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CONSENT TO JURISDICTION – THE RATIONALE IN CONSIDERING A COURT’S JURISDICTION IN THE ISSUING OF EMOLUMENTS ATTACHMENT ORDERS

by

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in the
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at the
UNIVERSITY OF JOHANNESBURG

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APRIL 2017
DECLARATION

This serves to confirm that I, Quinnell Petro Badenhorst, ID number 8508180071080, am an enrolled student for the programme LLM in Banking Law, Faculty of Law.

I hereby declare that my academic work is in line with the Plagiarism Policy of the University of Johannesburg which I am familiar with. I further declare that the work presented in this minor dissertation is authentic and original unless clearly indicated otherwise and in such instances full reference to the source is acknowledged. I declare that no unethical research practices were used or material gained through dishonesty. I understand that plagiarism is a serious offence.

Signed at Alberton on this 25th day of April 2017

Quinnell Petro Badenhorst
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I wish to express my sincere gratitude to the following people:

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I want to express my appreciation and gratitude to my parents. Thank you for your unconditional love, encouragement, and support. I am truly blessed to have you in my life.
SUMMARY

In South Africa tens of thousands of ordinary working people in debt are having substantial portions of their wages or salaries deducted based on unlawfully obtained emoluments attachment orders. Unscrupulous credit providers often insert dubious jurisdiction clauses in credit agreements and end up instituting legal proceedings in courts miles away from where consumers work or reside. In practice, debt collection practitioners use section 45 of the Magistrates’ Courts Act to obtain consent to the issuing of emoluments attachment orders from courts which would not have jurisdiction in terms of section 65J(1)(a) of the Magistrates’ Courts Act.

This minor dissertation investigates the inevitable impact of the National Credit Act on civil procedures used by credit providers to collect outstanding debts sounding in money; the interpretation of section 45 of the Magistrates’ Courts Act with regard to its application in practices relating to the issuing of emoluments attachment orders by consent; and the rationale in considering a court’s jurisdiction in the issuing of emoluments attachment orders where the underlying agreement is a credit agreement to which the National Credit Act applies.
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CHAPTER 1
INTRODUCTION

1 Background information

As in many developing countries, the credit market in South Africa is the lifeblood of economic development.¹ Credit enables consumers to obtain assets like houses, furniture and cars which they could not afford without credit finance.² Debt collection forms an integral part of commercial trade³ and as such remains a necessity in an economy that depends on the availability of debt.⁴ A balance must, however, be struck between the interests of the debtor who may be exploited by expeditious but heartless debt collection practices on the one hand and the credit provider’s interest in efficient debt collection processes, on the other.⁵

The Magistrates’ Courts Amendment Act⁶ introduced an expedient method of debt collection which allows debtors to consent to judgment and pay in instalments.⁷ In addition, section 65J of the Magistrates’ Courts Act⁸ makes provision for an emoluments attachment order in terms of which a judgment debtor’s employer is obliged to pay over to the judgment creditor or his agent weekly or monthly deductions made from the judgment debtor’s wage or salary. Regrettably, in the past unscrupulous debt collectors⁹ and attorneys exploited these legal

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¹ University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic; Mavava Trading 279 (Pty) Ltd v University of Stellenbosch Legal Aid Clinic (CCT127/15) 2016 ZACC 32 (13 September 2016) par 15.
² the University of Stellenbosch Legal Aid Clinic case (n 1) par 15.
⁴ Van den Bout “Perspective on EAOs – a problem or an abuse?” 2015:9 De Rebus 30 32 and Thebe “Bill to deal with debt collection issues” 2015:11 De Rebus 3 3.
⁵ Brand-Jonker “Konstitusionele hof oor loonbeslagleggings ‘Oorwinning vir verbruikers’ Talle hofsake kan volg oor bevele wat verkeerd toegestaan is” Sake Beeld (14-09-2016) 15; University of Pretoria Law Clinic and Business Enterprises at the University of Pretoria (Pty) Ltd (n 3) 16.
⁶ 63 of 1976.
⁷ the University of Stellenbosch Legal Aid Clinic case (n 1) par 10.
⁸ 32 of 1944.
⁹ A person who collects debts through use of recognised debt collection mechanisms such as emoluments attachment orders. This could be a statutory debt collector, an attorney or the creditor’s internal debt collection official. University of Pretoria Law Clinic and Business Enterprises at the University of Pretoria (Pty) Ltd (n 3) 37-38.
processes. Forum shopping often manifested itself as debt collection practitioners used section 45 of the Magistrates’ Courts Act to obtain consent to the issuing of emoluments attachment orders from magistrates’ courts which would not have jurisdiction in terms of section 65J(1)(a) of the Magistrates’ Courts Act. This exploitation caused extreme hardship to those against whom these orders were issued. 

Prior to the National Credit Act, both the Usury Act and the Credit Agreements Act regulated the financial credit market field in South Africa. However, the Credit Agreements Act regulated the court process in terms of which credit agreements were enforced, particularly as far as emoluments attachment orders are concerned, to a limited extent only. These matters were otherwise governed by ordinary rules of procedure.

The National Credit Act became fully operative on 1 June 2007. It overhauled previous credit legislation and introduced a reformed framework that governs the South African credit market and industry from the moment money is lent all the way up to the point of commencing legal proceedings to enforce the terms of a credit agreement.

The National Credit Act applies to all credit agreements between parties dealing at arm’s length and made within or having an effect within the Republic of South Africa. “Credit agreement” is the umbrella term used in the National Credit Act to describe an agreement where credit is extended and a charge, fee or interest is payable on the deferred amount. An agreement constitutes a credit agreement for the purposes of the National Credit Act if it is a

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10 Buchner “The debt collection scandal” 2015:5 De Rebus 32 32.
12 the University of Stellenbosch Legal Aid Clinic case (n 1) par 39.
13 34 of 2005.
14 73 of 1968.
15 75 of 1980.
16 Otto “National Credit Act. Vanwaar Gehási? Quo vadit lex? And some reflections on the National Credit Amendment Act 2014” 2015 TSAR 583 583 and the University of Stellenbosch Legal Aid Clinic case (n 1) n 4.
17 s 19 of the Credit Agreements Act.
18 the University of Stellenbosch Legal Aid Clinic case (n 1) par 8.
19 Otto (n 16) 584 n 18. The National Credit Act was assented to by the president in March 2006. GN 230 in GG 28619 (15-03-2006). The National Credit Act came into operation in three phases on 1 June 2006, 1 September 2006, and 1 June 2007. See proc 22 in GG 28824 (11-05-2006).
20 the University of Stellenbosch Legal Aid Clinic case (n 1) par 16 and 19.
21 See s 4(2)(b)(i)-(iv) of the act for examples of contracts not at arm’s length.
22 Otto and Otto The National Credit Act Explained (2016) 19 and s 4(1) of the act.
23 Aucamp The Incidental Credit Agreement – A Theoretical and Practical Perspective (2012 LLM diss UJ) 8. There are exceptions, such as mortgage agreements and credit guarantees, regarding which payment of a charge, fee or interest is not a prerequisite for the National Credit Act’s application. Otto and Otto (n 22) 19.
credit transaction, a credit guarantee, a credit facility or any combination of these transactions. An agreement is not a credit agreement if it is a policy of insurance or credit extended by an insurer merely to maintain the payment of premiums on a policy of insurance, a lease of immovable property or a transaction between a stokvel and its members in accordance with the rules of that stokvel.

The National Credit Act differs quite radically from previous credit legislation as there is no monetary limit to the value of the transaction as far as natural persons are concerned, nor does it only apply to certain services or goods. However, section 4(1) of the National Credit Act lists specific exemptions in respect of which the act does not apply even if the particular agreement falls within the definition of a credit agreement. These exemptions include credit agreements in respect of which the consumer is a juristic person whose annual turnover or asset value, together with the combined annual turnover or asset value of all related juristic persons, at the time the agreement is made, exceeds or equals R1 million; credit agreements in respect of which the consumer is the state or an organ of state; large agreements in terms of which the consumer is a juristic person whose annual turnover or asset value is, at the time the agreement is made, less than R1 million; credit agreements in respect of which the credit provider is the Reserve Bank of South Africa and credit agreements in respect of which the credit provider is situated outside the Republic of South Africa and the consumer applied to the Minister of Finance for exemption.

The purposes of the National Credit Act are to promote and advance the economic and social welfare of South Africans, promote a transparent, fair, sustainable, competitive, responsible,
effective, accessible and efficient credit market and industry, and to protect consumers.\textsuperscript{37} It can be classified as consumer credit legislation as it seeks to level the playing field by balancing the respective rights and responsibilities of consumers and credit providers.\textsuperscript{38} It provides a harmonised and consistent system of debt enforcement, restructuring and judgment which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.\textsuperscript{39} Part C of chapter 6 deals with “debt enforcement” and is a clear indication of the fact that the National Credit Act influences the debt collection regime in South Africa.\textsuperscript{40}

2 Problem statement and research objectives

When a creditor institutes proceedings for the enforcement of any credit agreement to which the National Credit Act applies, the question arises whether section 45 of the Magistrates’ Courts Act permits a debtor to consent in writing to the jurisdiction of a magistrates’ court other than that in which that debtor resides or is employed. The research objectives of this minor dissertation include an investigation into the inevitable impact of the National Credit Act on civil procedures used by credit providers to collect outstanding debts sounding in money; the interpretation of section 45 of the Magistrates’ Courts Act with regard to its application in practices relating to the issuing of emoluments attachment orders by consent; and the rationale in considering a court’s jurisdiction in the issuing of emoluments attachment orders where the underlying agreement is a credit agreement to which the National Credit Act applies.

\textsuperscript{37} s 3.
\textsuperscript{38} Boraine and Renke “Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005” 2007 De Jure 222 222 and 223; Coetzee The Impact of the National Credit Act on Civil Procedural Aspects Relating to Debt Enforcement (2009 LLM diss UP) 1 and s 3(d).
\textsuperscript{39} s 3(i).
\textsuperscript{40} University of Pretoria Law Clinic and Business Enterprises at the University of Pretoria (Pty) Ltd (n 3) 90. See Van Heerden and Otto “Debt enforcement in terms of the National Credit Act” 2007 TSAR 655 658 ff for a full discussion of enforcement in terms of part C of chap 6 of the National Credit Act.
This study considers various aspects such as ambiguities, irregularities and abuses pertaining to the emoluments attachment order process; the interpretation of section 65J of the Magistrates’ Courts Act with regard to its application in practices relating to the issuing of emoluments attachment orders; the legal positions of the parties to the emoluments attachment order process; the concept of jurisdiction; various sections of the Magistrates’ Courts Act pertaining to jurisdiction; right of access to courts; schedule 1 to the National Credit Act (“Rules Concerning Conflicting Legislation”); and whether sections 90 and 91 of the National Credit Act conflict with section 45 of the Magistrates’ Courts Act.

The constitutional validity of section 65J(2) of the Magistrates’ Courts Act with regard to judicial oversight over the issuing of emoluments attachment orders against a judgment debtor falls outside the ambit of the research objectives of this minor dissertation.

4 Significance of the study

The following factors prompted this study:

(a) uncertainty as to whether the use of section 45 of the Magistrates’ Courts Act is permissible within the context of section 65J of the Magistrates’ Courts Act;
(b) uncertainty as to whether reliance on section 45 of the Magistrates’ Courts Act conflicts with certain provisions of the National Credit Act where the underlying agreement between the parties is a credit agreement to which the National Credit Act applies;
(c) lack of uniformity amongst courts in respect of the issuing of emoluments attachment orders. Certain magistrates’ courts grant emoluments attachment orders based on a section 45 consent to jurisdiction and certain magistrates’ courts deny such applications where there is no jurisdictional link.

This study will provide a comprehensive analysis of the recent developments regarding consent to jurisdiction in respect of practices relating to the issuing of emoluments
attachment orders where the underlying agreement is a credit agreement to which the National Credit Act applies in an attempt to serve as a guide regarding these procedures.

5  **Structure of minor dissertation**

This minor dissertation consists of five chapters. Chapter 1 contains the general introduction and orientation. Chapter 2 provides an overview of the legal framework for debt collection. Chapter 3 sets out general principles relating to jurisdiction followed by a discussion of jurisdiction in terms of the National Credit Act. Chapter 4 investigates consent to jurisdiction and recent developments pertaining thereto. Chapter 5 contains the general conclusion.

6  **Research Methodology**

This study used doctrinal analysis which included references to case law, statutes, research reports, books, academic journal articles, rules of court, Government Gazettes, newspaper articles, media reports and dissertations.

7  **Key references**

For the purposes of this minor dissertation it is important to note that the Superior Courts Act\(^{41}\) introduced an entirely revised court structure. Although this act came into operation on 23 August 2013, in this minor dissertation all references to case law will, however, follow the specific case reference as it appears in the relevant law report or as referred to in a specific statute.

\(^{41}\) 10 of 2013. The Superior Courts Act became operative on 23 August 2013. See *GG* 36774 (22-08-2013).
CHAPTER 2

DEBT COLLECTION

1 General overview

Debt collection is a collective term which includes every step, directly related to legal proceedings or not, used to collect a debt due to a credit provider. The legal framework for debt collection is set out in various statutes and the common law. This chapter focuses specifically on magistrates’ courts as these courts are traditionally regarded as “debt collection” courts.

Section 55 of the Magistrates’ Courts Act defines “debt” as a liquidated sum of money, thus clearly delineating the scope of debts to be enforced in terms of the Magistrates’ Courts Act. Section 65 of the Magistrates’ Courts Act allows for the recovery of a debt and sets out the procedures to do so after judgment has been granted against a debtor. This specific debt-collection procedure is available only in magistrates’ courts. In addition to the section 65 debt-collection procedure, administration orders and emoluments attachment orders, the Magistrates’ Courts Act also provides for the recovery of debts in terms of section 57 where, without the involvement of the courts, the debtor admits liability in writing and offers to pay the debt in instalments together with collection fees and costs; or in terms of section 58 where the debtor unconditionally consents to judgment and an order for payment of the judgment debt in specified instalments. However, certain sections and parts of the National Credit Act prevail over sections 57 and 58 of the Magistrates’ Courts Act.

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42 Du Plessis and Goodey Practical Guide to Debt Collection (2003) 1 and University of Pretoria Law Clinic and Business Enterprises at the University of Pretoria (Pty) Ltd (n 3) 54.
43 University of Pretoria Law Clinic and Business Enterprises at the University of Pretoria (Pty) Ltd (n 3) 54.
44 Van Heerden “Perspectives on jurisdiction in terms of the National Credit Act 34 of 2005” 2008 TSAR 840 842.
45 the University of Stellenbosch Legal Aid Clinic case (n 1) par 10.
47 Theophilopoulos (n 46) 431.
48 Theophilopoulos (n 46) 431 and the University of Stellenbosch Legal Aid Clinic case (n 1) par 11 and 13.
Two procedures relating to payment of judgment debts in instalments can be found in section 65 of the Magistrates’ Courts Act. The one procedure is initiated by the judgment debtor as the judgment debtor makes a written offer to the judgment creditor to pay the judgment debt in quantified instalments. The offer can be made any time after a court has given judgment for the payment of a sum of money, but before a notice in terms of section 65A(1) of the Magistrates’ Courts Act is issued by the judgment creditor. If the judgment creditor or her attorney accepts the offer the clerk of the court must, upon the written request of the judgment creditor or her attorney, order the judgment debtor to pay the judgment debt in those instalments. This process does not culminate in an emoluments attachment order. No emoluments attachment order is needed if the judgment debtor pays the instalments. The purpose of this type of order is to attach the judgment debtor’s salary and deduct from it instalments to be paid over to the judgment creditor in settlement of the judgment debt.

However, where the judgment creditor initiates the process leading up to an order that the judgment debt be paid in instalments, an emoluments attachment order is needed to give effect to payment. The judgment creditor may only initiate this process where the judgment debtor has failed to pay the judgment debt and is not in possession of any assets that can be attached. Two factors, namely, the debtor’s failure to pay together with no offer to pay the

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49 viz s 164 (civil actions and jurisdiction), s 132 (compensation for credit provider for the costs of attachment), s 131 (repossession of goods), s 129 (required procedures before debt enforcement), s 127 (surrender of goods), chap 7 (dispute settlement) and part D of chap 4 (over-indebtedness and reckless credit). Otto and Otto (n 22) 138.

50 Van Loggerenberg, Dicker and Malan “Aspects of debt enforcement under the National Credit Act” 2008:1/2 De Rebus 40 40 and Otto and Otto (n 22) 138. For a full discussion of the impact of s 129 and 130 of the National Credit Act on the procedures set out in s 57 and 58 of the Magistrates’ Courts Act see the University of Stellenbosch Legal Aid Clinic case (n 1) par 27-32.

51 the University of Stellenbosch Legal Aid Clinic case (n 1) par 77.

52 s 65 and the University of Stellenbosch Legal Aid Clinic case (n 1) par 77 and 78.

53 “Notice to judgment debtor if judgment remains unsatisfied”.

54 s 65 and the University of Stellenbosch Legal Aid Clinic case (n 1) par 77 and 78. ibid.

55 ibid.

56 the University of Stellenbosch Legal Aid Clinic case (n 1) par 78.

57 ibid.

58 ibid.

59 the University of Stellenbosch Legal Aid Clinic case (n 1) par 79.

60 ibid.
judgment debt in instalments supports the supposition that the debtor is only likely to pay the judgment debt if she is coerced.\(^\text{61}\)

Section 65A(1) of the Magistrates’ Courts Act permits the judgment creditor to issue a notice calling upon the judgment debtor to appear before the court in chambers on a date specified in the notice. The purpose of such an appearance is to enable the court to inquire into the financial position of the judgment debtor and make an order that is equitable and just.\(^\text{62}\)

On appearance, the judgment debtor is required to give evidence regarding her financial position.\(^\text{63}\) Cross-examination by the judgment creditor is also allowed.\(^\text{64}\) The purpose of this inquiry is to assess the judgment debtor’s ability to pay the judgment debt in instalments.\(^\text{65}\)

Section 65D(4) of the Magistrates’ Courts Act guides the court in determining the judgment debtor’s ability to pay the judgment debt in instalments as it lists numerous considerations the court needs to take into account.\(^\text{66}\) These considerations include the nature of the judgment debtor’s income, the amounts required by her for her essential expenses and those of persons dependent on her, and for the making of periodical payments which she is compelled to make in terms of an order of court or agreement in respect of her other obligations as disclosed in the evidence presented at the hearing of the proceedings.\(^\text{67}\) The court may order the debtor to pay the judgment debt and costs in quantified instalments if it is satisfied that the judgment debtor will have sufficient funds left for essential expenses after such instalments have been paid.\(^\text{68}\) In addition, section 65E(1)(c) of the Magistrates’ Courts Act authorises the court to issue an emoluments attachment order by virtue of section 65J(1) of the Magistrates’ Courts Act for the payment of the judgment debt and costs by the judgment debtor’s employer, if the judgment debtor is employed by any person who carries on business, resides or is employed in the court’s area of jurisdiction.\(^\text{69}\) Ultimately, section 65 of the Magistrates’ Courts Act sets out successive steps a judgment creditor could follow in the event she desires the debt to be

\(^{61}\) ibid.
\(^{62}\) the University of Stellenbosch Legal Aid Clinic case (n 1) par 80.
\(^{63}\) the University of Stellenbosch Legal Aid Clinic case (n 1) par 81.
\(^{64}\) ibid.
\(^{65}\) ibid.
\(^{66}\) s 65D(4) and the University of Stellenbosch Legal Aid Clinic case (n 1) par 82.
\(^{67}\) s 65D(4).
\(^{68}\) s 65E and the University of Stellenbosch Legal Aid Clinic case (n 1) par 82.
\(^{69}\) s 65E(1)(c) and the University of Stellenbosch Legal Aid Clinic case (n 1) par 82.
paid in instalments. This path is available to the judgment creditor if the judgment debtor possesses no assets. Should it emerge that the judgment debtor does in fact possess assets the court may issue a writ of execution against such assets. The most important observation that should be made in respect of section 65 of the Magistrates’ Courts Act is that the court determines all the relevant issues, from the inquiry to the granting of an emoluments attachment order.

3 **Emoluments attachment orders**

Section 65J of the Magistrates’ Courts Act, entitled “Emoluments attachment orders”, covers all aspects relevant to emoluments attachment orders. An emoluments attachment order is one of many judicial methods used by credit providers to recover outstanding debts owed to them by defaulting debtors. Section 65J makes provision for an emoluments attachment order in terms of which a judgment debtor’s employer is obliged by court order to pay over to the judgment creditor or his agent weekly or monthly deductions made from the judgment debtor’s wage or salary. Section 61 of the Magistrates’ Courts Act defines “emoluments” as any allowance, wage, salary, or other form of remuneration whether expressed in money or not. The debtor’s employer, also known as the garnishee-employer or emoluments attachment debtor, must pay over such deductions until the relevant judgment debt and costs have been settled in full. If the garnishee-employer fails to pay over such deductions to the judgment creditor she will be in breach of her obligation to her creditor, the judgment debtor. It is important to differentiate between the employer as a garnishee, or emoluments attachment debtor, and the actual judgment debtor. The emoluments attachment order may be executed against the garnishee or emoluments attachment debtor as if it were a judgment

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70 the University of Stellenbosch Legal Aid Clinic case (n 1) par 83.
71 ibid.
72 ibid.
73 ibid.
74 University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services 2015 3 All SA 644 (WCC) par 89. See for commentary on the case Otto “The impact of the National Credit Act on consent to jurisdiction in terms of the Magistrates’ Courts Act” 2017 THRHR 140.
75 University of Pretoria Law Clinic (n 11) 3.
76 Theophilopoulos (n 46) 436.
77 s 65J(1)(b).
78 Reichenberg v R ntgen 1983 3 SA 745 (W) 748 and Van Loggerenberg (n 46) 442.
79 Theophilopoulos (n 46) 436.
of the court.\textsuperscript{80} The emoluments attachment order is at all times subject to the rights of the judgment debtor, garnishee-employer or any interested party to dispute the correctness or validity of the order.\textsuperscript{81}

An emoluments attachment order may only apply to resources that are in excess of the amount the judgment debtor requires for her and her dependants’ maintenance.\textsuperscript{82} Thus, said order will only be valid if the judgment debtor is left with adequate residual income to support not only herself, but her dependants as well.\textsuperscript{83} An emoluments attachment order should not be granted if no such funds are available.\textsuperscript{84} Section 65J(6) of the Magistrates’ Courts Act requires the court to rescind or amend an emoluments attachment order if it is shown that after executing such order the judgment debtor will not have sufficient resources for her and her dependants’ maintenance.

3.1 The emoluments attachment order process

“An emoluments attachment order is preceded by a court judgment, which in turn is preceded by a due debt owed by the debtor to the creditor.”\textsuperscript{85} If the due debt originates from a credit agreement governed by the National Credit Act, the latter will regulate the contractual relationship between the parties as far as the conduct of the parties and the contents of the contract are concerned.\textsuperscript{86}

\textsuperscript{80} ibid.
\textsuperscript{81} ibid.
\textsuperscript{82} the University of Stellenbosch Legal Aid Clinic case (n 1) par 90.
\textsuperscript{83} ibid.
\textsuperscript{84} ibid.
\textsuperscript{85} University of Pretoria Law Clinic and Business Enterprises at the University of Pretoria (Pty) Ltd (n 3) 75.
\textsuperscript{86} ibid.
3.2 Jurisdiction in respect of emoluments attachment orders

Section 65J(1) of the Magistrates’ Courts Act allows for a procedure specific jurisdictional indicator and clearly stipulates the court that should be approached where an emoluments attachment order is to be issued.87

Section 65J(1)(a) of the Magistrates’ Courts Act states that:

“Subject to the provisions of subsection (2), a judgment creditor may cause an order (hereinafter referred to as an emoluments attachment order) to be issued from the court of the district in which the employer of the judgment debtor resides, carries on business or is employed, or, if the judgment debtor is employed by the State, in which the judgment debtor is employed.”

Consequently, only four possibilities exist with regard to jurisdiction in terms of section 65J of the Magistrates’ Courts Act, namely:

(a) the district where the employer carries on business;
(b) the district where the employer resides;
(c) the district where the employer is employed;
(d) if the employer is the state, the district where the debtor is employed.88

4 The impact of the National Credit Act on proceedings in terms of section 65 of the Magistrates’ Courts Act

Section 19 of the repealed Credit Agreements Act provided:

“19. Orders as to committal for contempt of court and emoluments attachment and garnishee orders. — No court shall make –

(a) an order for committal for contempt of court
(b) an emoluments attachment order
(c) a garnishee order

87 s 65J(1) and University of Pretoria Law Clinic and Business Enterprises at the University of Pretoria (Pty) Ltd (n 3) 98.
88 University of Pretoria Law Clinic and Business Enterprises at the University of Pretoria (Pty) Ltd (n 3) 99.
(d) an order referred to in section 65A(1) of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944), or in rule 45(12)(j) of the Uniform Rules of Court published under section 43(2)(a) of the Supreme Court Act, 1959 (Act No. 59 of 1959),

for the purpose of enforcing compliance with any judgment or order of court for payment by any credit receiver of any amount payable in terms of, or as a result of the termination or rescission of, or as damages for the breach of, a credit agreement which is an instalment sale transaction, or in terms of any novation of any claim for such amount unless the credit grantor concerned has satisfied the court that –

(i) the goods in question cannot be recovered by him by reason of the fact that without any fault on his part those goods have been destroyed or become lost;
(ii) the credit receiver is no longer in possession of those goods and the credit grantor cannot locate the whereabouts thereof in the Republic
(iii) those goods have been seized under the Customs and Excise Act, 1964 (Act No. 91 of 1964), and that it is unlikely that the credit grantor will obtain possession thereof.”

Section 19 only applied in respect of instalment sale transactions as defined in the Credit Agreements Act.\textsuperscript{89} However, the National Credit Act contains no similar provision to the aforementioned section 19.\textsuperscript{90} Van Heerden submits that, in view of the fact that section 19 of the Credit Agreements Act was not re-enacted by the National Credit Act, it is competent to institute proceedings in terms of section 65 of the Magistrates’ Courts Act in respect of instalment agreements under the National Credit Act and that it is not only in instances as previously set out in section 19(i) to (iii) of the Credit Agreements Act where these proceedings may be used.\textsuperscript{91} According to Van Heerden this would also apply to garnishee orders, orders for contempt of court or emoluments attachment orders previously prohibited by section 19 of the Credit Agreements Act in respect of instalment sale transactions.\textsuperscript{92} Furthermore, Van Heerden submits that no reason exists to single out instalment agreements from the several other types of credit agreements introduced by the National Credit Act when it comes to proceedings in terms of section 65 of the Magistrates’ Courts Act or where garnishee orders, orders for contempt of court or emoluments attachment orders are concerned.\textsuperscript{93}

\textsuperscript{89} Van Heerden in Scholtz (ed) \textit{Guide to the National Credit Act} (2008 ff) par 12 17 3.
\textsuperscript{90} Van Heerden in Scholtz (n 89) par 12 17 3.
\textsuperscript{91} \textit{ibid}.
\textsuperscript{92} \textit{ibid}.
\textsuperscript{93} \textit{ibid}.
CHAPTER 3

JURISDICTION

1. General principles of jurisdiction

Jurisdiction refers to the competence or authority of a specific court to hear a particular matter which has been brought before it; to enforce any order made subsequent to such adjudication and to grant relief in respect of such matter.94 “Jurisdiction” has also been described as

“a lawful power to decide something in a case or to adjudicate upon a case, and to give effect to the judgment, that is, to have the power to compel the person condemned to make satisfaction”.95

Jurisdictional principles and factors play an important role when instituting legal proceedings as the consequences of approaching the incorrect court may be severe.96 Approaching the incorrect court may allow the opposition to defeat the claim without even entering into the substance or merits of said claim.97

Three jurisdictional indicators exist in general South African courts, namely, monetary value (the ability to adjudicate a matter of a specific monetary value), geographical reach (physical boundaries of the court’s jurisdiction in respect of causes of action, persons and property) and subject-matter (the ability to hear a specific type of action).98

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94 Harms Civil Procedure in the Superior Courts (SI 58 updated to Feb 2017) par A 4 1; University of Pretoria Law Clinic and Business Enterprises at the University of Pretoria (Pty) Ltd (n 3) 97 and Theophilopoulos (n 46) 47.
96 Theophilopoulos (n 46) 47.
97 Theophilopoulos (n 46) 48.
98 University of Pretoria Law Clinic and Business Enterprises at the University of Pretoria (Pty) Ltd (n 3) 97 and Theophilopoulos Fundamental Principles of Civil Procedure (2012) 52 and 53.
The onus of establishing jurisdiction rests on the applicant or plaintiff.\textsuperscript{99} The applicant or plaintiff must allege and prove the jurisdiction of the court in which she has instituted proceedings.\textsuperscript{100} Any founding affidavit or summons must, therefore, set out all factual allegations relating to jurisdiction.\textsuperscript{101}

Once a court’s jurisdiction is established it continues to exist until the legal proceedings are concluded, even if the ground upon which jurisdiction was based falls away.\textsuperscript{102}

The determination of the question of whether a court has jurisdiction in a specific matter involves a two-stage inquiry.\textsuperscript{103} Firstly, one should ascertain whether a lower court is competent to adjudicate on a matter or whether the high court has exclusive jurisdiction.\textsuperscript{104} This can be done by determining the monetary value and nature of the claim.\textsuperscript{105} Secondly, one should establish whether there is a nexus between the claim and the court’s territorial area of jurisdiction.\textsuperscript{106} After considering common-law jurisdictional factors\textsuperscript{107} called \textit{rationes jurisdictiones} in the high court and statutorily prescribed jurisdictional factors\textsuperscript{108} in the magistrates’ courts, it will become abundantly clear as to which division or local seat of a division of the high court or district court or court of a regional division of the magistrates’ courts should be approached.\textsuperscript{109}

The general rule regarding jurisdiction is \textit{actor sequitur forum rei}.\textsuperscript{110} The applicant or plaintiff ascertains where the respondent or defendant resides, goes to her forum, and serves her with the notice of motion or summons there.\textsuperscript{111} This reinforces the principle of

\textsuperscript{99}Harms \textit{Civil Procedure in Magistrates’ Courts} (SI 40 updated to Feb 2017) par B 5 11.
\textsuperscript{100}Hydromar (Pty) Ltd \textit{v} Pearl Oyster Shell Industries (Pty) Ltd 1976 2 SA 384 (C) 389 and Harms (n 99) par B 5 11. For a full discussion of the subject see \textit{Communication Workers Union \textit{v} Telkom SA Ltd} 1999 2 SA 586 (T).
\textsuperscript{101}SOS-Kinderdorf \textit{International v} Effie Lentin Architects 1991 3 SA 574 (NM); Marais \textit{v} Munro & Co Ltd 1957 4 SA 53 (E) and Harms (n 94) par A 4 1.
\textsuperscript{102}McConnell \textit{v} McConnell 1981 4 SA 300 (Z) and Harms (n 94) par A 4 1.
\textsuperscript{103}Harms (n 94) par A 4 7 and Theophilopoulos (n 46) 47.
\textsuperscript{104}Theophilopoulos (n 46) 47.
\textsuperscript{105}ibid.
\textsuperscript{106}Theophilopoulos (n 46) 47 and 57.
\textsuperscript{107}Veneta Mineraria Spa \textit{v} Carolina Collieries (Pty) Ltd (n 95) 886 and Harms (n 94) par A 4 7. The common-law grounds of jurisdiction are delict, domicile, contract, location of property, \textit{ratione rei gestae}, jurisdiction based on an attachment and cohesion of causes. Harms (n 94) par A 4 7.
\textsuperscript{108}contained in s 28-50 of the Magistrates’ Courts Act.
\textsuperscript{109}Theophilopoulos (n 46) 47 and 48.
\textsuperscript{110}National Credit Regulator \textit{v} Nedbank Ltd 2009 6 SA 295 (GNP) 313; Theophilopoulos (n 46) 49 and Harms (n 94) par A 4 13.
\textsuperscript{111}National Credit Regulator \textit{v} Nedbank Ltd (n 110) 313; Sciacero & Co \textit{v} Central South African Railways 1910 TS 119 121; Theophilopoulos (n 46) 49; Bisonboard Ltd \textit{v} K Braun Woodworking Machinery (Pty) Ltd 1991 1 SA 482 (A) 487; \textit{Thermo Radiant Oven Sales (Pty) Ltd \textit{v} Nelspruit Bakeries (Pty) Ltd} 1969 2 SA 295.
effectiveness, which entails that a court should only adjudicate on matters where it can give effect to its judgment.\textsuperscript{112}

With certain exceptions, a plaintiff or applicant must institute proceedings in the court that has jurisdiction in respect of the person of the defendant or respondent.\textsuperscript{113} This will usually be the court of the district wherein the defendant or respondent resides.\textsuperscript{114} In the case of a juristic person, legal proceedings must be instituted in the court of the district wherein the juristic person’s registered office or principal place of business is situated.\textsuperscript{115} Where there is more than one defendant or respondent, the proceedings must be instituted in a court that has jurisdiction over all the defendants or respondents.\textsuperscript{116}

A court may also assume jurisdiction on the basis that the cause of action arose wholly (magistrates’ court)\textsuperscript{117} or partially (high court) within the court’s area of jurisdiction.\textsuperscript{118} A cause of action can be described as a “legal fact in issue which gives rise to an obligation and a consequent legal liability”.\textsuperscript{119} The district in which the cause of action arose is the district where the facts upon which the plaintiff’s claim is based occurred.\textsuperscript{120} Where all the facts in issue occurred within the jurisdiction of a particular court it can be said that the cause of action arose wholly within the court’s area of jurisdiction.\textsuperscript{121} Whether a cause arose in the area of a particular court’s jurisdiction at common law depends on whether that particular court is regarded as a proper forum.\textsuperscript{122} Where the cause of action arises from a contract the

\begin{itemize}
\item \textsuperscript{112}Theophilopoulos (n 46) 49.
\item \textsuperscript{113}National Credit Regulator v Nedbank Ltd (n 110) 313; Theophilopoulos (n 46) 49 and Harms (n 94) par A 4 12.
\item \textsuperscript{114}See s 28(1)(a)-(b) and s 28(1A) of the Magistrates’ Courts Act. See s 21(1) of the Superior Courts Act. S 21(1)(a) of the Superior Courts Act attempts to confirm the common-law rules of jurisdiction. Harms (n 94) par A 4 12. Zokafa v Compuscan (Credit Bureau) 2011 1 SA 272 (ECM); Theophilopoulos (n 46) 49 and 57 and Harms (n 94) par A 4 7 and A 4 12.
\item \textsuperscript{115}Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd (n 111) 495 and 496; Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd 2013 1 SA 191 (WCC); Dairy Board v John Rennie & Co (Pty) Ltd 1976 3 SA 768 (W); Leibowitz t/a Lee Finance v Mkhla 2006 6 SA 180 (SCA) 183 and 184.
\item \textsuperscript{116}National Credit Regulator v Nedbank Ltd (n 110) 313.
\item \textsuperscript{117}s 28(1)(d) of the Magistrates’ Courts Act.
\item \textsuperscript{118}See s 29 of the Magistrates’ Courts Act and s 21(1) of the Superior Courts Act. Note, however, that in Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd (n 111) 486 the court interpreted “causes arising” not as “causes of action arising” but as legal proceedings in which a court has jurisdiction under the common law. See further Estate Agents Board v Lek 1979 3 SA 1048 (A). Theophilopoulos (n 46) 50, 58 and 64.
\item \textsuperscript{119}Theophilopoulos (n 46) 50 n 14.
\item \textsuperscript{120}Theophilopoulos (n 46) 50.
\item \textsuperscript{121}Dusheiko v Milburn 1964 4 SA 648 (A); Ndlovu v Santam Ltd 2006 2 SA 239 (SCA) and Theophilopoulos (n 46) 93 and 94.
\item \textsuperscript{122}Harms (n 94) par A 4 14.
\end{itemize}
court of the area in which the contract is or was to be performed, in which the contract was entered into or concluded or where the contract was breached will have jurisdiction. Where the cause of action arises from a delict the court in the area in which the wrongful act occurred or was committed will have jurisdiction. Where the cause of action arises from other causes the area of jurisdiction where the res gestae occurred will have jurisdiction.

“Concurrent jurisdiction” refers to jurisdiction exercised by two or more courts in respect of a matter. Where a plaintiff or applicant has a choice between courts with concurrent jurisdiction the determination of jurisdiction will often be based on certain underlying principles. Factors such as effectiveness and convenience are also taken into account when deciding upon a particular court.

The high court has inherent jurisdiction to regulate and protect its own procedure and does not derive its capacities and powers only from statute. The high court may adjudicate any unlawful interference with rights, undertake any procedural step or make any order that is not excluded by statute from its jurisdiction, thus entertaining any claim or giving any order it would have been entitled to entertain or give at common law. However, the high court’s

123 Coloured Development Corporation Ltd v Sahabodien 1981 1 SA 868 (C) and Harms (n 94) par A 4 14.
124 Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd 1962 4 SA 326 (A) and Harms (n 94) par A 4 14.
125 Harms (n 94) par A 4 14.
126 Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd 1985 3 SA 633 (D) and Harms (n 94) par A 4 14.
127 Harms (n 94) par A 4 14 and Theophilopoulos (n 46) 50 and 65.
128 Thomas v BMW South Africa (Pty) Ltd 1996 2 SA 106 (C) and Harms (n 94) par A 4 14.
129 Theophilopoulos (n 46) 65.
130 “all facts concomitant with, illustrating and forming part of the matter in question”. Hiemstra and Gonin Trilingual Legal Dictionary (3rd ed) 278.
131 Harms (n 94) par A 4 14.
132 Van Heerden (n 44) 842 and Theophilopoulos (n 46) 80.
133 University of Pretoria Law Clinic and Business Enterprises at the University of Pretoria (Pty) Ltd (n 3) 100 and Theophilopoulos (n 98) 44.
134 This reference to “convenience” does not include the “convenience” of parties consenting to jurisdiction in terms of s 45 of the Magistrates’ Courts Act. University of Pretoria Law Clinic and Business Enterprises at the University of Pretoria (Pty) Ltd (n 3) 100 n 176.
135 University of Pretoria Law Clinic and Business Enterprises at the University of Pretoria (Pty) Ltd (n 3) 100 and Theophilopoulos (n 98) 45 and 46.
136 s 173 of the Constitution of the Republic of South Africa, 1996; South African Broadcasting Corporation Ltd v National Director of Public Prosecutions 2007 1 SA 523 (CC) par 88; Phillips v National Director of Public Prosecutions 2006 1 SA 505 (CC); Theophilopoulos (n 46) 48 and Harms (n 94) par A 3 2.
137 Theophilopoulos (n 46) 48.
138 Theophilopoulos (n 46) 48 and 61. See s 21(1)(a) of the Superior Courts Act.
139 Harms (n 94) par A 3 2.
inherent power does not extend to assumption of jurisdiction which it did not otherwise have.\textsuperscript{140}

In terms of the Superior Courts Act\textsuperscript{141} “the original jurisdiction of each high court division is territorial and is to be exercised within the particular geographical area specified by the Minister . . .”.\textsuperscript{142}

In contrast, magistrates’ courts are creatures of statute\textsuperscript{143} as their powers are derived from the Magistrates’ Courts Rules\textsuperscript{144} and the Magistrates’ Courts Act.\textsuperscript{145} Section 170 of the constitution\textsuperscript{146} confirms this position by stating that magistrates’ courts may decide any matter determined by an act of parliament. Thus, only an act of parliament can confer certain powers on a magistrates’ court.\textsuperscript{147} No principle can confer jurisdiction on a magistrates’ court where such court does not have jurisdiction by virtue of the Magistrates’ Courts Act or another statute.\textsuperscript{148} A magistrates’ court has no inherent power to regulate its own proceedings outside the provisions of the Magistrates’ Courts Rules, Magistrates’ Courts Act or other relevant statutes such as the National Credit Act.\textsuperscript{149}

Usually, sections 29 and 46 of the Magistrates’ Courts Act regulate a magistrates’ court’s jurisdiction in respect of specific causes of action.\textsuperscript{150} Section 46 stipulates matters in respect of which magistrates’ courts do not have jurisdiction and section 29 sets out matters magistrates’ courts are entitled to hear and adjudicate on (monetary restrictions on matters are

\textsuperscript{140} Shabangu v Road Accident Fund 2013 3 SA 245 (GNP) and Theophilopoulos (n 46) 62.
\textsuperscript{141} s 6.
\textsuperscript{142} Harms (n 94) par A 4 9.
\textsuperscript{143} Hydromar (Pty) Ltd v Pearl Oyster Shell Industries (Pty) Ltd (n 100) 386 and 387; S v Mkize 1962 2 SA 457 (N) 459; Els v Els 1967 3 SA 207 (T) 213A; Santum Insurance Co Ltd v Liebenberg 1976 4 SA 312 (N) 323H; Hatfield Town Management Board v Mynfred Poultry Farm (Pty) Ltd 1963 1 SA 737 (SR) 739E; Eimco (South Africa) (Pty) Ltd v Magistrate, Wynberg 1967 3 SA 715 (C) 718; Hoosan v Joubert 1964 4 SA 291 (T) 292B; Bosiu v Landdros, Marguard 1959 1 SA 81 (O) 87; National Credit Regulator v Nedbank Ltd (n 110) 307; Roestof v Heymans 1943 OPD 70 73 and Harms (n 99) par B 1 2.
\textsuperscript{144} Rules Regulating the Conduct of the Proceedings of the Magistrates’ Courts of South Africa published under GN R 740 in GG 33487 (23-08-2010). These rules came into force on 15 October 2010. GN 888 in GG 33620 (08-10-2010). For a full discussion of the rules with commentary see Van Loggereenbberg II Jones and Buckle: Civil Practice of the Magistrates’ Courts in South Africa (10th ed).
\textsuperscript{145} Blue Chip 2 (Pty) Ltd v a Blue Chip 49 v Ryneveldt (n 95) par 15; Mason Motors (Edms) Bpk v Van Niekerk 1983 4 SA 406 (T) 409D-F; Ndumase v Functions 4 All 2004 5 SA 602 (SCA) 605; Harms (n 99) par B 1 2; National Credit Regulator v Nedbank Ltd (n 110) 307 and Theophilopoulos (n 46) 48.
\textsuperscript{146} Constitution of the Republic of South Africa, 1996.
\textsuperscript{147} National Credit Regulator v Nedbank Ltd (n 110) 307.
\textsuperscript{148} University of Pretoria Law Clinic and Business Enterprises at the University of Pretoria (Pty) Ltd (n 3) 100 n 176.
\textsuperscript{149} Theophilopoulos (n 98) 44 and University of Pretoria Law Clinic and Business Enterprises at the University of Pretoria (Pty) Ltd (n 3) 97.
\textsuperscript{150} University of Pretoria Law Clinic and Business Enterprises at the University of Pretoria (Pty) Ltd (n 3) 97.
also mentioned). Section 28 of the Magistrates’ Courts Act determines the geographical choice of court, regulating jurisdiction over the person of the respondent, defendant or litigant where certain criteria are met.  

Ultimately, when determining whether a particular court has jurisdiction in a matter one should ascertain whether a recognised jurisdictional ground exists and whether an effective judgment can be given.

2 Jurisdiction in terms of the National Credit Act

2.1 Brief historical overview

In terms of the repealed Credit Agreements Act ordinary rules of jurisdiction applied. However, an exception to the jurisdiction of a lower (civil) court could be found in section 21 of the Credit Agreements Act. Section 21, which only applied to civil proceedings, excluded jurisdiction contemplated in section 28(1)(d) of the Magistrates’ Courts Act, unless the consumer no longer resided in the Republic of South Africa. Thus, if the Credit Agreements Act applied to a contract the credit grantor could not found jurisdiction on the ground that the cause of action arose wholly within the district of a particular magistrates’ court. Therefore, if credit agreement litigation fell within the magistrates’ courts’ monetary jurisdictional limit it had to be conducted in the magistrates’ court where the credit receiver was employed, resided or carried on business.

In the case of credit agreements in terms of the Credit Agreements Act, a lower (civil) court had jurisdiction in actions on, or arising out of, a credit agreement as defined in section 1 of

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151 ibid.
152 University of Pretoria Law Clinic and Business Enterprises at the University of Pretoria (Pty) Ltd (n 3) 98.
153 Harms (n 94) par A 4 7.
155 Otto (n 154) 10-6 par 81(a).
156 s 21 of the Credit Agreements Act; Otto (n 154) 10-6 par 81(a); Van Heerden (n 44) 843.
157 Van Heerden (n 44) 843; Otto (n 154) 10-6 par 81(a).
158 s 28(1)(a); Van Heerden (n 44) 843.
the Credit Agreements Act, where the value of the property in dispute or the claim did not exceed R100 000 (as the monetary jurisdictional limit at the time).\(^{159}\)

As section 21 of the repealed Credit Agreements Act did not exclude the jurisdiction of the supreme court, a credit receiver could be sued in a supreme court with jurisdiction over the area in which the cause of action arose.\(^{160}\)

2.2 Current position – Jurisdiction of the courts for purposes of the National Credit Act

Unlike the Credit Agreements Act, the National Credit Act contains no specific provision regulating jurisdiction in respect of the person of the consumer.\(^{161}\) Van Heerden submits that for the purposes of debt-enforcement litigation it is vital to establish which courts have jurisdiction to adjudicate on matters arising from the National Credit Act and provisions dealing with jurisdiction in respect of the person of a defendant, as set out in section 19(1)(a) of the Supreme Court Act\(^ {162}\) (now section 21(1) of the Superior Courts Act) and section 28(1) of the Magistrates’ Courts Act, will apply respectively, depending on which court is approached.\(^ {163}\) Jurisdictional principles and rules of the respective courts will also have to be observed.\(^ {164}\)

As the National Credit Act contains no similar provision to section 21 of the Credit Agreements Act it appears that the prohibition against founding jurisdiction for purposes of enforcement of a credit agreement on the ground that the cause of action arose wholly within the district of a specific magistrates’ court, does not apply to credit agreements governed by the National Credit Act.\(^ {165}\) According to Otto\(^ {166}\) it would seem that the well-known ground for jurisdiction contemplated in section 28(1)(d) of the Magistrates’ Courts Act may not be

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159 s 29(1)(e) read with GN R 1411 in GG 19435 (30-10-1998); Otto (n 154) 10-6 and 10-7 par 81(a); Otto and Otto in Scholtz (n 89) par 20 2 and Van Heerden in Scholtz (n 89) par 12 13.
160 Otto (n 154) 10-6 par 81(a).
161 Roestoff and Coetzee “Consent to jurisdiction – unlawful provision in a credit agreement in terms of the National Credit Act – is the jurisdiction of a court ousted thereby?” 2008 THRHR 678 688 and Van Heerden in Scholtz (n 89) par 12 13.
162 59 of 1959.
163 Van Heerden in Scholtz (n 89) par 12 13.
164 Theophilooulos (n 46) 58.
165 Van Heerden in Scholtz (n 89) par 12 13.
166 Otto and Otto (n 22) 60 n 61.
agreed upon by the parties in respect of credit agreements governed by the National Credit Act as section 90(2)(k)(vi)(bb)\(^{167}\) of the National Credit Act prohibits provisions in credit agreements constituting consent to the jurisdiction of any court located outside the area of jurisdiction of a court having concurrent jurisdiction and in which area the consumer works, resides or where the goods are ordinarily kept. However, Otto submits that section 90(2)(k)(vi)(bb) does not exclude jurisdiction by operation of law, by virtue of the provisions of s 28(1)(d) of the Magistrates’ Courts Act.\(^{168}\) In Otto’s opinion this was more than likely not the (subjective) intention of the legislature, especially when one contemplates how provisions regarding jurisdiction were formulated in the Credit Agreements Act.\(^{169}\)

Schedule 2 to the National Credit Act sets out the amendment of laws in accordance with section 172(2)\(^{170}\).\(^{171}\) Schedule 2 to the National Credit Act amends, \textit{inter alia}, section 29(1) of the Magistrates’ Courts Act by inserting the words “and the National Credit Act, 2005” after the expression “Subject to the provisions of this Act”.\(^{172}\) Furthermore, schedule 2 to the National Credit Act also amends section 29(1)(e) of the Magistrates’ Courts Act and consequently does away with the limitation on the value of a claim.\(^{173}\) Paragraph (e) of section 29(1) of the Magistrates’ Courts Act was substituted with the following paragraph: “(e) actions on or arising out of any credit agreement, as defined in section 1 of the National Credit Act, 2005”.\(^{174}\) No mention is made of a limit on the amount involved, as was the case with the previous version of section 29(1)(e).\(^{175}\) The amended section 29(1)(e) of the Magistrates’ Courts Act thus provides that a court, in respect of causes of action, shall have jurisdiction in actions on, or arising out of, any credit agreement as defined in section 1 of the National Credit Act, 2005. It is clear from section 29(1)(e) of the Magistrates’ Courts Act that for purposes of jurisdiction it is not necessary that the credit agreement is one to which the National Credit Act applies; as long as it falls within the definition of a credit agreement as defined in section 1 of the National Credit Act.\(^{176}\)

\(^{167}\) See chap 4 par 3 3.
\(^{168}\) Otto and Otto (n 22) 60 n 61 and Van Heerden in Scholtz par 12 13 n 507.
\(^{169}\) Otto and Otto (n 22) 60 n 61.
\(^{170}\) S 172(2) of the National Credit Act states that laws referred to in schedule 2 to the National Credit Act are amended in the manner set out in that schedule.
\(^{171}\) Van Heerden in Scholtz (n 89) par 12 13.
\(^{172}\) \textit{Ibid.}
\(^{173}\) Otto and Otto in Scholtz (n 89) par 20 2.
\(^{174}\) Van Heerden in Scholtz (n 89) par 12 13.
\(^{175}\) Otto and Otto in Scholtz (n 89) par 20 2.
\(^{176}\) See Otto (n 154) 10-7 par 81(a) and 10-10 n 16.
Two significant consequences result from the abovementioned amendment, namely:

a) district magistrates’ courts may adjudicate on credit agreements as defined in section 1 of the National Credit Act\(^\text{177}\) and  
b) district magistrates’ courts have been granted unlimited monetary jurisdiction in respect of credit agreements as defined in section 1 of the National Credit Act as the amended section 29(1)(e) of the Magistrates’ Courts Act does not include a monetary “cap”.\(^\text{178}\)

An anomalous situation was however created by the Jurisdiction of Regional Courts Amendment Act\(^\text{179}\) which came into operation on 9 August 2010.\(^\text{180}\) This act established regional civil magistrates’ courts and initially capped the monetary jurisdiction of such courts in respect of actions on, or arising out of a credit agreement as defined in section 1 of the National Credit Act at a maximum of R300 000.\(^\text{181}\) This resulted in the absurd situation where regional magistrates’ courts had a limited monetary jurisdiction of R300 000 in respect of actions on, or arising out of a credit agreement as defined in section 1 of the National Credit Act, and district magistrates’ courts had unlimited jurisdiction in respect of these actions.\(^\text{182}\) To date, this irregularity has unfortunately not been addressed.\(^\text{183}\)

In *National Credit Regulator v Nedbank Ltd*\(^\text{184}\) the court confirmed a magistrates’ court’s unlimited monetary jurisdiction in respect of credit agreements as defined in section 1 of the National Credit Act as it held that there is no monetary limit upon the jurisdiction of magistrates’ courts to hear a referral under section 87 of the National Credit Act. In *Firstrand Bank Ltd v Maleke and three similar cases*\(^\text{185}\) the court also held that a magistrates’ court’s jurisdiction to hear cases under the National Credit Act is unlimited.

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177 Van Heerden in Scholtz (n 89) par 12 13.  
178 Van Heerden in Scholtz (n 89) par 12 13 and Theophilopoulos (n 46) 58.  
179 31 of 2008.  
180 See *GG* 33448 (06-08-2010). Van Heerden in Scholtz (n 89) par 12 13.  
181 As set out in GN 216 in *GG* 37477 (27-03-2014) the monetary jurisdiction of regional magistrates’ courts in respect of causes of action set out in s 29 of the Magistrates’ Courts Act has been increased to between R200 000 and R400 000 with effect from 1 June 2014. Van Heerden in Scholtz (n 89) par 12 13.  
182 Van Heerden in Scholtz (n 89) par 12 13.  
183 ibid.  
184 2009 6 SA 295 (GNP) 321.  
185 2010 1 SA 143 (GSJ) par 22.
CHAPTER 4

CONSENT TO JURISDICTION

1 General overview

This chapter investigates the scope of section 45 of the Magistrates’ Courts Act and whether it permits a debtor to consent in writing to the jurisdiction of a magistrates’ court other than that in which that debtor is employed or resides when proceedings are brought by a creditor for the enforcement of any credit agreement to which the National Credit applies.

Predatory lending practices are rife in South Africa, especially in the micro-lending industry. Unscrupulous credit providers often insert dubious jurisdiction clauses in credit agreements and end up instituting legal proceedings in courts miles away from where consumers work or reside. This often results in great costs to the consumer.

In practice, debt collection practitioners use section 45 of the Magistrates’ Courts Act to obtain consent to the issuing of emoluments attachment orders from courts which would not have jurisdiction in terms of section 65J(1)(a) of the Magistrates’ Courts Act. Many debt collectors reason that section 45 of the Magistrates’ Courts Act allows for competent consents to the jurisdiction of magistrates’ courts that would normally not have jurisdiction. Where the employer carries on business, resides or is employed within the jurisdiction of the Alice magistrates’ court, the argument allows for a section 45 consent to, for example, the Hennenman magistrates’ court. This method is often employed within the context of sections 57, 58 and 65 of the Magistrates’ Courts Act. As was pointed out above, sections 57, 58 and 65 of the Magistrates’ Courts Act contain mechanisms that legal

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186 Van Heerden (n 44) 845.
187 See annex A.
188 Van Heerden (n 44) 845.
189 ibid.
190 University of Pretoria Law Clinic (n 11) 34.
191 University of Pretoria Law Clinic and Business Enterprises at the University of Pretoria (Pty) Ltd (n 3) 101.
192 ibid.
193 Bently “Separating the baby and the bath water” 2013:3 De Rebus 23 25 and University of Pretoria Law Clinic and Business Enterprises at the University of Pretoria (Pty) Ltd (n 3) 101.
194 chap 2 par 1 and 2.
practitioners use to collect debts on behalf of their clients. The procedures related to sections 57, 58 and 65 are circumscribed in these specific sections of the Magistrates’ Courts Act and Magistrates’ Courts Rules. However, sections of a general nature, such as section 45 of the Magistrates’ Courts Act, are often applied within the context of debt collection to facilitate the process, even though they do not fall to be specified within the constraints of the aforementioned debt collection methods.

In practice, parties often consent to the jurisdiction of a specific magistrates’ court to process their applications in terms of sections 57, 58 and 65 of the Magistrates’ Courts Act. Simultaneously with this process, debtors also consent to the issuing of an emoluments attachment order from the same magistrates’ court to whose jurisdiction they have consented to judgment, which is not the magistrates’ court that has jurisdiction in terms of section 65J of the Magistrates’ Courts Act.

The chief argument against conferring jurisdiction in terms of section 45 of the Magistrates’ Courts Act in the absence of a jurisdictional link is that it is costly and problematic for the debtor to query the contents or validity of the emoluments attachment order or to rescind such order where the magistrates’ court in which said order was issued is located many miles away from the court of the area in which the employer of the consumer carries on business, resides or is employed, or, if the consumer is employed by the state, in which the consumer is employed. An application to amend, challenge or rescind the emoluments attachment order or to set it aside upon final payment for credit bureau profile purposes will necessitate the services of a local attorney as well as a correspondent attorney located within the jurisdiction of the area of the magistrates’ court that granted the order.

The fact that certain magistrates’ courts are issuing emoluments attachment orders without a jurisdictional link has led to forum shopping amongst debt collectors. Factors such as a specific court’s staff’s competency and/or willingness to issue emoluments attachment orders

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195 University of Pretoria Law Clinic and Business Enterprises at the University of Pretoria (Pty) Ltd (n 3) 101.
196 ibid.
197 ibid.
198 ibid.
199 ibid.
200 ibid.
201 ibid.
202 ibid.
in a timely manner all play a role when a jurisdiction is decided upon by a debt collector. Some magistrates’ courts’ unwillingness to issue emoluments attachment orders, even where the merits of the case warrant it, as well as long waiting periods for the granting of such orders might explain why debt collectors would utilise section 45 of the Magistrates’ Courts Act to obtain emoluments attachment orders from magistrates’ courts other than those specified in section 65J of the Magistrates’ Courts Act.

2 Consent to the extension of jurisdiction in terms of section 45 of the Magistrates’ Courts Act

Section 45 of the Magistrates’ Courts Act deals with jurisdiction by consent of parties. Section 45(1) provides that, subject to the provisions of section 46 of the Magistrates’ Courts Act, a magistrates’ court shall have jurisdiction to determine any proceeding or action otherwise beyond the jurisdiction, if the parties consent in writing thereto: Provided that no court other than a court having jurisdiction under section 28 of the Magistrates’ Courts Act shall, except where such consent is given specifically with reference to specific proceedings already instituted or about to be instituted in such court, have jurisdiction in any such matter. Section 45(2) provides that any provision in a contract existing at the commencement of the Magistrates’ Courts Act or thereafter entered into, whereby a person undertakes that, when proceedings have been or are about to be instituted, he will give such consent to jurisdiction as is contemplated in the proviso to sub-section (1), shall be null and void.

Section 45 of the Magistrates’ Courts Act makes it possible to confer jurisdiction by consent on a magistrates’ court or on a particular magistrates’ court where such court did not ordinarily have jurisdiction in terms of section 28(1) of the Magistrates’ Courts Act. However, section 45 of the Magistrates’ Courts Act cannot be used to extend a magistrates’

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203 Whittle “LSSA condemns unscrupulous garnishee practices” 2013:4 De Rebus 13 13 and University of Pretoria Law Clinic (n 11) 35.
204 University of Pretoria Law Clinic (n 11) 35 and 36.
205 “Matters beyond the jurisdiction”.
206 s 45(1).
207 s 45(2).
208 McLaren v Badenhorst 2011 1 SA 214 (ECG) par 11; University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (n 74) par 88 and Theophilopoulos (n 46) 102.
court’s jurisdiction if the cause of action is specifically excluded by section 46 of the Magistrates’ Courts Act.\(^\text{209}\)

Section 45 of the Magistrates’ Courts Act provides for two situations in respect of which the parties may consent in writing to an extension of jurisdiction.\(^\text{210}\) Firstly, the parties may consent to increase the monetary jurisdictional limit of the magistrates’ courts.\(^\text{211}\) Such consent may be given beforehand, in anticipation of claims which may arise in the future.\(^\text{212}\) Secondly, parties may consent to the jurisdiction of a particular magistrates’ court, which would not ordinarily have jurisdiction in respect of the person of the defendant.\(^\text{213}\) However, the proviso contained in section 45(1) of the Magistrates’ Courts Act provides that such consent will only be valid if it is given specifically with reference to particular proceedings already instituted or about to be instituted.\(^\text{214}\) It is evident from section 45 that “pre-emptive”\(^\text{215}\) consent to jurisdiction is thus prohibited and only non-pre-emptive consents that arise from existing or soon-to-be initiated proceedings are allowed.\(^\text{216}\) Ultimately, consent to jurisdiction can only be given once proceedings are imminent.\(^\text{217}\)

Consent to jurisdiction envisaged in section 45 of the Magistrates’ Courts Act often evokes much confusion.\(^\text{218}\) According to Beck the confusion can be attributed to the wording of section 45.\(^\text{219}\) He remarks that section 45 does not keep the two aspects of subject matter and person separate.\(^\text{220}\) The consent referred to in section 45(1) is a consent to subject matter, but the proviso to section 45(1) extends it to a consent to personal jurisdiction.\(^\text{221}\) Nevertheless, as it stands, it appears that such a consent will found jurisdiction over the defendant’s person.\(^\text{222}\)

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\(^{209}\) s 45(1) and Theophilopoulos (n 46) 102.

\(^{210}\) Theophilopoulos (n 46) 102.

\(^{211}\) ibid.

\(^{212}\) ibid.

\(^{213}\) ibid.

\(^{214}\) ibid.

\(^{215}\) “Pre-emptive” consent to jurisdiction can be described as consent that is given at a time prior to any proceedings having been instituted or which are about to be instituted, in anticipation of claims which might arise in future. Theophilopoulos (n 46) 102 and the University of Stellenbosch Legal Aid Clinic case (n 1) par 112.

\(^{216}\) the University of Stellenbosch Legal Aid Clinic case (n 1) par 112 and 114.

\(^{217}\) the University of Stellenbosch Legal Aid Clinic case (n 1) par 112.

\(^{218}\) McLaren v Badenhorst (n 208) par 5.


\(^{220}\) Beck (n 219) 409 ff.

\(^{221}\) ibid.

\(^{222}\) ibid.
In *McLaren v Badenhorst*\(^{223}\) the court held that where only one of the parties consents to the jurisdiction of a magistrates’ court in terms of section 45 of the Magistrates’ Courts Act, such consent is null and void. The requirement of consent to jurisdiction by both parties can be satisfied by the written consent of the defendant and the issue of summons by the plaintiff alleging the consent of the parties.\(^{224}\)

3. University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic; Mavava Trading 279 (Pty) Ltd v University of Stellenbosch Legal Aid Clinic (CCT127/15) 2016 ZACC 32 (13 September 2016)

3.1 General overview

The facts underpinning this case relate to the debt collection procedures employed by the micro-lending industry to secure repayment of loans.\(^{225}\) The most alarming feature of this case is the manner in which the micro-lenders forum shopped for courts which would entertain their applications for judgment and the issuing of emoluments attachment orders.\(^{226}\) The law governing the issuing of emoluments attachment orders was misapplied and abused by the credit providers.\(^{227}\) This caused extreme hardship to the individual applicants against whom these orders were issued.\(^{228}\)

This minor dissertation focusses on one of the two key issues arising in this matter which relates to the appeal, namely, whether the declaration made by the high court should be overturned and replaced by a declaration to the effect that a judgment debtor may, for

\(^{223}\) 2011 1 SA 214 (ECG) par 12.

\(^{224}\) *MBD Securitisation (Pty) Ltd v Booi* 2015 5 SA 450 (FB) par 36 and *Suid-Westelike Transvaalse Landbou Ko perasie v Kotze* 2000 1 All SA 170 (NC) 177.

\(^{225}\) *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* (n 74) par 1 and 9.

\(^{226}\) Van Niekerk “The use of emolument (sic) attachment orders, jurisdiction and forum shopping under the spotlight” 2015:10 *De Rebus* 59 59 and *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* (n 74) par 6.

\(^{227}\) the *University of Stellenbosch Legal Aid Clinic* case (n 1) par 41.

\(^{228}\) *ibid.*
purposes of granting an emoluments attachment order, consent to the jurisdiction of a magistrates’ court other than the magistrates’ court of the area in which the debtor works or resides.  

3.2 Facts

The individual applicants were general workers on the lower end of the wage scale, residing in Paarl, Macassar and Stellenbosch in the Western Cape. They approached SA Multiloan in Stellenbosch for small loans. After signing forms at SA Multiloan’s offices, the individual applicants obtained the micro-loans they asked for. However, these micro-loans were granted without any reasonable steps being taken prior to the conclusion of the credit agreements to assess the applicants’ existing financial means, obligations and prospects. The affordability assessment was either non-existent or perfunctory and the repayments at times exceeded 50% of the individual applicants’ monthly income. The micro-loans were thus advanced in breach of section 81 of the National Credit Act which seeks to prevent the granting of reckless credit.

Due to these predatory lending practices, the individual applicants defaulted on their payments. Subsequently, the credit providers, through their representatives, asked the individual applicants to sign further documents which resulted in default judgments and emoluments attachment orders being obtained by the credit providers from clerks of

229 University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (n 74) par 23.
230 the University of Stellenbosch Legal Aid Clinic case (n 1) par 42.
231 A loan originator whose business was to facilitate loans for a fee between credit providers and consumers. See the University of Stellenbosch Legal Aid Clinic case (n 1) par 47.
232 the University of Stellenbosch Legal Aid Clinic case (n 1) par 42.
233 ibid.
234 University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (n 74) par 33.
235 ibid.
236 Thebe “Debt collection system to be changed” 2015:8 De Rebus 3 3 and University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (n 74) par 34. For a full discussion of reckless credit see Vessio “Beware the provider of reckless credit” 2009 TSAR 274 par 3.
237 Thebe (n 236) 3; University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (n 74) par 11.
238 The debtors were asked to sign a written consent to judgment; the payment of the debt by way of instalments; the issuing of an emoluments attachment order against them; and the jurisdiction of a court seated many miles away from where they work or reside. University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (n 74) par 23.
magistrates’ courts situated many miles away from where the individual applicants resided or worked.\textsuperscript{239}

Pivotal to the debt collection procedure employed by the credit providers was the written consent of the individual applicants.\textsuperscript{240} The individual applicants alleged that they either signed the documents under pressure from the debt collectors; that the documents were not explained to them or that they did not sign the consents at all.\textsuperscript{241} In most instances, the individual applicants’ signatures, that enabled the credit providers to obtain such orders, were forged.\textsuperscript{242} Fraudulent documents were submitted to clerks of the court for purposes of granting default judgments purportedly by consent and emoluments attachment orders also purportedly by consent.\textsuperscript{243} Documents relating to consent to jurisdiction, recording that the parties had agreed to the jurisdiction of a magistrates’ court other than that in which the individual applicants resided or worked, were also included in the fraudulent documents.\textsuperscript{244}

Most of the individual applicants only became aware of the legal route taken by the credit providers when their employers made deductions from their wages.\textsuperscript{245} These deductions were extremely high, leaving the individual applicants with little money to support themselves and their families.\textsuperscript{246}

Dissatisfied with the emoluments attachment orders granted against them, some of the individual applicants requested the credit providers to reduce the deductions so that they would have enough money left after such deductions to support themselves and their families.\textsuperscript{247} The credit providers refused.\textsuperscript{248} Subsequently, the orders taken against the individual applicants were challenged by the University of Stellenbosch Legal Aid Clinic\textsuperscript{249} who instituted legal proceedings on behalf of the individual applicants.\textsuperscript{250} Flemix & Associates Incorporated Attorneys, an external debt collector for the credit providers, acted

\begin{itemize}
  \item \textsuperscript{239} University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (n 74) par 11 and the University of Stellenbosch Legal Aid Clinic case (n 1) par 42.
  \item \textsuperscript{240} University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (n 74) par 23.
  \item \textsuperscript{241} University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (n 74) par 25.
  \item \textsuperscript{242} the University of Stellenbosch Legal Aid Clinic case (n 1) par 42.
  \item \textsuperscript{243} the University of Stellenbosch Legal Aid Clinic case (n 1) par 49.
  \item \textsuperscript{244} the University of Stellenbosch Legal Aid Clinic case (n 1) par 54.
  \item \textsuperscript{245} the University of Stellenbosch Legal Aid Clinic case (n 1) par 43.
  \item \textsuperscript{246} ibid.
  \item \textsuperscript{247} the University of Stellenbosch Legal Aid Clinic case (n 1) par 57.
  \item \textsuperscript{248} ibid.
  \item \textsuperscript{249} A law clinic established by the University of Stellenbosch and registered with the Cape Law Society, in terms of the Attorneys Act 53 of 1979, that provides free legal services to indigent people. See the University of Stellenbosch Legal Aid Clinic case (n 1) par 3.
  \item \textsuperscript{250} the University of Stellenbosch Legal Aid Clinic case (n 1) par 43 and 57.
\end{itemize}
on the credit providers’ behalf in opposing the proceedings.\(^{251}\) The credit providers were cited individually in the high court, but will hereinafter be referred to collectively as the Flemix respondents. The Association of Debt Recovery Agents NPC\(^{252}\) was joined as a respondent and the South African Human Rights Commission was admitted as an *amicus curiae* in the high court.\(^{253}\)

In September 2014, the University of Stellenbosch Legal Aid Clinic instituted legal proceedings in the high court.\(^{254}\) In the main it sought an order declaring the emoluments attachment orders, obtained with the written consent of the individual applicants from clerks of the court in jurisdictions alien to them, invalid and of no force and effect.\(^{255}\) The Stellenbosch Legal Aid Clinic asserted that these orders were unlawful by reason that they were based on fraudulent documents and issued by clerks of the court, employed in various magistrates’ offices, who had no power to grant them.\(^{256}\)

The issue of jurisdiction arose in the context of prayer 3 of the applicants’ notice of motion and the counter-application brought by the Flemix respondents.\(^{257}\) The applicants sought an order declaring that section 45 of the Magistrates’ Courts Act does not empower a judgment debtor to consent to the jurisdiction of a magistrates’ court of the area other than that in which the judgment debtor works or resides.\(^{258}\) The Association of Debt Recovery Agents NPC, Flemix & Associates Incorporated Attorneys and individual credit providers sought a declaration to the effect that section 45 of the Magistrates’ Courts Act does empower debtors to give such consent.\(^{259}\) The Association of Debt Recovery Agents NCP and Flemix & Associates Incorporated Attorneys asserted that their (Flemix & Associates Incorporated Attorneys) conduct in using the provisions of section 45 of the Magistrates’ Courts Act for

\(^{251}\) *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* (n 74) par 16.

\(^{252}\) ADRA is a non-profit organisation that represents the “formal” debt collection industry. Its members vary from law firms specialising in debt recovery, credit providers, debt collectors and other service providers in the debt collection industry. It advances members’ interests at relevant statutory and non-statutory bodies and takes part in the process of drafting legislation that impacts on its members’ interests. *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* (n 74) par 18 and the *University of Stellenbosch Legal Aid Clinic* case (n 1) par 5.

\(^{253}\) the *University of Stellenbosch Legal Aid Clinic* case (n 1) par 5.

\(^{254}\) the *University of Stellenbosch Legal Aid Clinic* case (n 1) par 58.

\(^{255}\) *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* (n 74) par 21 and the *University of Stellenbosch Legal Aid Clinic* case (n 1) par 58.

\(^{256}\) the *University of Stellenbosch Legal Aid Clinic* case (n 1) par 58.

\(^{257}\) *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* (n 74) par 86.

\(^{258}\) *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* (n 74) par 86 and the *University of Stellenbosch Legal Aid Clinic* case (n 1) par 58.

\(^{259}\) the *University of Stellenbosch Legal Aid Clinic* case (n 1) par 58.
purposes of “navigating around” magistrates’ courts which would allegedly “simply refuse to entertain section 58 matters” did not constitute forum shopping. Furthermore, it was contended that their conduct was rather a means of ensuring that their clients (credit providers) were afforded their constitutional right of access to courts.

The individual applicants also sought relief in relation to the setting aside of the emoluments attachment orders granted against each of them as it was contended that the orders were invalid and unlawful.

The Stellenbosch Legal Aid Clinic also challenged the constitutional validity of section 65J(2) of the Magistrates’ Courts Act and sought a declaration that the phrase “the judgment debtor has consented thereto in writing” is inconsistent with the constitution and invalid to the extent that it fails to provide for judicial oversight over the issuing of emoluments attachment orders against judgment debtors.

3.3 High court judgment

Desai J held that Flemix & Associates Incorporated Attorneys and the micro-lenders’ conduct, in using section 45 of the Magistrates’ Courts Act to bypass courts in areas in which the individual applicants, or their employers, reside, in order to obtain judgments in courts which would otherwise not have jurisdiction and which in any event would have no jurisdiction to issue an emoluments attachment order against that individual applicant, amounts to a blatant case of forum shopping.

Furthermore, Desai J held that the emoluments attachment orders against the individual applicants were issued in breach of the statutory requirements contained in section 65J(1)(a) of the Magistrates’ Courts Act as these orders were issued in magistrates’ courts other than

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260 University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (n 74) par 54.
261 ibid.
262 ibid.
263 University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (n 74) par 56.
264 University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (n 74) par 22.
265 s 65J(2)(a).
266 the University of Stellenbosch Legal Aid Clinic case (n 1) par 59.
267 University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (n 74) par 57.
those in which the employers of the said individual applicants carried on business or resided.\textsuperscript{268}

No defence was raised against the setting aside of the emoluments attachment orders against the individual applicants and subsequently Desai J declared the said emoluments attachment orders unlawful and set them aside.\textsuperscript{269} No appeal was sought against this order.\textsuperscript{270}

When an exorbitant portion of a debtor’s income is attached by way of an emoluments attachment order, the remedy provided by the Magistrates’ Courts Act is the opportunity to review and set aside said order.\textsuperscript{271} However, Desai J proclaimed that this will not be an effective remedy if section 45 of the Magistrates’ Courts Act is interpreted such that it allows impoverished, vulnerable, disadvantaged debtors to consent to the jurisdiction of distant courts.\textsuperscript{272}

The following legislative provisions are relevant to the question of jurisdiction in this case:

(a) section 45 of the Magistrates’ Courts Act which provides that in certain circumstances parties may consent to the jurisdiction of a magistrates’ court to adjudicate any action or proceeding that is otherwise beyond its jurisdiction;\textsuperscript{273}

(b) section 65J(1)(a) of the Magistrates’ Courts Act which provides that an emoluments attachment order must be issued from the magistrates’ court of the area in which the employer of the judgment debtor carries on business, resides or is employed;\textsuperscript{274}

(c) section 90(2)(k)(vi)(bb) of the National Credit Act which provides that a provision of a credit agreement is unlawful if it expresses on behalf of the consumer a consent to jurisdiction of any court located outside the jurisdiction of a court in which the consumer works or resides;\textsuperscript{275}

(d) section 91 of the National Credit Act which provides that a credit provider must not indirectly or directly induce or require a consumer to enter into a supplementary

\textsuperscript{268} \textit{University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services} (n 74) par 60 and 61.

\textsuperscript{269} \textit{University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services} (n 74) par 64 and the \textit{University of Stellenbosch Legal Aid Clinic} case (n 1) par 60.

\textsuperscript{270} \textit{ibid}.

\textsuperscript{271} \textit{ibid}.

\textsuperscript{272} \textit{ibid}.

\textsuperscript{273} \textit{ibid}.

\textsuperscript{274} \textit{ibid}.

\textsuperscript{275} \textit{ibid}.
agreement that contains a provision that would be unlawful if it were included in a credit agreement.\textsuperscript{276}

Desai J concluded that sections 65J and 45 of the Magistrates’ Courts Act cannot be read together.\textsuperscript{277} The narrow provisions of section 65J of the Magistrates’ Courts Act cannot be reconciled with the broad provisions of section 45 of the Magistrates’ Courts Act.\textsuperscript{278} It is a well-established principle in law that where two provisions are contradictory, the specific provision in a statute trumps the general provision.\textsuperscript{279} According to Desai J the provisions of section 65 of the Magistrates’ Courts Act are specific in that they govern emoluments attachment orders.\textsuperscript{280} Consequently, the high court declared that a judgment debtor may not consent to jurisdiction of a court other than that of the area where the debtor works or resides as section 65 clearly trumps section 45.\textsuperscript{281}

Regarding the declaration relating to section 45 of the Magistrates’ Courts Act, Desai J also considered the interface between section 45 of the Magistrates’ Courts Act and sections 90 and 91 of the National Credit Act.\textsuperscript{282}

Section 90 of the National Credit Act deals with unlawful provisions of credit agreements and sets out various declared unlawful provisions.\textsuperscript{283} Any provision that is unlawful in terms of section 90 is void as from the date that such provision purported to take effect.\textsuperscript{284}

Section 90(2)(k)(vi)(aa) and (bb) relates to a consumer’s consent to jurisdiction of a specific court and provides that “[a] provision of a credit agreement is unlawful if … it expresses, on behalf of the consumer … a consent to the jurisdiction of -

(aa) the High Court, if the magistrate’s (sic) court has concurrent jurisdiction; or

\textsuperscript{276} ibid.
\textsuperscript{277} University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (n 74) par 88.
\textsuperscript{278} University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (n 74) par 88 and the University of Stellenbosch Legal Aid Clinic case (n 1) par 62.
\textsuperscript{279} University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (n 74) par 90 and the University of Stellenbosch Legal Aid Clinic case (n 1) par 62.
\textsuperscript{280} University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (n 74) par 90.
\textsuperscript{281} University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (n 74) par 90 and the University of Stellenbosch Legal Aid Clinic case (n 1) par 62.
\textsuperscript{282} the University of Stellenbosch Legal Aid Clinic case (n 1) par 61.
\textsuperscript{283} See s 90(2) and Kelly-Louw Consumer Credit Regulation in South Africa (2012) 200-205.
\textsuperscript{284} s 90(3).
Section 90(2)(k)(vi)(bb) of the National Credit Act thus precludes a credit agreement as defined in section 1 of the National Credit Act from including a consent by a consumer to the jurisdiction of a court seated outside the area of jurisdiction in which the consumer works or resides or where the goods in question, if any, are ordinarily kept. The legislature’s main objective with this provision is to outlaw forum shopping by credit providers who include provisions into their credit agreements containing consent to the jurisdiction of any court seated outside the area of jurisdiction of a court having concurrent jurisdiction and in which the consumer works or resides or where the goods in question, if any, are ordinarily kept.

Section 91(2) of the National Credit Act extends the abovementioned prohibition to supplementary agreements. A credit provider is prohibited to indirectly or directly induce or require a consumer to sign any document or enter into a supplementary agreement that contains a provision that would be unlawful if it were included in a credit agreement.

According to Desai J, the protection of consumers appears to be the underlying rationale to the limitation of jurisdiction in sections 90 and 91 of the National Credit Act. The high court held that section 45 of the Magistrates’ Courts Act, which takes a broad approach to jurisdiction, directly contradicts sections 90 and 91 of the National Credit Act and undermines the purposes and objects of said act. The National Credit Act’s limitation of section 45 of the Magistrates’ Courts Act is thus necessarily implied.

The following reasons were given as to why the National Credit Act’s jurisdiction provisions trump section 45 of the Magistrates’ Courts Act:

(a) The interpretative principle that specifies that when a provision of a later act is inconsistent with a provision of an earlier act, the later act supersedes the earlier act’s

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285 MBD Securitisation (Pty) Ltd v Booi (n 224) par 33.
286 Van Heerden (n 44) 845 and 846.
287 MBD Securitisation (Pty) Ltd v Booi (n 224) par 30.
288 s 91(2).
289 ibid.
290 University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (n 74) par 91.
291 ibid.
provisions.\textsuperscript{292} Section 45 of the Magistrates’ Courts Act came into force in July 1945 while the National Credit Act came into force on 1 June 2006.\textsuperscript{293}

(b) The National Credit Act establishes a protective regime aimed at preventing the abuse and exploitation of consumers.\textsuperscript{294} In the circumstances, it is abundantly clear that section 45 of the Magistrates’ Courts Act fails to protect consumers; it is inconsistent with sections 90 and 91 of the National Credit Act and is trumped by the latter provisions.\textsuperscript{295}

Desai J concluded that if section 45 of the Magistrates’ Courts Act is correctly interpreted in the context of the Magistrates’ Courts Act and in light of the Bill of Rights, it does not apply to causes of action based on agreements covered by the National Credit Act.\textsuperscript{296} Consequently, if a debtor admits liability for a debt and consents to an emoluments attachment order, section 45 of the Magistrates’ Courts Act does not empower that debtor to consent to the jurisdiction of a court seated outside the area in which the debtor works or resides.\textsuperscript{297}

3.4 The appeal

Both the Association of Debt Recovery Agents NCP and the Flemix respondents acknowledged that for purposes of granting an emoluments attachment order under section 65J of the Magistrates’ Courts Act, section 45 of the Magistrates’ Courts Act does not empower a debtor to consent in writing to the jurisdiction of a court other than the court of the area in which the employer of the judgment debtor carries on business, resides or is employed, or, if the judgment debtor is employed by the state, in which the judgment debtor is employed.\textsuperscript{298}

\begin{itemize}
\item \textsuperscript{292} University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (n 74) par 92.
\item \textsuperscript{293} ibid.
\item \textsuperscript{294} s 3 and University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (n 74) par 92.
\item \textsuperscript{295} University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (n 74) par 92.
\item \textsuperscript{296} ibid.
\item \textsuperscript{297} ibid.
\item \textsuperscript{298} the University of Stellenbosch Legal Aid Clinic case (n 1) n 47.
\end{itemize}
However, the Association of Debt Recovery Agents NCP and the Flemix respondents sought to appeal against the high court’s order that declared “that in proceedings brought by a creditor for the enforcement of any credit agreement to which the National Credit Act 34 of 2005 . . . applies, section 45 of the Magistrates’ Courts Act does not permit a debtor to consent in writing to the jurisdiction of a magistrates’ court other than that in which that debtor resides or is employed”.

Three main arguments were advanced:

(a) It was submitted that sections 90 and 91 of the National Credit Act and section 45 of the Magistrates’ Courts Act must be read in a manner that avoids conflict.

(b) Even if it is not possible to avoid the conflict, the declarator sought must still be granted, because in the schedule that lists the provisions of the National Credit Act that trump Chapter IX of the Magistrates’ Courts Act, section 90 of the National Credit Act is not included. It was submitted that this is a clear sign that section 90 of the National Credit Act was not intended to prevail over section 45 of the Magistrates’ Courts Act.

(c) It was argued that section 45 of the Magistrates’ Courts Act promotes the right of access to courts by allowing parties, for cost effectiveness and convenience, to consent to the jurisdiction of a magistrates’ court that would ordinarily not have jurisdiction.

The following is a brief discussion of Jaffe J’s judgment regarding each of the abovementioned arguments:

(a) Do sections 90 and 91 of the National Credit Act conflict with section 45 of the Magistrates’ Courts Act?
Jafta J confirmed that section 45 of the Magistrates’ Courts Act prohibits “pre-emptive” consent to jurisdiction and reiterated that the consent can, therefore, only be given once proceedings are imminent.\(^{306}\)

Both the Association of Debt Recovery Agents NCP and the Flemix respondents contended that section 45 of the Magistrates’ Courts Act and sections 90(2)(k)(vi)(bb) and 91(2) of the National Credit Act can be read together.\(^{307}\) They submitted that sections 90(2)(k)(vi)(bb) and 91(2) of the National Credit Act relate to provisions that would be prohibited if they were in a credit agreement (either because they are included in the credit agreement itself or through a supplementary agreement or other document) but that it must be, in theory, conceivable for the provision in question to form part of a credit agreement.\(^{308}\)

The Flemix respondents and the Association of Debt Recovery Agents NCP then referred to the Magistrates’ Courts Act’s section 45 prohibition on pre-emptive consents to jurisdiction and contended that as non-pre-emptive consents arise from the workings of a credit agreement itself it can never be included in a credit agreement to begin with.\(^{309}\) In accordance with their argument, non-pre-emptive consents only come into play once a dispute is brewing and a dispute arising from a credit agreement can only begin to brew if the credit agreement has already come into force.\(^{310}\) If the non-pre-emptive consent can only exist once the credit agreement has come into force, then such non-pre-emptive consent could never have been included in the credit agreement to begin with and so the prohibition in sections 90(2)(k)(vi)(bb) and 91(2) will not apply.\(^{311}\)

Jafta J found the preceding argument unpersuasive.\(^{312}\) Jafta J proclaimed that the focus of sections 90 and 91 of the National Credit Act is on “unlawful provisions” and section 91(2) of the National Credit Act is in the hypothetical “if it were included”.\(^{313}\) The “document” referred to in section 91(2) of the National Credit Act need not be a credit agreement-related document as the wording of section 91(2) clearly mentions “any” document.\(^{314}\) According to

\(^{306}\) The University of Stellenbosch Legal Aid Clinic case (n 1) par 112.

\(^{307}\) The University of Stellenbosch Legal Aid Clinic case (n 1) par 114.

\(^{308}\) ibid.

\(^{309}\) ibid.

\(^{310}\) ibid.

\(^{311}\) ibid.

\(^{312}\) ibid par 115.

\(^{313}\) ibid.

\(^{314}\) ibid.
Jafta J “we are looking at hypothetical provisions [and] [t]he question is simply: would the provision of a document be unlawful if that provision were in a credit agreement.”

This matter is concerned with the Magistrates’ Courts Act’s section 45 consents to jurisdiction that exist in documents that are signed. They can include a provision in which a consumer consents to the jurisdiction of a magistrates’ court located outside the area of jurisdiction of a court having concurrent jurisdiction and in which the consumer works or resides or where the goods in question, if any, are ordinarily kept. However, if such a provision is transported into a credit agreement, it would be unlawful under section 90(2)(k)(vi)(bb) of the National Credit Act.

Section 90(2)(k)(vi)(bb) of the National Credit Act does not stipulate whether the “consent” it prohibits is pre-emptive or non-pre-emptive, it simply refers to “a consent to the jurisdiction . . .” The Association of Debt Recovery Agents NCP and the Flemix respondents’ technical focus on whether, by logic, a consent to jurisdiction included in a credit agreement would be pre-emptive and, therefore, not permissible under section 45(2) of the Magistrates’ Courts Act side-steps and overcomplicates the legislative prohibition in the National Credit Act.

The Flemix respondents also contended that section 91(2) of the National Credit Act only forbids specific conduct, namely, when a credit provider indirectly or directly requires or induces a consumer to enter into a supplementary agreement or sign any document, that contains a provision that would be unlawful if it were included in a credit agreement. They asserted that a section 45 consent is a voluntary agreement that does not involve any requiring or inducing by the credit provider. Jafta J strongly disagreed with this assertion and emphasised that the facts of this case clearly illustrate that said consents are frequently induced.

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315 ibid.
316 the University of Stellenbosch Legal Aid Clinic case (n 1) par 116.
317 “[I]n theory, a consumer could consent, under section 45, to the jurisdiction of a court where ‘the goods in question (if any) are ordinarily kept’. This is because section 45 allows for consents to jurisdiction beyond those courts ‘having jurisdiction under section twenty-eight’ of the Magistrates’ Courts Act and a court with jurisdiction over the goods in question might not be covered by section 28.” The University of Stellenbosch Legal Aid Clinic case (n 1) n 48.
318 ibid.
319 ibid.
320 ibid.
321 ibid.
322 ibid par 117.
323 ibid.
324 ibid.
The wording of section 91(2)\(^{325}\) of the National Credit Act sets a low threshold.\(^{326}\) By informing the debtor about the Magistrates’ Courts Act’s section 45 procedure and providing her with the relevant documents, the credit provider has indirectly induced the consumer to sign the consent.\(^{327}\) According to Jafta J this interpretation is underscored by the purposes of the National Credit Act, one of which is “to prohibit certain unfair credit and credit marketing practices . . .”\(^{328}\) It is thus clear from the aforementioned and the title\(^{329}\) of section 91 of the National Credit Act itself, that the focus is on the unlawful provisions rather than on the credit provider’s conduct.\(^{330}\)

Ultimately, sections 90 and 91 of the National Credit Act “limit” section 45 of the Magistrates’ Courts Act, rather than “conflict” with it.\(^{331}\) Sections 90 and 91 only prevent section 45 consents to jurisdiction that pertain to a relationship arising out of a credit agreement\(^{332}\) and provide consent to the jurisdiction of a court located outside the area of jurisdiction of a court having concurrent jurisdiction and in which the consumer works or resides or where the goods in question, if any, are ordinarily kept.\(^{333}\)

(b) Schedule 1 to the National Credit Act

Section 2 of the National Credit Act deals with the interpretation of the National Credit Act and section 2(7)(a) states that:

> “Except as specifically set out in, or necessarily implied by, this Act, the provisions of this Act are not to be construed as-

(a) limiting, amending, repealing or otherwise altering any provision of any other Act.”

Schedule 1, entitled “Rules Concerning Conflicting Legislation”, consists of three columns. The second column sets out a list of legislation that conflicts with the National Credit Act.\(^{334}\) The first column details provisions of the National Credit Act that conflict with the legislation.

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\(^{325}\) “indirectly . . . induce”.

\(^{326}\) the University of Stellenbosch Legal Aid Clinic case (n 1) par 117.

\(^{327}\) ibid.

\(^{328}\) ibid.

\(^{329}\) “Prohibition of unlawful provisions in credit agreements and supplementary agreements”.

\(^{330}\) ibid par 117.

\(^{331}\) ibid par 118.

\(^{332}\) ibid.

\(^{333}\) ibid.

\(^{334}\) ibid par 119.
at issue and the third column offers conflict resolution rules that solve the conflict. Section 172(1) of the National Credit Act, entitled “Conflicting legislation, consequential amendments, repeal of laws and transitional arrangements”, states that:

“If there is a conflict between a provision of this Act mentioned in the first column of the table set out in Schedule 1, and a provision of another Act set out in the second column of that table, the conflict must be resolved in accordance with the rule set out in the third column of that table.”

The Association of Debt Recovery Agents NCP and the Flemix respondents contended that sections 90 and 91 of the National Credit Act should not be read to amend, repeal, limit or otherwise alter section 45 of the Magistrates’ Courts Act. Their argument was based on the fact that although Chapter IX of the Magistrates’ Courts Act (of which section 45 is a part) is listed under the second column of schedule 1 to the National Credit Act, sections 90 and 91 of the National Credit Act are not included in the list of provisions of the National Credit Act that prevail to the extent of a conflict with Chapter IX of the Magistrates’ Courts Act.

According to Jafta J the Association of Debt Recovery Agents NCP and the Flemix respondents’ abovementioned approach clearly ignored a key phrase in section 2(7) of the National Credit Act – “necessarily implied”. Jafta J referred to Kent v South African Railways regarding the meaning of “necessarily implied” and reaffirmed that such implication must be a necessary one and not merely a possible one. Sections 90 and 91 of the National Credit Act’s limitation of section 45 of the Magistrates’ Courts Act is necessarily implied by an interpretation of both statutes as a reading of the plain language of sections 90 and 91, especially in light of the harm they are designed to prevent, clearly meets this test. In conclusion, Jafta J held that we are dealing with a limitation or qualification rather than a conflict and schedule 1 to the National Credit Act applies only to “conflicts” properly so termed.

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335 ibid.
336 ibid par 120.
337 ibid.
338 ibid par 121.
339 1946 AD 398 405.
340 the University of Stellenbosch Legal Aid Clinic case (n 1) par 121.
341 University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (n 74) par 91 and the University of Stellenbosch Legal Aid Clinic case (n 1) par 121.
342 the University of Stellenbosch Legal Aid Clinic case (n 1) n 51.
(c) Right of access to courts

The right of access to courts is central to the rule of law in a constitutional state like South Africa.\textsuperscript{343} Section 34 of the constitution protects the right of access to courts\textsuperscript{344} and section 39(2) of the constitution states that:

“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal, or forum must promote the spirit, purport and objects of the Bill of Rights.”

Both the Flemix respondents and the Association of Debt Recovery Agents NCP argued that the Magistrates’ Courts Act’s section 45 consents to jurisdiction improve access to courts and that this should be taken into consideration when interpreting the provisions.\textsuperscript{345}

The Association of Debt Recovery Agents NCP asserted that debtors could reduce litigation costs through consents.\textsuperscript{346} For example, a debtor may choose to consent to the jurisdiction of a single court for both the judgment debt and the issuing of the emoluments attachment order where these two would otherwise be in different jurisdictions.\textsuperscript{347} Their argument was predicated on the fact that separate proceedings are expensive and time consuming and consents to jurisdiction could save the debtor the costs of instructing different attorneys in different jurisdictions.\textsuperscript{348} The Association of Debt Recovery Agents NCP focussed on the magistrates’ courts’ capacity to deal with judgments and asserted that by permitting section 45 consents to jurisdiction debtors and creditors would be able to choose magistrates’ courts that have greater capacity to deal with judgments quickly.\textsuperscript{349} According to the Association of Debt Recovery Agents NCP “speedier justice enhances access to courts”\textsuperscript{350}

The Flemix respondents’ argument focussed more on access to courts for the creditors and was based on the assertion that several magistrates’ courts refuse to consider section 58 applications for judgment because, in their view, section 58 of the Magistrates’ Courts Act is not allowed by the National Credit Act.\textsuperscript{351} The Flemix respondents submitted that the

\textsuperscript{343} University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (n 74) par 51.
\textsuperscript{344} the University of Stellenbosch Legal Aid Clinic case (n 1) n 53.
\textsuperscript{345} ibid par 122.
\textsuperscript{346} ibid.
\textsuperscript{347} ibid.
\textsuperscript{348} ibid.
\textsuperscript{349} ibid.
\textsuperscript{350} ibid.
\textsuperscript{351} the University of Stellenbosch Legal Aid Clinic case (n 1) par 123.
Magistrates’ Courts Act’s section 45 consents to jurisdiction are, therefore, necessary to allow creditors to approach different courts that will entertain such applications.352

Regarding the Association of Debt Recovery Agents NCP’s argument Jafta J concurred that in some circumstances a section 45 consent may result in cost-savings for the debtor, however, the facts of this case point to the contrary.353 A debtor will more than likely incur much greater practical difficulties and costs where she consents to a magistrates’ court far removed from her residence.354 The Flemix respondents were obtaining judgments and emoluments attachment orders against the individual applicants in courts the debtors could not hope to reach.355 The individual applicants’ right to approach the courts was seriously jeopardised, if not effectively denied.356 The Flemix respondents’ forum shopping for courts which would entertain their applications for judgments and the issuing of emoluments attachment orders ultimately violated the debtors’ right to access courts and enjoy the protection of the law.357

Jafta J concluded that although it may be possible for a debtor to ensure, by way of a section 45 consent, that the same jurisdiction will deal with the judgment debt and the granting of any emoluments attachment order, there is no assurance that this is how section 45 consents to jurisdiction will be used.358 The Association of Debt Recovery Agents NCP failed to demonstrate why reading section 45 of the Magistrates’ Courts Act as compatible with sections 90 and 91 of the National Credit Act will ensure greater protection of the right of access to courts.359 Ultimately, the Association of Debt Recovery Agents NCP’s argument does not hold water as the risks to the debtors markedly outweigh the potential benefits.360

Regarding the Flemix respondents’ argument, their remedy lied in bringing a legal challenge to the conduct of the magistrates’ courts that regularly denied section 58361 applications.

352 ibid.
353 the University of Stellenbosch Legal Aid Clinic case (n 1) par 124.
354 ibid.
355 University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (n 74) par 51.
356 ibid.
357 ibid.
358 the University of Stellenbosch Legal Aid Clinic case (n 1) par 125.
359 ibid.
360 the University of Stellenbosch Legal Aid Clinic case (n 1) par 124.
361 of the Magistrates’ Courts Act.
Jafta J held that they could not ask the court in this matter to re-interpret distinct statutory provisions to alleviate an unrelated problem.\(^\text{362}\)

4  \textit{MBD Securitisation (Pty) Ltd v Booi} 2015 5 SA 450 (FB)

4.1 General overview

The facts underpinning this case have been described as bizarre,\(^\text{363}\) extraordinary\(^\text{364}\) and unbelievably peculiar.\(^\text{365}\) The case dealt with substantially the same legal issues as the \textit{University of Stellenbosch Legal Aid Clinic} case, above.\(^\text{366}\) The judgment focuses on the proverbial nuts and bolts of the prerequisites of vesting jurisdiction in a particular court in the issuing of emoluments attachment orders.\(^\text{367}\)

4.2 Facts

The consumer, Ms Booi, was resident and employed in Alice, a small town close to East London in the Eastern Cape.\(^\text{368}\) Ms Booi signed an admission of debt, consented in terms of section 45 of the Magistrates’ Courts Act to the jurisdiction of the Hennenman magistrates’ court in the Free State, some 800 kilometers away, and consented to the issue of an emoluments attachment order in that court in terms of section 65J of the Magistrates’ Courts Act.\(^\text{369}\)

\textsuperscript{362} the \textit{University of Stellenbosch Legal Aid Clinic} case (n 1) par 126.

\textsuperscript{363} Otto (n 74) 142.

\textsuperscript{364} \textit{MBD Securitisation (Pty) Ltd v Booi} (n 224) par 1.

\textsuperscript{365} \textit{MBD Securitisation (Pty) Ltd v Booi} (n 224) par 7.

\textsuperscript{366} Van Niekerk and Parker “The use of EAOs, jurisdiction and forum shopping under the spotlight” 2015:11 \textit{De Rebus} 40 40.

\textsuperscript{367} Van Niekerk and Parker (n 366) 40.

\textsuperscript{368} Otto (n 74) 143 and \textit{MBD Securitisation (Pty) Ltd v Booi} (n 224) par 1 and 3.

\textsuperscript{369} \textit{MBD Securitisation (Pty) Ltd v Booi} (n 224) par 11 and Otto (n 74) 143.
Ms Booi (respondent) alleged in the court proceedings that she never entered into an agreement with MBD Securitisation (Pty) Ltd (appellant) and that the origin of the debt was unknown to her.\(^{370}\) There was no indication in any of the documents before the court that the appellant had acted as a cessionary of book debts.\(^{371}\) On the contrary, the documents were indicative of a claim by the appellant as a creditor, with its head and/or registered office in Johannesburg, who sold and delivered goods to Ms Booi.\(^{372}\) According to Ms Booi an agent representing the appellant approached her at her work and explained to her that she was indebted to the appellant in the amount of R4 854.14.\(^{373}\) Ms Booi was embarrassed when approached at her place of employment and responded by signing the documents presented for signature.\(^{374}\)

The appellant’s attorney, situated in Nelspruit, prepared and signed a request for judgment in terms of section 58 of the Magistrates’ Courts Act.\(^{375}\) Judgment was subsequently granted in favour of the appellant by an unidentified person at the Hennenman magistrates’ court.\(^{376}\) The judgment included an order that the judgment debt be paid in instalments of R300 per month following service of an emoluments attachment order granted pursuant to the judgment by consent.\(^{377}\) A few months later an emoluments attachment order was issued by the Hennenman clerk of the court at the request of the appellant’s attorney.\(^{378}\)

4.3 The order of the court a quo

The magistrate of Hennenman set aside the emoluments attachment order as the appellant was not entitled to the order and was also not entitled to any benefits gained as a result of said order.\(^{379}\)

\(^{370}\) Otto (n 74) 143 and MBD Securitisation (Pty) Ltd v Booi (n 224) par 2, 3 and 8.
\(^{371}\) MBD Securitisation (Pty) Ltd v Booi (n 224) par 10 and Otto (n 74) 143.
\(^{372}\) Otto (n 74) 143 and MBD Securitisation (Pty) Ltd v Booi (n 224) par 1, 2 and 10.
\(^{373}\) MBD Securitisation (Pty) Ltd v Booi (n 224) par 8 and Otto (n 74) 143.
\(^{374}\) ibid.
\(^{375}\) MBD Securitisation (Pty) Ltd v Booi (n 224) par 12 and Van Niekerk and Parker (n 366) 40.
\(^{376}\) Van Niekerk and Parker (n 366) 40 and MBD Securitisation (Pty) Ltd v Booi (n 224) par 13.
\(^{377}\) ibid.
\(^{378}\) MBD Securitisation (Pty) Ltd v Booi (n 224) par 14; Otto (n 74) 143 and Van Niekerk and Parker (n 366) 40.
\(^{379}\) Otto (n 74) 143 and MBD Securitisation (Pty) Ltd v Booi (n 224) par 41.
The appellant relied on the following grounds of appeal:

(a) The magistrate of Hennenman erred in law in finding that the clerk of the court was not authorised to grant the relevant judgment by consent.\textsuperscript{380}

(b) The magistrate of Hennenman erred in law in finding that the appellant had not complied with the relevant Magistrates’ Courts Rules in obtaining the judgment by default.\textsuperscript{381}

(c) The magistrate of Hennenman erred in law in finding that, in applying for judgment, the appellant had contravened section 90(2)(k)(vi)(bb) of the National Credit Act.\textsuperscript{382}

(d) The magistrate of Hennenman erred in law in granting an order which set aside the emoluments attachment order.\textsuperscript{383}

(e) The magistrate of Hennenman erred in law in granting costs in favour of Ms Booi on the scale as between attorney and client.\textsuperscript{384}

For the purposes of this minor dissertation the focus is on the high court’s views and decision on the jurisdictional matter.

The high court pointed out that the Hennenman magistrates’ court never had jurisdiction over the person of the respondent in terms of section 28 of the Magistrates’ Courts Act.\textsuperscript{385} Ms Booi was neither resident nor employed in that district.\textsuperscript{386} Section 29 of the Magistrates’ Court Act did not apply as the whole cause of action, “whatever it may be”,\textsuperscript{387} did not arise in Hennenman.\textsuperscript{388}

The court confirmed that both the National Credit Act and the Magistrates’ Courts Act “prohibit a provision in a contract embodying consent to jurisdiction in a specific district by one of the parties”.\textsuperscript{389} The court also pointed out that even though the proviso to section

\begin{footnotes}
\item[380] MBD Securitisation (Pty) Ltd v Booi (n 224) par 6 and Otto (n 74) 143.
\item[381] MBD Securitisation (Pty) Ltd v Booi (n 224) par 6.
\item[382] ibid.
\item[383] MBD Securitisation (Pty) Ltd v Booi (n 224) par 6 and Otto (n 74) 143.
\item[384] ibid.
\item[385] MBD Securitisation (Pty) Ltd v Booi (n 224) par 31.
\item[386] ibid.
\item[387] MBD Securitisation (Pty) Ltd v Booi (n 224) par 1.
\item[388] MBD Securitisation (Pty) Ltd v Booi (n 224) par 31.
\item[389] MBD Securitisation (Pty) Ltd v Booi (n 224) par 34 and Otto (n 74) 143.
\end{footnotes}
45(1) of the Magistrates’ Courts Act provides for an exception to the common-law principles and those contained in the Magistrates’ Courts Act, as well as the National Credit Act, it should be scrutinised carefully.  

Even if it might be found that Ms Booi validly consented to the jurisdiction of the Hennenman magistrates’ court, such consent could only have been in respect of the institution of proceedings in the Hennenman magistrates’ court, ie the request for judgment by consent or the issuing of summons until judgment is granted.  

Section 65J of the Magistrates’ Courts Act is perfectly clear and provides that only the court of the area in which the employer of the judgment debtor carries on business, resides or is employed, or if the judgment debtor is employed by the state, in which the judgment debtor is employed, has jurisdiction to issue an emoluments attachment order.  

Therefore, in casu the emoluments attachment order had to be issued by the Alice magistrates’ court, even if judgment could have been granted, in terms of the consent to jurisdiction, by the Hennenman magistrates’ court.

As was pointed out above, both parties must consent to the jurisdiction of a particular magistrates’ court in terms of section 45(1) of the Magistrates’ Courts Act.  

In casu MBD Securitisation (Pty) Ltd did not consent to the jurisdiction of the Hennenman magistrates’ court.  

MBD Securitisation (Pty) Ltd also did not sign the consent to judgment and no averment was made in the application for judgment that the parties consented to the jurisdiction of the Hennenman magistrates’ court.  

Daffue J with whom Williams AJ concurred, remarked that this on its own was fatal to the appellant’s case.

The purposes of the National Credit Act were also given full consideration in adjudicating the appeal.  

In light thereof, the court expressed the view that the proviso to section 45(1) of the Magistrates’ Courts Act does not apply in the circumstances with which Ms Booi was confronted.  

The court concluded that the legislature in all probability intended to make it

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390 MBD Securitisation (Pty) Ltd v Booi (n 224) par 34.  
391 MBD Securitisation (Pty) Ltd v Booi (n 224) par 35.  
392 MBD Securitisation (Pty) Ltd v Booi (n 224) par 35 and Otto (n 74) 143 and 144.  
393 Otto (n 74) 144 and MBD Securitisation (Pty) Ltd v Booi (n 224) par 35.  
394 See chap 4 par 2.  
395 Otto (n 74) 144 and MBD Securitisation (Pty) Ltd v Booi (n 224) par 36.  
396 MBD Securitisation (Pty) Ltd v Booi (n 224) par 45 and Otto (n 74) 144.  
397 ibid.  
398 ibid.  
399 MBD Securitisation (Pty) Ltd v Booi (n 224) par 38 and Otto (n 74) 144.  
400 MBD Securitisation (Pty) Ltd v Booi (n 224) par 46 and Otto (n 74) 144.
as convenient as possible for parties to approach a court in order to obtain prompt resolution of a dispute.\textsuperscript{401}

It was never disclosed why the Hennenman magistrates’ court was elected as the appropriate court.\textsuperscript{402} It could never have been the most convenient court to deal with the matter, especially if one considers where the parties found themselves.\textsuperscript{403} Ms Booi was tricked into consenting to the jurisdiction of a court located many miles away from her home.\textsuperscript{404} Bearing in mind all the relevant circumstances, the court held that it would make a mockery of our judicial system if they were to find that Ms Booi’s consent was suitably covered by the proviso in section 45 of the Magistrates’ Courts Act.\textsuperscript{405}

The court held that Ms Booi’s consent could not be relied upon as it was in direct conflict with section 90(2)(k)(vi)(bb) of the National Credit Act read with section 91(a) and section 45(2) of the Magistrates’ Courts Act.\textsuperscript{406}

A serious abuse of process occurred in this case.\textsuperscript{407} The Hennenman magistrates’ court was approached for judgment based on a dubious procedure.\textsuperscript{408} Legal costs of over R250 000 were incurred, bearing in mind the several firms of attorneys involved and the fact that the respondent decided to make use of a senior junior of the local bar and the appellant chose to appoint senior counsel to argue the appeal, while the amount claimed was less than R5 000.\textsuperscript{409}

Daffue J concluded that two possible reasons exist as to why the Hennenman magistrates’ court was elected,

\begin{quote}
“ie (i) the personnel of that court deliver services of professional and high quality standard in an efficient manner, ensuring thereby that court processes are dealt with swiftly and in accordance with the rules. The other reason is too ghastly to contemplate. . . . [I]t is possible that there is a link between the appellant and /or a legal representative on the one hand, and
\end{quote}

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\textsuperscript{401} MBD Securitisation (Pty) Ltd v Booi (n 224) par 46.  
\textsuperscript{402} MBD Securitisation (Pty) Ltd v Booi (n 224) par 11 and Otto (n 74) 143.  
\textsuperscript{403} ibid.  
\textsuperscript{404} MBD Securitisation (Pty) Ltd v Booi (n 224) par 46 and Otto (n 74) 144 and 145.  
\textsuperscript{405} MBD Securitisation (Pty) Ltd v Booi (n 224) par 46 and Otto (n 74) 145.  
\textsuperscript{406} ibid.  
\textsuperscript{407} MBD Securitisation (Pty) Ltd v Booi (n 224) par 47.  
\textsuperscript{408} MBD Securitisation (Pty) Ltd v Booi (n 224) par 48.  
\textsuperscript{409} MBD Securitisation (Pty) Ltd v Booi (n 224) par 48 and Otto (n 74) 145.
\end{flushright}
someone or more than one person at the Hennenman Magistrates’ Court, and that favours can be obtained unduly”.410

In the interest of justice, the court ordered that copies of the judgment be sent to the Minister of Justice and Constitutional Development, the Law Society of the Northern Provinces, and the National Credit Regulator, for their attention and investigation if so required.411

410 ibid.
411 Otto (n 74) 145 and MBD Securitisation (Pty) Ltd v Booi (n 224) par 48 and 49.
CHAPTER 5
CONCLUSION

The *MBD Securitisation (Pty) Ltd v Booi* and *University of Stellenbosch Legal Aid Clinic* cases “have brought significant clarity to the law of civil procedure concerning credit agreements”. The *University of Stellenbosch Legal Aid Clinic* case has been labelled a victory for the vulnerable, marginalised and poor by the South African Human Rights Commission. The judgment has set a precedent for indebted consumers in South Africa and can be regarded as an important milestone in the protection of low income money borrowers.

In light of how the debt collectors secured the consents, the forum shopping involved and the fact that all the emoluments attachments orders in the *University of Stellenbosch Legal Aid Clinic* case were unlawfully obtained in the wrong jurisdiction, it is safe to assume that tens of thousands of ordinary working people in debt are having substantial portions of their wages or salaries deducted based on unlawfully obtained emoluments attachment orders.

Section 65J of the Magistrates’ Courts Act creates safeguards for the implementation of emoluments attachment orders against judgment debtors, such as the right to dispute the validity or existence of the order; the correctness of the balance claimed and the power of the court to amend or set aside such order on good cause. However, these safeguards are worthless when the person whose wage or salary has been attached under an emoluments attachment order or his or her employer is unable to access the court which issued such order.

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412 Otto (n 74) 145.
414 Giokos “Concourt clears the way for magistrates to sign off on debt” The Star (14-09-2016) 2.
416 *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* (n 74) par 65.
417 *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* (n 74) par 53.
418 *ibid.*
Finally, it has become abundantly clear that for purposes of granting an emoluments attachment order under section 65J of the Magistrates’ Courts Act, section 45 of the Magistrates’ Courts Act does not empower a debtor to consent in writing to the jurisdiction of a court other than the court of the area in which the employer of the judgment debtor carries on business, resides or is employed, or, if the judgment debtor is employed by the state, in which the judgment debtor is employed.\(^41\) If section 45 of the Magistrates’ Courts Act is correctly interpreted in the context of the Magistrates’ Courts Act and in the light of the Bill of Rights, it does not apply to causes of action based on agreements covered by the National Credit Act.\(^42\) Consequently, if a debtor admits liability for a debt and consents to an emoluments attachment order, section 45 of the Magistrates’ Courts Act does not empower that debtor to consent to the jurisdiction of a court seated outside the area in which the debtor works or resides.\(^43\)

\(^{41}\) MBD Securitisation (Pty) Ltd v Booi (n 224) par 35; University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (n 74) par 52 and 88 and University of Stellenbosch Legal Aid Clinic case (n 1) n 47.

\(^{42}\) University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (n 74) par 93.

\(^{43}\) ibid.
ANNEXURE A

Examples of dubious jurisdiction clauses:

A.1 Consent to the jurisdiction of (for instance) the Hennenman magistrates’ court in terms of section 45 of the Magistrates’ Courts Act 32 of 1944, specifically with regard to the request and granting of judgment, and the request and issuing of an emoluments attachment order.\(^{422}\)

A.2 The parties hereby agree that in the event of litigation emanating from this credit agreement, the plaintiff may sue the defendant in the Hennenman magistrates’ court.\(^{423}\)

A.3 The defendant consents to the jurisdiction of the Hennenman magistrates’ court in respect of any action that the plaintiff may institute against the defendant in future.\(^{424}\)

\(^{422}\) University of Pretoria Law Clinic (n 11) 34. See \textit{MBD Securitisation (Pty) Ltd v Booi supra.}

\(^{423}\) Theophilopoulos (n 46) 103.

\(^{424}\) Theophilopoulos (n 46) 104.
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