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PRACTICE AREAS

AN ALERT FROM OUR EMPLOYMENT AND DISPUTE RESOLUTION PRACTICES

A JOINT INITIATIVE BY KNOWLEDGE MANAGEMENT, DISPUTE RESOLUTION AND EMPLOYMENT PRACTICE AREAS

Emoluments Attachment Orders: No More 'Rubber Stamping' by Clerks

Debt recovery is obviously big business, and a necessary step in any economy. However some creditors have not acted responsibly in offering loans to employees and then using short-cut processes to try to enforce repayment of the loans with a minimum of court action. Emoluments Attachment Orders are a favoured process, with some of these orders issued by Clerks of the Magistrates' Courts, on the strength of the judgment debtor having consented to the order. This process is open to abuse because of the absence of any judicial oversight and particularly because no evaluation is done of the affordability of the amount to be deducted from the employee's salary.

On Wednesday, 8 July 2015 the Western Cape Division of the High Court declared unconstitutional certain sections of the Magistrates' Court Act regulating Emoluments Attachment Orders.

Judge Desai's decision has the following effects:

- (a) Emoluments Attachment Orders may no longer be issued by Clerks of the Magistrates' Courts on the strength of the fact that the judgment debtor has consented to the order being issued; and
- (b) it is no longer possible in a credit agreement to which the National Credit Act applies for a debtor to consent to the jurisdiction of a Magistrates' Court outside of the area in which that debtor either resides or is employed.

The practical effect of the judgment is that all Emoluments Attachment Orders issued by the Clerk of any Magistrates' Court are invalid. Henceforth Emoluments Attachment Orders must be issued by a Magistrate in open court and, where they arise from an agreement regulated by the NCA, they must be issued in the area in which the employee resides or works.

Before paying any further amounts in terms of Emoluments Attachment Orders, employers would be well advised to check that the orders comply with the new requirements.

Aadil Patel and Tim Fletcher

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CONTACT US

For more information about our Employment practice and services, please contact:



Aadil Patel
National Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@dlacdh.com



Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@dlacdh.com

Anli Bezuidenhout
Associate
T +27 (0)21 481 6351
E anli.bezuidenhout@dlacdh.com



Gillian Lumb
Regional Practice Head
Director
T +27 (0)21 481 6315
E gillian.lumb@dlacdh.com



Faan Coetzee
Executive Consultant
T +27 (0)11 562 1600
E faan.coetzee@dlacdh.com

Katlego Letlonkane
Associate
T +27 (0)21 481 6319
E katlego.letlonkane@dlacdh.com



Johan Botes
Director
T +27 (0)11 562 1124
E johan.botes@dlacdh.com

Kirsten Caddy
Senior Associate
T +27 (0)11 562 1412
E kirsten.caddy@dlacdh.com

Inez Moosa
Associate
T +27 (0)11 562 1420
E inez.moosa@dlacdh.com



Mohsina Chenia
Director
T +27 (0)11 562 1299
E mohsina.chenia@dlacdh.com

Nicholas Preston
Senior Associate
T +27 (0)11 562 1788
E nicholas.preston@dlacdh.com

Thandeka Nhleko
Associate
T +27 (0)11 562 1280
E thandeka.nhleko@dlacdh.com



Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@dlacdh.com

Lauren Salt
Senior Associate
T +27 (0)11 562 1378
E lauren.salt@dlacdh.com

Sihle Tshetlo
Associate
T +27 (0)11 562 1196
E sihle.tshetlo@dlacdh.com



Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@dlacdh.com

Ndumiso Zwane
Senior Associate
T +27 (0)11 562 1231
E ndumiso.zwane@dlacdh.com

CHAMBERS GLOBAL 2014 - 2015 ranks our Employment practice in Band 2: Employment.

Aadil Patel ranked by CHAMBERS GLOBAL 2015 in Band 2: Employment.

Hugo Pienaar ranked by CHAMBERS GLOBAL 2014 - 2015 in Band 2: Employment.

Fiona Leppan ranked by CHAMBERS GLOBAL 2015 in Band 4: Employment.



CONTACT US

For more information about our Dispute Resolution practice and services, please contact:



Tim Fletcher
National Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@dlacdh.com

Lionel Egypt
Director
T +27 (0)21 481 6400
E lionel.egypt@dlacdh.com

Richard Marcus
Director
T +27 (0)21 481 6396
E richard.marcus@dlacdh.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhodie@dlacdh.com



Grant Ford
Regional Practice Head
Director
T +27 (0)21 405 6111
E grant.ford@dlacdh.com

Jackwell Feris
Director
T +27 (0)11 562 1825
E jackwell.feris@dlacdh.com

Burton Meyer
Director
T +27 (0)11 562 1056
E burton.meyer@dlacdh.com

Brigit Rubinstein
Director
T +27 (0)21 481 6308
E brigitt.rubinstein@dlacdh.com

Thabile Fuhmann
Director
T +27 (0)11 562 1331
E thabile.fuhmann@dlacdh.com

Rishaban Moodley
Director
T +27 (0)11 562 1666
E rishaban.moodley@dlacdh.com

Willie van Wyk
Director
T +27 (0)11 562 1057
E willie.vanwyk@dlacdh.com

Adine Abro
Director
T +27 (0)11 562 1009
E adine.abro@dlacdh.com

Craig Hindley
Director
T +27 (0)21 405 6188
E craig.hindley@dlacdh.com

Nick Muller
Director
T +27 (0)21 481 6385
E nick.muller@dlacdh.com

Joe Whittle
Director
T +27 (0)11 562 1138
E joe.whittle@dlacdh.com

Roy Barendse
Director
T +27 (0)21 405 6177
E roy.barendse@dlacdh.com

Anja Hofmeyr
Director
T +27 (0)11 562 1129
E anja.hofmeyr@dlacdh.com

Byron O'Connor
Director
T +27 (0)11 562 1140
E byron.oconnor@dlacdh.com

Jonathan Witts-Hewinson
Director
T +27 (0)11 562 1146
E witts@dlacdh.com

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@dlacdh.com

Willem Janse van Rensburg
Director
T +27 (0)11 562 1110
E willem.jansevanrensburg@dlacdh.com

Sam Oosthuizen
Director
T +27 (0)11 562 1067
E sam.oosthuizen@dlacdh.com

Pieter Conradie
Executive Consultant
T +27 (0)11 562 1071
E pieter.conradie@dlacdh.com

Sonia de Vries
Director
T +27 (0)11 562 1892
E sonia.devries@dlacdh.com

Julian Jones
Director
T +27 (0)11 562 1189
E julian.jones@dlacdh.com

Marius Potgieter
Director
T +27 (0)11 562 1142
E marius.potgieter@dlacdh.com

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@dlacdh.com

CAPE TOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@dlacdh.com

cliffedekkerhofmeyr.com

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