

REPUBLIC OF SOUTH AFRICA

**MAGISTRATES' COURTS
AMENDMENT BILL**

(As introduced)

(MINISTER OF JUSTICE)

[B 27—96]

REPUBLIEK VAN SUID-AFRIKA

**WYSIGINGSWETSONTWERP OP
LANDDROSHOWE**

(Soos ingedien)

(MINISTER VAN JUSTISIE)

[W 27—96]

ISBN 0 621 17059 3

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

 Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Magistrates' Courts Act, 1944, so as to add certain definitions and to delete other definitions; to provide that the manner and particulars of applications and of the issue, service and execution of process be prescribed in the rules; to extend the jurisdiction of the court in respect of persons; to provide for the attachment of property as security for debt; to extend the instances where a judgment may be rescinded or varied; to further provide for the judgments which a court may grant; to provide that a court may grant a provisional sentence in respect of a liquid claim; to provide for the recovery of debt by way of application; to make new arrangements in connection with consent to judgment and an order for the payment of debt in instalments; to further regulate the prohibition of the recovery of fees or remuneration in connection with the collection of debt; to regulate anew the power to grant or set aside a warrant; to provide for simplified new procedures for the collection of debt; to further regulate the manner of execution; to further regulate the payment of debt in instalments; to provide that costs may also be taxed by a costs committee and for the review of such taxation; to make other provision in respect of the penalty for the disobedience of certain judgments or orders of court; and to further provide for the amendment of proceedings; to amend the Abolition of Civil Imprisonment Act, 1977, so as to bring it into line with a decision of the Constitutional Court; to amend the Sheriffs Act, 1986, to provide that a sheriff may perform his or her functions outside the area assigned or allocated to him or her; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 32 of 1944, as substituted by section 1 of Act 53 of 1970 and amended by section 1 of Act 105 of 1982, section 2 of Act 34 of 1986 and section 1 of Act 4 of 1991

5

1. Section 1 of the Magistrates' Courts Act, 1944 (hereinafter referred to as the principal Act), is hereby amended—

- (a) by the insertion after the definition of “court of appeal” of the following definitions:
- “ ‘creditor’ means the person in whose favour an order or judgment has been given and includes an execution creditor;
- ‘debt’ means any liquidated or unliquidated claim, and for the purposes of debt recovery, includes capital, interest and costs including costs as between attorney and client;
- ‘debtor’ means the person against whom an order or judgment has been given and includes an execution debtor;
- ‘defendant’ includes a respondent and a defendant in reconvention;
- ‘emoluments’ means salary, allowances and any other form of remuneration, whether expressed in money or not;
- ‘execution’ includes any procedure followed in order to give effect to a judgment or order of a court;
- ‘*ex parte* order’ means an order obtained on application without notice to the opposite party prior to the hearing of the application;
- ‘firm’ means any business or professional practice, including a business or professional practice conducted by the owner or owners thereof under a name differing from his or her or their own name;”;
- (b) by the insertion after the definition of “offence” of the following definition: “ ‘plaintiff’ includes an applicant and a plaintiff in reconvention;”
- (c) by the deletion of the definitions of “province” and “Republic”;
- (d) by the insertion before the definition of “to record” of the following definitions:
- ‘request’ means any oral or written request to the court or the clerk of the court for relief with notice to other parties, but excluding a formal application;
- ‘summons’ includes a summons for provisional sentence;”;
- (e) by the deletion of the definition of “territory”.

Deletion of heading to Chapter V and insertion of sections 24 and 25 in Act 32 of 1944

2. The heading to Chapter V is hereby deleted and the following sections are inserted in the principal Act after section 23:

“Manner and particulars of application

24. Any application contemplated in this Act shall be made in the manner and contain the particulars prescribed by the rules.

Manner of issue of process

25. The issue, if necessary, and service or execution of any process in a civil case shall take place in the manner prescribed by the rules.”.

Amendment of section 28 of Act 32 of 1944, as amended by section 12 of Act 40 of 1952

3. Section 28 of the principal Act is hereby amended—

- (a) by the substitution for paragraphs (a) and (b) of subsection (1) of the following paragraphs:
- “(a) any person who resides, carries on business or is employed within the district or within a radius of 50 kilometres from the court-house of the district;
- (b) any partnership, firm or juristic person which has business premises or a registered office situated [or any member whereof resides] within the district or within a radius of 50 kilometres from the court-house of the district or in the case of any partnership, any member whereof resides in the district or within a radius of 50 kilometres from the court-house of the district;”;
- (b) by the addition of the following subsection:

“(3) Whenever the question arises whether a particular place is situated within a radius of 50 kilometres from the court-house of the district, a court of that district may take judicial notice of the distance which that place is situated from the court-house and for such purpose the court may make use of any official map or plan.”

5

Insertion of section 32A in Act 32 of 1944

4. The following section is hereby inserted in the principal Act after section 32:

“Attachment of property as security for debt

32A. (1) If on an application made *ex parte* by an applicant on the strength of sworn evidence it *prima facie* appears to the court that—

(a) a liquidated amount of money is due and payable to the applicant;

(b) the applicant intends without delay to institute an action in that court against the opposite party for recovery of the debt;

(c) the opposite party has no *bona fide* defence to the intended action;

(d) if such action will be instituted, the court will have jurisdiction in respect of the opposite party and the cause of action;

(e) the opposite party has assets at his or her disposal from which the debt or any part thereof can be satisfied if those assets are available for execution after judgment;

(f) a substantial danger exists that if an action for the recovery of the debt is instituted against the opposite party, he or she will dispose of such assets or will remove those assets from the area of jurisdiction of the court in order to evade satisfaction of the debt; and

(g) arrangements including the giving of security have been or will be made by the applicant in order to protect the interests of the opposite party or any other person whose interests will or may be affected by the granting of the order concerned,

the court may, subject to such conditions as it may deem fit with regard to the institution of the action and the giving of security by the applicant for any damages which the opposite party or any other person may suffer or costs which may be incurred in consequence of the attachment of any of his or her assets, make an order whereby the sheriff is ordered, subject to paragraph (e), to attach particular assets or sufficient assets of the opposite party to satisfy the debt and to remove such assets.

(2) On application by the applicant the court may in chambers hold proceedings in terms of this section and may, in its order, stipulate rules relating to the secrecy of the proceedings pending the attachment.

(3) Subject to subsection (2) the court may order that notice of its order shall be given to persons, other than the opposite party, who are affected by the order and of whom the court has knowledge.

(4) Any person affected by an order referred to in subsection (1), may apply to have the order set aside.”

10

15

20

25

30

35

40

Amendment of section 36 of Act 32 of 1944

5. Section 36 of the principal Act is hereby amended—

- (a) by the substitution for paragraph (c) of the following paragraph: 45
- “(c) correct patent errors in any judgment in respect of which no appeal is pending, or rescind or vary an incorrect judgment or a judgment given on a date on which an appearance to defend has already been filed with the clerk of the court;” and
- (b) by the addition of the following subsection, the existing section becoming subsection (1): 50

- “(2) The court may on request of any person affected thereby—
- (a) rescind or vary any judgment obtained in consequence of any error by a party or his legal representative;
 - (b) rescind or vary any judgment in accordance with a written agreement between the parties that such judgment may be rescinded or varied.”.

Amendment of section 48 of Act 32 of 1944, as amended by section 3 of Act 48 of 1965 and section 12 of Act 53 of 1970

6. Section 48 of the principal Act is hereby amended by the addition of the following paragraph: 10

- “(f) an order against a party for the payment of an amount of money for which judgment has been granted in specified instalments or otherwise, including an order contemplated in section 65J or 73.”.

Insertion of section 48A in Act 32 of 1944

7. The following section is hereby inserted in the principal Act after section 48: 15

“Jurisdiction in respect of provisional sentence

48A. Subject to the jurisdiction granted to it by this Act, the court may grant provisional sentence in respect of a liquid claim as prescribed in the rules.”.

Amendment of heading to Chapter VIII of Act 32 of 1944, as substituted by section 1 of Act 63 of 1976 20

8. The principal Act is hereby amended by the addition to the heading to Chapter VIII of the words “AND EXECUTION”.

Repeal of section 55 of Act 32 of 1944, as substituted by section 1 of Act 63 of 1976

9. Section 55 of the principal Act is hereby repealed. 25

Insertion of section 55A in Act 32 of 1944

10. The following section is hereby inserted in the principal Act after section 55:

“Debt recovery by way of application

55A. (1) A plaintiff having a claim against a defendant for the payment of a sum of money may, in lieu of utilising the summons procedure for recovery of the debt, apply to the court upon notice of motion for an order for payment of the debt with costs if the plaintiff simultaneously applies for— 30

- (a) an order for the attachment of property in terms of section 32;
- (b) the ejectment of the defendant from premises occupied by him or her; 35
- or
- (c) the restitution of the property in the defendant’s possession.

(2) If an application referred to in subsection (1) is urgent, the court may dispense with the requirements prescribed in the rules in respect of the form of the application and the manner and period of service of the notice of motion. 40

(3) When considering the question whether any requirement contemplated in subsection (2) should be dispensed with, the court shall have regard to the following factors, where applicable:

- (a) If the relief sought, or any part thereof, is the recovery of arrear rental, that compliance with the requirements concerned will pose a substantial danger that any hypothec available to the plaintiff will be defeated; 45

- (b) that there is a substantial danger that compliance with the requirements concerned may result in rendering ineffective any other relief sought by the plaintiff;
- (c) that, for any other reason, there is a substantial danger that the plaintiff may suffer damages if he or she is compelled to comply with such requirements; or
- (d) that, in the circumstances of the case, it cannot, for any other reason, reasonably be expected from the plaintiff to comply with such requirements.”.

Amendment of section 57 of Act 32 of 1944, as substituted by section 1 of Act 63 of 1976

11. Section 57 of the principal Act is hereby amended by the substitution for subparagraph (ii) of paragraph (c) of subsection (2) of the following subparagraph:
 “(ii) order the defendant to pay the judgment debt and costs in specified instalments or otherwise in accordance with his or her offer, and such order shall be deemed to be an order of the court mentioned in section [65A(1)] 65D.”.

Substitution of section 58 of Act 32 of 1944, as substituted by section 1 of Act 63 of 1976

12. The following section is hereby substituted for section 58 of the principal Act:

“Consent to judgment or to judgment and an order for payment of debt in instalments

58. (1) If any person (in this section called the defendant), after having received a letter of demand or having been served with a summons demanding payment of any debt, consents in writing in any form—
 (a) to judgment for the debt or any part thereof or any additional amount or costs, including costs as between attorney and client and collection commission;
 (b) and also consents—
 (i) to pay the amount or amounts referred to in paragraph (a) in specified instalments on specified dates or otherwise;
 (ii) that upon any failure to make payment in accordance with subparagraph (i) the full balance of the debt will immediately become due and payable; or
 (iii) that any payment made in terms of subparagraph (i), may be applied in a specific sequence in respect of the redemption of the capital amount of the debt, interest and costs,
 the clerk of the court shall upon the written request of the plaintiff or his or her attorney enter judgment against the defendant for the amount or amounts to which the defendant so consented and order the defendant to make payments in accordance with his or her consent, and such order shall be deemed to be an order of court mentioned in section 65D.
 (2) The provisions of subsection (1) relating to the order by the clerk of the court shall *mutatis mutandis* apply if a defendant against whom judgment for the payment of a debt has already been granted by a court, in writing consents as contemplated in subsection (1).
 (3) The provisions of section 57(3) and (4) shall apply in respect of the judgment and order referred to in subsection (1) of this section.”.

Amendment of section 60 of Act 32 of 1944, as substituted by section 1 of Act 63 of 1976 and amended by section 2 of Act 4 of 1991

13. Section 60 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) Unless expressly otherwise provided in this Act or the rules or in an Act of Parliament, no person other than an attorney or an agent referred to in section 22 shall be entitled to recover from the debtor any fees or remuneration in connection with the collection of any debt.”.

Deletion of heading to Chapter IX of Act 32 of 1944 5

14. The principal Act is hereby amended by the deletion of the heading to Chapter IX.

Substitution of section 61 of Act 32 of 1944

15. The following section is hereby substituted for section 61 of the principal Act:

“Definition

61. In this Chapter— 10
“representative” means any director, manager, accounting officer or member of a juristic person who appears in a court on behalf of a juristic person where the juristic person is the defendant or a debtor.”.

Substitution of section 62 of Act 32 of 1944

16. The following section is hereby substituted for section 62 of the principal Act: 15

“Power to grant or set aside a warrant

62. (1) Any court shall have jurisdiction to issue any process for
 execution of a judgment or order if such judgment or order was given or
 made in that court or, if it was not given or made in that court, if it is proved
 to the court that a judgment or order was given or made in another court, 20
 including a division of the Supreme Court, and the debtor, at the time of the
 intended issue of such process, resides, carries on business or is employed
 within the area of jurisdiction of or within a radius of 50 kilometres from
 the seat of that court.

(2) A court (in this subsection called a second court) other than the court 25
 which gave judgment in an action or issued a warrant referred to in this
 section, shall have jurisdiction to suspend, on application or, if good cause
 is shown for a request, upon request of any interested party, any warrant of
 execution or for the delivery of property or for ejection or arrest issued by 30
 another court except a division of the Supreme Court against a party who,
 at the time of the intended application or request resides, carries on business
 or is employed within the area of jurisdiction of or within a radius of 50
 kilometres from the seat of the second court.

(3) Any court may, on application or, if good cause is shown for a request, 35
 on request of any interested party, suspend or set aside any warrant of
 execution or for the delivery of property or for ejection or arrest issued by
 itself, on such conditions as the court may deem fit, including conditions as
 to the payment of the debt, interest and costs in instalments.

(4) Any request for the suspension or setting aside of a warrant shall take 40
 place with notice to all interested parties, provided that on good cause
 shown the court may order that notice is unnecessary.

(5) For the purposes of subsections (2) and (3) the court may accept 45
 evidence in such form as it may deem fit, including oral evidence, oral
 communications by telephone or otherwise, affidavits and exhibits or
 submissions by means of telefax relating to the suspension or setting aside
of warrants referred to in this section, and the court may attach such value
as it may deem fit to such evidence.”.

Repeal of section 65 of Act 32 of 1944, as substituted by section 2 of Act 63 of 1976

17. Section 65 of the principal Act is hereby repealed.

Substitution of section 65A of Act 32 of 1944, as inserted by section 2 of Act 63 of 1976

18. The following section is hereby substituted for section 65A of the principal Act: 5

“Summons and judgment

65A. (1) A plaintiff shall include in a summons commencing an action a notice informing the defendant—

(a) that if he or she wishes to dispute the action, he or she must enter an appearance to defend within the period mentioned in the notice, which period shall be prescribed by the rules; 10

(b) that he or she may negotiate with the plaintiff or his or her attorney with a view to making an agreement for payment of the debt in instalments or otherwise; and

(c) that if he or she fails to enter an appearance to defend the plaintiff’s claim in accordance with paragraph (a), judgment may at any time after expiration of the period referred to in paragraph (a) be entered against him or her. 15

(2) A plaintiff may include in a summons a notice directing the defendant or a representative, unless the defendant enters an appearance to defend the action within the time prescribed by the rules or unless the defendant has complied with the claim or claims to the plaintiff’s satisfaction, to appear before the court in chambers on a specified date and at a specified time and in a specified room for an enquiry into his or her financial position and to submit to the court, on that date, the documents stated in the notice which may be relevant to the determination of his or her financial position. 20

(3) A plaintiff may file a summons with the clerk of the court at any time after expiration of the period prescribed by the rules after service of the summons, in which case judgment in favour of the plaintiff shall be entered by the clerk of the court provided that the plaintiff or his or her attorney has appended his or her signature to the summons at the prescribed place: Provided that judgment shall not be so entered if the defendant has prior to such entering filed a notice of appearance to defend with the clerk of the court. 25

(4) A plaintiff may, on the date upon which the defendant is required to appear for an enquiry into his or her financial position and if judgment has not yet been given, orally request the court for judgment, in which case the court, if satisfied that the defendant has not entered an appearance to defend prior to the request, shall grant the request: Provided that if the defendant is present in court and alleges that he or she cannot be held liable for the plaintiff’s claim or any part thereof the court— 30

(a) as well as the plaintiff or his or her attorney may, without cross-examining the defendant, question the defendant as to his or her defence and if the court is satisfied that the debtor has no defence to a claim or part of a claim, it shall grant judgment for such claim or part thereof; 35

(b) may enquire from the defendant whether he or she intends to defend the action, and if the defendant answers in the affirmative, the court shall record that the defendant intends to defend the action and it shall be deemed that the defendant on that date formally entered an appearance to defend the action; 40

50

(c) shall grant judgment against the defendant for that part of the claim which is unopposed.

(5) A creditor may, after judgment, irrespective of whether the notice mentioned in subsection (2) was included in the summons and irrespective of whether a financial enquiry as contemplated in section 65D has already been held, draw up a notice in the form prescribed by the rules and serve it on the debtor in accordance with the provisions of section 65B directing the debtor to appear before the court in chambers on a specified date and at a specified time and in a specified room for an enquiry into his or her financial position.

(6) If it appears to a court that a notice to a defendant or debtor in terms of subsection (2) or (5) to appear in court on a specified date has come to the notice of the defendant or a representative or the debtor and the person concerned has failed to appear on that date or any subsequent date to which the proceedings have been postponed and it appears to the court that the person concerned has knowledge of the notice, the court may on application of the plaintiff or creditor issue a warrant directing the sheriff to arrest the said person and bring him or her before the court forthwith in order to enable the court to hold a financial enquiry contemplated in section 65D: Provided that if such notice was served on any person other than the defendant or representative or the debtor at the place of employment or business of such person, the court may accept any evidence, hearsay or otherwise, that the said notice came to the attention of the defendant or representative or the debtor, as *prima facie* proof that the defendant or representative or debtor has knowledge of such notice.

(7) A notice referred to in subsection (2) or (5) shall be deemed to be an order of court, the wilful disregard of or neglect to comply with shall be an offence punishable in terms of section 106.

(8) Any court the seat of which is situated within a radius of 50 kilometres from the place where the debtor resides, carries on business or is employed, or in the case where the debtor is a juristic person, within such distance from the place where the juristic person has a registered office or business premises, shall have jurisdiction to conduct a financial enquiry contemplated in section 65D.

(9) If the defendant is a juristic person its representative shall also appear in his or her personal capacity.”.

Substitution of section 65B of Act 32 of 1944, as inserted by section 2 of Act 63 of 1976

19. The following section is hereby substituted for section 65B of the principal Act:

“Drawing up and service of notice on debtor or representative

65B. A notice referred to in section 65A(5) shall be drawn up and signed by the creditor or his or her attorney and shall be served by the creditor or his or her attorney or the latter’s employee or the sheriff on the debtor or a representative in person as if it is a process of the court as contemplated in the rules, at least seven days prior to the date specified in that notice for the hearing of the enquiry.”.

Substitution of section 65C of Act 32 of 1944, as inserted by section 2 of Act 63 of 1976

20. The following section is hereby substituted for section 65C of the principal Act:

“Joinder of proceedings

65C. If it appears that more than one judgment has been recorded against a debtor, a court may at any stage of the proceedings determine a date and time for the holding of a financial enquiry contemplated in section 65D in respect of all known judgments in that court, in which case the clerk of the court shall give notice of such an enquiry in the manner prescribed by the rules to the creditors or their attorneys and to the debtor and his or her attorney, if any.”

Substitution of section 65D of Act 32 of 1944, as inserted by section 2 of Act 63 of 1976

21. The following section is hereby substituted for section 65D of the principal Act:

“Procedure when defendant, debtor or representative appears in court

65D. (1) Whenever a defendant, debtor or representative appears in court on the date determined for a financial enquiry and judgment has been previously granted or is then granted—

- (a) he or she shall in chambers give evidence under oath or affirmation as to his or her financial position or the financial position of the juristic person, as the case may be;
- (b) the court shall permit the examination or cross-examination of the debtor or representative on all matters concerning his or her financial position including his or her ability to pay the debt and costs; and
- (c) the court shall receive such further evidence as may be adduced either orally or by affidavit or in such other manner as the court may deem fit, by or on behalf of the creditor or debtor, as is material to the determination of the debtor’s financial position including his or her ability to pay the debt, and for purposes of such evidence witnesses may be subpoenaed in the prescribed manner.

(2) If it appears to the court from proceedings in terms of subsection (1) that judgment has been granted against the debtor in error or for an incorrect amount, the court may vary or rescind the judgment, or if it appears that the debtor has a valid defence against the whole or any portion of the claim for which judgment has been granted, the court may vary or rescind the judgment with the consent of the creditor or his or her attorney.

(3) If there is a dispute between the creditor and debtor as to whether the judgment should be varied or rescinded, the court may postpone the proceedings and give the debtor the opportunity to apply, in terms of the rules within the period specified by the court, for variation or rescission of the judgment, or the court may proceed with the proceedings and if an order is made for payment of the debt in instalments or otherwise, the court may order that payments made to the creditor’s attorney shall be held in trust pending the filing of an application by the debtor for variation or rescission of the judgment.

(4) In determining the ability of the debtor to pay the debt, the court shall take into consideration—

- (a) in the case of a natural person, his or her assets, liabilities, income and expenditure in respect of his or her necessary sustenance and that of his or her dependants and other necessary expenses including his or her obligations in terms of orders of court;
- (b) in the case of a juristic person, its assets and liabilities, the amounts required by the juristic person for defraying its necessary administrative expenses and for complying with orders of court, or its other necessary obligations as disclosed in the evidence presented at the hearing of the proceedings.

(5) In determining the ability of the debtor to pay the debt, the court may, in its discretion, refuse to take account of the periodical payments that a debtor has undertaken to make in terms of an instalment sale transaction for the purchase of goods which are not protected from seizure in terms of section 67 or which cannot, in the opinion of the court, be regarded as the debtor's necessary requirements. 5

(6) The court may at any time postpone the proceedings on such conditions as it may deem fit and may order the defendant, debtor or representative to submit such documents as the court may require on a date determined by the court. 10

(7) After considering the debtor's financial position the court may—

- (a) order the debtor to pay the debt, interest and costs in instalments or otherwise and postpone the proceedings to a specified date for variation or rescission of the order or may make no specific order in which case the proceedings shall be deemed to be postponed *sine die*; 15
- (b) vary, suspend or withdraw an existing order made under this section on such conditions as it may deem fit;
- (c) authorise a warrant of seizure of and execution against the debtor's movable or immovable property, or both his or her movable and immovable property; 20
- (d) authorise a warrant of execution against any debt owing to the debtor;
- (e) make an order attaching the debtor's emoluments on such conditions as the court may deem fit;
- (f) upon request by the creditor or his or her attorney make any written agreement with or written undertaking by the debtor for payment of the debt in instalments or otherwise, irrespective of the terms thereof, an order of court provided that, in the opinion of the court, it is fair, and the court may include in the order an undertaking to pay costs as between attorney and client and collection commission; 25
- (g) combine any of the orders mentioned above or make any other order which the court may deem fit." 30

Substitution of section 65E of Act 32 of 1944, as inserted by section 2 of Act 63 of 1976

22. The following section is hereby substituted for section 65E of the principal Act:

“Placing of proceedings on roll 35

65E. Any proceedings which had been placed on the roll in a court, irrespective of whether the proceedings were heard or postponed by such court, and irrespective of whether the defendant or debtor has left the area of jurisdiction of such court, may be proceeded with in that court by the placing of the proceedings on the roll by the plaintiff, creditor, defendant or debtor by notice of set-down in the manner prescribed by the rules: Provided that the plaintiff or creditor may, according to his or her choice, initiate a new financial enquiry in a court having jurisdiction under section 65A(8) in the manner prescribed by the rules.” 40

Repeal of section 65F of Act 32 of 1944, as inserted by section 2 of Act 63 of 1976 45

23. Section 65F of the principal Act is hereby repealed.

Repeal of section 65G of Act 32 of 1944, as inserted by section 2 of Act 63 of 1976

24. Section 65G of the principal Act is hereby repealed.

Repeal of section 65H of Act 32 of 1944, as inserted by section 2 of Act 63 of 1976

25. Section 65H of the principal Act is hereby repealed.

Amendment of section 65I of Act 32 of 1944, as inserted by section 2 of Act 63 of 1976, and amended by section 4 of Act 19 of 1985 and section 7 of Act 25 of 1987

26. Section 65I of the principal Act is hereby amended— 5
- (a) by the substitution for subsection (1) of the following subsection: 10
- “(1) If, before or during the hearing of the proceedings in terms of a summons or notice under section 65A[(1)] (5) a **[judgment]** debtor has lodged or lodges with the court an application for an administration order for hearing on a date not later than the earliest date on which such application may be heard and it appears that he or she has complied with the provisions of section 74, the court shall postpone the hearing of the proceedings until the application for an administration order has been disposed of.”; and
- (b) by the substitution for subsection (4) of the following subsection: 15
- “(4) If the court grants an administration order in respect of the **[judgment]** debtor’s estate, it shall stay the proceedings in terms of the summons or notice under section 65A[(1)] (5), but may grant the **[judgment]** creditor costs already incurred in connection with such proceedings, and such costs may be added to the judgment debt.”. 20

Amendment of section 65J of Act 32 of 1944, as inserted by section 2 of Act 63 of 1976 and amended by section 2 of Act 53 of 1983

27. Section 65J of the principal Act is hereby amended—
- (a) by the deletion of paragraphs (a) and (c) of subsection (1);
- (b) by the substitution for paragraph (e) of subsection (1) and the words following thereupon, of the following paragraph and words: 25
- “(e) the court has so **[authorized]**, authorised including an authorisation obtained upon application after service of a notice of motion, the **[judgment]** creditor may, subject to the provisions of subsection (2), issue an order (hereinafter called an emoluments attachment order) 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 he is employed]** having jurisdiction in respect of the debtor, attaching the emoluments at present or in future owing or accruing to the **[judgment]** debtor by or from **[such]** his or her employer (in this section called the garnishee) to the amount necessary to cover the [judgment and the costs of the attachment] judgment debt, judgment costs, interest in accordance with the judgment and any other costs for which the debtor is legally liable, whether such judgment was obtained in that court or in any other magistrate’s court, and obliging the garnishee to pay from time to time to the **[judgment]** creditor or his or her attorney at the address of such **[judgment]** creditor or his or her attorney specific amounts out of the emoluments of the **[judgment]** debtor in accordance with the order of court laying down the specific instalments payable by the **[judgment]** debtor, until such judgment debt and costs have been paid in full.”; 30 35 40 45
- (c) by the deletion of subparagraph (ii) of paragraph (b) of subsection (2);
- (d) by the addition to subsection (4) of the following paragraph, the existing subsection becoming paragraph (a):

“(b) The creditor or his or her attorney shall upon the reasonable request of the garnishee or the debtor provide to him or her, free of charge, a statement containing particulars of payments, costs, expenditure and interest as well as the balance still owing at that stage.”;

- (e) by the substitution for subsection (5) of the following subsection: 5
“(5) If a garnishee fails to comply with the provisions of [An] an emoluments attachment order, such order may be executed against [the] that garnishee as if it were a court judgment, including the issue of one or more warrants of execution for the payment in arrears and for this purpose the court shall accept an affidavit or affirmation from the creditor or a certificate from his or her attorney specifying the amount in arrears and how it is arrived at, subject to the right of the [judgment] debtor, the garnishee or any other interested party to dispute the existence or validity of the order or the correctness of the balance claimed.”; 10
- (f) by the substitution for paragraph (a) of subsection (9) of the following paragraph: 15
“(a) Whenever any [judgment] debtor to whom an emoluments attachment order relates, leaves the service of the garnishee before the judgment debt has been paid in full and becomes self-employed or is employed by someone else, he or she shall, or shall pending the service of the emoluments attachment order on his or her new employer, again be obliged to comply with the relevant order referred to in subsection (1) [(a) or] (b) [and may, subject to the provisions of section 65G, be committed for contempt of court for failing to comply with the said order].”; and 20
 25
- (g) by the deletion of paragraph (b) of subsection (9).

Substitution of section 65K of Act 32 of 1944, as inserted by section 2 of Act 63 of 1976

28. The following section is hereby substituted for section 65K of the principal Act:

“Orders as to costs due to certain acts or omissions 30

65K. If the court, at the hearing of an enquiry in terms of section 65D, is of the opinion that the creditor or his or her attorney has taken any unnecessary legal action against the debtor, or in an unreasonable manner—

- (a) increased the costs of any proceedings; or 35
 (b) failed to accept a reasonable offer by the defendant or debtor to pay the debt,

the court may order that the creditor shall not be entitled to recover from the debtor the costs caused by such acts or omissions, and if the debtor has incurred costs as a result of such conduct by the creditor, order the creditor to pay such costs to the debtor.”. 40

Repeal of section 65L of Act 32 of 1944, as inserted by section 2 of Act 63 of 1976

29. Section 65L of the principal Act is hereby repealed.

Substitution of section 65M of Act 32 of 1944, as inserted by section 2 of Act 63 of 1976 45

30. The following section is hereby substituted for section 65M of the principal Act:

“Enforcement of certain judgments of Supreme Court

65M. (1) If a judgment for the payment of any amount of money has been given by a division of the Supreme Court of South Africa, the [judgment]

creditor may file with **[the]** any clerk of the court **[from which the judgment creditor is required to issue a notice in terms of section 65A(1)]** which has jurisdiction in respect of the debtor's person in terms of section 28(1)(a) or (b), a certified copy of such judgment and an affidavit or affirmation by the **[judgment]** creditor or a certificate by his or her attorney specifying the amount still owing under the judgment and how such amount is arrived at, and thereupon such judgment, whether or not the amount of such judgment would otherwise have exceeded the jurisdiction of the court, shall have all the effects of a judgment of such court and any proceedings may be taken thereon, including the issue of one or more warrants of execution, as if it were a judgment [lawfully] given in such court in favour of the [judgment] creditor for the amount mentioned in the affidavit or affirmation or the certificate as still owing under such judgment, subject however to the right of the [judgment] debtor to dispute the correctness of the amount specified in the said affidavit or affirmation or certificate. (2) The costs of the Supreme Court proceedings need not have been taxed by the date upon which the copy of the judgment is filed with the clerk of the court and such untaxed costs shall, after taxation thereof, be added to the debt."

Amendment of section 66 of Act 32 of 1944, as amended by section 3 of Act 63 of 1976

31. Section 66 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1)(a) A creditor may, after obtaining a judgment or an order for the payment of an amount of money or costs against a debtor, cause a warrant of execution to be issued against a debtor's movable and immovable property as well as the rights, of a debtor in the manner prescribed by the rules.
(b) For the purposes of paragraph (a) ‘rights’ means any right, title, interest or claim which a debtor has in or on a movable or an immovable thing or against a third party, including any debt owing to the debtor and immaterial property owned by the debtor or upon which he or she has a right or partial right.”

Repeal of section 72 of Act 32 of 1944, as substituted by section 4 of Act 63 of 1976

32. Section 72 of the principal Act is hereby repealed.

Amendment of section 73 of Act 32 of 1944, as amended by section 18 of Act 40 of 1952 and section 5 of Act 63 of 1976

33. Section 73 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) The court may, upon the application of any **[judgment debtor or under section 65E(1)(a)(ii) or 65E(1)(c)]** debtor and if it appears to the court that the **[judgment]** debtor is unable to satisfy the judgment debt in full at once, but is able to pay reasonable periodical instalments towards satisfaction thereof or if the **[judgment]** debtor consents to an emoluments attachment order **[or a garnishee order]** being made against him or her, or if the debtor indicates that he or she has received an offer by a bona fide purchaser in respect of attachable property at a value which is higher than the value placed upon such property by the sheriff, suspend execution against that debtor either wholly or in part on such conditions as to security or otherwise as the court may determine.”

Amendment of section 74A of Act 32 of 1944, as inserted by section 6 of Act 63 of 1976

34. Section 74A of the principal Act is hereby amended by the substitution for subparagraph (i) of paragraph (e) of subsection (2) of the following subparagraph:

- “(i) debts the whole amount of which is owing, including judgment debts payable in instalments in terms of a court order or an emoluments attachment order [**or a garnishee order**]; and”.

Amendment of section 74I of Act 32 of 1944, as inserted by section 6 of Act 63 of 1976 and amended by section 4 of Act 28 of 1981

35. Section 74I of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection:

- “(3) If, in addition to the administration order, the court has authorised the issue of an emoluments attachment order [**or a garnishee order**] and has suspended such authorisation conditionally and the debtor fails to comply with the conditions of suspension, the administrator may lodge a certificate to this effect with the clerk of the court, and the clerk of the court shall thereupon issue the emoluments attachment order [**or garnishee order, as the case may be**].”.

Amendment of section 74Q of Act 32 of 1944, as inserted by section 6 of Act 63 of 1976

36. Section 74Q of the principal Act is hereby amended—

- (a) by the deletion in subsection (3) of the words “or garnishee order”, wherever they occur; and
- (b) by the substitution for subsection (5) of the following subsection:

“(5) When an order of court for the payment of any judgment debt in instalments or any emoluments attachment order [**or garnishee order**] has lapsed in consequence of the granting of an administration order and such judgment debt has not been paid in full upon the rescission of the administration order, such court order or emoluments attachment order [**or garnishee order**] shall revive in respect of such judgment debt, unless the court otherwise orders.”.

Amendment of section 80 of Act 32 of 1944

37. Section 80 of the principal Act is hereby amended by the substitution for subsections (2), (3) and (4) of the following subsections:

“(2) The clerk of the court or a costs committee may tax or assess from time to time any account or statement of costs, interest and payments as between party and party or costs as between attorney and client owed by a debtor to a creditor, whether before or after the commencement of an action, in any case where—

- (a) any person is obliged to pay costs as between attorney and client or in accordance with an agreed tariff;
- (b) any person has made payments over a period and a taxation or assessment of the amount still owed by him or her is required;
- (c) one party owes to another costs as between party and party.

(3) Upon the taxation or assessment of the amount owed by one person to another, whether on the basis of costs as between attorney and client or as between party and party, or owed by a client to his or her attorney, the clerk of the court or a costs committee shall, in a matter which is not opposed or is no longer opposed, take the following into account:

- (a) An agreement to pay costs as between attorney and client, tracing fees or other expenses;
- (b) collection commission;
- (c) guidelines or established practice in the area concerned;
- (d) an agreement as to the order in which capital, interest and costs are being satisfied;

- (e) payments made by any person; and
 (f) interest accrued from time to time.

(4) If a defendant or debtor owes an amount of money to a plaintiff or creditor or a client owes an amount of money to an attorney, the plaintiff, creditor, defendant, debtor, the employer of the debtor, the client or attorney may, against payment of any fee prescribed by the rules, or a magistrate or sheriff may request the clerk of the court or a costs committee to tax or assess an account, statement, debt or amount.

(5) In this section and in the rules—
 ‘costs committee’ means a committee consisting of one or more persons designated by the Law Society within whose area the court is situated;
 ‘assessment’ means the determination of the amount owed without any party being obliged to submit a bill of costs.”.

Substitution of section 81 of Act 32 of 1944

38. The following section is hereby substituted for section 81 of the principal Act: 15

“Review of taxation

81. The **[Taxation]** taxation or assessment by the clerk of the court or a costs committee, as the case may be, in terms of section 80 shall be subject to review free of charge by a judicial officer of the district, and the decision of such judicial officer may at any time within one month thereafter be brought in review before a judge of the court of appeal in the manner prescribed by the rules.”.

Substitution of section 106 of Act 32 of 1944, as substituted by section 9 of Act 19 of 1985

39. The following section is hereby substituted for section 106 of the principal Act: 25

“Penalty for disobedience of judgment or order of court

106. Any person wilfully disobeying or neglecting to comply with any judgment or order of a court or with a notice lawfully endorsed on a summons for rent prohibiting the removal of any furniture or effects or with an oral notification by a court to appear on a specified date, shall be guilty of contempt of court and shall upon conviction, be liable to a fine, **[not exceeding R500]** or **[in default of payment]** to imprisonment for a period not exceeding six months or to such imprisonment without the option of a fine: Provided that for the purposes of this section the word ‘judgment’ or ‘order’ shall not include a judgment or an order referred to in section **[65]65D(7)(a), [65E,65G], 65I, 65J, [65K,72] 74 or 74J.”.**

Amendment of section 109 of Act 32 of 1944, as substituted by section 9 of Act 63 of 1976

40. Section 109 of the principal Act is hereby amended—
 (a) by the substitution for subsection (2) of the following subsection: 40

“(2) A **[judgment]** creditor or administrator may, if the **[judgment]** debtor concerned fails to comply with the provisions of subsection (1) and if the judgment or order concerned is not a judgment or order referred to in section **65D(7)(a)**, issue a notice from the court of the district in which the **[judgment]** debtor resides, carries on business or is employed, calling upon the **[judgment]** debtor to appear before such court in chambers to adduce reasons why he or she should not be committed for such failure.”; and 45

(b) by the insertion after subsection (4) of the following subsection:

“(4A) Any debtor against whom a court has given judgment or made an order referred to in section 65D(7)(a) and who fails to comply with the provisions of subsection (1), shall be guilty of an offence and liable upon conviction to a fine, or to imprisonment for a period not exceeding one month.”. 5

Amendment of section 111 of Act 32 of 1944, as amended by section 10 of Act 63 of 1976 and section 4 of Act 132 of 1993

41. Section 111 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: 10

“(1) In any civil proceedings, the court may, upon application, at any time before or after judgment, amend or substitute any summons or any other document [forming part of the record] pertaining to the proceedings in the manner prescribed by the rules: Provided that no amendment or substitution shall be made by which any party other than the party applying for such amendment or substitution may (notwithstanding adjournment) be prejudiced in the conduct of his or her action or defence.”. 15

Substitution of words in Act 32 of 1944

42. The principal Act is hereby amended—

- (a) by the substitution for the words “judgment creditor” and “execution creditor”, wherever they occur, of the word “creditor”; and 20
 (b) by the substitution for the words “judgment debtor” and “execution debtor”, wherever they occur, of the word “debtor”.

Substitution of section 3 of Act 2 of 1977

43. The following section is hereby substituted for section 3 of the Abolition of Civil Imprisonment Act, 1977: 25

“Saving

3. This Act shall not affect the power of a court to grant an order for the committal of any person for contempt of court [or to sentence a judgment debtor to imprisonment in terms of any provision of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944), for failing to satisfy a judgment].” 30

Amendment of section 3 of Act 90 of 1986.

44. Section 3 of the Sheriffs Act, 1986, is hereby amended by the insertion after subsection (3) of the following subsection: 35

“(3A) The provisions of subsections (1) and (3) shall not preclude a sheriff from performing his or her functions in an area other than the area assigned or allocated to him or her: Provided that the sheriff shall in such case not remove from any premises any property subject to attachment or sell such property unless he or she has satisfied himself or herself that such property has not already been attached.”. 40

Short title and commencement

45. This Act shall be called the Magistrates’ Courts Amendment Act, 1996, and shall come into operation on a date fixed by the President by proclamation in the *Gazette*.

**MEMORANDUM ON THE OBJECTS OF THE MAGISTRATES'
COURTS AMENDMENT BILL, 1996**

1. The Bill emanates from the South African Law Commission's Interim Report on Imprisonment for Debt as well as its Report on Debt Collecting (Project 74). The principal objects of the Bill are to repeal those provisions of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), in terms of which a judgment debtor may be committed to prison for failure to pay such debt, and to provide for a simplified and less costly procedure for the recovery of debt.

2. In *Coetzee v Government of the Republic of South Africa: Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others*, 1995 (10) BCLR 1382 (CC) the Constitutional Court held that the provisions of the Magistrates' Courts Act, 1944, pertaining to imprisonment for debt, are inconsistent with the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), which provisions were consequently declared to be invalid. By repealing the provisions concerned, the Bill will bring the Magistrates' Courts Act, 1944, into line with the said judgment of the Constitutional Court.

3. The bulk of the provisions contained in the Bill, however, deals with proposed new procedures aimed at improving the effectiveness of the debt recovery procedure and at facilitating access to the courts by decreasing the costs involved in recovering debt.

Matters being addressed are, *inter alia*—

- * expanding the courts' jurisdiction with regard to persons (clause 3);
- * creating a pre-judgment attachment remedy (clause 4);
- * increasing the powers of the courts with regard to variation and rescission of judgments (clause 5);
- * provisional sentences in magistrates' courts (clause 7);
- * debt recovery by means of application proceedings (clause 10);
- * creating procedures to secure the debtor's presence in court for purposes of a financial enquiry, and to streamline the default judgment procedure (clause 18);
- * authorising the service of process by a creditor, attorney or the latter's employee (clause 19);
- * expanding the powers of the court pertaining to the orders that may be made after an enquiry into the financial position of a debtor (clauses 21 and 22);
- * the granting of emoluments attachment orders (clause 27);
- * execution against both movable and immovable property (clauses 31 and 33);
- * taxation of costs by costs committees (clause 37); and
- * authorising sheriffs to perform their functions in areas other than those assigned or allocated to them in terms of the Sheriffs Act, 1986 (Act No. 90 of 1986) (clause 44).

4. The South African Law Commission consulted a wide variety of interested parties, including the legal professions, magistrates, sheriffs, banking institutions, debt-collecting agencies, consumer organisations and credit bureaus.