



**Human Rights Impact of
Unsecured Lending and
Debt Collection Practices
in South Africa
March 2017**

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Acronyms

ACHPR	African Charter on Human and Peoples' Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CFVI	Consumer Financial Vulnerability Index
CLAB	Court of Law Amendment Bill
DCAB	Debt Collectors Amendment Bill
EAO	Emolument attachment order
GDP	Growth Domestic Product
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
NCA	National Credit Act, 2005
NCR	National Credit Regulator
NHRI	National human rights institution
SAHRC	South African Human Rights Commission
SASSA	South African Social Security Agency
UNHRC	United Nations Human Rights Council
UPLC 2008	University of Pretoria Law Clinic Report, 2008
UPLC 2013	University of Pretoria Law Clinic Report, 2013

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Executive Summary

Within South Africa, the finance industry constitutes the largest sector of the economy, with consumer credit contributing significantly to the country's GDP. In recent years, unsecured lending has burgeoned, and with it, discriminatory and predatory practices of debt collection. Many living in South Africa are struggling under a burden of debt that is unsurmountable, rendering them in an endless cycle of debt and poverty. Loans are largely needed to cover basic household expenses such as food, and to pay off old debts. Indeed, it has been estimated that 'at least 40% of the monthly income of South African workers is being directed to the repayment of debt',¹ and further, that around 80% of South Africa's formal sector employees were subject to deductions from their salaries for debt owed.² Subject to summary deductions from their salaries, individuals are left with little take-home cash to cover their basic needs. Under such conditions, the fundamental rights and freedoms of individuals are at risk.

In light of these concerns, this report sets out to understand the human rights implications of unsecured lending and debt collection practices in South Africa. Given the complex and interrelated roles of both the public and private sector, this report draws on the *United Nations Principles on Business and Human Rights* as an internationally agreed upon best-practice framework for assessing the respective responsibilities of public and private bodies with respect to debt and human rights. Moreover, the *United Nations Principles on Business and Human Rights* finds resonance in the South African Constitution with its horizontal application of rights, as articulated under Section 8.

The report provides an in-depth background to indebtedness in South Africa, demonstrating that while lending schemes may be predominantly targeted at middle income groups, it is the lower income groups and those in poverty who are rendered most vulnerable to human rights violations resultant from unethical lending and debt collection practices. Moreover, those with impaired credit records often face discrimination by employers and potential employers, reducing their ability to escape cycles of debt and poverty.

The report provides an overview of the *United Nations Principles on Business and Human Rights* and, using these as a best-practice standard, assesses the current national and regulatory framework governing debt in South Africa. In particular, the Magistrate's Court Act with regard to stop-orders on wages is examined, as well as the National Credit Act on over-indebtedness and debt relief. The assessment further includes an examination of two bills currently before Parliament – the Court of Laws Amendment Bill and the Debt Collectors Amendment Bill. These bills are likely to have a significant effect on the regulatory environment on debt in South Africa if passed. The Court of Laws Amendment Bill deals with the irregularities in the Magistrate's Court Act which has, in part, allowed for summary deductions on salaries to be authorised by a clerk of the court without judicial oversight. The Debt Collectors Amendment Bill seeks to deal with the flagrant abuses that have been taking place through concerning practices of debt collection, noting in its preamble that

1 M Rees 'Financially illiterate miners debt shocker' Moneyweb (1 October 2012) <https://www.moneyweb.co.za/archive/financially-illiterate-miners-debt-shocker-fraud-a/> (last accessed 7.03.2017).

2 C Benjamin 'Garnishee abuse is order of the day' Mail&Guardian (25 October 2013) <https://mg.co.za/article/2013-10-25-00-garnishee-abuse-is-order-of-the-day> (last accessed 7.03.2017); University of Pretoria Law Clinic 'The incidence of and the undesirable practices relating to garnishee orders in South Africa' (2008) <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf> (last accessed 7.03.2017).

'the victims of these abuses in the collection of debts are mostly the poorest and most vulnerable members of society'.³

The fourth chapter of this report examines the actual and potential human rights impact of indebtedness and debt collection practices in South Africa. Six groups of rights are examined with regard to both their protection within national, regional and international law, and the extent to which they may be impacted upon by debt and predatory debt collection practices. This list may not, however, constitute an exhaustive list of all rights which may be impacted upon by over-indebtedness. This chapter notes how indebtedness significantly affects an individual's ability to cover their basic household needs, thereby affecting their access to socio-economic rights. This of course has a corollary effect on an individual's right to inherent dignity for, as Judge Desai noted in the matter of *University of Stellenbosch v Justice*, the inherent human dignity of an individual may be severely impaired when over-indebted or subject to undignified debt collection practices, including wage stop-orders.

Moreover, under a number of international instruments (including, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the African Charter on Human and Peoples' Rights, and International Labour Organisation Conventions) the 'right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity' is protected, together with the right to work and seek work.⁴ These rights are oftentimes directly affected by unfairly prescribed emolument attachment orders.

While the right to dignity exists as a correlative right which is impacted interdependently where the enjoyment or realisation of other rights are affected, the right to privacy may also be affected by debt collection practices that are invasive or which involve the potential collection and abuse of personal information.

In addition, the report notes how individuals are oftentimes drawn into credit without being properly informed of the terms and conditions, including repayment terms. The right of access to information, as protected under international law as well as Section 32 of the South African Constitution, is therefore a key right whose protection needs to be ensured through the proper regulation of unsecured lending practices.

Lastly, the report considers the right of access to remedy and redress, together with the right of access to justice. A fundamental principle of human rights law is the availability of mechanisms for redress and remedy where human rights violations occur; access to courts, as well as non-judicial mechanisms are therefore important in this regard. However, this right has been severely compromised in cases where magistrate court clerks have authorised emolument attachment orders without judicial oversight (and oftentimes outside of the jurisdiction of the employer and employee), as has been brought to the fore in recent court cases.

Noting that the issue of indebtedness has, to this date, received attention from policy-makers, in chapter 5 of this report an overview of measures taken to address some of the concerns laid out herein is provided. This stands as the basis for a series of recommendations to strengthen law

³ Debt Collectors Amendment Bill (2016), available at <http://www.justice.gov.za/legislation/invitations/DebtColBill-Oct2015.pdf> (last accessed 23.04.2017).
⁴ Article 23(3) of the Universal Declaration of Human Rights.

and policy relating to debt and debt collection practices from a human rights based approach, and particularly in line with the *United Nations Principles on Business and Human Rights*. While it is hoped that many of the issues will be attended to through the passing of the Draft Debt Collectors Amendment Bill and Draft Courts of Law Amendment Bill, these draft bills must not be seen as the golden bullet, and should be accompanied by other policy measure to improve the protection of the rights of those entering credit agreements.

More specifically, this report recommends that the Draft Debt Collectors Amendment Bill be brought in line with the *United Nations Guiding Principles on Business and Human Rights*, including by prescribing that debt collectors develop an internal complaints mechanisms for redress and remedy; develop a human rights policy and due diligence process to guide business activities from a human rights based approach, taking into account the vulnerabilities of the poor to indebtedness; report to the Council for Debt Collectors on measures taken to address adverse human rights impacts of their activities; and ensure protection of personal information in line with the Protection of Personal Information Act.

In addition, Chapter 5 draws on international best practices and examples in developing further recommendations. Noting, for example, the regulation of wage stop-orders in the Netherlands and Germany, it is suggested that a ban on emolument attachment orders in South Africa be revisited (as was agreed in October 2012 by the Banking Association South Africa and the Minister of Finance).

Moreover, noting the impact that indebtedness has on the debtor's family, a recommendation is developed regarding the need for debt relief programmes to take into account the fact that a debtor's family and dependents are often directly affected by household debt, and thus, debt relief measures cannot be entirely individualistic, as currently envisaged under the National Credit Act.

Lastly, the report notes the responsibilities of other role-players, including trade unions and employers, to provide information and education to employees on debt, debt orders and basic financial literacy.

CHAPTER ONE: INTRODUCTION

1. Background

This report sets out to explore the human rights implications of unsecured lending and debt collection practices, including emolument attachment orders (EAO), in South Africa. Recently, the human rights abuses associated with unsecured lending, and the EAO system in particular, have been brought to light by the media and two notable court judgments, including a judgement of the Constitutional Court handed down in September 2016.⁵ In addition, the South African Human Rights Commission (SAHRC) has been monitoring this issue under its “Access to Justice” Portfolio, and participated as *amicus* in the original matter concerning the abuses in the EAO system brought to the Western Cape High Court in 2015.⁶

Despite the economic strength of South Africa’s financial sector, which constitutes the biggest contributor to the national growth domestic product (GDP), the industry is riddled with stark inequalities, historically favouring capital intensive investment and wealth creation. In particular, regardless of policy and recent legislative intentions and developments (see chapter 3 below), the poor and indigent remain unable to access secure financial lending, and are often rendered subject to punitive and exploitative debt collection practices when unable to meet demanding loan repayment schemes, including EAOs. Many become ensnared in an endless cycle of debt, seeking new debts to pay off old ones. Those within the lower income brackets are most severely affected, with many households struggling to meet their basic needs, such as food, water, housing, electricity, clothing and education.

The issue of indebtedness thus constitutes a major human rights concern on a number of levels. Embroiled in this issue are violations of the right of access to justice, the right of access to information, the right to dignity in addition to the range of socio-economic rights which may be affected by indebtedness. Some of these concerns were raised in the recent court case where the SAHRC was admitted as *amicus curiae*.⁷ In this case the SAHRC brought to the attention of the court the detrimental affect such orders were having on the human rights by those whose pay was subject to summary deductions, as well as the lack of judicial oversight in the issuing of EAOs. The case was subsequently heard by the Constitutional Court in September 2016, which decreed that the relevant section of the Magistrates’ Court Act (1944) that did not provide for judicial oversight in administering EAOs was unconstitutional.⁸

Although this Constitutional Court judgment will be instrumental in preventing future abuses within the EAO system, unsecured financial lending and the micro-loans industry in South Africa remain a

5 University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others 16703/14 [2015] ZAWCHC 99; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others (CCT127/15) [2016] ZACC 32; 2016 (6) SA 596 (CC); (2016) 37 ILJ 2730 (CC); 2016 (12) BCLR 1535 (CC) (13 September 2016).

6 Ibid.

7 Note 1 above.

8 Note 1 above.

cause for concern. Further investigation is warranted to better understand how practices within this industry may impact upon the enjoyment and realisation of human rights, and to develop evidence-based policy recommendations for government, industry bodies and businesses in order to prevent further violations.

As a starting point for better understanding the human rights impact of indebtedness and debt collection practices in South Africa, this report draws on the framework developed by Professor John Ruggie during his term as the special representative to the United Nations Human Rights Council (UNHRC) on the issue of business and human rights: the *United Nations Guiding Principles on Business and Human Rights* ("the *Ruggie Principles*"). The *Ruggie Principles* were developed to guide states and businesses in ensuring respect for and the protection of human rights within their respective spheres of influence, and represent an internationally agreed upon standard thereof. This framework is applicable for two key reasons:

1. The issue of indebtedness involves a broad range of actors – both state and non-state. Credit is granted to individuals by businesses within the financial sector; courts and tribunals prescribe for garnishee orders and EAOs; debt collectors are typically privately established companies and individuals; and the industry as a whole is regulated by both industry- and state-led bodies (see chapter 3 below). The *Ruggie Principles* recognise the overlapping spheres of influence both businesses and governments may hold with respect to any given human rights issue. It recognises that although a business may be directly responsible for infringing upon an individual's human rights, the government bears overall responsibility for ensuring the promotion, protection and respect for human rights by all.
2. In addition, the *Ruggie Principles* constitute the global standard on business and human rights, and a wealth of material has been developed in order to provide clear guidance on how they should be interpreted in national policy.

2. Objectives of the study

In light of the above, this report seeks to analyse the impact on the realisation and enjoyment of human rights caused by over-indebtedness and debt collection practices in South Africa. In doing so, this paper:

- Provides a comprehensive background to these issue, noting the saturation of indebtedness in South Africa;
- Assess the current regulatory framework, including proposed legislative developments, against the standards on business and human rights set out by the *Ruggie Principles*;
- Discuss the human rights implications of indebtedness and debt collection practices in South Africa, with reference to international and national laws and standards on human rights;

- Where relevant, draw comparative analysis from international experiences and practices in this regard; and
- Develop recommendations for government, industries bodies, employers, and businesses to direct them in the exercise of due diligence against exploitative micro-lending practices.

3. Mandate of the SAHRC

The SAHRC is a constitutional body established in terms of the Constitution of the Republic of South Africa, Act 108 of 1996 (hereinafter ‘the Constitution’). The Constitution mandates the SAHRC to contribute to the creation of a human rights culture in the country. The SAHRC carries out its mandate through various approaches including through the compilation of research reports on the state of human rights in South Africa.

This report emanates out of the SAHRC’s strategic focus area for 2015/2016 on Business and Human Rights. The report constitutes the second Business and Human Rights report to be produced by the SAHRC. During the period under review the SAHRC conducted a number of activities relating to the abuses of the EAO system, in exercise of its duty to monitor the observance of human rights in the country.⁹ The SAHRC witnessed the manner in which individuals were subject to default judgments against their salaries without effective judicial oversight, leaving such individuals unable to meet the basic needs of their households. This report thus constitutes a continuation of the SAHRC’s work in this regard, and its recognition of the matter of over-indebtedness and predatory credit regimes as a human rights concern.

4. Limitations and scope

The issue of punitive debt collection practices, such as the abuses that are taking place within the EAO system of South Africa, are situated within a broader global crisis of individual and household indebtedness. While over-indebtedness constitutes a significant human rights concern in and of itself, it is outside the scope of this paper to fully address this issue.

4.1. Research Methodology

In compiling this report, the authors drew on a broad range of literature and data, largely from desktop sources. In doing so, this paper seeks to synthesise the existent research on the issue,

⁹ Activities included, hosting a Roundtable with key stakeholders to discuss the issue of EAOs in 2015; submitting comments to the Portfolio Committee on Justice and Correctional Services on the Courts of Law Amendment Bill in October 2016; participating as Amicus in the matter of University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others [2015] ZAWCHC 99; and drafting opinion pieces for daily newspapers.

drawing out the specific human rights impacts of some of the exploitative and unsavoury debt collection practices that have may have already been researched and documented.

5. Structure of the report

This report is structured into five main sections, as follows:

- Chapter 2 provides a brief historical background to the credit market of South Africa, and to the EAO system as a debt collection practice.
- Chapter 3 introduces the *Ruggie Principles* and sets out the regulatory framework for debt in South Africa, noting pending legislative developments, including the Debt Collectors Amendment Bill (DCAB) and the Court of Law Amendment Bill (CLAB). This chapter further assesses how far the national regulatory framework is conducive with the standards set by the *Ruggie Principles*.
- Chapter 4 analyses the actual and the potential human rights implications of indebtedness and debt collection practices with reference to international and national laws and standards;
- And Chapter 5 assesses the measures taken to address the issues occurring with regard to unsecured loans and the debt collection system within South Africa, and sets out recommendations in line with the *Ruggie Principles* to mitigate abuse.

CHAPTER TWO:

UNSECURED LENDING AND DEBT COLLECTION IN SOUTH AFRICA

1. Background to unsecured lending and EAOs

The financial industry is the single largest sector of South Africa's economy. Expansion in consumer credit has been responsible for most of South Africa's GDP growth since 2000.¹⁰ But this expansion is not without cost: when the economy becomes reliant on consumer credit fuelled growth, over-indebtedness often results.¹¹ This is not merely an economic problem, but also one that effects the enjoyment and realisation of the human rights of both the debtor and his/her family and dependents. Indeed, according to Rees around \$400 million [around R5.2 billion Rands] is annually 'exploited for South Africa's workforce by collection attorneys and other debt collectors [... and] at least 40% of the monthly income of South African workers is being directed to the repayment of debt'.¹² Moreover, Benjamin has reported that around 80% of South Africa's formal sector employees were subject to deductions from their salaries for debt owed, and that in many instances, individuals had multiple EAOs against their salaries.¹³

1.1. Household debt in South Africa

It is well known that a large proportion of South African consumers are heavily indebted, and particularly vulnerable to economic downturns, interest rate hikes and job losses. Credit Bureau Monitor's report (Figure 1 below) shows that *Total credit records of consumers* have increased dramatically (from about 17 million in 2007 to 24 million in 2016) over the 9 year period, and those with *Impaired record* have also increased – both in absolute (6 million to almost 10 millions) and relative (37% to 40%) terms. Although the *Impaired* percentage has dropped since 2013, this is mostly due to the increase of *Good standing records* from 10.5 million to over 14 million while that of *Impaired record* stayed roughly the same at about 10 million. According to Unisa and Momentum's Consumer Financial vulnerability index (CFVI) and Compliance & Risk Resources Ltd's 2012 unsecured loan report to the National Credit Regulator (NCR)¹⁴, the increase of the *Good standing* records is largely driven by higher income and therefore greater disposable income.

10 P Bond 'Contradictions in consumer credit: innovations in South African super-exploitation' (2015) 29 Critical Art: South-north cultural and media studies 2 218.

11 Ibid; C Ondersma 'A Human Rights Framework for Debt Relief' (2014) University of Pennsylvania Journal of International Law 269.

12 M Rees 'Financially illiterate miners debt shocker' Moneyweb (1 October 2012) <https://www.moneyweb.co.za/archive/financially-illiterate-miners-debt-shocker-fraud-a/> (last accessed 7.03.2017).

13 C Benjamin 'Garnishee abuse is order of the day' Mail&Guardian (25 October 2013) <https://mg.co.za/article/2013-10-25-00-garnishee-abuse-is-order-of-the-day> (last accessed 7.03.2017); University of Pretoria Law Clinic 'The incidence of and the undesirable practices relating to garnishee orders in South Africa' (2008) <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf> (last accessed 7.03.2017).

14 Hereinafter called NCR unsecured loan report.

Figure 1: Good standing records, Impaired records (those with 3+ months in arrears + adverse listing + judgments and administration orders), and percentage of impaired records to total records, 2007-2015 yearly average: millions and percentage¹⁵

This overall improvement trend is also confirmatory to other statistics and indices (for example, TransUnion’s South African consumer Credit Index 2016, see Figures 2 and 3 below; Unisa and Momentum’s CFVI index 2016; the Momentum Unisa Household financial wellness index 2015; and NCR unsecured loan report 2013.¹⁶

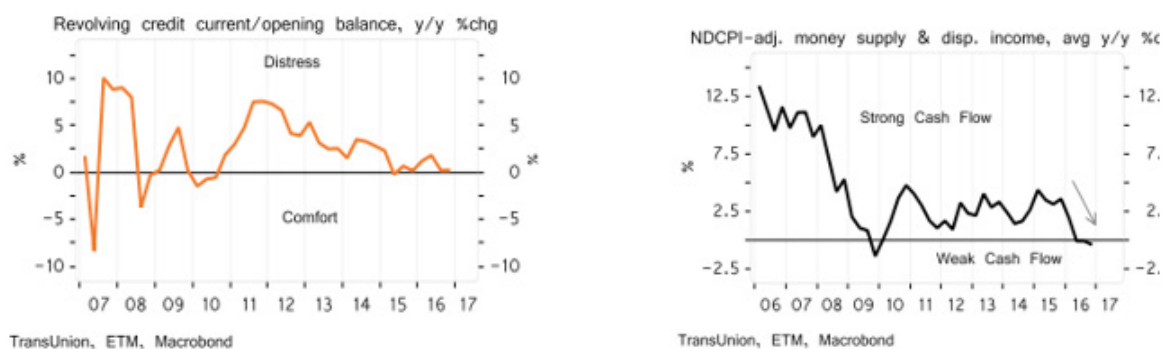


Figure 2 and 3: distressed borrowing and household cash flow. 2006-2016¹⁷

1.2. Debt Collection Practices

In South Africa, as in anywhere else, defaulting consumers are subject to debt collection. Both judicial methods and non-judicial methods are used to recover the debts. Judicial methods refer to the use of court system and court judgements in securing repayment, including EAOs. Whereas non-judicial methods include voluntary stop orders or other voluntary arrangements, as well as other coercive – and typically outlawed – practices. For example, anecdotal evidence reveals a debt collection practice whereby a debtor’s credit card would be confiscated by the debt collection agency and then used to withdraw the owed amount, plus interest, directly from ATMs.¹⁸

A chart from the UPLC report (2008 and 2013) maps out the debt collection process:¹⁹

¹⁵ Source: Credit Bureau Monitor, yearly average calculated from quarterly report. <https://www.ncr.org.za/credit-bureau-monitoring-cbm>.

¹⁶ University of Pretoria Law Clinic ‘The incidence of and undesirable practices relating to “garnishee orders” – a follow up report.’ (2013) <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf> (last accessed 7.03.2017)

¹⁷ Source: TransUnion SA consumer Credit Index. <http://transunioninsights.co.za/CCI/files/TU-CCI-Report-Q4-2016.pdf?v=q42016>.

¹⁸ D James 2014 “‘Deeper into a hole?’ borrowing and lending in South Africa’ (2014) 55 Current anthropology 55 17.

¹⁹ University of Pretoria Law Clinic (note 9 above); and note 12 above.

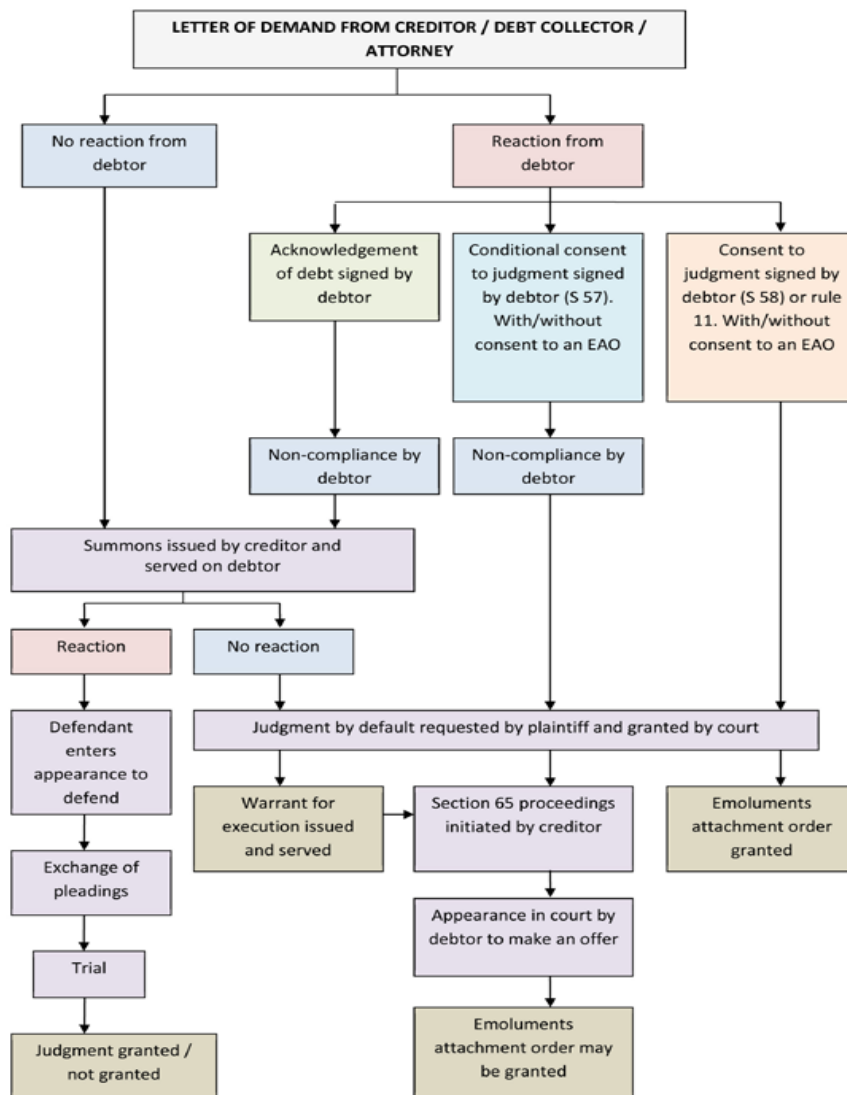


Figure 4: Debt Collection Process²⁰

Many have expressed concerns over the abuses in the debt collection processes, particularly in the unsecured lending sector (since these lending schemes are by definition lending without security and therefore pose higher risks for the lenders) and particularly with regard to the use of EAOs. According to Clark Gardner, the chief executive of *Summit* (a company that conducts EAO audits), 'it is difficult to estimate the number of EAOs in circulation, but there are close to three million'.²¹

Abuses of the EAO system, tend to take place 'outside the formal bank sector, [and are] used by retailers and other small lenders'.²² Part of the issue relates to the fact that debt collectors, as third parties to the debt contract, buy books of debts owed from larger lenders, and because they are, according to Leriba, 'free of the regulatory oversight faced by big banks and other registered lenders', they tend to use aggressive and threatening collection method, including the illegal usage of EAOs.²³ Moreover, this report notes that:

²⁰ Source: UPLC Report (note 12 above) 11.

²¹ A Arde 'Garnishee' challenge: hope to indebted. Business report' (2014) <http://www.ioi.co.za/business-report/garnishee-challenge-hope-to-indebted-1770527> (last accessed 7.03.2017).

²² Leriba The Risk of Unsecured Lending in South Africa (2013), <http://www.leriba.com/wp-content/uploads/2013/06/Leriba-unsecured-lending-Report.pdf> (last accessed 7.03.2017) 7.

²³ Ibid.

There is evidence that collectors have bribed clerks at magistrates courts to sign of the orders. These orders in many respects fail to meet the legal requirements for their issue, and often include grossly inflated collection fees and interest rates in violation of South Africa's *in duplum* rule which caps maximum loan exposures at 50%. Many collectors also ignore that any loan obligation proscribes after three years.

These abuses have often resulted in insufficient amounts of take-home cash and have contributed to civil service strikes, violent wage negotiations, as well as the Marikana tragedy of August 2012.²⁴ According to the same report:

Unsecured lending is one of the factors driving South Africa's often violent wage negotiations. Heavily indebted employees become desperate for increases with their take-home salaries because of repayment deductions. This is thought to be a major cause of strikes in the civil service. Some have also suggested it is one of the factors behind the violence at Marikana earlier this year that led to the fatal shooting of 34 mine workers by police.²⁵

Moreover, blacklisting defaulters may have also contributed to unemployment when potential employers undertake credit checks and discriminate against potential employees without a clear record.²⁶

1.3. The growth of the unsecured lending market in South Africa

Many have expressed concerns over the growth of the unsecured lending market in South Africa, therefore it is deemed necessary to examine the history of the growth of this market as well as to examine this market as a comparison to the other credit alternatives. As noted by Bond, South Africa's consumer debt originates within South Africa's historic inequalities, including issues regarding access to land and land restitution:

Underlying it all [indebtedness in South Africa] [...] was that poor people were unable to generate surpluses sufficient to make loan repayments, especially in rural areas: 'Unlike peasantries elsewhere in Africa, South Africa's rural poor lack access to basic means of production, such as land, because of unresolved issues of comprehensive settler dispossession. They live in crowded rural villages squeezed between commercial farmland (no longer exclusively white) and tourist- oriented game reserves.' Likewise, for urban residents, income-generating activity is 'constrained by South Africa's manufacturing and retail sectors, the most advanced in Africa, which relegate small-scale trading and manufacturing to the margins'. Displacing capitalism's crises into the credit sphere simply enhanced the contradictions over time.²⁷

According to Leriba,²⁸ the first major growth in the unsecured lending market in South Africa took place around mid-1990s; this was the time when small, short term loans (mostly microloans) were exempted from the Usury Act (which was repealed in 2005 after the passing of the National Credit

24 Note 18 above; and note 6 above.
25 Note 18 above, 8.
26 Note 18 above.
27 Note 6 above, 229-230.
28 Note 22 above

Act (NCA)). This exemption was, at the time, aimed at broadening financial access, particularly for those who were previously excluded from the formal banking sectors, notably, poor black Africans.

But the exemption also meant that these newly established products operated in a 'regulatory vacuum' until the establishment of the Micro Finance Regulatory Council in 1999.²⁹ Many of these microloans were targeted at civil servants and took advantage of the fact that payments could be directly deducted from government payrolls. In 2000, the government decided to end this allowance of direct deductions. However, together with the weakening Rand and interest rate hikes, it triggered spikes in defaults and the collapse of some micro-loan lenders (including small banks such as Unifer and Saambou), as well as caused a general erosion of confidence in bigger banks^{30,31}. Subsequently, the NCR was established with the NCA in order to regulate all lending in South Africa.

When the 2007 South African financial crisis subsided and the market confidence resumed in 2010, this sector underwent its second major growth. This expansion, according to various scholars,³² was driven by a number of factors, including: demand for more stringent borrowing criteria for other types of loans; lack of a savings culture but aspiration to 'satisfy the desire for what was felt necessary for a good life';³³ a greater formal employment sector with lenders moving into the market because of its higher profit margin; and the requirements of Basel III to reduce the maturity profile of lenders' asset mix.

Figure 5 below from the latest NCR's annual report (2015/2016) shows that while unsecured lending has increased from just over 10% of overall credit granted to peaking at close to 25% in 2012 (although has since dropped to under 20%), mortgage absorbed the largest proportion of all credit granted (although decreased from 50% to just over 30%) while secured lending has remained around 30%. It is important to note, however, that a large proportion of the unsecured loans are in fact consolidation loans which accounted for over 50% of the growth in unsecured loans in Q3 2011.³⁴

29 Note 22 above, 2.

30 For example, BoE was acquiesced at its height. African bank survived however.

31 Note 18 above.

32 Note 18 above; note 14 above; and S De Wet, I Botha, M Booysens 'Measuring the effect of the National credit Act on indebtedness in South Africa' (2015) 8 Journal of economic and financial sciences 1, 83.

33 Note 14 above, 17.

34 National Credit Regulator 'Research on the increase of unsecured personal loans in South Africa's credit market' (2012) <https://www.ncr.org.za/documents/pages/research-reports/aug12/UPL%20Report%2047%20Final.pdf> (last accessed 7.03.2017).

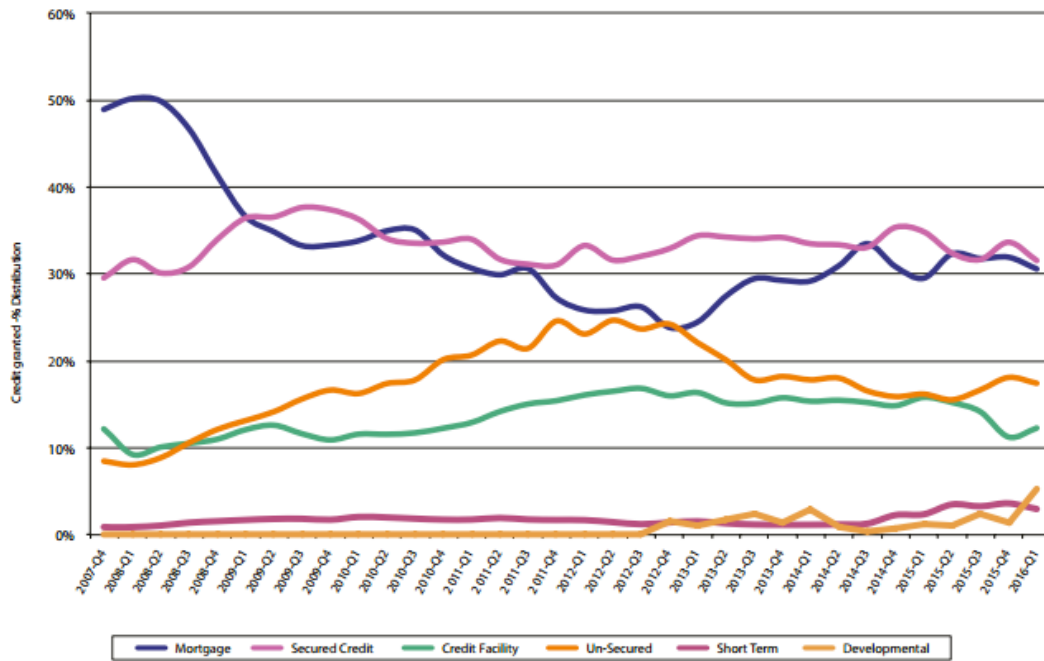


Figure 5: Credit granted: percentage of distribution³⁵

Besides expansion, both in terms of the rand value and repayment terms (R230,000 and 84 months as compared to 10,000 and 36 months before the small bank crisis), these unsecured loans have also shifted away from lower income consumers. As Figure 5 illustrates, the number of unsecured loans granted to those with low income (lower than R5,500) has dropped rather dramatically since 2008 (although still quite sizable and understandably more likely to be severely impacted by any financial shocks), while loans to all other income categories has increased, particularly for those whose salary is greater than R15,000. This is also consistent with the analysis conducted by James who demonstrates that ‘salary- or wage-earning consumers were most likely to be over-indebted’.³⁶

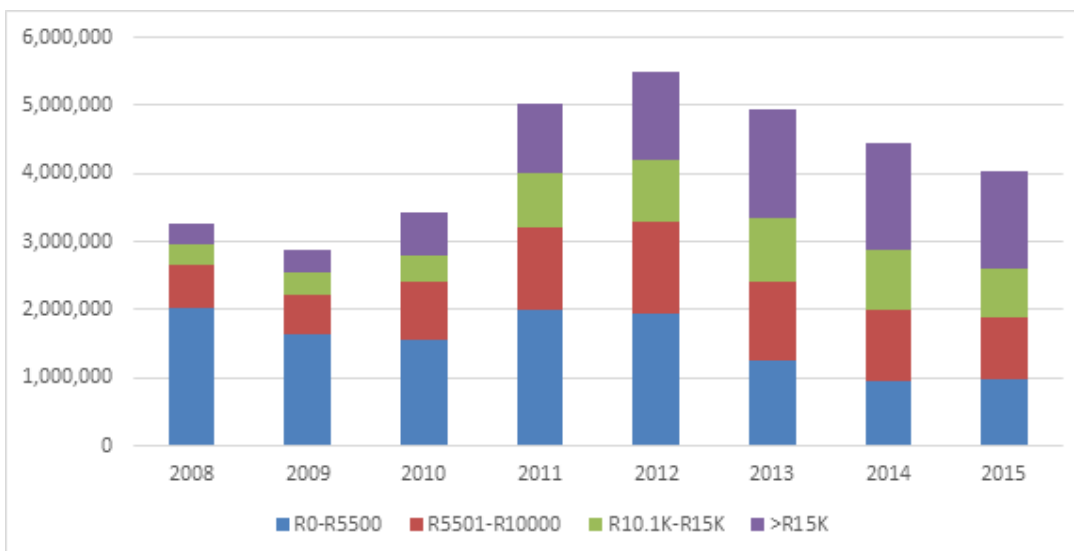


Figure 6: number of unsecured credit granted per income category, calculated from quarterly report³⁷

35 Source: National Credit Regulator Annual report, 2015/2016. <http://www.ncr.org.za/documents/pages/Annual%20Reports/NCR%20Annual%20Report%202015-16.pdf>

36 Note 14 above, 20.

37 Source: Consumer Credit Market Report. <https://www.ncr.org.za/consumer-credit-market-report-cemr>

Note: 2007 and 2016 are excluded because not all 4 quarters are reported in the available report.

Leriba also notes that the size of unsecured loans has also increased dramatically, possibly fuelled by increased wage overboard, greater affordability levels of the higher income borrowers, the growth of consolidation loans, as well as the practice that lenders tend to 'offer clients substantially more than the client actually wants in order to absorb their full capacity'.³⁸

According to Rees, the six commercial banks³⁹ command more than 80% of the unsecured credit market.⁴⁰ While ABSA made an explicit decision to reduce its involvement in this sector, the other 5 and most notably African bank and Capitec, have deliberately targeted the unsecured credit market because of its profitability. The market also consists of a number of other lenders. According to James, there are many NCA registered micro-lenders,⁴¹ as well as *Mashonisas* (informal credit provider)⁴² who remain largely unregistered.⁴³ There are also many other credit providers, such as insurers, retailers and specialist lenders.⁴⁴ The greater number and diversification of the lender profile, as Leriba notes, has led to 'increased competition for clients'.⁴⁵ However, Leriba further states that 'such competition has not led to significant price competition but rather to a "race to the bottom" in credit vetting criteria. In order to grow their book, many lenders will accept lower quality clients than their competitors'.⁴⁶

According to James, EAOs are mostly used by registered lenders (while *Mashonisas* typically apply the ATM card method mentioned above).⁴⁷ In the UPLC 2008 report on garnishee orders, they examined a subset of 4305 cases and explained the distribution of the usage of the garnishee orders among the industry as follows:

Table 1: Type of creditors and their frequencies⁴⁸

Creditor	Number of incidents per type	Total monthly instalment per type R	Average monthly instalment per type R	Percentage of total in number %	Percentage of total in monthly instalments %
Administrator	257	83 539.15	325.06	5.55%	9.01%
Maintenance	29	10 722.08	369.73	0.73%	10.25%
Bank	1 026	398 317.83	388.22	27.00%	10.76%
Micro lender	1 374	416 299.93	302.98	28.22%	8.40%
Medical	312	116 144.20	372.26	7.87%	10.32%
Retail	964	348 938.55	361.97	23.66%	10.03%
Levies	4	2 012.08	503.02	0.14%	13.94%
Services	78	25 375.97	325.33	1.72%	9.02%
School	237	64 357.86	271.55	4.36%	7.53%
University	24	9 298.03	387.42	0.63%	10.47%
Total	4 305	1 475 005.68	3 607.54	100%	100%

38 Note 22 above, 6.

39 The big four retail banks – First National Bank, Absa, Nedbank and Standard Bank, together with African bank and Capitec. Standard Bank's position is that it "recognizes that part of its corporate responsibility is to protect and uphold human rights in its operational practice and financing activities in line with the UN's Guiding Principles on Business and Human Rights." 14 p. 16 of UNGP shadow report

40 Note 8 above.

41 According to James, many are run by Afrikaans-speaking former civil servants investing their redundancy package. Note 14 above.

42 Mashonisa is the name given to the ubiquitous usurer in black South African townships; the isiZulu word means 'to impoverish' (or 'to sink'). Note 6 above.

43 Note 14 above.

44 Note 18 above.

45 Note 18 above, 6.

46 Note 18 above, 6.

47 Note 14 above.

48 Source: The UP law clinic report (2008)

The UPLC 2008 report also shows the percentage of employees in formal employment that have EAOs attached their salary as shown in Figure 7 below. It is clear from this figure that more public sector employees have garnishee orders and, within the private sector, the mining industry is the most affected.

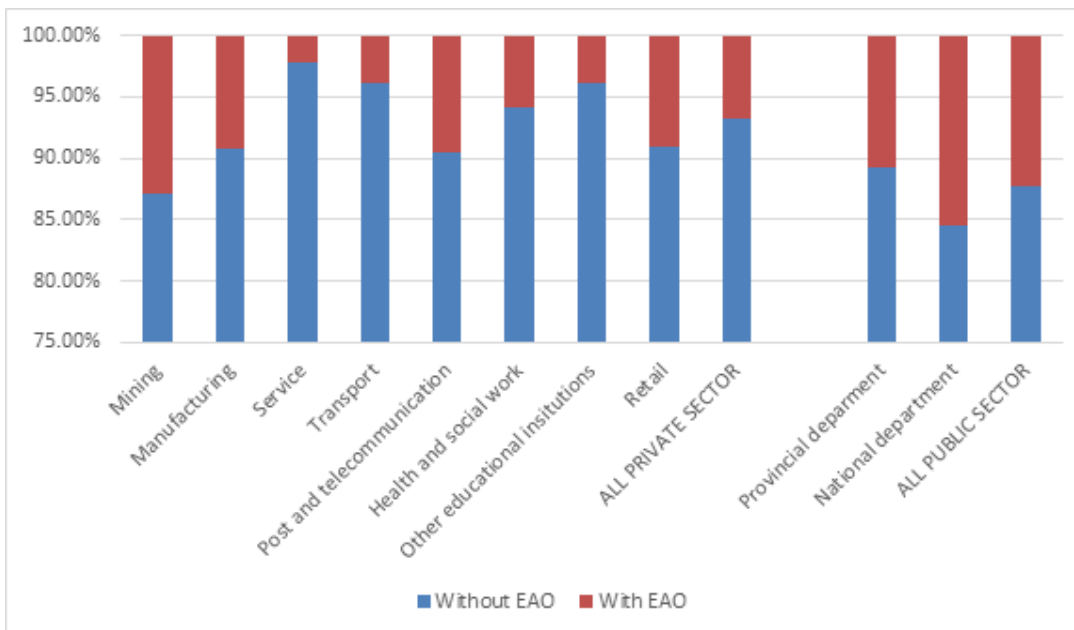


Figure 7: percentage of those with EAO and without⁴⁹

According to FinScope’s Financial Inclusion Survey (2016), the majority of South African adults have some type of financial account and that food and groceries remains the largest expenditure for all income levels.



Figure 8: Financial access.⁵⁰

49 Source: The UP law clinic report (2008)
50 Source: Finscope, 2016.

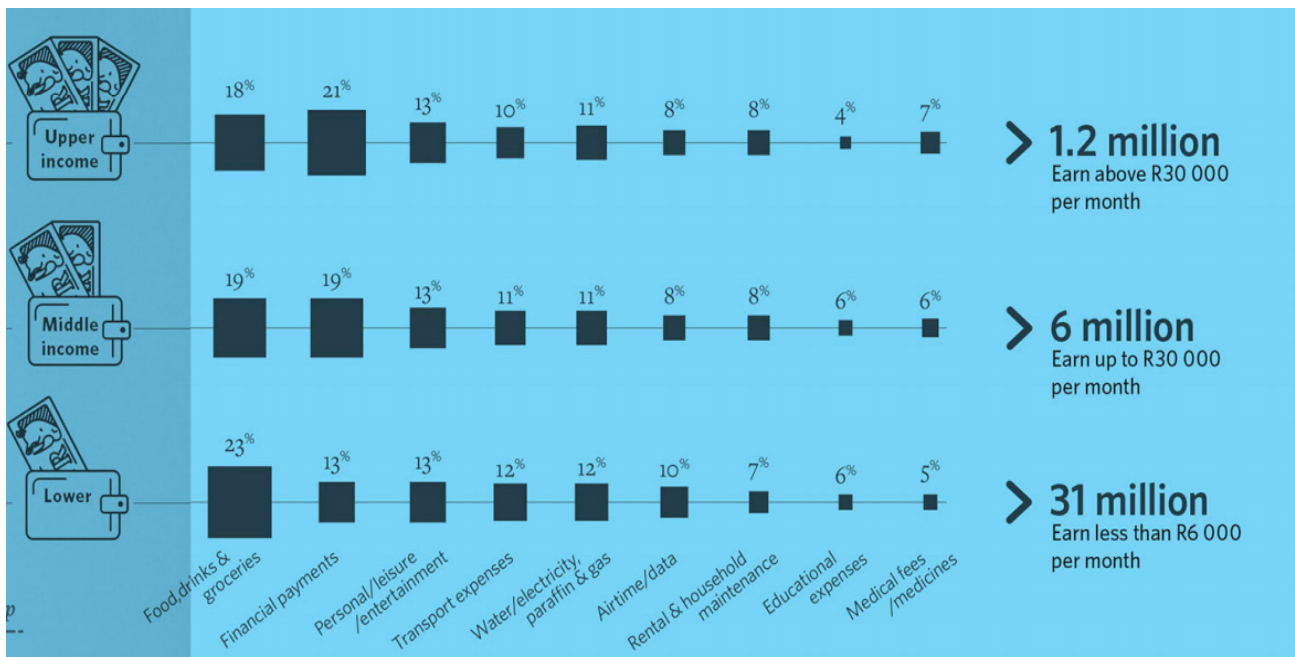


Figure 9: Expenditure.⁵¹

The same survey reports that around 50% respondents are borrowing from various sources to supplement their own resources, including from banking institutions (14%) and from non-bank formal credit providers (46%), and often in combination. This practice is confirmatory to James's anthropological investigation of the borrowing behaviour in South Africa, where he finds that many borrowers or 'those in need of banking facilities have long been aware of and have made use of them, commonly combining the use of formal banks for savings and transmission purposes with hire-purchase arrangements and informal money borrowing in order to pay for things in advance'.⁵²

The purpose of the loan agreement is generally not recorded in the loan agreements themselves.⁵³ However, the authors of the NCR unsecured loan report obtained data from 10 largest providers of unsecured loans (6 banks and 4 micro lenders) for Q3 2011 and concluded that a sizable loan goes to *building and renovations* (23%) and to debt consolidation (27%). Another source states that 'in 2009, studies show that 40% of money from micro financing was used to buy food and many borrowers get more loans to pay off old loans [...] There is a cycle among those struggling to meet monthly expenses to keep going to lenders or even racking up bigger loans due to an inability to fully settle the older loan [...] yet the industry is booming because often there is no other options for quick access to cash'.⁵⁴

⁵¹ Source: Finscope, 2016.

⁵² Note 14 above, 25.

⁵³ Note 30 above.

⁵⁴ Quoted in Bond (note 6 above) 227.

Figure 10 below shows that additional changes such as initiation fees and insurance charges also contribute to consumer indebtedness. Using NCR data, Leriba shows that only about 70% of the unsecured loan revenue is derived from the interest.⁵⁵

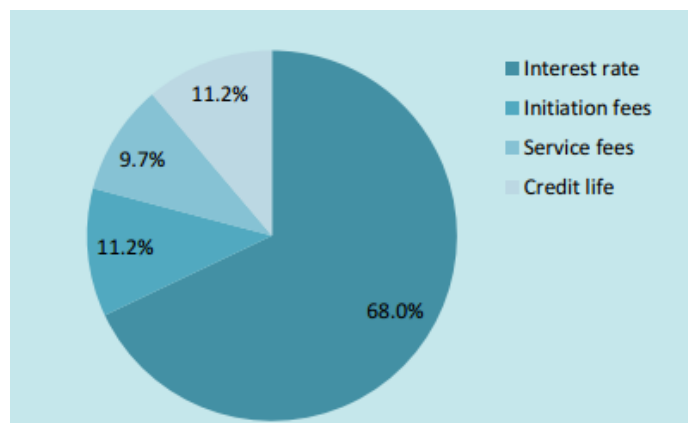


Figure 10: revenue from unsecured personal loans⁵⁶

Lastly, it has been noted that those receiving social grants are also subject to summary deductions for loan repayments. According to a report from the Studies on Poverty and Inequality Institute on the development of social security policy:

Another major problem [of the social grant system] is beneficiaries experiencing ‘unauthorized’ and ‘unlawful’ deductions of their grants, often in the form of micro-loans, which exceed the regulations as stipulated in the Social Assistance Act of 2004 that deductions for funeral schemes should not exceed 10% of the value of the grant. SASSA has made various efforts to curb the deductions of grants, notably the introduction of a new automated biometric based grant payment system. As of 1 June 2013, SASSA will only allow deductions of up to 10% of grant for funeral insurance policies, with SASSA taking no responsibility for the repayment of installments for micro-loans.⁵⁷

Although the report notes that SASSA capped deductions to 10% of the total grant amount in 2013, it is not clear whether this cap is adhered to in practice.⁵⁸ Moreover, given that social grants fall way below the amount needed to cover basic household income, even a deduction of 10% can be detrimental.

Against this background, this paper turns to examine in detail the legal framework regulating debt and debt collection in South Africa, as well as the nationally and internationally established human rights norms which are implicated therein.

⁵⁵ Note 18 above.

⁵⁶ Source: Leriba, 2013, using NCR data.

⁵⁷ Studies in Poverty and Inequality Institute A Review of the Development of Social Security Policy in South Africa (2013) http://spii.org.za/wp-content/uploads/2014/01/Working-Paper-6_Social-Security-policy-review.pdf (last accessed 13.03.2017) 39.

⁵⁸ E Torkelson ‘Deductions from Social Grants: How It All Works’ (2017) <http://www.groundup.org.za/article/deductions-social-grants-how-it-works/> (last accessed 13.03.2017).

CHAPTER THREE:

DOMESTICATING THE RUGGIE PRINCIPLES ON BUSINESS AND HUMAN RIGHTS – ASSESSING THE REGULATORY FRAMEWORK ON DEBT IN SOUTH AFRICA

Introduction

The issue of unsecured lending and indebtedness is a complex legal issue which impacts upon a broad range of human rights, which will be discussed in further detail in Chapter 4 below. It is also an issue which involves a range of stakeholders, both state and non-state. Such stakeholders include: banks and financial institutions which lend money; industry regulatory bodies, such as the NCR; debt collectors and debt collection agencies; as well as the courts and the justice system itself, as was evident in the matter of *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others*. Given these dynamics, the report draws on the *Ruggie Principles* – as the internationally developed and agreed upon standard for business and human rights – as a tool against which to benchmark the regulatory framework on debt in South Africa. Within this domestic framework, two pieces of draft legislation will be considered, given their proximity to the issues of indebtedness being discussed here: that is, the DCAB and CLAB. It is also important to note the *Ruggie Principles* are particularly relevant to the South African context where the horizontal application of rights is provided under Section 8 of the Constitution. This section provides that:

- (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

This provision of the Constitution is in line with the standards set out in the Ruggie Principles, particularly with regard to the fact that private companies must respect human rights within their respective spheres of influence. In light of the above, the chapter then begins by providing an overview of the Ruggie Principles, before moving on to discuss the national regulatory framework on debt in South Africa.

1. The Ruggie Principles

In 2005 Professor John Ruggie was appointed by the United Nations Human Rights Council (UNHRC) as the special representative on the issue of business and human rights. As a result of this appointment Ruggie developed the *Guiding Principles on Business and Human Rights for Implementing the UN “Protect, Respect and Remedy” Framework (Ruggie Principles)*, which was endorsed by the UNHRC in 2011.⁵⁹ Although the *Ruggie Principles* offer only a soft-law mechanism, meaning the principles are only recommendatory and not binding in nature, they have been cited globally as the internationally accepted standard for business and human rights.

The *Ruggie Principles* are structured upon the three pillar framework of “protect, respect and remedy”, as follows, below. In addition, the *Ruggie Principles* highlight that when implementing these principles, ‘particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized, and with due regard to the different risks that may be faced by women’.⁶⁰

1.1. Pillar 1: The State Duty to Protect Human Rights

Recognising the fundamental role of the state in *protecting* human rights, the *Ruggie Principles* provide that states must take steps to prevent, investigate, punish and redress human rights abuses. The *Ruggie Principles* note that the state duty to protect human rights can be realised through implementing policies, legislation, regulation and adjudication to regulate corporate activity. Moreover, part of the role of the state as set out in the *Ruggie Principles* is to assist private actors in understanding the human rights impact of their activities, including by offering incentives for self-reporting.⁶¹ The commentary for Principle 3 of the *Ruggie Principles* highlights that states must provide guidance to business companies on how to respect human rights, including by providing advice through law and policy on:

59 S Liebenberg ‘The Potential of the ICESCR as a Tool for Poverty Reduction in South Africa’ (2014) 15 *ESR Review* 3, 4.

60 Office of the High Commissioner for Human Rights *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (2011)

61 *Ibid.*, 6.

Appropriate methods, including human rights due diligence, and how to consider effectively issues of gender, vulnerability and/or marginalization, recognizing the specific challenges that may be faced by indigenous people, women, national or ethnic minorities, religious and linguistic minorities, children, persons with disabilities, and migrant workers and their families.⁶²

Within the scope of the role of the state, the *Ruggie Principles* also note the importance of national human rights institutions (NHRIs), such as the SAHRC:

National human rights institutions that comply with the Paris Principles have an important role to play in helping States identify whether relevant laws are aligned with their human rights obligations and are being effectively enforced, and in providing guidance on human rights also to business enterprises and other non-State actors.⁶³

It is in this respect that the laws and legislative developments on debt in South Africa are being analysed below.

1.2. Pillar 2: The Corporate Responsibility to Respect Human Rights

Noting that businesses of any size hold the potential to adversely impact upon the enjoyment and realisation of human rights, through both their direct activities, and through their subsidiaries and supply chains, the *Ruggie Principles* provide a normative framework for the corporate responsibility to respect human rights. The *Ruggie Principles* highlight how businesses can enact policies and processes appropriate for handling human rights violations, and for measuring the human rights impacts of their activities.

The importance of the fact that these principles apply to all private actors regardless of size cannot be understated, and has a particular relevance to the context discuss here where small debt collection agencies and finance providers are participating in reckless lending schemes and debt collection practices. The commentary on the *Ruggie Principles* notes this as follows:

Small and medium-sized enterprises may have less capacity as well as more informal processes and management structures than larger companies, so their respective policies and processes will take on different forms. But some small and medium-sized enterprises can have severe human rights impacts, which will require corresponding measures regardless of their size. Severity of impacts will be judged by their scale, scope and irremediable character. The means through which a business enterprise meets its responsibility to respect human rights may also vary depending on whether, and the extent to which, it conducts business through a corporate group or individually. However, the responsibility to respect human rights applies fully and equally to all business enterprises.⁶⁴

Businesses are thus required to conduct an assessment of the human rights impact of their business activities, as detailed in the commentary under Principle 18 of the *Ruggie Principles*:

62 Note 56 above, 5-6.
63 Note 56 above, 6.
64 Note 56 above, 15.

The initial step in conducting human rights due diligence is to identify and assess the nature of the actual and potential adverse human rights impacts which a business enterprise may be involved. The purpose is to understand the specific impacts on specific people, given a specific context of operations. Typically this includes assessing the human rights context prior to a proposed business activity, where possible; identifying who may be affected; cataloguing the relevant human rights standards and issues; and projecting how the proposed activity and associated business relationships could have adverse human rights impacts on those identified. In this process, business enterprises should pay special attention to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization, and bear in mind the different risks that may be faced by women and men.⁶⁵

Of additional importance is the leverage a particular business enterprise holds to enact change within their sphere of influence. Within the Ruggie Principles “leverage” is defined as follows: ‘[l]everage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm’.⁶⁶ This then extends to the other actors within the supply chain of a business. Lastly, the Ruggie Principles highlight under Pillar 2 that ‘the responsibility to respect human rights requires that business enterprises have in place policies and processes through which they can both know and show that they respect human rights in practice’.⁶⁷

1.3. Pillar 3: Access to Remedy

The *Ruggie Principles* highlight the importance of effective remedies and redress for where human rights violations occur. This responsibility is beholden upon both states and businesses to ensure that access to redress and remedy, both judicial and non-judicial, is available. The *Ruggie Principles* encourage that these mechanisms are developed through stakeholder engagement, and are made accessible to all who may be affected by business activities and fall within the business’s sphere of influence. Moreover the *Ruggie Principles* state that ‘ensuring access to remedy for business-related human rights abuses requires also that States facilitate public awareness and understanding of these mechanisms, how they can be accessed, and any support (financial or expert) for doing so’.⁶⁸

It is important to note that the Ruggie Principles highlight the role of NHRIs in providing a non-judicial mechanism for redress. In particular, the Ruggie Principles demonstrate the need for ‘mediation-based, adjudicative or [...] other culturally appropriate and rights-compatible processes’ for remediation, which an NHRI can itself fulfil.⁶⁹

65 Note 56 above, 19-20.
66 Note 56 above, 21.
67 Note 56 above, 24.
68 Note 56 above, 28.
69 Note 56 above, 30.

2. National framework on unsecured lending and EAOs

The issue of unsecured lending and EAOs in South Africa is largely governed by the National Credit Act (NCA) and the Magistrates' Court Act (MCA). In addition to the NCA and MCA, discussed below, the following laws also have some overlapping relevance:

- Basic Conditions of Employment Act, 1997 (as amended);
- Protection of Personal Information Act 4 of 2013;
- Public Finance Management Act 1 of 1999;
- Maintenance Act 99 of 1998;
- Children's Act 38 of 2008;
- Income Tax Act 58 of 1962;
- Debt Collectors Act 1998;
- Insolvency Act 36 of 1924;
- Consumer Protection Act 68 of 2008;
- Treasury Regulations, 2001; and
- Financial Advisory and Intermediary Services Act 37 of 2002.

According to the *Ruggie Principles*, the state has a particular role to play under its protection mandate to ensure that laws and policies are developed and implemented in line with international commitments on human rights. The principles state that, 'States may breach their international human rights law obligations where such abuse [business related human rights abuse] can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse'.⁷⁰ And further, that 'States also have the duty to protect and promote the rule of law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency'.⁷¹ Moreover, the *Ruggie Principles* state that 'it is equally important for States to review whether these laws [which regulate business activities] provide the necessary coverage in light of evolving circumstances and whether, together with relevant policies, they provide an environment conducive to business respect for human rights'.⁷²

It is thus in light of this responsibility incumbent on states that the following review of the laws and regulation governing debt in South Africa is being reviewed.

70 Note 56 above, 3.
71 Note 56 above, 3.
72 Note 56 above, 5.

2.1.1. Magistrates' Court Act

The MCA provides the attachment of stop-orders to employee wages. Section 61 of the MCA describes "emoluments" as:

- (i) salary, wages or any other form of remuneration; and
- (ii) any allowances, whether expressed in money or not.

EAOs are provided under section 65J, conferring the creditor with the authority to receive money owed from an order placed on the debtors' wages or salary. The employer of the debtor is then responsible for providing the debtor (or the debtor's representative, such an attorney or debt collector) with monies owed by summarily deducting this money from the employee's wages.

In comparison, a garnishee order denotes the attachment of a debt owed to a third party to an employee, typically a once-off debt.

The 2013 report of the University of Pretoria Law Clinic notes the difference between an EAO and a garnishee order thus:

An emoluments attachment order is a court order in terms of which the employer is obliged to deduct monthly instalments from the salary of the employee against whom the emoluments attachment order was issued. On the court order the employer who administers the emoluments attachment order is referred to as the 'garnishee employer' which may be the reason for the confusion about the terminology.

The following table provides further clarification:

GARNISHEE ORDER	EMOLUMENTS ATTACHMENT ORDER
A third party is the garnishee	The judgment debtor's employer is the garnishee
Method through which debt is attached	Forms part of procedure for collection of debt
In terms of section 72 and rule 47	In terms of section 65J and rule 46
Served on the garnishee and the debtor	Served only on the garnishee

Table 2: Comparison of "garnishee order" and "emolument attachment order"⁷³

Part of the issue with regard to EAOs was that they were being served by a clerk of the magistrates' court on employees who were employed outside of the jurisdiction of the issuing court. Moreover, employees may be subject to multiple EAOs, with no cap on how much of their salary could be subject to deductions. The Public Finance Management Act provides under regulation 23.3.6. for a 40% cap on EAOs of public sector employees, there is currently no cap on the amount that can be deducted from private sector employees. In short, this practice is inconsistent with Pillar 3 of the *Ruggie Principles* which provide that 'effective judicial mechanisms are at the core of ensuring access to remedy. Their ability to address business-related human rights abuses depends on their impartiality, integrity and ability to accord due process'.⁷⁴

⁷³ Table taken from University of Pretoria Law Clinic Report, 2013.
⁷⁴ Note 56 above, 28.

2.1.1.1. Court of Law Amendment Bill

In 2016, the Court of Law Amendment Bill was introduced in Parliament ('the Amendment Bill'). The Amendment Bill seeks to make substantial changes to section 65J of the Magistrates' Court Act in order to regulate abuses to the EAO system, which clearly demonstrate an absence of 'impartiality, integrity and ability to accord due process'.⁷⁵ In particular, the Amendment Bill provides: that EAOs can only be issued from the court in which the judgment debtor resides, carries on business or is employed, and only with the authorisation of the court; there is a cap of 25% for an EAO which may be placed on the debtor's salary; for a preliminary procedure be introduced to give notice to debtors that an EAO will be placed on their salary, and introduces an appeal by way of a notice of intention to oppose the attachment of an EAO; the establishment of monthly statements to employer (garnishee) and employee (debtor) setting out payments made and balance owed; that an employer must notify the creditor if he/she has reason to believe that the debtor does not have sufficient means for themselves and their dependents, such that the matter may be set down for hearing; and an employer will be liable to repay the debtor if they do not deduct the instalments timeously or fail to stop deductions once the debt has been repaid.

In particular, the issue of capping must be addressed. From a comparative perspective, Rwanda allows only 1/3 of salary to be subjected to attachment; in Botswana, the final order EAO can be opposed if the debtor can prove that the attachment will leave him without sufficient means to maintain himself and those dependents; and in some other developing countries (eg, Czech Republic and Slovakia, for example), a fixed minimum proportion of the wage is declared immune from the attachment (UPLC 2008). Fair remuneration, as will be discussed below, constitutes a human right under the international human rights system to which South Africa is a party. As such, the South African state must ensure this right is protected by addressing the issue of capping.

At the time of writing the Amendment Bill is currently still before the National Assembly and has not yet been passed into law. The SAHRC made a submission to the Portfolio Committee on Justice and Correctional Services in support of the Amendment Bill. Moreover, the Amendment Bill is in line with judgement handed down by the Constitutional Court in September 2016 which decreed that certain clauses of section 65J of the Magistrates' Court Act are unconstitutional, particularly insofar as an EAO could be sanctioned by a clerk of the court without judicial oversight. As a prospective measure of redress, the Constitutional Court declared that from September 2016 no EAOs may be authorised without judicial oversight, and particularly, without the court being satisfied that the EAO is just and equitable.⁷⁶

2.1.2. National Credit Act

The NCA was passed in 2005 to, amongst others, repeal the Usury Act (of 1968), promote equitable access to consumer credit, prohibit unfair and reckless credit practices, to regulate over-indebtedness through debt counselling and debt re-organisation, to establish norms and standards for consumer credit, and also to establish the National Credit Regulator (NRC) and National Consumer Tribunal.

⁷⁵ Note 56 above, 28.

⁷⁶ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* (CCT127/15) [2016] ZACC 32; 2016 (6) SA 596 (CC); (2016) 37 ILJ 2730 (CC); 2016 (12) BCLR 1535 (CC).

The NCA provides a definition of what constitutes a credit agreement as well as what constitutes over-indebtedness. According to section 79 of the NCA, over-indebtedness is defined as follows:

A consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party.

The main debt relief mechanism established by the NCA is debt-counselling, under section 86. However, as noted in a recent report by the National Credit Regulator, given the 'high costs associated with debt counselling, this mechanism is not accessible to the poor'.⁷⁷

Sections 129-130 of the NCA set out two enforcement procedures for credit agreements. Under section 129 a letter of demand can be sent to defaulting debtors to notify them of their rights in terms of the Act, including their right to debt-counselling, and to tribunals where credit disputes

may be resolved. Section 130 of the NCA sets out the pre-enforcement procedures, which includes that a credit provider can only approach the court to enforce a credit agreement when the debtor has been in default for at least 20 business days, and at least 10 business days have passed since issuing a letter of demand, as per section 129.

The NCA further established the NRC which was set up to:

promote a fair and non-discriminatory market place for access of consumer credit provides for the general regulation of consumer credit and improved standards of consumer information, promotes black economic empowerment and ownership within the consumer credit industry, prohibits certain unfair credit and credit-marketing practices, promotes responsible credit granting and use, and for that purpose to prohibit reckless credit granting, provides for debt re-organisation in cases of over-indebtedness, regulates credit information, provides for registration of credit bureau, credit providers and debt counseling services, establishes national norms and standards relating to consumer credit, promotes a consistent enforcement framework relating to consumer credit.⁷⁸

The NRC constitutes a mechanism for remedy and redress as articulated under Pillar 3 of the Ruggie Principles.

2.1.3. Draft Debt Collectors Amendment Bill

The Draft Debt Collectors Amendment Bill (DCAB) was introduced in Parliament in 2016, and has not yet been passed into law. The DCAB, which seeks to amend the Debt Collectors Act of 1998, notes the following in its Preamble:

- recent court cases and media reports have highlighted the flagrant abuses prevalent in the collection of debts;

⁷⁷ National Credit Regulator 'The Feasibility of a Debt Forgiveness Programme in South Africa' (2015) https://www.thedti.gov.za/parliament/2016/Debt_Forgiveness_Report.pdf (last accessed 7.03.2017) 4.

⁷⁸ Department of Trade and Industry Webpage: <https://www.thedti.gov.za/agencies/ncr.jsp>.

- the victims of these abuses in the collection of debts are mostly the poorest and most vulnerable members of society;
- the existing legislative framework would seem to be inadequate in ensuring that debts are recovered in a fair and efficient manner where there is proper control and oversight; and
- there is a disparity in the tariffs charged by debt collectors and attorneys doing debt collection.

Despite these telling concerns raised in the Preamble, the DCAB has been met with some concern, particularly with regard to the fact that it may cause all attorneys to be governed by the body responsible for debt collectors. According to Sean Barrat (2016): 'This means that attorneys, who are not registered as debt collectors, will effectively be prevented from engaging in litigation in respect of money owed. This is clearly a far-reaching consequence that was never intended.'

Moreover, given the well-documented abuses taking place within debt collection systems, the DCAB marks an opportunity for the State to enact its protection mandate and develop laws which encourage private actors to respect human rights in line with the *Ruggie Principles*. In order to bring the DCAB in line with the *Ruggie Principles*, it would need to ensure that debt collection agencies adhere to the following:

- In addition to the Council for Debt Collectors, which constitutes an external complaints mechanism for individuals aggrieved by a debt collection process, debt collection agencies should develop internal complaints mechanisms for redress and remedy.
- Debt collection agencies should be encouraged to develop a human rights policy and due diligence process to guide business activities from a human rights based approach, taking into account the vulnerabilities of the poor to indebtedness.
- Debt collection agencies should be encouraged to report to the Council for Debt Collectors on measures taken to address adverse human rights impacts of their activities.

CHAPTER FOUR:

THE HUMAN RIGHTS IMPLICATIONS OF INDEBTEDNESS AND DEBT COLLECTION

Introduction

In 2004, the Department of Trade and Industry (DTI) released a report entitled 'Making Credit Markets Work'. This report noted that:

There is a considerable imbalance of power between consumers and credit providers, consumer education levels are frequently low, consumers are poorly informed about their rights and unable to enforce such rights through either negotiation or legal action. Commission-driven agents, deceptive marketing practices and weak disclosure can easily cause consumers to enter into unaffordable credit contracts.

And further,

It is quite easy for credit to lead to financial hardship and destroy a household's wealth. Taking on extra loans in order to pay back existing loans can lead people into a debt spiral out of which it may be difficult to escape. Over-indebtedness has a negative impact on families and has in some extreme cases even led to family suicides. Over-indebtedness further has an impact upon the workplace, can lead to de-motivation, absenteeism and even a propensity to commit theft.

The report highlights a number of the key human rights concerns arising from the South African credit culture. On the one hand, the report reveals: a power imbalance between consumers and credit providers; a lack of information provided to consumers; a lack of awareness by consumers of their rights, with a corresponding lack of enforcement of rights; and consumers tied to unfair and burdensome credit contracts. On the other hand, the report points to the broader socio-economic impact of credit agreements, including: financial hardship and loss of wealth and savings; debt spiralling; as well as psychological and psycho-social suffering.

According to Ondersma, who, as noted above, has conducted extensive research into human rights and indebtedness (although focused mainly on the U.S. experience), the main impact of over-indebtedness is 'shame, marginalization, exclusion and the inability to meet [...] basic needs'.⁷⁹ She notes that, in particular, the following human rights may be impacted: adequate standard of living,

⁷⁹ Note 11 above, 272.

rights to healthcare, right to work and 'favourable' remuneration, prohibition on incarcerations for failure to pay debt, prohibition on debt peonage, discrimination, privacy and human dignity. While in South Africa, incarceration for failure to pay debt is outlawed, the other rights listed can be impacted by indebtedness and exploitations within the EAO system, as will be explored below. Although the section below is structured thematically according to rights, it is important to note that human rights dynamically intertwine and overlap, and are rarely impacted in isolation of other rights. Moreover, while the rights examined here are by no means exhaustive, and noting that people experience debt and violations to their human rights in ways that are differential and circumstantial, this chapter notes in particular that indebtedness and abusive debt collection practices may impact upon the following rights: the right to human dignity, the right to privacy, socio-economic rights broadly, the right to work and to fair remuneration, the right to non-discrimination, the right of access to information, and the right of access to justice (which includes here the right of access to courts).

1. Socio-economic rights

A number of socio-economic rights are both directly and indirectly impacted by indebtedness and unsecured lending practices, as discussed in detail below. The ICESCR constitutes the main international human rights instrument for social and economic rights. In particular, it provides for: the rights to work (Articles 6 and 7, and discussed in detail in the proceeding section); the right to social security (9); the right to an adequate standard of living (Article 11), which includes 'adequate food, clothing and housing, and to the continuous improvement of living conditions'; the right to the 'enjoyment of the highest attainable standard of physical and mental health' (Article 12); and the right to education (Article 13). Moreover, the General Comments of the ICESCR – particularly General Comment 12 and General Comment 14 on Right to Adequate Food and Right to Highest Attainable Standard of Health, respectively – note that the private sector too bear responsibilities in ensuring that individuals enjoy an adequate standard of living.

The African system similarly recognises the right to the highest attainable physical and mental health (Article 16) and the right to education (Article 17). The *Women's Protocol* provides more extensive protection for socio-economic rights, including: Article 13, which provides for Economic and Social Welfare Rights; Article 15 which provides for Food Security; and Article 16 which provides for the Right to Adequate Housing.

However, the South African Constitution provides the most far-reaching legal guarantee of socio-economic rights. Of relevance here are the labour rights protected under section 23 (discussed further below); as well as the right to adequate housing, as provided under section 26; the right to education, provided under section 29; and the rights contained in section 27, as follows:

Health care, food, water and social security 27.

- (1) Everyone has the right to have access to—
 - (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

South Africa's extensive protection of socio-economic rights is part and parcel of the *transformative* vision of its Constitution to address the stark inequalities of the past.⁸⁰ Yet, like the protection of socio-economic rights in international law, the socio-economic rights contained within the South African Constitution are subject to progressive realisation.

Ondersma, too, notes how human dignity can be impacted when one is unable – due to default payments on one's salary – to provide for the basic needs of one's family and dependents.⁸¹ Indeed, where individuals are burdened by debt and subject to punitive garnishment orders on their income, they may have little disposable income left to cover their basic needs, as well as the needs of their families and dependents. Such basic needs include: food, water, electricity, housing, transport, medical care, clothing, and children's education. Indeed, a study has demonstrated that unsecured loans are 'most often driven by a basic set of needs, such as the need to get food on the table every day, deal with illness, pay school fees'.⁸² Crippled by debt, people are rendered vulnerable to human rights violations such as a lack of access to food, water, education, and housing.

It is troubling that – as Patrick Bond notes in mapping the historical development of credit loaning in South Africa – credit is often taken to pay for basic household needs, such as food:

The confluence of money, power, space and scale is most poignantly witnessed in the predatory microcredit system that emerged during South Africa's financial deregulation, starting in the early 1990s. The financialisation era saw not only a dramatic rise in financial activity within the formal economy. In addition, what had traditionally been informal loan-shark activity in townships and workplaces was codified by microfinance non-governmental organisations (NGOs), soaring unsecured loans from formal banks (whose usury ceiling on interest rate levels was conveniently lifted for loans of less than \$1800 in value in 1992), and widespread use of garnishee stop-order repayment. Much of the lending was for desperation purposes, with 40 per cent used to buy food in 2009.⁸³

What is thus created is an endless cycle of debt, where one is forced to take out further loans in order to cover the basic needs of their households which they are unable to themselves cover due

80 CR Sustain 'Social and economic rights? Lessons from South Africa' (2001) *University of Chicago Working Paper 12*.

81 Note 11 above, 305.

82 R Rom 'The Impact of Unsecured Lending on the Financial Wellbeing of Consumers' (2013) University of Pretoria dissertation, 9.

83 Note 6 above, 226-7.

to debt repayments. Moreover, it is clear that this is an issue that is most severely felt by those living in poverty. Yet, in its current form, the debt market and debt collection in South Africa has made it near to impossible for the poor and indigent to lift themselves out of poverty. Indeed, as Bond notes, it is an issue which particularly affects the poor, and which is borne out of the inherent inequalities and power imbalances of South Africa's financial sector.

In addition, it has been noted that indebtedness and punitive debt collection practices can severely impact upon an individual's health. Ondersma has noted that:

The health problems that have been linked to overindebtedness include both psychological and physical trauma. Studies have consistently found evidence that debt burdens can lead to anxiety, depression, and social withdrawal. Suffering from debt loads can even lead to physical illness, including sleep deprivation, lack of concentration, indigestion, heart problems, nerve problems, and even suicide.⁸⁴

Indeed, as Porter notes, 'the problem of excessive debt is not that it reduces wealth per se but that it harms people's capacity for well-being'.⁸⁵ Yet, not only does impaired physical and mental health affect one's wellbeing, but it also, in turn, affects the well-being of one's family and dependents.

2. Labour and remuneration rights

Unsecured lending and indebtedness implicate labour and remuneration rights in a myriad of ways. Article 23(3) of the UDHR provides that,

Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.⁸⁶

Article 23(3) of the UDHR is expanded under Articles 6 and 7 of the ICESCR.⁸⁷ Article 6 provides for the right to work and calls upon States Parties to take steps to ensure the full realisation of this right. Article 7(a) details that,

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

84 Note 11 above, 301.

85 K Porter 'The Damage of Debt' (2012) 69 *Washington and Lee Law Review* 1004.

86 UDHR.

87 H Hannum 'The UDHR in National and International Law' (1998) 3 *Health and Human Rights* 144.

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant.⁸⁸

In addition, the Committee on Economic, Social and Cultural Rights issued General Comment 18 in 2005, which provides guidance on the interpretation of Articles 6 and 7. The General Comment highlights the key relationship between work and human dignity, stating that it is 'essential for realizing other human rights and forms an inseparable and inherent part of human dignity'.⁸⁹ Further, in defining 'decent work', the General Comment states that it must 'provide an income allowing workers to support themselves and their families'.⁹⁰

Although South Africa signed the ICESCR in 1994, it was only ratified in 2015. As noted by Sandra Liebenberg, the ratification of this treaty has the potential to make a significant impact insofar as it provides for the right to work – a right which is not enshrined in the South African Constitution:

The right to work is one of the most neglected socioeconomic rights. By acceding to the Covenant, South Africa is afforded the opportunity to view employment and livelihood creation through a rights-based perspective and to draw on the resources and experience available through the Covenant and its supervisory body, the CESCR, to develop this central right in the struggle against poverty and inequality.⁹¹

Indeed, the right to work is essential for combatting poverty in view of the fact that it generates income. Where a worker is arbitrarily denied their income or a part thereof, s/he is left vulnerable to poverty and other human rights violations, including lack of access to food, housing and education.

In addition, the ACHPR provides for the right to work (Article 15). Moreover, also of relevance is the International Labor Organization (ILO) Covenant on the Protection of Wages. Although South Africa has not ratified this Covenant, it states that deduction of wages can only be done through national law.

In the matter of *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others*, Judge Desai lays out the correlation between human dignity and one's income, stating:

For debtors who work in low paid and vulnerable occupations, their salaries or wages are invariably their only asset and means of survival. A substantial reduction of this asset has the potential of reducing human dignity. The State, if it is a party to the grant of the EAO, has the duty to refrain from conduct which results in the debtor being left impoverished or facing a life of "humiliation and degradation" (See: *Minister of Home Affairs and Others v Watchenuka and Another* 2004(4) SA326 paras 27 – 32). The ability of people to earn an income and support themselves and their families is central to the right to human dignity (See: Section 10 of the Constitution). Any court order or legislation which deprives a person of their means of support or impairs the ability of people to access their socio-economic rights constitutes a limitation of their right to dignity.⁹²

88 ICESCR.

89 Committee on Economic, Social and Cultural Rights, General Comment No. 18 (2005) E/C.12/GC/18, paragraph 1.

90 As above, paragraph 7.

91 Note 59 above, 4.

92 *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others*, para. 50.

Judge Desai echoes the international standards, as outlined in the section above, which note the correlation between dignity and just and favourable remuneration. Indicative of all human rights, the right to human dignity is inextricably bound to the enjoyment and realisation of other rights, and is thus broadly implicated in the human rights concerns of indebtedness and abusive debt collection practices, including privacy, as discussed above.

Yet, in addition to violating one's right to inherent human dignity, EAOs also directly infringe upon one's right to work and receive fair remuneration. According to Schraten 'an over-indebted citizen not only has lost the possibility to participate in the wealth of the country, he also has lost incentives to strive of work effort or legal integrity because his earning will be seized by a creditor and his signature is not trusted as act of faith anymore.'⁹³ In its extreme, this amounts to indirect debt peonage, where individuals work only to pay off debt. In a country riddled with high levels of unemployment, it is indeed worrying that so many in employment are unable to fully reap its rewards.

Moreover, as Leriba notes, over-indebtedness may also interfere with one's right to seek employment where defaulters are black listed and potential employers undertake credit checks.⁹⁴ According to the report of Leriba Consulting:

There is also a view in some political circles that unsecured lending and the black listing of defaulters contributes to unemployment because potential employers undertake credit checks. This seems to suggest irrational behaviour on the part of employers. This is cited as one reason for a credit amnesty currently being proposed which will see credit bureaus being forced to delete the adverse credit information they hold about certain categories of borrowers.⁹⁵

The right to receive fair remuneration also directly impacts upon other rights, including the right to an adequate standard of living and socio-economic rights, as discussed below, and also the rights of children, where parents or guardians are unable to meet a child's basic needs because of default judgements against their salaries, or even where household indebtedness causes anxiety and depression, and affects the wellbeing of the child.

93 J Schraten 'Managing a consumer debt crisis' Paper presented at "Towards Cargenie III" conference held at UCT 2012, Sep 3-7. http://carnegie3.org.za/docs/papers/238_Schraten_Managing%20a%20consumer%20debt%20crisis.pdf (last accessed 7.03.2017).

94 Note 22 above.

95 Note 22 above, 8.

3. Right to privacy and right to dignity

In particular, the right to privacy can be impacted when predatory debt collection practices are used. In international human rights law, the right to privacy is protected under the UDHR and the ICCPR. Under Article 12, the UDHR provides that:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

The ICCPR follows similar wording in protecting the right to privacy under Article 17.

Under the African human rights system, the right to privacy is not granted under either the ACHPR or the Women's Protocol. It is, however, provided under Article 10 of the African Charter on the Rights and the Welfare of the Child.

Nationally, the South African Constitution details the right to privacy under section 14 as follows:

Everyone has the right to privacy, which includes the right not to have—

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.

Although there is little documented on the South African experience, it can certainly be inferred that an individual's right to privacy (as noted under section 3.1.2 above) is infringed if subject to harassment from debt collectors, and if personal information and personal financial information is disclosed without oversight. For Colin Hector, who has written about debt collection practices in the information age, 'while advances in communication technology have the potential to create conveniences for both collectors and consumers, they also pose new possibilities for deception and raise serious privacy concerns.'⁹⁶

To counter these concerns, Ondersma insists that debt collection practices must be consistent with established standards on privacy:

To comply with privacy obligations, debt relief regimes should be structured in a way that is consistent with privacy rights. Court proceedings and court records should be cognizant of debtor privacy. In the case of proceedings that involve the exposing of debtors' personal information, for example, the case proceedings should be private, and debtors' personal information should be kept private.⁹⁷

⁹⁶ H Hector 'Debt Collection in the Information Age: New Technologies and the Fair Debt Collection Practices Act' (2011) 99 *California Law Review* 1601, 1620.
⁹⁷ Note 11 above, 319.

Indeed, interference with privacy rights constitutes one of the ways in which punitive debt collection practices can harm an individual's right to dignity. Although a Code of Conduct for Debt Collectors was gazetted in 2003 under the Debt Collectors Act 1998, the Draft Debt Collectors Amendment Bill is silent on the issue of privacy and of protecting the personal information of debtors. In this regard, the Bill should be aligned to the Protection of Personal Information Act, 4 of 2013.

Relatedly, and as noted by Judge Desai in the matter of *University of Stellenbosch v Justice*, the inherent human dignity of an individual may be severely impaired when over-indebted or subject to undignified debt collection practices, including wage stop-orders.

Human dignity is mentioned in a number of international human rights instruments, including the Universal Declaration of Human Rights which recognises human dignity in the Preamble, Article 1, Article 22 and Article 23 (discussed in further detail in section 4 below); the International Covenant on Civil and Political Rights (ICCPR) which notes that the rights contained therein stem from 'the inherent dignity of the human person' (Preamble and Article 10);⁹⁸ the International Covenant on Economic, Social and Cultural Rights (ICESCR), specifically with regard to education (Article 13);⁹⁹ and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which notes respect for the dignity of women (Preamble).¹⁰⁰ These instruments do not, however, expressly guarantee a *right* to human dignity.

In comparison, the African human rights system provides for a right to human dignity. The African Charter on Human and Peoples' Rights (ACHPR), which was ratified by South Africa in 1996, provides that 'every individual shall have the right to the respect of the dignity inherent in all human beings' (Article 5). Moreover, the 'Right to Dignity' is expressly guaranteed in Article 3 of the Protocol to the ACHPR on the Right of Women in Africa (*Women's Protocol*).¹⁰¹

Moreover, the right to human dignity is recognised and protected in the South African Constitution under section 10: '[e]veryone has inherent dignity and the right to have their dignity respected and protected'.

4. Non-discrimination rights

The right to non-discrimination is can be affected by unsecured lending and indebtedness where individuals are discriminated against on account of their debt status. Indeed, it has been noted that individuals may be refused employment, for example, on the basis of their credit rating (discussed in more detail below).

The right to non-discrimination is protected universally within human rights law, however the right to be free from discrimination on the basis of financial status is not expressly provided. The South African Constitution provides for the right to equality under section 9, but this does not detail non-discrimination on the basis of debt or financial status.

98 The ICCPR was ratified by South Africa in 1998.

99 The ICESCR was ratified by South Africa in 2015.

100 The CEDAW was ratified by South Africa in 1995.

101 The *Women's Protocol* was ratified by South Africa in 2005.

5. Right to information

The right to information is a key right which should have a normative place in any debt scheme or contract. It has been noted (and will be discussed further below) that in many cases debtors are unaware of the terms of their debt contract, leading not only to exploitation and other human rights concerns.

The UDHR and the ICCPR protect the right to 'to seek, receive and impart information' (Articles 19). The ACHPR guarantees a right to 'receive information' (Article 9).

However, the South African Constitution not only provides for the right of access to information from both public and private bodies under section 32, but has also put in place legislation to give effect to this right (Promotion of Access to Information Act 2 of 2000).

One of the key concerns that emanated out of the UPLC reports of 2008 and 2013 was the fact that individuals were unaware of the terms of the debt they had signed up to. The following case from the UPLC report of 2008 is indicative of this trend:

During 2004, the Stellenbosch Legal Aid Clinic was approached by 10 employees of Berco cleaning services. Their average monthly salaries were approximately R1400.00 per month. It transpired that they were all approached during their 45 minute lunch breaks by an agent offering cash Report on the incidence of and the undesirable practices relating to garnishee orders in SA – University of Pretoria Law Clinic - July 2008 76 loans and were induced to sign contracts in a language which was not familiar to them. These persons had very little schooling and educational training. Amounts of between R820.00 and R1 820.00 were paid to each person. Garnishee orders were then issued from the Bloemfontein court, where the creditor resided, even though the debtors were employed (and resided) in Stellenbosch. Amounts ranging from R4 000.00 to R7 000.00 were already garnished against the salaries of each of these persons when they sought legal aid. Investigation of the matters revealed that the balance of the debt increased dramatically from month to month notwithstanding the garnishee deductions. In one of the debtors, Mrs C's case, her initial loan was R1300.00 in 2002. By March 2003 a garnishee order of R212.00 per month was implemented and the creditor informed the employer that the amount of the total debt was R4251. By January 2004, 11-monthly instalments amounting to R2338.00 had been deducted from Mrs C's salary. At this stage, the creditor indicated that the amount still due was R7 953.00. By July 2004 a further R1 062.00 had been paid over to the creditor, who informed that the balance was now R8 391.00!¹⁰²

This case study is revealing of a number of concerns related to the exploitation of the poor. In particular, the lack of free, prior and informed consent before a loan agreement is taken out, clearly amounts to a violation of one's right of access to information, as well as contractual rights. Over and above the fact the garnishee orders were issued from a court outside of the jurisdiction in which the debtor lived and worked, a lack of transparency about the loan amount, and the terms of

¹⁰² University of Pretoria Law Clinic 2008. The incidence of and the undesirable practices relating to garnishee orders in South Africa <https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf> (last accessed 7.03.2017) 75-76.

Repayment, is evident. While in the Courts of Law Amendment Bill provisions are made to ensure that the debtor and employer are informed of the balance paid and balance owing in terms of debt judgements, the Draft Debt Collectors Bill does not address the issue of transparency. Given that debt collectors are third parties between debtor and creditor, they are well placed to play a role in ensuring that the debtor is adequately informed both of their rights and of the status of their debts.

6. Right to redress and remedy and access to justice

Access to redress or remedy – which entails some form of restitution, reparations, damages or relief – where rights have been violated are central to establishing a human rights culture. In addition, access to justice – which may be broadly understood as basic legal rights, or access to legal services

(both judicial and non-judicial) – holds an equally important place in human rights structures as a means to address violations.

Under international human rights law, Article 2(3)(a) of the ICCPR provides:

Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.

In addition, Article 14 of the ICCPR provides for equality before courts and tribunals; Article 16 provides for recognition before the law; and Article 26 provides generally for equality before the law. In this regard, the ICCPR follows Articles 6, 7 and 8 of the UDHR. At the international level, there is also the *Ruggie Principles* which stipulate the importance of access to remedy as part of its three-tiered approach – see section below.

Regionally, the ACHPR guarantees equality before the law in Article 3, and the right to have one's cause heard under Article 7.

In addition, within South Africa, the Constitution provides for the right to just administrative action, under section 33, and the right of access to courts or other fair tribunals, under section 34.

Moreover, the right of access to justice was a key right found to be infringed in the matter regarding EOAs taken to the Constitutional Court. As the court order noted:

Primarily, the debtor's section 34 right of access to court is breached by an execution process not sanctioned by a court. Moreover, taking away the basic income that indigent debtors rely on for subsistence, without court supervision, rubs right up against the right to dignity (which underlies all the socio-economic rights of housing, food and health care). It may also implicate the protection against arbitrary deprivation of property afforded under section 25.¹⁰³

Through this judgement, and as noted above, the process of EOAs must be conducted with judicial oversight to ensure that debt orders are fair and equitable. Moreover, the reforms to the MCA under the Courts of Law Amendment Bill have been undertaken in an effort to curb further abuses to the EAO system

¹⁰³ *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others* (CCT127/15) [2016] ZACC 32; 2016 (6) SA 596 (CC); (2016) 37 ILJ 2730 (CC); 2016 (12) BCLR 1535 (CC), para 133.

CHAPTER FIVE:

ASSESSING ALTERNATIVES AND DEVELOPING RECOMMENDATIONS

Introduction

In conceiving alternatives for over-indebtedness, both retroactive and proactive solutions must be sought, in order to address the vast levels of indebtedness which currently exists. The recent Constitutional Court judgment was, in particular, a prospective solution to the issue of EAOs, prescribing that any future EAOs be issued only with judicial oversight. Moreover, given that the abuses that occurred with the EAO system were, in many instances, also happening below the law, and not just in the gaps where the law did not make direct provisions, any alternative framework or recommendatory actions needs to be directed at both judicial and non-judicial measures.

1. EAOs

The abuse of the garnishee orders is one grave concern that requires special attention. It is important to recognise that various initiatives have been already developed to address this issue, including a joint agreement in October 2012 between the Banking Association South Africa and the Minister of Finance for banks to observe a ban on EAOs. However, according to Arde 'this ban on the use of EAOs is not observed by all the banks'.¹⁰⁴ Another initiative entailed the establishment of an EAO Task Team in October 2013, chaired by the Credit Ombud. The Task Team submitted a report to National Treasury, also suggesting a ban on EAOs. But, again according to Arde, the Credit Ombud has not, to date, received any feedback from Treasury.¹⁰⁵

In October 2008, GTZ published the "Garnishee Orders: Employers Guide". However the follow up report found that among sampled employers, many are not aware of this document; and for many who handle the processing of EAO in-house, there is a general lack of sufficient knowledge of the EAO procedures.¹⁰⁶

Both the two UPLC reports (2008, 2013) and Leriba have pointed out numerous loopholes existing in the current judiciary system that open to abuse either due to ignorance or deliberate manipulation.¹⁰⁷ With regard to the MCA, the uncertainty regarding the interpretation of jurisdiction, and varied

¹⁰⁴ Note 21 above.

¹⁰⁵ Note 21 above.

¹⁰⁶ University of Pretoria Law Clinic 'The incidence of and undesirable practices relating to "garnishee orders" – a follow up report' (2013) <http://archivedpublicwebsite.up.ac.za/sitefiles/file/47/327/2013%20garnishee%20orders%20follow%20up%20report.pdf> (last accessed 7.03.2017).

¹⁰⁷ Note 22 above; note 106 above; and note 102 above.

practice among the provinces regarding whether consent in terms of section 45 is allowed or the number of requirement to be met before granting EAO, or whether other costs are included *in duplum*, both call for standardization and greater judiciary uniformity. All these issues affect an individual's right of access to justice, as noted above. However, should the Courts of Law Amendment Bill be passed as is, these issues with the MCA will likely be addressed.

Those two UPLC reports also mention numerous cases where magistrates courts clerks are bribed by aggressive debt collectors to sign EAOs that fail to meet the legal requirement: including with grossly inflated collection fees and interest rates (in violation of the *in duplum* rule that cap maximum loan exposure at 50% and interest stops running when unpaid interest equals the outstanding capital amount); signing acknowledgement before outstanding balance is filled in; un-validated and fraudulent payment orders; fraudulent consent; double, and even multiple, deductions; reinstating payment order after informing the debtors that the debt has settled; when wrong fees/interest charged not corrected; payments are made into incorrect 3rd party not corrected; and deliberately approaching magistrates courts in locations different and inconvenient for the debtor to obtain default judgement. All these call for better credit borrower education of their rights and access to due judiciary procedures for redress as well as appropriate prosecution. While the conduct of debt collectors may be addressed by the passing of the Draft Debt Collection Amendment Bill, other concerns with regard to awareness by debtors of their rights will need to be addressed separately.

Another issue within the EAO system that must be addressed relates to the attachment of multiple orders to an individual's salary. This issue is not covered under the new Courts of Law Amendment Bill. Comparatively, in the Netherlands, the first creditor who obtains an EAO is responsible for distribution of the available income to creditors who obtain subsequent orders. In Germany, multiple attachments are not allowed and the entire attachment will go to the one creditor until that debt is paid in full. In Australia, within a fixed cap, the orders for civil debt, maintenance or fines receive priority; otherwise the multiple orders are carried out according to the order in which they are served.

In light of the above, it is recommended that the proposal to ban EAOs be revisited. In addition, and in line with the UPLC Report (2008) it is recommended that a record or register for existing EAOs to be established, in order to ensure that they are fairly regulated and administered.

2. Debt Relief

It is important to recognise the inherent contradiction of preventing over-indebtedness and encouraging consumer credit extension. It is also important to recognise that at least some of the lenders and some of their practices (including the alleged 'race to the bottom' or forcing/misguiding consumers into unsecured loans when they have security to take out secured loan) have also contributed to the over-indebtedness, arguably suggesting lenders need to be considered as important stakeholders is discussing solutions to over-indebtedness. Moreover, as James observes, although debt counsellors have been useful in 'educating debtors and persuading them to be more

frugal',¹⁰⁸ but they have not actively considered/suggested plans for joint actions with the creditor to share liability, to 'accept some culpability and even to write off debts'.¹⁰⁹

In this line, Schraten has also proposed to consider the German model of debt relief--that an once-in-a-lifetime debt relief is allowed after a period of 6 years of good financial conduct.¹¹⁰ One needs to be aware of possible unintended consequence however, as Bond has cautioned: credit amnesty could also lead to borrowers returning to their lenders for renewed purchases.¹¹¹

According to the Banking Association South Africa:

The Banking Association and National Treasury have called for the review of loan affordability assessments, relief measures for distressed borrowers, limiting garnishee orders and reviewing the use of debit orders. [... In addition,] the Banking Association's member banks are expected to develop a framework that could see qualifying distressed borrowers having their instalments reduced without incurring extra costs.¹¹²

Bond further suggests that unclaimed pension and retirement fund benefits could be considered as the debt relief fund.¹¹³

Moreover, debt relief programmes must take into account the fact that a debtor's family and dependents are often directly affected by household debt. In light of this, debt relief measures cannot be entirely individualistic.

3. Addressing regulatory gaps

More stringent regulation for the debt industry, especially regarding other fees and additional charges, has largely been accomplished with both the NCR's investigation of overcharging of cost of credit, including life insurance and other unlawful fees (NCR 2015/2016 annual report) and the cap of maximum interest, service and initiation fees charged on various types of loans, including unsecured loan (interest rate capped at repo+21%) since May 2016. Published in Feb 2017 and expected to come into effect in 6 months, credit life insurance is also going to be capped.¹¹⁴ The provision of occupational disability cover to pensioners, and provision for cover other than retrenchment for self-employed people are also going to be banned.

Moreover, it is also encouraging that the NCR has referred micro-lenders for investigation and prosecution for failing to conduct affordability assessment, failing to provide copies of quotes, charging interest and fees above prescribed rates. The NCR further conducted raids on credit providers who unlawfully garnishing.¹¹⁵

There have been worries that when the formal credit sector becomes more stringently regulated and selective of those they lend money to, it will drive the borrowers towards loan sharks.

108 Note 18 above, 22.

109 Note 18 above, 22; see also Bond (note 6 above).

110 Note 93 above.

111 Note 6 above.

112 http://www.treasury.gov.za/comm_media/press/2012/2012110101.pdf.

113 Note 6 above.

114 <https://www.ncr.org.za/documents/Final%20Credit%20Life%20Insurance%20Regulations.pdf>.

115 <https://www.ncr.org.za/documents/pages/Annual%20Reports/NCR%20Annual%20Report%202015-16.pdf>.

It has been found that only the more formal sector and the registered micro-lenders use the garnishee orders and that often the key players and registered lenders do adhere to NCA regulations and caps.¹¹⁶ But the *mashonisas* (as noted above), according to James, 'typically charge monthly interest of 50% [amounts to 600% annual interest rate] and use ATM card to force debt payment.'¹¹⁷ With such high interest rates, an endless cycle of debt is arguably inevitable.

However, it remains encouraging that the NCR has also conducted raids on credit providers who retain pension cards, bank cards ID and PIN, which constitute the typical ways in which *mashonisas* force repayment.¹¹⁸ But the NCR would need to consider more systematic ways to obtain information on this informal sector and design ways to regulate them (including when necessary prosecution). It is hoped that this will be addressed largely through the passing of the DCAB.

Moreover, with regard to the DCAB, it is recommended that the suggestions noted above on how to bring the Bill in line with the *Ruggie Principles* be taken into account. To summarise, these suggestions included that debt collection agencies should:

- Develop an internal complaints mechanisms for redress and remedy.
- Develop a human rights policy and due diligence process to guide business activities from a human rights based approach, taking into account the vulnerabilities of the poor to indebtedness.
- Report to the Council for Debt Collectors on measures taken to address adverse human rights impacts of their activities.
- Ensure protection of personal information in line with the Protection of Personal Information Act.

In addition, a recommendation emanating out of the Leriba consulting report is to 'regulation of rate disclosures to consumers to allow for easier price comparisons'.¹¹⁹ In line with the NCR unsecured loan report, 2012, it is also recommended that the 'layout, format, clarity and complexity of the language used' in credit agreements be improved. Lastly, it is recommended that standardized affordability tests and guidelines therein be developed for credit agreements and loan repayment schemes: as Leriba report notes, 'a standardised test would help prevent the "race to the bottom" that characterises current competitive dynamics'.¹²⁰

4. Consumer Education

The NCR has actively engaged both consumers and other stakeholders in their education and communication campaigns, using various medias—workshops, exhibitions, roadshows, stakeholder meeting, radio and television interviews, CEO's Imbizo for pensioners and social grants recipients.¹²¹ Certainly, further research is needed to better understanding consumer attitudes and behaviours.

116 Note 22 above.
117 Note 18 above, 20.
118 Note 115 above.
119 Note 22 above, 11.
120 Note 22 above, 11.
121 Note 115 above.

Moreover, intensifying public engagement and debate on this matter are important to generate further knowledge and understanding among affected groups. It is encouraging that The Banking Association South Africa has suggested that its 'member banks to start up a consumer education fund that would educate the public about borrowing and other financial matters.'¹²²

It is also recommended that employers, Unions and payrolls recognise their responsibility to educate employees on debt, debt orders and basic financial literacy. From the perspective of the Ruggie Principles, these concerns fall within the sphere of influence of such bodies to ensure that the rights of their employees or members are respected.

5. Other recommendations to Government

Other recommendations to government to address the issues surrounding indebtedness in South Africa include:

- Sign and ratify the ILO Convention on the Protection of Wages and the ILO Social Security (Minimum Standards) Convention; and
- Work to improve social safety nets to ensure that individuals and households can meet their basic needs.

122 Quoted in <http://www.banking.org.za/news-media/association-news/lenders-and-regulators-need-to-take-action>.

CONCLUSION

According to a recent report published by the Centre for Human Rights which examined the implementation of the *Ruggie Principles* in law and policy in South Africa to date,

South Africa's legislative and regulatory framework around business and human rights is relatively well developed, especially in the context of an emerging economy. However, it appears that, in most cases, these laws and regulations are not interpreted as one would expect nor fully implemented and enforced. The country is also at an interesting point in time, where multistakeholder discussions and government activities are revolving around legal and policy reforms that impact business and human rights.¹²³

While the issue of indebtedness may be rampant across South Africa, it is the impoverished of the country whose rights are most likely to be infringed upon by punitive debt and debt collection practices. This report has sought to develop further understanding on the issue of indebtedness in South Africa, and particularly the phenomenon of EAOs. It has assessed the human rights which are potentially implicated in indebtedness and debt collection practices, and, noting the many proposals that have been tabled by various bodies to address these issues, offered a number of recommendations. Most forcefully, however, it is recommended that indebtedness be considered an important human rights concern; that policies aimed at addressing indebtedness are developed from a human rights based approach; and that the Court of Laws Amendment Bill and Draft Debt Collectors Amendment Bill are swiftly considered by Parliament, and are implemented in line with the *Ruggie Principles*.

¹²³ Centre for Human Rights "Shadow" National Baseline Assessment of Current Implementation of Business and Human Rights Frameworks: South Africa', available at http://www.chr.up.ac.za/images/files/news/news_2016/Shadow-SA-NBA-Final.pdf.

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