

REPUBLIC OF SOUTH AFRICA

**MAGISTRATES' COURTS
AMENDMENT BILL**

(As amended by the Portfolio Committee on Justice (National Assembly))

(MINISTER OF JUSTICE)

[B 43B—97]

REPUBLIEK VAN SUID-AFRIKA

**WYSIGINGSWETSONTWERP OP
LANDDROSHOWE**

(Soos gewysig deur die Portefeuljekomitee oor Justisie (Nasionale Vergadering))

(MINISTER VAN JUSTISIE)

[W 43B—97]

ISBN 0 621 27501 8

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.
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BILL

To amend the Magistrates' Courts Act, 1944, so as to repeal or amend certain provisions in order to bring the Act into line with a judgment of the Constitutional Court; and to provide for matters connected therewith.

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

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

1. Section 48 of the Magistrates' Courts Act, 1944 (hereinafter referred to as the principal Act), is hereby amended by the addition of the following paragraph: 5
 “(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 by section 65J or 73.”.

Amendment of section 57 of Act 32 of 1944, as substituted by section 1 of Act 63 of 1976 10

2. Section 57 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection: 15
 “(3) When the judgment referred to in subsection (2) has been entered and an order made, and if the judgment debtor was not present or represented when the judgment was entered by the clerk of the court and the order made, the judgment creditor or his or her attorney shall forthwith advise the judgment debtor by registered letter of the terms of the judgment and order **[and of the consequences of his failure to satisfy them]**.”.

Amendment of section 65A of Act 32 of 1944, as inserted by section 2 of Act 63 of 1976 20

3. Section 65A of the principal Act is hereby amended—
 (a) by the substitution for subsection (1) of the following subsection:
 “(1) (a) If a court has given judgment for the payment of a sum of

- money or has ordered the payment in specified instalments or otherwise of such an amount, and such judgment or order has remained unsatisfied for a period of 10 days from the date on which it was given or on which such an amount became payable or from the expiry of the period of suspension ordered in terms of section 48(e), as the case may be, the judgment creditor may issue, from the court of the district in which the judgment debtor resides, carries on business or is employed, or if the judgment debtor is a juristic person, from the court of the district in which the registered office or main place of business of the juristic person is situate, a notice calling upon the judgment debtor or, if the judgment debtor is a juristic person, a director or officer of the juristic person as representative of the juristic person and in his or her personal capacity, to appear before the court in chambers on a date specified in such notice **[to show cause why he should not be committed for contempt of court and why the judgment debtor should not be ordered to pay the judgment debt in instalments or otherwise]** in order to enable the court to inquire into the financial position of the judgment debtor and to make such order as the court may deem just and equitable.
- (b) A notice referred to in paragraph (a) shall be drawn up by the judgment creditor or his or her attorney, signed by the judgment creditor or his or her attorney and the clerk of the court, and served by the sheriff, or by the attorney of the judgment creditor or any candidate attorney in his or her employ, on the judgment debtor or, if the judgment debtor is a juristic person, on the director or officer summonsed as the representative of the juristic person and in his or her personal capacity, in the manner prescribed by the rules for the service of process in general and at least ten days before the date fixed in the notice for the appearance before the court.
- (c) The fees and charges in respect of a notice served by any attorney or candidate attorney shall be determined in accordance with the tariffs prescribed by the rules for the service of process by a sheriff: Provided that no such fees and charges shall be payable unless personal service of the notice has been effected.”;
- (b) by the substitution for subsection (2) of the following subsection:
“(2) If the minutes of the proceedings do not show that the judgment debtor was present in person or represented by any person when judgment was given and if no warrant of execution pursuant to the judgment has been served on the judgment debtor personally, no notice under subsection (1) shall be issued unless the judgment creditor or his or her attorney provides proof to the satisfaction of the clerk of the court that he or she has advised the judgment debtor by registered letter of the terms of the judgment or of the expiry of the suspension ordered under section 48(e), as the case may be **[and of the consequences of his failure to satisfy the judgment]**, and a period of 10 days has elapsed since the date on which the said letter was posted.”;
- (c) by the substitution for subsection (4) of the following subsection:
“(4) If the court has given judgment for the payment of an amount of money in instalments, no notice under subsection (1) shall be issued unless the judgment creditor has delivered an affidavit or affirmation or his or her attorney has delivered a certificate to the clerk of the court in which is mentioned the outstanding balance of the judgment debt, in what respects the judgment debtor has failed to comply with the court order, to what extent he or she is in arrear with the payment of the instalments and that the judgment debtor was advised by registered letter of the terms of the judgment **[and of the consequences of his failure to satisfy it]**.”; and
- (d) by the addition of the following subsections:

“(5) If a judgment debtor fails to satisfy an order to pay the judgment debt in instalments or otherwise, or if an emoluments attachment order has not been satisfied, a judgment creditor may issue anew a notice in accordance with subsection (1).

(6) If the court is satisfied on the ground of sufficient proof or otherwise— 5

(a) that the judgment debtor, director or officer concerned has knowledge of a notice referred to in subsection (1) and that he or she has failed to appear before the court and on the date and at the time specified in the notice; 10

(b) that the judgment debtor, director or officer concerned, in the case where the relevant proceedings were postponed in his or her presence to a date and time determined by the court, has failed to appear before the court on that date and at that time; or

(c) that the judgment debtor, director or officer concerned has failed to remain in attendance at the relevant proceedings or at the proceedings as so postponed, 15

the court may, at the request of the judgment creditor or his or her attorney, authorise the issue of a warrant directing a sheriff to arrest the said judgment debtor, director or officer and to bring him or her before a competent court at the earliest possible opportunity in order to enable that court to conduct an inquiry referred to in subsection (1). 20

(7) A warrant authorised under subsection (6) shall be prepared by the judgment creditor or his or her attorney, signed by the judgment creditor or his or her attorney and the clerk of the court, and executed by the sheriff. 25

(8) (a) Any person arrested under a warrant referred to in subsection (6) shall, in accordance with section 35(1)(d) of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), be brought as soon as reasonably possible before the court within the district of which that person was arrested: Provided that any such person, if it is not possible to bring him or her before the court concerned, may be detained at any police station pending his or her appearance before that court. 30

(b) In lieu of arresting a person contemplated in paragraph (a), the sheriff may, if the judgment creditor or his or her attorney consents thereto, hand to that person a notice in writing which— 35

(i) specifies the name, the residential address and the occupation or status of that person;

(ii) calls upon that person to appear before the court and on the date and at the time specified in the notice; and 40

(iii) contains a certificate signed by the sheriff to the effect that he or she has handed the original of the notice to that person and that he or she has explained to that person the import thereof.

(c) The sheriff shall forthwith forward a duplicate original of the notice to the clerk of the court concerned, and the mere production in the court of such a duplicate original shall be *prima facie* proof that the original thereof was handed to the person specified therein. 45

(d) The provisions of subsection (6) shall *mutatis mutandis* apply in respect of a notice referred to in paragraph (b).

(9) Any person who— 50

(a) is called upon to appear before a court under a notice referred to in subsection (1) or (8)(b) and who wilfully fails to appear before the court and on the date and at the time specified in the notice;

(b) in the case where the relevant proceedings were postponed in his or her presence to a date and time determined by a court, wilfully fails to appear before the court on that date and at that time; 55

(c) wilfully fails to remain in attendance at the relevant proceedings or at the proceedings as so postponed, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three months.

(10) (a) Notwithstanding anything to the contrary contained in this Act—

- (i) the court which authorised the issue of a warrant referred to in subsection (6) and the court contemplated in subsection (8)(a), if the latter court is not the court which authorised the issue of the warrant concerned, shall have jurisdiction to inquire in a summary manner into the commission of an offence referred to in subsection (9), and upon proof beyond reasonable doubt that the person concerned is guilty of such an offence, to so convict him or her and to impose on him or her any penalty provided for in the said subsection (9);
- (ii) the court contemplated in subsection (8)(a), if the court is not the court which authorised the issue of the warrant concerned, shall have jurisdiction to conduct an inquiry referred to in subsection (1) and to perform such other acts as the court which authorised the issue of the warrant concerned could lawfully have performed.

(b) On the appearance before the court of the judgment debtor, director or officer concerned in pursuance of either his or her arrest under a warrant referred to in subsection (6) or the delivery to him or her of a notice referred to in subsection (8)(b), the court shall inform him or her—

- (i) that the court intends to inquire in a summary manner into his or her alleged wilful failure to appear before the court and on the date and at the time specified in a notice referred to in subsection (1) or (8)(b), or to appear, in the case where the relevant proceedings were postponed in his or her presence to a date and time determined by any court, before that court on that date and at that time, or to remain in attendance at the relevant proceedings or at the proceedings as so postponed, as the case may be;
- (ii) that the court, if the court so convicts him or her, may impose on him or her any penalty provided for in subsection (9); and
- (iii) that he or she has the right to choose, and be represented by, a legal practitioner.

(c) A court before which proceedings under paragraph (b) are pending—

- (i) shall have due regard to the following rights, namely—
 - (aa) the right of an accused person to be presumed innocent, to remain silent and not to testify;
 - (bb) the right of an accused person to adduce and to challenge evidence; and
 - (cc) the right of an accused person not to be compelled to give self-incriminating evidence;
- (ii) may adjourn such proceedings to any date on such conditions not inconsistent with a provision of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), and as the court may think fit;
- (iii) if the court is of the opinion that it is in the interests of the administration of justice, may at any time before the judgment debtor, director or officer concerned is acquitted or convicted of an offence referred to in subsection (9) suspend such proceedings and refer the matter to the public prosecutor concerned to take a decision on the prosecution of the said judgment debtor, director or officer for such an offence.

(11) After the court has dealt with the inquiry referred to in subsection (10)(b), the court shall proceed to the inquiry referred to in subsection (1) and deal with the matter in accordance with the other sections of this Chapter: Provided that the court—

- (a) if the court is not the court which authorised the issue of the warrant concerned; and

(b) if the court is of the opinion that it is in the interests of the administration of justice, may transfer the matter to the court which authorised the issue of that warrant.

(12) (a) If the court before which proceedings under subsections (10)(b) and (11) are pending is not the court which authorised the issue of the warrant concerned, the clerk of the former court shall without any delay notify the clerk of the latter court of the appearance of the judgment debtor, director or officer concerned before the former court, and shall inform the judgment creditor or his or her attorney accordingly.

(b) The clerk of the court which authorised the issue of the warrant concerned shall without any delay furnish the court before which proceedings under subsections (10)(b) and (11) are pending with such records or documents relating to such proceedings as the latter court may direct.

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

4. Section 65B of the principal Act is hereby repealed.

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

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

“Joinder of proceedings

65C. If, under section 65A(1), two or more notices have been served on any judgment debtor or director or officer to **[show cause]** appear on the same day as provided in that section, the proceedings in terms of such notices may be heard concurrently.”

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

6. Section 65D of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) On the appearance before the court of the judgment debtor or, if the judgment debtor is a juristic person, the director or officer of the juristic person summonsed as the representative of the juristic person or in his or her personal capacity, on the return day of the notice referred to in section 65A(1) or (8)(b), in pursuance of his or her arrest under a warrant referred to in section 65A(6), or on any date to which the proceedings have been postponed, the court in chambers shall, subject to the provisions of subsection (2) of this section, call upon him or her to give evidence under oath or affirmation on his or her financial position or the financial position of the juristic person, as the case may be, and the court shall permit the examination or cross-examination of the judgment debtor or the said director or officer on all matters relevant to the judgment debtor’s financial position and his or her ability to pay the judgment debt **[and his failure to do so]**, and 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 just, by or on behalf of either the judgment debtor or the judgment creditor, as is material to the determination of the judgment debtor’s financial position and his or her ability to pay the judgment debt **[and his failure so to do]**, and for the purposes of such evidence witnesses may be summonsed in the manner prescribed in the rules.”;

(b) by the substitution for the words preceding paragraph (a) of subsection (4) of the following words:

“In determining the ability of the judgment debtor to **[satisfy the judgment]** pay the judgment debt in instalments or otherwise the court shall take into consideration—”; and

(c) by the substitution for subsection (5) of the following subsection:

“(5) In determining the ability of the judgment debtor to pay the judgment debt in instalments or otherwise **[The]** the court may, in its discretion, refuse to take account of the periodical payments that a judgment debtor has undertaken to make in terms of a hire-purchase agreement for the purchase of goods which have not been exempted from seizure in terms of section 67 or which cannot, in the opinion of the court, be regarded as the judgment debtor’s household requirements.”.

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

7. Section 65E of the principal Act is hereby amended by the substitution for subsection (6) of the following subsection: 15

“(6) Upon an order referred to in subsection (1)(c) of this section or section 57, 58 or 65 having been made and if the judgment debtor was not present or represented in court when the order was made, the judgment creditor or his or her attorney shall forthwith by registered letter advise the judgment debtor of the terms of the order **[and of the consequences of his failure to satisfy it]**.”. 20

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

8. 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

9. 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

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

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

11. Section 65J of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection: 30

“(1) (a) 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. 35

(b) An emoluments attachment order—

(i) shall attach the emoluments at present or in future owing or accruing to the judgment debtor by or from his or her employer (in this section called the garnishee), to the amount necessary to cover the judgment and the costs of the attachment, whether that judgment was obtained in the court concerned or in any other court; and 40

(ii) shall oblige the garnishee to pay from time to time to the 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 the relevant judgment debt and costs have been paid in full.”; 45

- (b) by the substitution for subsection (2) of the following subsection:
 - “(2) An emoluments attachment order shall not be issued—
 - (a) unless the judgment debtor has consented thereto in writing or the court has so authorised, whether on application to the court or otherwise, and such authorisation has not been suspended; or 5
 - (b) unless the judgment creditor or his or her attorney has first—
 - (i) sent a registered letter to the judgment debtor at his or her last known address advising him or her of the amount of the judgment debt and costs as yet unpaid and warning him or her that an emoluments attachment order will be issued if the said amount is not paid within ten days of the date on which that registered letter was posted; and 10
 - (ii) filed with the clerk of the court an affidavit or an affirmation by the judgment creditor or a certificate by his or her attorney setting forth the amount of the judgment debt at the date of the order laying down the specific instalments, the costs, if any, which have accumulated since that date, the payments received since that date and the balance owing and declaring that the provisions of subparagraph (i) have been complied with on the date specified therein.”; 15 20
- (c) by the addition to subsection (4) of the following paragraph, the existing subsection becoming paragraph (a):
 - “(b) The judgment creditor or his or her attorney shall, at the reasonable request of the garnishee or the judgment debtor, furnish him or her free of charge with a statement containing particulars of the payments received up to the date concerned and the balance owing.”; 25
- (d) by the substitution for paragraph (a) of subsection (9) of the following paragraph:
 - “(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 30 35
- (e) by the deletion of paragraph (b) of subsection (9).

Amendment of section 65K of Act 32 of 1944, as inserted by section 2 of Act 63 of 1976 40

12. Section 65K of the principal Act is hereby amended by the deletion of subsection (2).

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

13. Section 65L of the principal Act is hereby repealed. 45

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

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

“Penalty for disobedience of judgment or order of court

106. Any person wilfully disobeying, or [neglecting] refusing or failing 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 shall be guilty of contempt of court and shall, upon conviction, be 50

liable to a fine [not exceeding R500 or, in default of payment], or 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 ‘order’ shall not include an order referred to in section 65, 65E, 65G, 65I, 65J, 65K, 72, 74 or 74J.**”].”

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

15. Section 109 of the principal Act is hereby amended—

(a) by the substitution for subsection (2) of the following subsection:

“(2) [A judgment creditor or an administrator may, if the judgment debtor concerned fails to comply with the provisions of subsection (1), 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 should not be committed for such failure] Any judgment debtor who fails to comply with the provisions of subsection (1) shall be guilty of an offence and upon conviction, be liable to a fine, or to imprisonment for a period not exceeding three months.”; and

(b) by the deletion of subsections (3) up to and including (8).

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Short title

16. This Act shall be called the Magistrates’ Courts Amendment Act, 1997.

**MEMORANDUM ON THE OBJECTS OF THE MAGISTRATES'
COURTS AMENDMENT BILL, 1997**

During the 1996 session of Parliament, the Magistrates' Courts Amendment Bill [B 27—96] was introduced into the Senate. The Bill, which emanated from the South African Law Commission's Report on Debt Recovery (Project 74) was subsequently published in the *Gazette* for comment, and the Select Committee on Justice (Senate) heard evidence from numerous interested parties on the provisions thereof. The Senate was unable to finalise its deliberations on the Bill before the dissolution of that body and the Bill was consequently withdrawn from the Senate by the Minister of Justice before the commencement of the 1997 session of Parliament. The said Committee did, however, submit a comprehensive report to the Minister, recommending that—

- (a) the bulk of the provisions contained in the Bill should be referred back to the Department of Justice for further investigation; and
- (b) a shortened Bill, dealing with consequential amendments emanating from the Constitutional Court's judgment 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) should be considered by Parliament.

The present Magistrates' Courts Amendment Bill, 1997, purports to give effect to the said Committee's recommendation in paragraph (b) above, as well as to amend the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), so as to ensure that a court would have the power to enforce a notice to a judgment debtor to appear in court for the purpose of a financial enquiry and to attend court proceedings.

In the opinion of the Department and the State Law Advisers this Bill should be dealt with in terms of section 75 of the Constitution.