment and related human rights and socio-economic concerns.

2 Legislative framework

The contemporary, post-constitutional South African wage garnishment mechanism is primarily regulated by section 65J of the *MCA*.[27] Oversight regarding the EAO process is situated in the lower courts, due to the extreme unlikelihood of salary deductions exceeding the relevant jurisdictional limits.[28] It is unnecessary to reproduce the (rather lengthy) content of section 65J of the *MCA* in this article. To avoid prolixity, the author will also abstain from a broad and detailed description of the general EAO process set out in the Act, since various authors have already discussed the basic characteristics of the EAO mechanism in several textbooks on civil procedure.[29] At its core this debt collection mechanism follows the granting of a civil judgment and regulates the transfer of funds from employers to their employees' creditors. This legal interference regulates current as well as the future payment of wages "until the relevant judgment debt and costs have been paid in full."[30] Jurisdictionally EAOs can be issued only "from the court of the district in which the judgment debtor resides, carries on business or is employed."[31] An EAO "may only be issued if the court has so authorised, after satisfying itself that it is just and equitable"[32] and

argues that wage garnishment is, however, potentially more ruinous. Due *inter alia* to 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.

27 Also see reg. 46 in GN R740 in GG 33487 of 23 August 2010 regarding the content and format of applicable forms. Van Sittert and Haupt 2013 https://www.adraonline.co.za/file/5e0b80159406fe9270c9415d60db0d64/2013-garnishee-orders-follow-up-report.pdf 20-22 contains a summary of additional legislation providing for the attachment of wages, to wit the *Maintenance Act* 99 of 1998, the *Basic Conditions of Employment Act* 75 of 1997, the *Public Finance Management Act* 1 of 1999, the *Children's Act* 38 of 2008, the *Income Tax Act* 58 of 1962, and ss 74D and 65(E)(1)*(c)* of the *MCA*.

28 In terms of section 29 of the *MCA*. The current limit is R200 000 for District Courts (GN 217 in *GG* 37477 of 27 March 2014) and R400 000 for Regional Courts (GN 216 in *GG* 37477 of 27 March 2014). In cases that were initially heard, and subsequent judgments delivered, in the High Court, section 65M of the *MCA* provide for the transfer and enforcement of such judgments in the lower court.

29 See e.g. Broodryk *Eckard's Principles of Civil Procedure* 317-324; Theophilopoulos *et al Fundamental Principles of Civil Procedure* 486-490; Pete, Du Plessis and Palmer *Civil Procedure* 394-396.

30 See section 65J(1)*(b)* of the *MCA*.

31 Section 65J(1)*(a)* of the *MCA*. Before the 2018 amendments to the *MCA* resulting from the *CLA*, EAO debtors could consent to the jurisdiction of alternative courts in terms of section 45 of the *MCA*. This practice has since been outlawed by section 45(3) of the *MCA*.

32 This form of judicial oversight is required by section 65J(2) of the *MCA*.

deductions in terms of one or more EAOs are limited to 25% of a debtor's basic salary.[33]

Other than the debtor, it is perhaps the latter's employer, as garnishee, who is most at risk from and burdened by the current EAO process.[34] The provisions of section 65J of the *MCA* emphasise that the garnishee has an important role to play in the implementation and administration of EAOs. In this regard creditors can issue EAOs only after engaging garnishees in a preliminary procedure[35] by serving a prescribed notice containing related information[36] on the debtor *and* the debtor's employer.[37] Debtors as well as their employers have the opportunity to oppose the issuing of an EAO on the following grounds:

> (i) That the amounts claimed are erroneous or not in accordance with the law; or
>
> (ii) that 25 per cent of the judgment debtor's basic salary is already committed to other emoluments attachment orders and that the debtor will not have sufficient means left for his or her own maintenance or that of his or her dependants.[38]

The garnishee is further involved in the process by the provisions regarding the court's power to amend EAOs.[39] The debtor's financial situation could quite possibly change after the granting of an EAO and a court should therefore be able to amend the quantum of earning deductions.[40] In terms of the *MCA*, creditors must be notified if, after the service of an EAO, garnishees believe, become aware of or are otherwise shown that EAO deductions are excessive, erroneous or illegal.[41] Employers who fail in their duties in terms of the EAO process could be liable to creditors for non-payment of EAOs,[42] as well as to their own employees for "unreasonably fail[ing] to timeously stop the deductions when the judgment debt and costs

33 Section 65J(1A) of the *MCA*. See, however, the confusion created by the wording of section 65J(2C)*(b)* below.

34 Coetzee and Van Sittert 2018 *Int J Private Law* 118-119; Haupt and Coetzee 2008 *Employee Financial Wellness* 85-86.

35 See Coetzee and Van Sittert 2018 *IJPL* 118-119. The authors note that the EAO follows a similar process in this regard to that of the wage garnishment mechanism in Botswana, except that the latter jurisdiction requires two separate hearings as a result of the initial issuing of a provisional order (*rule nisi*).

36 See section 65J(2B) of the *MCA*. This information includes the full amount of the capital debt, interest and costs outstanding.

37 Section 65J(2A) of the *MCA*.

38 Section 65J(2C)*(b)* of the *MCA*.

39 Section 65J(6) of the *MCA*.

40 *Minter v Baker* 2001 3 SA 175 (W) 183 C-F.

41 Section 65J(6*)(a)* of the *MCA*.

42 Section 65J(5) of the *MCA*.

have been paid in full."[43] The result is that the EAO debtor has a statutory cause of action against an employer where the employer is at fault for making deductions beyond those contemplated in the EAO.[44] The author submits that employers arguably therefore have a statutory duty towards their employees, the breach of which could see them liable for the debtors' considerable resultant damages.[45]

Employers of EAO debtors are therefore in a tenuous position. They are expected to continuously monitor each of their numerous relevant employees' financial situations and challenge creditors based on vague criteria. In this regard there is considerable uncertainty regarding the interpretation of exactly when an EAO has been "paid in full".[46] This specific problem falls outside the scope of this article, but it is nonetheless relevant, important, and closely related to the matter at hand. It should be mentioned in this context and it has been discussed in detail elsewhere.[47] In addition, it is arguable that employers will be confused by the complex prompt for their objection on behalf of their employees, to wit:

> that 25 per cent of the judgment debtor's basic salary is already committed to other emoluments attachment orders *and* that the debtor will not have sufficient means left for his or her own maintenance or that of his or her dependants.[48]

The author suggests that this section appears to prescribe two tests for objecting to an EAO: Firstly, the 25% committal test and secondly, the sufficient means left for maintenance test. The relevant section of the Act appears to indicate that EAO deductions must be in contravention of both these tests to trigger employer responsibility. This interpretation is, however, unsettled and susceptible to challenge:

> At first blush this paragraph seems to provide for a two-pronged defence, both elements of which must be present, as illustrated by the word 'and'. It is submitted, however, that if only the first of the two elements is present then, in the light of the provisions of subsecs (1A)(a) and (1A)(c) (iii), a valid ground of opposition exists on its own. In the light of the provisions of subsec (2E)(a), the position in regard to the second element is similar, i e it could be raised as a valid ground of opposition on its own.[49]

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43 Section 65J(10)*(b)*(ii) of the *MCA*.

44 This statutory cause of action exists in addition to the more regular claims in contract and delict that an employee could possibly institute against a non-paying employer.

45 See e.g. para 5 below.

46 See e.g. Van der Merwe *Developing a Procedural Framework* 100-101, 250-256; *Bayport Securitisation Limited v University of Stellenbosch Law Clinic* 2022 2 SA 343 (SCA).

47 See Van der Merwe *Developing a Procedural Framework* 100-148, 250-256.

48 Section 65J(2C)*(b)* of the *MCA* [own emphasis].

49 Van Loggerenberg *Jones and Buckle: Civil Practice* RS 23, 2021 Actp444E.

The author agrees that, from a policy perspective, it would be more sensible to treat the 25% committal test and sufficient means left for maintenance test as two separate defences against errant EAOs. If this is the case, which is yet to be determined, it does, however, not serve to decrease the employer's burden. While the objective 25% committal test would be relatively simple to enforce through an auditing software system,[50] it is difficult to anticipate how an employer with a sizable labour force would go about enforcing the subjective sufficient means left for maintenance test. The matter is further complicated by the requirement for intercession when "the garnishee believes or becomes aware or it is otherwise shown" that an employer will not have sufficient means for his/her maintenance.[51] To successfully discharge the onus brought about by this test, an employer would arguably be required to conduct regular consultations with each of its employees burdened by an EAO. During these consultations, the employer would need to establish whether its employee would have sufficient means to maintain his/her household after an EAO deduction, irrespective of its size relative to the employee's basic salary.

The measures to limit the extent of EAO deductions described above are aimed at protecting the EAO debtor by ensuring fair proportionality in the operation of the EAO mechanism. While this is a laudable objective, it is questionable whether the current provisions of the *MCA* offer a viable solution. The issue of proportionality in EAO deductions warrants further investigation.

3 Delineation of proportionality as a requirement for fair EAO deductions

An essential aspect of the EAO mechanism, which is closely related to the issue of judicial oversight,[52] is the aim to achieve fair proportionality[53] in the

50 A computer software programme could flag employers who have 25% or more deducted from their wages through one or more EAOs.

51 Section 65J(6)*(a)* of the *MCA*. In terms of section 65J(6)*(b)* of the Act, the garnishee must present their employer's creditor with a written notice disclosing the reasons for their concern with the EAO.

52 See Van der Merwe *Developing a Procedural Framework* 208-219.

53 It is arguable that the concept of proportionality is itself indicative of fairness and that it is, perhaps, superfluous to explicitly qualify it in this manner. The author submits that, while there is a correlation between fairness and proportionality, the two concepts are not necessarily inseparable. Urbina 2012 *Am J Juris* 50-52 argues that the word proportionality is equivocal and that the "different stages of the proportionality test follow from the requirement to optimize relative to what is legally and factually possible." The various factors involved in balancing the interests of different parties to optimise possibilities may not necessarily prioritise fairness. Conversely, Bücheler *Proportionality in Investor-State Arbitration* 186 considers the

enforcement of earning deductions.[54] The concept of proportionality[55] has a particular meaning in law and is used internationally as a factor to adjudicate legal disputes.[56] In this broad context proportionality has developed into a test that is based on factors such as legitimacy, suitability, necessity and proportionality *stricto sensu*.[57] Proportionality, which functions as an optimising principle,[58] requires analysis of the balancing of conflicting rights and involves philosophical judgments based on relevant values and morals.[59] The concept has been applied in the context for example of the need for governments to justify that restrictions imposed on the rights of private citizens are roughly proportionate to the level of invasiveness of the relevant limitation.[60] While it is useful to be aware that the concept is used in this manner as a doctrinal tool,[61] a detailed discussion of proportionality, as understood in the latter context, falls outside the scope of this article.

For current purposes, the concept of proportionality regarding EAO enforcement is used in relation to establishing a fair quantum for the periodic deductions from an employee's earnings.[62] This determination requires the careful balancing of the interests of creditors in effectively recovering the debts owed against the debtors' right to be legally compensated for their labour. In addition, the proportion of the debtors' earnings that is susceptible to attachment should provide for a sufficient residual to allow the debtors to provide for themselves and their dependants. Finally, the concept of proportionality is also relevant to determining the legitimate quantum of the total amount that should be deducted from the EAO-effected debtor, considering the creditor's judgment against the debtor.

Ultimately, the matter involves an assessment based on the fairness of the scope of exclusions and the extent of the restrictions on wage garnishment. To function effectively, wage garnishment mechanisms should clearly

role of proportionality as a possible factor within the context of fair and equitable treatment standards.

54 Legislation regarding earning deductions inevitably deals with the proportion of earnings that should be deducted. See e.g. para 6 below.

55 Proportionality can be defined as "the fact or quality of being in proper balance or relation as to size or quantity, degree, severity, etc." See Dictionary.com 2023 https://www.dictionary.com/browse/proportionality.

56 Urbina 2012 *Am J Juris* 49.

57 Bücheler *Proportionality in Investor-State Arbitration* 2; Urbina 2012 *Am J Juris* 49.

58 Urbina 2012 *Am J Juris* 53.

59 Urbina 2012 *Am J Juris* 50-53. Also see the importance of proportionality in *Jaftha v Schoeman* 2005 2 SA 140 (CC) para 56.

60 Slobogin 2010 *Minn L Rev* 1588.

61 Urbina 2012 *Am J Juris* 49, 80.

62 It is suggested that the accurate balancing of conflicting rights required by proportionality will aid efforts to establish a fair quantum. Conversely, a fair quantum will be proportional.

regulate whose earnings should be garnished, what amounts should be deducted, and what amounts should be protected. Proportionality therefore also requires proper consideration of the composition of the judgment debt and all the eventual collections over the full duration of the EAO's enforcement. Specific regard should be had to the amounts accumulated due to interest and collection fees, in addition to the capital debt. When legal systems fail to cater to the need for proportionality in the application of their wage garnishment mechanisms, the human rights of debtors are in peril.[63]

4 Summary of the historic and contemporary context

Proportionality regarding the extent of the injury debtors caused and the resulting restitution they were required to make has been a consideration since the earliest recorded times.[64] Roman law was acquainted with the principle that aggrieved parties were able to be compensated only to the extent that they had suffered harm.[65] The concept was applied in the context of wage garnishment under the Roman-Dutch legal system, which recognised the need to protect the earnings of employees in certain professions to the extent that was necessary for their support.[66] The lack of certainty inherent to this enquiry caused jurists like Voet to recognise the challenge of identifying what part of the earnings of different workers should be attached.[67] This challenge, concerning the appropriate quantum of wage deductions, was still prevalent during the early twentieth century when South African jurisprudence was strongly influenced by its English common-law heritage.[68] At the time it seemed that the relevant enquiry was a matter left to the discretion of a prudent and circumspect judge,[69] to ensure that

63 See e.g. *University of Stellenbosch Law Clinic v National Credit Regulator* 2020 3 SA 307 (WCC) paras 74-75.

64 See e.g. *New International Version of Bible translation*, Exodus 21:23-24: "But if there is serious injury, you are to take life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise."

65 Zimmermann *Law of Obligations* 2-3.

66 Van Leeuwen *Commentaries Book V, Chapters VII and XXVI* 547, para 22.

67 Buchanan *Johannes Voet: His Commentary Title IV* 254, para 52.

68 See e.g. *European Hotel, Pretoria v Beckett* 1911 TPD 31. The matter concerned the return date of a provisional interdict forbidding the debtor's employer from paying his wages in order to have it attached in satisfaction of a judgment of the Magistrates' Court. The challenge of establishing an appropriate proportional deduction of wages is demonstrated at para 33: "The Magistrate made an order that he [the debtor] should pay £10 a month. I do not know the merits of the application upon which that order was granted. It may be that the amount is too large, but I cannot alter it at present. So long as the judgment of the Magistrate stands, it must be obeyed. Leave is granted to attach an amount of £10 out of the £17 odd due, and the respondent must pay the costs of the application."

69 *Shaw and Bosman v Tatham* 1912 WLD 75.

debtors had sufficient income remaining after the deduction to sustain themselves and their dependents before the receipt of their next payment.[70]

Despite the subsequent enactment of the *MCA*, the *Constitution of the Republic of South Africa*, 1996 and the *National Credit Act* 34 of 2005, the ambiguity and lack of legal certainty concerning proportionality contributed to large-scale abuse in EAO deductions during the early twenty-first century. Loopholes in the relevant legislation allowed an unfettered EAO practice that permitted unscrupulous creditors to abuse employers, as their agents, as these creditors enriched themselves at the cost of their debtors' financial ruin.[71] Unlawful EAO practices included creditors requiring debtors to repay several times the original loan amount, while the balance that was allegedly due kept escalating. Some creditors also abused the situation by deducting monthly instalments that were completely disproportionate to their debtors' monthly earnings.[72] The problems were exacerbated by procedural difficulties in rescinding or amending errant EAOs.[73]

These abuses led various commentators,[74] and eventually the courts and the legislature,[75] to identify the need to limit each of the periodical deductions against debtors' earnings. In *University of Stellenbosch Legal Aid Clinic v Minister of Justice*[76] Desai J expressed certain misgivings about the option of instituting a percentage capping to the proportion of a debtor's salary that is vulnerable to attachment.[77] He opted instead to emphasise the importance of judicial oversight in the granting of EAOs.[78] The requirement of judicial oversight was subsequently afforded legislative recognition by the

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70 *European Hotel, Pretoria, v Beckett* 1911 TPD 33. This approach was supported in the Select Committee on Garnisheeing Wages *Report* and later enacted in the *Magistrates' Courts Act* 32 of 1917.

71 See e.g. James *Money from Nothing* 3, 90; Van der Merwe 2019 *Stell LR* 78-82; Haupt *et al* 2008 https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf 63-79.

72 See e.g. James *Money from Nothing* 3, 90; Van der Merwe 2019 *Stell LR* 78-82; Haupt *et al* 2008 https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf 63-79.

73 Van der Merwe 2008 *JJS* 77-82.

74 See e.g. Bentley 2013 *De Rebus*.

75 *University of Stellenbosch Legal Aid Clinic v Minister of Justice* 2015 5 SA 221 (WCC); *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 Clinic* 2016 6 SA 596 (CC) and the resulting *CLA*.

76 *University of Stellenbosch Legal Aid Clinic v Minister of Justice* 2015 5 SA 221 (WCC).

77 The *University of Stellenbosch Legal Aid Clinic v Minister of Justice* 2015 5 SA 221 (WCC) para 50. Also see para 7 below.

78 *University of Stellenbosch Legal Aid Clinic v Minister of Justice* 2015 5 SA 221 (WCC) order 2.

CLA,[79] which also limits the total instalment amount that can be deducted in terms of one or more EAOs to 25% of the debtor's basic gross monthly salary.[80] The *MCA* acknowledges the need for proportionality in EAO matters by implementing this 25% cap and expanding provisions to address gratuitous EAOs.[81]

5 Main challenges

The amendments that the *CLA* imposed on the *MCA* impact on the quantum of the allowable deductions against a debtor's salary if an EAO is issued or reconsidered after the legislative amendments were enacted.[82] In cases where monthly deductions were previously ordered for amounts in excess of these amended limitations, the *MCA* provides for the revision of errant EAOs.[83] However, this provision can address the concern only after untoward deductions have already occurred, and places the onus and relevant costs on the debtor. Courts are not called upon to engage in this form of judicial intervention of their own initiative.[84] The implication is that EAOs issued prior to and continued in divergence of the *CLA* amendment will remain in force unless corrected by the creditor or challenged by the debtor or the debtor's employer, the garnishee. Research has demonstrated that it is unreasonable to expect indigent debtors to take the initiative to correct the consequences of illegal deductions against their salaries.[85] Ironically, because courts will divide the deductible amount between all the established EAOs, it may transpire that demands for the issuing of further EAOs against a debtor may cause a reduction of the total monthly EAO deduction.[86]

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79 Sections 7-9 of the *CLA*.

80 Section 9 of the *CLA* as reflected in section 65J(1A) of the *MCA*.

81 See Van der Merwe 2019 *Stell LR* 88-90.

82 Sections 65J(1A) and 65J(2) of the *MCA*.

83 Section 65J(7) of the *MCA*.

84 This lack of judicial intervention post the issuing of the EAO presents a frailty in the current EAO system. See Van der Merwe *Developing a Procedural Framework* 208-219.

85 See e.g. *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council* 2007 1 SA 343 (CC), where the Constitutional Court acknowledged the exploitation of debtors since "borrowers are usually in a much weaker position than lenders." Pearson, Stoop and Kelly-Louw 2017 *PELJ* 20 argue that the skewed power relationship between these parties ensures that debtors simply are no match for shrewd creditors. Ramsay "Consumer Redress and Access to Justice" 28-33 argues that debtors, and especially impoverished debtors, generally have poor "complaint competence" and suffer prejudice and discrimination in the handling of their grievances.

86 Section 65J(1A)*(c)* of the *MCA*.

The uncertainty created by the *MCA*'s vague wording, which seems to introduce either or both a 25% committal and a sufficient means left for maintenance defence to EAO deductions, is not the only legislative ambiguity. There is also uncertainty about the interplay between this limitation imposed in the *MCA* and section 29(3) of the *Maintenance Act* 99 of 1998, which prioritises the payment of EAOs based on maintenance claims.[87] Should a clear solution to the difficulties with the legislative interpretations regarding limits to EAO deductions eventually emerge, it would still be debatable whether the *CLA*-induced amendments have successfully introduced proportionality in EAO proceedings. As mentioned above,[88] the practical enforcement of these provisions depends on the consistent monitoring and intercession of employers or the initiative of often vulnerable debtors. Still, proportionality is even less likely in cases where these provisions have not dictated the quantum of monthly EAO deductions.[89] The *CLA* amendments are also irrelevant to the major problem of continued EAO collections, irrespective of the size of each of the monthly deductions, totalling amounts that are completely disproportionate to the judgment debt. For this reason, and because unscrupulous creditors unilaterally add questionable interest, unregulated collection costs and legal fees to debtors' liability after judgment, disproportionate EAO collections still abound.[90] In one specific case recently heard in the Paarl Magistrates' Court[91] the court was informed that a total of R175 808,00 had been deducted from an employee's salary over the course of six years based on EAOs issued by an administrator[92] for an initial debt of R9 327,51.

87 Coetzee and Van Sittert 2018 *IJPL* 116.

88 See para 2 above.

89 See e.g. Van der Merwe 2008 *JJS*.

90 See e.g. *University of Stellenbosch Law Clinic v National Credit Regulator* 2020 3 SA 307 (WCC). In the case of the seventh applicant, the unpaid balance of her principal debt was R597. A total amount of approximately R5 100, almost nine times the initial debt, was paid in service thereof after an EAO of R500 per month was granted against her. According to the relevant creditor, an amount of R605 was still due, assuming that no further legal costs would be incurred. The fifth applicant, a general farm labourer, earned wages of approximately R2 000 per month, of which R917 was deducted from his monthly salary by means of an EAO after he defaulted on a cash loan procured during 2011. By June 2018, in terms of the creditor's own statements, the debtor had repaid an amount in excess of R31 500 through EAO and debit order deductions. In its statement the creditor also indicated that an amount of R37 000 was still due to be collected from this debtor in terms of the judgment based on the initial loan of R16 000. This evidence regarding the extent of the applicants' various loans and subsequent repayments was left uncontroverted by the respondent creditors. Also see Van der Merwe 2019 *Stell LR* 93; Van der Merwe *Developing a Procedural Framework* 288-290.

91 *Kalipha v Armfield* (Paarl Magistrates' Court) (unreported) case number 2379/14 of 27 May 2021.

92 In terms of section 74D of the *MCA*.

It is not difficult to appreciate why the challenge to establish fair proportionality between the interests of creditors and debtors continues to be a serious threat to the viability of the modern EAO mechanism. Despite the legislative amendments imposing stricter judicial oversight[93] and limitations to the percentage of salaries susceptible to deduction,[94] the situation is clearly far from ideal. As a result, all the relevant role-players may suffer. Creditors who invest their funds to extend loans to debtors who are irresponsible in their borrowing habits may be hard hit by the 25% limit to the monthly recoverable amount. This would be especially true where a creditor had to share this restricted payment with other creditors of the same debtor,[95] or where the monthly repayment was insignificant compared to the loan amount.[96] This might negatively impact the broader economy and the credit industry specifically.[97] Conversely, the disproportionate collection of EAO orders adversely impacts employers who are expected to act as the creditor's agent in deducting and transferring hard-earned salaries. The situation is exacerbated by the current reality that employers must either trust that their employees and the latters' creditors will play fairly, incur considerable effort and expenses in setting up systems to monitor EAO deductions, or bear the risk that they will face personal liability *vis a vis* the employee or their creditor. This potentially also has a negative impact on labour relations.[98]

It is, however, undoubtedly debtors who are most disadvantaged by the disproportionate deduction of their earnings. It is not only the obvious abuse of effectively stealing employee wages through unlawful EAO deductions that is problematic. The delaying effect of the failure to discharge EAOs that are abused to collect disproportionate amounts from debtors extends debtor indebtedness and prolongs the duration of the existence of the judgment against them. This in turn extends the period during which debtors are burdened with negative credit records, a factor that could have serious repercussions for their financial and general wellbeing.[99]

93 Section 65J(2) of the *MCA*.
94 Section 65J(1A) of the *MCA*.
95 Section 65J(1A)*(c)*(iii) of the *MCA*.
96 In scenarios such as these it is likely that loans were extended on a reckless basis and that the creditor may therefore be a victim of its own irresponsible lending practices.
97 Fatoki 2015 *J Soc Sci* 98; Mullen 2019 *Mitchell Hamline Law Review* 236.
98 See para 1 above.
99 Ondersma 2015 *University of Pennsylvania Journal of International Law* 319; Moloantoa *Effect of Garnishee Orders* 35-37.

6 Comparative approach

As mentioned above,[100] it is not the purpose of this article to engage in a comparative analysis of the South African wage garnishment mechanism but to highlight the risk to garnishees in the administration of EAOs specifically arising from the legal uncertainty regarding proportionality in EAO deductions. A brief reference to appropriate comparative wage garnishment systems may aid this investigation, however. In this regard, relevant aspects of the English and United States of America (USA) systems will be considered. 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.[101]

Like their South African counterparts, employers in England and the USA generally loathe wage garnishment because of the inconvenience of the added administrative burden and its interference with employment relations.[102] The present-day English attachment of earnings order (English AEO) mechanism is regulated by the *Attachment of Earnings Act* 1971 (*AEAct*) and Part 89 of the *Civil Procedure Rules* 1998 (*CPR*).[103] These legislative regulations encumber English employers who are tasked with the administration of English AEOs with extensive duties.[104] These duties include calculating, deducting and transferring appropriate amounts according to payment priorities.[105] Employers must also furnish debtors with written accounts of every English AEO payment[106] and liaise with the court should the debtor leave their employ.[107] Failure to perform their duties may result in a fine or even imprisonment.[108] The employer is allowed to deduct

100 See para 1 above.

101 For a detailed comparative analysis between the emolument attachment order mechanism and its English and American counterparts, see Van der Merwe *Developing a Procedural Framework* 149-275.

102 Wood 1963 *MLR* 55; Mullen 2019 *Mitchell Hamline Law Review* 214-215.

103 1998 No 3132 (L 17) as amended by *The Civil Procedure (Amendment) Rules* 2016 No. 234 (L 3), which inserted the current Part 89. The *Civil Procedure Rules* 1998 (the *CPR*) apply to all proceedings in the County Court, High Court and the Civil Division of the Court of Appeal (reg 2.1(1)). Part 89 of the *CPR* replaced order 27 of the *County Court Rules* 1981 on 6 April 2016.

104 Schedule 3 of the *Attachment of Earnings Act*, 1971 (the *AEAct*).

105 Schedule 3, part 1, para 5 and schedule 3, part 2 of the *AEAct*.

106 Section 7(4)(b) of the *AEAct*.

107 Section 7(2) of the *AEAct*.

108 Section 23 of the *AEAct*.

£1[109] from the debtor as cost for an English AEO deduction.[110] It would be safe to assume that no employers would deem this nominal amount as a proper consideration for the effort and risk they bear in the wage garnishment process.

Before the enactment of the *AEAct* and the *CPR*, the English AEO mechanism lacked proportionality. Debtors could forfeit their entire salaries because of wage deductions.[111] This atrocious situation was remedied by the *AEAct* and the *CPR*'s inclusion of numerous provisions aimed at establishing a basis for proportionally fair wage deductions. These provisions include the requirement for the full disclosure by the creditor of the amount due in terms of the relevant judgment, including all costs.[112] One of the *CPR*'s main objectives is to ensure proportionality in the expensing of legal costs.[113] Restrictions on the issuing of English AEOs for minor debts prevent creditors from manipulating the system to escalate legal costs through frivolous debt collections.[114]

The English AEO must also specify the normal deduction rate, which represents the court's estimation of the reasonable quantum of the periodic deductions against the specific debtor's salary.[115] In addition, the English AEO must indicate the relevant protected earnings rate (PER), which represents the court's estimation of the reasonable limit below which the specific debtor's periodic salary payments should not be reduced.[116] The PER therefore represents the amount of money that debtors need to support themselves and their families, and includes necessary expenses such as food, rent, mortgage, electricity and gas.[117] The PER is determined by the court and can be adjusted to protect debtors' interests where they have experienced substantial changes in their financial position.[118] Priority is afforded to English AEOs originating from maintenance orders and fines.[119] Similar orders are processed in chronological order, while later orders are

109 The UK Rules 2021 https://www.theukrules.co.uk/rules/employment/employing/payroll/attachment-of-earnings-order.html.
110 Section 7(4)(a) of the *AEAct*.
111 *Gordon v Jennings* [1882] 9 QBD 45.
112 Section 6(4) of the *AEAct*. This is the case for all causes of action except maintenance.
113 Part 1.1(1) of the *CPR*.
114 See e.g. Van der Merwe 2008 *JJS* and Van der Merwe 2019 *Stell LR* regarding the abuses associated with the disproportionate EAO collection of small amounts and the resulting legal costs incurred.
115 Section 6(5)(a) of the *AEAct*.
116 Section 6(5)(b) of the *AEAct*.
117 *University of Stellenbosch Legal Aid Clinic v Minister of Justice* 2015 5 SA 221 (WCC) para 48.
118 Section 9(3)(b) of the *AEAct*.
119 Para 8, part 2, schedule 3 of the *AEAct*.

postponed until earlier ones have been satisfied.[120] The court can therefore ensure that there is proportionality in terms of the percentage of the debtor's salary that is susceptible to wage deduction and can vary or suspend the English AEO of its own initiative.[121] Restrictions are imposed not only on the deductible portion of a debtor's earnings but certain types of earnings and debtors are completely excluded from wage deduction via English AEOs.[122]

The primary wage garnishment legislation in the USA is the *Federal Wage Garnishment Law* (*FWGL*).[123] In the USA employers are also typically[124] required to apply their resources towards the computation and transfer of the amount deducted from their employees' salaries.[125] In this manner employers assist in guaranteeing transparency and proportionality in wage deductions. In addition, employers are expected to complete various documents to disclose employee information[126] and could even be required to appear at a wage garnishment hearing.[127] Employers who fail in their duties could be liable towards the creditor or their own employee.[128] In return for performing this service and bearing the associated risks, employers receive minimum compensation, if any.[129]

The *FWGL* endorses the objective of attaining proportionality in wage garnishment. This law provides a basic level of earnings protection to debtors by restricting the garnishment of wages.[130] The maximum amount of an employee's disposable earnings available for garnishment is the

120 Para 7, part 2, schedule 3 of the *AEAct*.

121 Section 9(3)(a); Part 89.14 of the *CPR*.

122 Income tax, specified social security contributions and superannuation scheme deductions are excluded from the amount of earnings susceptible to deduction through English AEOs. See schedule 3, part 1 of the *AEAct*; HM Courts and Tribunals Service 2020 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/865024/ex323-eng.pdf.

123 *Federal Wage Garnishment Law* 15 USC 1671 (1968) (the *FWGL*). Although the various states of the USA can proclaim their own wage garnishment statutes, states are mandated to deviate from the federal act only where their relevant statutes are more advantageous to debtors. In this manner the federal statute guarantees a uniform minimum level of protection.

124 See Mullen 2019 *Mitchell Hamline L Rev* 198, where the author described the wage garnishment mechanism of the State of Minnesota as a typical example.

125 For example, *2020 Minnesota Statutes*, Postjudgment Remedies, Alternative Dispute Resolution, Bonds, Chapter 571-78(3)(a).

126 For example, *2020 Minnesota Statutes*, Postjudgment Remedies, Alternative Dispute Resolution, Bonds, Chapter 571.74-75.

127 Mullen 2019 *Mitchell Hamline Law Review* 198, 208 (n 118), 212 (n 146) and 219.

128 See Mullen 2019 *Mitchell Hamline Law Review* 208, where the author accurately states that "garnishment draws employers into legal disputes not of their own making"; Arnold 2014 https://www.npr.org/2014/09/15/347957729/when-consumer-debts-go-unpaid-paychecks-can-take-a-big-hit.

129 Mullen 2019 *Mitchell Hamline Law Review* 212-214.

130 Sections 303 and 304 of the *FWGL*.

lesser of 25% of the said earnings or the portion thereof that exceeds 30 times the federal minimum wage.[131] Some commentators have argued that this limit should be increased to ensure that debtors are left with enough means for their support.[132] Debtors in some states benefit from extended restrictions against the garnishment of disposable earnings.[133] Restrictions on the amounts of earnings susceptible to wage garnishment and the classes of payments and debtors excluded from this collection mechanism differ from state to state.[134] Disparities also exist with regard to the discharge of employees due to wage garnishment and applicable interest rates and legal fees in wage garnishment collections,[135] as well as the prioritisation of multiple wage garnishment orders.[136] Concerns have been raised about the resulting uncertainty and lack of advocacy and education in the communication of wage garnishment restrictions and exceptions.[137] Due to the requirement that wage garnishment orders must generally be renewed, and therefore reconsidered, on a regular basis, the occurrence of collections of total amounts that are completely disproportionate to the initial debt is less probable than in South Africa.[138]

7 Recommendation

As demonstrated in this article, the goal to achieve proportionality in determining appropriate amounts for wage deductions has remained a constant challenge during the development of wage garnishment mechanisms, in South Africa as well as in foreign jurisdictions.[139] Unsurprisingly, it remains a serious threat to the efficacy of the

131 Section 303(a)(1) of the *FWGL*. Exceptions to this limit, applicable to maintenance, bankruptcy, and tax debt, are listed in section 303(b)(1).

132 Mullen 2019 *Mitchell Hamline Law Review* 234.

133 Four states, specifically North Carolina, Pennsylvania, South Carolina and Texas, enforce a complete ban on the use of wage garnishment for normal debt-related matters. In other cases states have opted to protect a larger amount or percentage of the debtor's income; 36 states impose wage garnishment restrictions that protect more of the debtor's pay check than the federal minimum. See Carter 2020 https://www.nclc.org/issues/report-still-no-fresh-start.html 16-17.

134 Willborn 2019 *Seton Hall L Rev* 861; Mullen 2019 *Mitchell Hamline Law Review* 203-207, 219-223.

135 Mullen 2019 *Mitchell Hamline Law Review* 217; Arnold 2014 https://www.npr.org/2014/09/15/347957729/when-consumer-debts-go-unpaid-paychecks-can-take-a-big-hit.

136 Yearout 1979 *Iowa L Rev* 1015. Wage garnishments based on support of dependants and tax judgments generally receive priority over other orders, that are prioritised chronologically according to the date of receipt.

137 Arnold 2014 https://www.npr.org/2014/09/15/347957729/when-consumer-debts-go-unpaid-paychecks-can-take-a-big-hit. Also see para 8 below.

138 Though not impossible. See Arnold 2014 https://www.npr.org/2014/09/15/347957729/when-consumer-debts-go-unpaid-paychecks-can-take-a-big-hit.

139 See paras 4, 5 and 6 above.

contemporary EAO mechanism. The legislature has attempted to address this issue by reinforcing the role of judicial oversight[140] and imposing a standard, nonspecific 25% limit and a sufficient means left for maintenance test on the amount deductible as a result of one or more EAOs against a debtor's gross monthly salary.[141] Although the 25% cap is subsidiary to the court's evaluation as to the appropriateness of the amount of the EAO deduction,[142] the merit of this limit warrants interrogation. In the absence of proper judicial oversight, as has often proven to be the situation in the past, and the presence of pragmatic problems with enforcing the sufficient means test, this limit is the distressed debtor's only lifeline.[143]

The applicants in *University of Stellenbosch Legal Aid Clinic v Minister of Justice*[144] elected to address the issue of proportionality by requesting more effective judicial oversight instead of simply requiring a cap on deductible earnings.[145] Desai J agreed with this approach, holding that:

> [T]he objective conditions in this country [South Africa] with its vast disparities of wealth may result in a 'cap' or the proportion of a debtor's salary being attached, impacting differently on the various sectors of our society. If that proposition is correct, judicial oversight would be the only remaining mechanism for dealing with EAOs without compromising the dignity of the poor.[146]

The option of implementing such a cap was never considered by the Constitutional Court in the subsequent *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 Clinic*[147] case. Desai J's misgivings about the implementation of a one-size-fits-all cap are understandable. The inclusion of the cap in the *CLA* raises the question of whether it creates an arbitrary classification that will unfairly discriminate, based on a debtor's income. During 2021 the cost of basic food, household and hygienic items

140 Section 65J(2) of the *MCA*.
141 Section 65J(1A)*(a)* of the *MCA*.
142 Section 65J(2E)*(b)* of the *MCA*.
143 See para 2 above regarding the uncertainty about employer involvement and the interplay between the 25% committal test and the sufficient means left for maintenance tests.
144 *University of Stellenbosch Legal Aid Clinic v Minister of Justice* 2015 5 SA 221 (WCC).
145 *University of Stellenbosch Legal Aid Clinic v Minister of Justice* 2015 5 SA 221 (WCC) para 50.
146 *University of Stellenbosch Legal Aid Clinic v Minister of Justice* 2015 5 SA 221 (WCC) para 50.
147 *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 Clinic* 2016 6 SA 596 (CC).

for South African households was estimated at approximately R2 900 per month.[148] This cost remains consistent, irrespective of the income that a debtor receives. It is therefore submitted that forfeiting 25% of a minimum wage salary of, for example, R3 000 per month,[149] would make it considerably more difficult for debtors and their families to support themselves than would be the case with debtors earning ten times that amount. The cap would thus actually have an undesirable, disproportionate effect on poorer households.

Attaining proportionality in the collection of debt through EAOs would not be possible if creditors were permitted to indiscriminately add interest, collection costs and legal fees to debtors' liability. In the past, this has occurred before and after the granting of the judgment and the subsequent EAO.[150] The efforts of the applicants in the *University of Stellenbosch Law Clinic v National Credit Regulator*[151] to attain legal certainty in this area have been aimed at limiting legal fees typically associated with EAO collections, especially of small debts.[152] Debtors should not be expected to pay legal fees which are often untaxed and inflated when creditors insist on employing expensive legal representatives to collect minuscule debts.[153] In addition, interest rates should be levied at appropriate levels for the risks associated with what is effectively a secured loan.[154] Creditors should be prohibited from continuing to commercialise and then profit from these auxiliary costs, that are opportunistically generated during the collection of minor debts.

148 Bhengu 2021 https://www.timeslive.co.za/news/south-africa/2021-02-10-explained-the-national-minimum-wage-is-set-to-increase-in-march-heres-what-it-can-get-you/.

149 Bhengu 2021 https://www.timeslive.co.za/news/south-africa/2021-02-10-explained-the-national-minimum-wage-is-set-to-increase-in-march-heres-what-it-can-get-you/.

150 See eg Van der Merwe 2019 *Stell LR* 92-96; *University of Stellenbosch Law Clinic v National Credit Regulator* 2020 3 SA 307 (WCC).

151 *University of Stellenbosch Law Clinic v National Credit Regulator* 2020 3 SA 307 (WCC).

152 The progress that was made in this regard was negated by the Supreme Court of Appeal's judgment in *Bayport Securitisation Limited v University of Stellenbosch Law Clinic* 2022 2 SA 343 (SCA). For a detailed discussion and critique of the various shortcomings of this controversial judgment, see Van der Merwe 2023 *SALJ*.

153 This is especially problematic when legal representatives are employed in terms of contingency fee arrangements, where they receive only the fees which they generate and collect. See Haupt *et al* 2008 https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf 10.

154 James, Neves and Torkelson 2020 https://www.blacksash.org.za/images/publications/Social_Grants_-_Challenging_Reckless_Lending_in_South_Africa_FINALCHANGES_Thurs10092020.pdf 16; Schraten *Credit and Debt in an Unequal Society* 67-68.

The experience with wage garnishment in the USA has demonstrated the concerns of imposing an arbitrary cap.[155] It is therefore submitted that the 25% limit imposed by the *MCA* should be reconsidered in the light of its discriminatory implications. The English model of establishing an appropriate PER is preferable. The best scenario would be for every case to be considered on its own merit to determine whether the relevant debtors would be capable of supporting themselves and their families after every EAO deduction.[156] This arrangement would also assist in the effort of prioritising deductions based on multiple EAOs. In addition, collection costs, legal fees and interest should be limited in proportion to the size of the judgment debt. These costs should be recoverable from the debtor only after taxation. Debtors and creditors should be properly informed and educated about these issues.

To assist employers to meet the burdensome responsibilities imposed by the *MCA*,[157] clear and transparent regulations should provide guidance in setting up realistic systems for risk management. While the author suggests that employers should be expected to lend their full cooperation to the court, employers should not have to assume responsibility for the entire EAO administrative process.[158] Employer responsibility should be curtailed to the extent that it is suggested that courts play a more pronounced role through extended judicial oversight to ensure proportionality in the EAO process. Courts should also be mandated to review existing EAOs on a regular basis to ensure that deductions are proportionally fair.

In addition, employers should invest in educating their own human resource departments and their labour force on EAO-related issues.[159] This article has explained why informed employer participation is important for the effective functioning of the EAO mechanism. This is true from the perspective of debtors and creditors, but it is also in employers' own best interest. In recent years increasing efforts have been made to empower employers and employer organisations with EAO information through the dissemination of documents and the presentation of training sessions on EAOs.[160] Employers have been encouraged to verify the lawful existence of

155 See para 6 above.

156 As provided by section 65J(6)*(a)*(i) of the *MCA*.

157 See para 2 above.

158 Coetzee and Van Sittert 2018 *IJPL* 118-119 argue that the post-*CLA* EAO procedure involving the debtor's employer is already over burdensome.

159 Kerr 1969 *U Mich J L Refom* 383.

160 See e.g. Haupt *et al* 2008 https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf; Haupt and Coetzee 2008 *Employee Financial Wellness*. The author was involved in training members of

EAO orders and to clearly communicate with concerned employees.[161] Employers have also been urged to institute employee wellness programmes to provide reactive and proactive assistance to over-indebted consumers.[162] It is argued that employers should be encouraged to source accredited trainers to present programmes on the EAO mechanism and related practice. They should also involve labour unions in this endeavour.[163]

8 Conclusion

For the EAO mechanism to operate effectively, all the key role-players must fulfil their respective functions. If debtors, creditors, legislative and regulatory authorities, and employers are plagued by serious challenges, their respective contributions to the success of the mechanism will be jeopardised. It is therefore crucial that these challenges are identified and that measures are developed to address them. Employers are in the unenviable position of having to balance their own interests with that of their employee and the latter's creditor.[164] Employers of EAO debtors are faced with the significant challenge of administering their employees' EAOs. This burden is exacerbated by the lack of consistent proportionality in EAO deductions, resulting in EAO debtor exploitation. The calls for creditors to desist from using employers as their own debt collectors are therefore understandable.[165]

The author submits that employers are currently more at risk of being held liable for the maladministration of their employees' EAOs than they may generally appreciate. For example, employers are liable to repay their employees any unreasonable deductions that occurred after "the judgment debt and costs have been paid in full."[166] Due to the current legal uncertainty regarding section 103(5) of the *National Credit Act* 34 of 2005 and the complicated interest and legal cost calculations that could be involved, it is normally difficult to establish when the EAO debt has been legally

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the Bargaining Council for the Civil Engineering Industry during 2019 and guided the development of training material in this regard.

161 Haupt and Coetzee 2008 *Employee Financial Wellness* 87, 90.

162 Haupt *et al* 2008 https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf 125.

163 Kerr 1969 *U Mich J L Refom* 384-386.

164 Mullen 2019 *Mitchell Hamline Law Review* 201; Wilson, Ford and Hughes 1992 *CJQ* 369.

165 See eg, Vollgraaff 2013 https://mg.co.za/article/2013-11-04-ex-anglogold-ceo-godsell-wants-ban-on-garnishee-orders/.

166 Section 65J(10)(b)(ii) of the *MCA*.

discharged.[167] Consequently employers should be very concerned about their possible liability and should be actively seeking legal advice to clarify this issue in the light of the Supreme Court of Appeal's verdict in *Bayport Securitisation Limited v University of Stellenbosch Law Clinic.*[168] Along with the penalties for maladministration,[169] the commission awarded to employers for their EAO-related services, even if it is a pittance,[170] suggests that the legislator intended to require a measure of professionalism in providing EAO administrative support.

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167 See eg Van der Merwe 2019 *Stell LR* 94-96; Van der Merwe *Developing a Procedural Framework* 102-148.

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List of Abbreviations

AEAct	Attachment of Earnings Act, 1971
Am J Juris	The American Journal of Jurisprudence
Cal L Rev	California Law Review
CJQ	Civil Justice Quarterly
CLA	Courts of Law Amendment Act 7 of 2017
CPR	Civil Procedure Rules, 1998
DJCD	Department of Justice and Constitutional Development
EAO	Emolument attachment order
English AEO	English attachment of earnings order
FWGL	Federal Wage Garnishment Law 15 USC 1671 (1968)
IJPL	International Journal of Private Law
Iowa L Rev	Iowa Law Review
JJS	Journal of Juridical Science
J Soc Sci	Journal of Social Sciences
MCA	Magistrates' Courts Act 32 of 1944
Minn L Rev	Minnesota Law Review
MLR	Modern Law Review
PELJ	Potchefstroom Electronic Law Journal
PER	Protected earnings rate
SALJ	South African Law Journal
Seton Hall L Rev	Seton Hall Law Review
Stell LR	Stellenbosch Law Review
U Mich J L Refom	University of Michigan Journal of Law Reform
USA	United States of America