SUBMISSION BY THE LAW SOCIETY OF SOUTH AFRICA ON THE DEBT COLLECTORS AMENDMENT BILL, 2016

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1. INTRODUCTION

The Law Society of South Africa (LSSA) represents more than 24 000 practising attorneys and almost 6 000 candidate attorneys countrywide. It is the umbrella body of the attorneys' profession in South Africa and its constituent members are the Black Lawyers Association (BLA), the National Association of Democratic Lawyers (NADEL) and the four statutory provincial law societies, namely the Cape Law Society (CLS), the KwaZulu-Natal Law Society (KSNLS), the Law Society of the Northern Provinces (LSNP) and the Law Society of the Free State (LSFS).

The LSSA has received a number of commentaries and submissions from stakeholders on the Debt Collectors Amendment Bill, 2016 (the Bill). This submission includes aspects of such commentaries and submissions.

The LSSA is supportive of establishing a legal framework that ensures that debts are recovered in a fair and efficient manner where there is proper control and oversight. The LSSA is however strongly opposed to the provisions of the Bill which propose making attorneys and their staff subject to the jurisdiction of the Council of Debt Collectors and the provisions of the Debt Collectors Act 114 of 1998 (the Debt Collectors Act).

The LSSA is, in particular, concerned that the measures introduced by the Bill:

- will not contribute towards a solution; instead it will create more setbacks than solutions;
- b. are premised on flawed interpretations of court cases and media reports with regard to the abuses regarding the collection of debts;
- c. will make significant inroads into the independence of the legal profession;
- will result in the overwhelming majority of attorneys, if not all, together with their staff members having to register as debt collectors, including those attorneys who do not primarily engage in debt collection;
- e. are based upon misconceptions as to the extent of abuses by attorneys. We submit that there are relatively few attorneys that are guilty of such abuses;
- completely disregard existing legislation regulating attorneys and duplicate the regulation of attorneys;
- disregard proposed amendments to the Magistrates' Courts Act, No. 32 of 1944 to remedy the abuse of emolument attachment orders and jurisdictional matters, which are due to be promulgated in early 2016;
- h. completely disregard the firmly established principle of legal privilege which is an inherent part of the South African and global legal profession;
- will render invalid, in terms of section 8(3) of the Debt Collectors Act, any agreement (or parts thereof) entered into between an attorney and his or her client (which involves debt collection) before or after the Bill becomes law - if the attorney is not registered with the Council for Debt Collectors. This will have far-reaching implications for the overwhelming majority of law firms and their clients;

- j. may result in a situation where a legal practitioner, who has been reprimanded by a law society for a relatively minor transgression such as not having answered correspondence timeously, is considered not to be competent to be registered as a debt collector and will effectively be prevented from operating a legal practice; and
- k. endeavour to compare fees between attorneys in litigious matters and debt collectors in non-litigious matters, even though there is virtually no comparison between the academic qualifications of debt collectors and attorneys.

It is evident that a number of ambiguities exist within the legislation governing emolument attachment orders. This has contributed towards the lack of understanding of the law.

We submit that the attorneys' profession is unfairly being blamed for such ambiguities and the conduct of a relatively few attorneys.

2. THE ATTORNEYS' PROFESSION

The LSSA and its constituent members do not condone any abuse of people or legal processes, including in the collection of debts. However, the practice and conduct of attorneys are currently regulated in terms of the Attorneys Act, 53 of 1979 (the Attorneys Act) which established mechanisms for the provincial law societies to discipline their members.

To the extent that it is alleged that an attorney has been guilty of unconscionable conduct, a complaint can be lodged with the relevant provincial law society by the person who is a victim of such practice. Law societies have extensive powers to discipline recalcitrant members. Depending on the type of contravention, penalties can range from a reprimand to a fine of up to R100 000. The cap is set by legislation and each matter is treated on its own merits. However, it appears that if a matter justifies the maximum fee, the Council will bring an application to the High Court for the striking or suspension of the errant attorney.

In the final analysis, attorneys are officers of the Court and can be removed by the High Court in cases of transgression. They can also be charged criminally when available evidence dictates that. The law societies are committed to working closely with the SA Police Service and the National Prosecuting Authority to ensure that those who are involved in criminal activities are prosecuted successfully.

The LSSA submits that the provisions of the Bill will not contribute towards a solution; instead it will create more setbacks than solutions. There is no rational basis to conclude that the Council for Debt Collectors will be in any better position to discipline attorneys compared to the legal profession's own disciplinary structures, as set out in the Attorneys Act and the Legal Practice Act, 28 of 2014 (Legal Practice Act), which creates the replacement structure to take over the regulatory function of legal practitioners.

COURT CASES AND MEDIA REPORTS

The Preamble of the Debt Collectors Amendment Bill states that <u>recent court cases</u> and <u>media reports</u> have highlighted the flagrant abuses prevalent in the collection of debts. The LSSA submits that the legislation should be drafted based on a thorough understanding of the problem, properly investigated through research and consultation with all parties concerned.

It is evident that the recent decision of the Western Cape High Court in the matter of *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice And Correctional Services and Others (16703/14) [2015] ZAWCHC 99 (8 July 2015)* (the Stellenbosch case) has significantly influenced the proposed inclusion of attorneys within the ambit of the Debt Collectors Amendment Bill. For example, at the recent Annual General Meeting of the LSNP, the Deputy Minister of Justice made the following comments:

"I'm sure you have all heard about the University of Stellenbosch Legal Aid Clinic case, on behalf of several debtors, which raised a number of concerns about the abuse by some attorneys in debt collection. It has been found that some attorneys obtain judgments by default without the knowledge of the debtors and load the initial amount owed by the debtor with exorbitant legal costs. And there definitely are perceptions amongst the public that the law societies are not able to discipline their members.

As a legislative response, we will be introducing amendments to the Magistrates Court Act and the Superior Courts Act to address some of the abuses of the civil debt recovery system. We are also proposing an amendment to the Debt Collectors Act that will subject attorneys who do debt collection to the jurisdiction of the Council for Debt Collectors in terms of the Debt Collectors Act."

See more at: http://www.justice.gov.za/m_speeches/2015/20151031_AGM-NP.html#sthash.GWWFPqi0.dpuf

The Stellenbosch case has highlighted a number of important issues. It should in particular be noted that:

- Only one law firm, cited as the Seventeenth Respondent, was involved and the Court expressed serious reservations about the conduct of this law firm which specialised in debt collection and provided such services to forty-five credit providers;
- The Court referred to thousands, if not tens of thousands of matters from the attorney's 150 000 cases. The Court did not implicate other law firms beyond the law firm in this particular matter;
- c. The plight of the debtors in the Stellenbosch-case was brought to the attention of the Court with the assistance of members of the legal profession; and
- d. The Court ordered that a copy of the proceedings be forwarded to the LSNP to determine whether the attorneys have breached their ethical duties, particularly with regard to forum shopping to secure emolument attachment orders. The LSNP is attending to the matter.

The Bill unfortunately introduces a remedy that has not *per se* been identified in the Stellenbosch-case as a failure. In fact, the Court ordered that the conduct of the law firm be brought to the attention of the relevant law society for further investigation. The Court has in no way suggested that law societies are unable to discipline their members. On the contrary, it recognises the ability of the law societies to do so.

The Stellenbosch case should succeed in preventing, or at least reducing, some of the more undesirable debt procedure stratagems conducted by some, very small minority, legal practitioners.

A number of legislative and other defects have been identified by Judge Desai in this case, in particular the following:

- a. No limit on amount of EAO: 'There is no statutory limit on the amount which may be deducted from the earnings of a debtor in terms of an EAO'. [Paragraph 3]
- b. No limit on number of EAOs: 'Nor is there a limit on the number of EAOs which may be granted against a particular debtor.' [Paragraph 3]
- c. No evaluation of affordability: '...the clerk of the court issued EAOs attaching their earnings without any evaluation of their ability to afford the deductions to be made from their salaries and without deciding whether or not the issuing of an EAO itself would be just and equitable.' [Paragraph 5]
- d. No judicial oversight: 'The whole process of obtaining the EAOs was driven by the creditors without any judicial oversight whatsoever.' [Paragraph 5]
- e. <u>Forum shopping:</u> '...the most disturbing feature of this matter is the manner in which the respondents the micro-lenders forum shop for courts which would entertain the applications for judgment and the issuing of EAOs.' [Paragraph 6]
- f. Access to courts compromised: 'The debtors' rights to access the courts and enjoy the protection of the law were clearly compromised in these instances.' [Paragraph 6]
- g. <u>Involuntary and uninformed consent:</u> '...the [involuntary and uninformed] manner in which the consents to jurisdiction and the judgments themselves were obtained.' [Paragraph 8]
- h. No representations before granting EAOs: 'Workers are not given an opportunity to make representations before an EAO is issued.' [Paragraph 75]
- Ineffective review remedy: 'When an excessive portion of a debtor's earnings is attached, the remedy provided by the MCA is the opportunity to review and set aside the order. However, this will not be an effective remedy if Section 45 of the [Magistrates Court Act]is interpreted such that it allows indigent debtors to consent to the jurisdiction of distant courts.' [Paragraph 75]

The key legislative failures that require remedy, pursuant to the Stellenbosch case, are the failures by the South African emolument attachment order procedure established by the Magistrates Courts Act to comply with the principles set out by the Court. The above legislative defects are, for

the most part, being addressed through proposed amendments to the Magistrates' Courts Act through the Magistrates' Courts Amendment Bill.

It should be noted that, as far back as 2013, the LSSA has identified some of the defects raised by Judge Desai and made submissions in this regard to the Department of Justice. A copy of these submissions is attached as **Annexure A**.

The Preamble of the Bill also states that the existing legislative framework would <u>seem to be</u> <u>inadequate</u> in ensuring that debts are recovered in a fair and efficient manner where there is proper control and oversight.

This cannot be an accurate assessment as far as it relates to attorneys. If this is, for the moment, assumed to be correct - the proper remedy with reference to attorneys is to ensure that the Attorneys Act and, in future the Legal Practice Act, provide for proper control and oversight.

The Legislature has unfortunately not given due consideration to the historical and current context, nor the legal and other processes that are already in existence.

4. CHALLENGES WITH REGARD TO THE DEBT COLLECTORS AMENDMENT BILL.

4.1 DEFINITION OF 'DEBT', 'DEBT COLLECTION' AND 'DEBT COLLECTOR'

Neither the Bill, nor the Debt Collectors Act defines what is meant by "debt" or "debt collection".

The Debt Collectors Act does provide a definition for "debt collector" in section 4(a) which is regrettably unclear. It provides for "any person including an attorney or his or her employee or agent contemplated in Section 8A, or a party to a factoring arrangement, who for reward collects debts owed to another on the latter's behalf".

The definition of "debt collector" and lack of definition of "debt" is of serious concern. Because "debt" is not defined, the term will be interpreted broadly. The effect is that, not only attorneys who primarily do debt collecting will be brought under the jurisdiction of the regulatory body responsible for debt collectors, but the overwhelming majority, if not all, attorneys. As presently framed "debt collectors" will include:

- Conveyancers who are, by implication and incidentally, required to perform debt collection functions on behalf of the South African Revenue Service and municipalities which are not conventional debt collection functions;
- b. Deceased estates and insolvency practitioners, as "debt" will include the liquidation of insolvent and deceased estates;
- Employees of attorneys who assist with telephone calls, letters and emails to collect outstanding debts – whether for the attorney or a dient, including bookkeepers and secretaries; and
- d. Candidate attorneys.

The Bill will, by implication, have the result of all litigation matters also falling within the ambit of debt collection, including any claim sounding in money, delictual, contractual and enrichment matters. The collection of debt is ordinarily involved in corporate litigation; breach of contract, motor vehicle accidents, maritime law, insurance law, leasing of property and maintenance matters, to name but a few. If a litigation matter happens to fall outside the ambit of debt collection, the enforcement of a cost order will be considered debt collection. Issuing a summons for any claim sounding in money will be considered debt collection.

We doubt that the intention of the drafters of the Bill was to create such a wide net.

This means that attorneys, who are not registered as debt collectors, will effectively be prevented from engaging in litigation in respect of monies owed. This will essentially nullify years of academic and vocational training of most litigation attorneys — if they do not register as debt collectors. Litigation, arguably, forms the core component of most law practices in South Africa and is reserved for attorneys as legal representatives.

4.2 INDEPENDENCE OF THE LEGAL PROFESSION

The independence of the attorneys' profession has a long history and is deeply rooted in the Rule of Law and it is jealously guarded. It is of grave concern that the Bill, which is in an advanced stage, was initially forwarded to the LSSA for comment within a short period of two months. This creates the impression that much work has been done in getting the proposed legislation to this stage after consultation with some stakeholders, but seemingly not with the attorneys' profession, the very stakeholder to be affected by the proposed amendment.

The Bill will make significant inroads into the independence of the attorneys' profession. The attorneys' profession is firmly of the view that the proposed amendments are grossly unfair and that they do not achieve the redress of the injustices complained of in the preamble of the Bill.

4.3 LEGAL PRIVILEGE

The Bill completely disregards the firmly established principle of legal privilege, which is an inherent part of the South African and global legal profession. This has been confirmed by the Constitutional Court¹ when it stated:

"The right to legal professional privilege is a general rule of our common law which states that communications between a legal advisor and his or her client are protected from disclosure, provided that certain requirements are met. The rationale of this right has changed over time. It is now generally accepted that these communications should be protected in order to facilitate the proper functioning of an adversarial system of justice, because it encourages full and frank disclosure between advisors and clients. This, in turn, promotes fairness in litigation. In the context of criminal proceedings, moreover, the right to have privileged communications with a lawyer

¹ Thint (Pty) Ltd v National Director of Public Prosecutions and Others: Zuma and Another v National Director of Public Prosecutions and Others [2008] ZACC 14; 2009 (1) SA 141 (CC).

protected is necessary to uphold the right to a fair trial in terms of s 35 of the Constitution, and for that reason it is to be taken very seriously indeed."

The Bill empowers inspectors, appointed by the Council for Debt Collectors, to enter any business premises of an attorney or legal practice in certain instances without prior notice and a search warrant and require from the attorney (or any person found on the premises) the particulars and information pertaining to the investigation, including copies of the books, documents or objects relevant to his or her investigation.

The Council for Debt Collectors is authorised to appoint 'any suitably qualified or experienced person' as an inspector. This broad definition may result in:

- a. the appointment of almost any individual as an inspector;
- b. an unlimited number of persons being appointed as inspectors; and
- c. unsupervised and unregulated individuals being appointed as inspectors as the guardians of the legal profession.

The LSSA is of the view that the Bill completely disregards the accepted common law principle of legal privilege, which has been accepted by the Constitutional Court. The Bill, in essence, creates the untenable situation where numerous inspectors, who might have a very limited understanding of the principle of legal privilege, will be granted the legal power to systemically erode the principle of legal privilege. It should be noted that inspectors from Law Societies are ordinarily qualified legally qualified persons or auditors.

4.4 OVER REGULATION

The Bill introduces a system where the conduct of the overwhelming majority of attorneys will be regulated by two sets of rules and two controlling bodies. The attorneys' profession is already regulated by the Attorneys Act. The Law Societies (and in future, the South African Legal Practice Council) have the exclusive mandate to regulate the attorneys' profession.

This is captured in a number of provisions of the Attorneys Act, including:

- a. Section 58(b) which provides: "to regulate the exercise of the profession";
- b. Section 58(d) which provides: "to deal with <u>all matters</u> relating to the interests of the profession and to protect those interest";
- c. Section 58(e) which provides: "to uphold the integrity of practitioners";
- d. Section 58(f) which provides: "to uphold and improve standards of professional conduct of practitioners";
- e. Section 58(g) which provides: "to provide for an effective control of the professional conduct of practitioners"; and

f. Section 58(h) which provides: "to promote uniform practice and discipline among practitioners".

Likewise, the Legal Practice Act, which is due to take over the regulatory function of legal practitioners, has *inter alia* the following purposes:

- Section 3(c) to create a single unified statutory body to regulate the affairs of all legal practitioners and all candidate legal practitioners in pursuit of the goal of any accountable, efficient and independent legal profession;
- b. Section 3(f) to provide a fair, effective and <u>transparent</u> procedure for the resolution of complaints against legal practitioners and candidate legal practitioners; and
- c. Section 3(g) to create a framework for the development and maintenance of <u>appropriate</u> <u>professional and ethical norms and standards</u> for the rendering of legal services by legal practitioners and candidate legal practitioners."

The Bill clearly detracts from and duplicates a core purpose of the Legal Practice Act. The Bill also operates on the specious premise that:

- a. Law Societies cannot effectively discipline their members (or in future the South African Legal Practice Council);
- The South African Legal Practice Council will in future not be in position to effectively implement its legal mandate to regulate legal practitioners, despite a <u>fair</u>, <u>effective and</u> <u>transparent</u> procedure being required for the resolution of complaints against legal practitioners; and
- c. The Council for Debt Collectors will be better equipped and best-placed to regulate and discipline attorneys.

Duplication of Disciplinary Processes and Penalties

Attorneys and candidate attorneys will effectively be subject to disciplinary proceedings of two separate bodies, i.e.; the Council for Debt Collectors and the Law Societies (in future, the South African Legal Practice Council), the latter being a professional body, the former not. It may also result in them being subjected to two different penalties for the same offence, if found guilty.

The Bill introduces a new section 10(1)(c) which provides that 'no person shall be competent to be registered as a debt collector in the case of an attorney if he or she has been found guilty of unprofessional or dishonourable or unworthy conduct in terms of section 72 of the Attorneys Act.'

Section 72 of the Attorneys Act allows for a situation where a legal practitioner may be reprimanded by the relevant law society for a minor transgression like not having answered correspondence timeously.

The implication is that such an attorney will not be competent to be registered as a debt collector and will, in terms of the Bill, effectively be prevented from operating any legal practice if he or she is not registered as a debt collector. This cannot be the intention of the legislature.

In summary, the legislation governing attorneys is geared toward the governance of a profession and subjecting attorneys to the jurisdiction of the Debt Collectors Council is tantamount to admitting that the mechanisms and systems introduced in the Legal Practice Act are ineffectual.

4.5 DEBT COLLECTION PROCESS

There are clear differences between the roles of debt collectors and attorneys in the debt collection process. There is a distinction between two phases in the debt collection process, which can be described as the pre-litigation and litigation process.

Pre-litigation

The pre-litigation process generally entails the following:

- Contacting the debtor by way of letters, e-mails and text messages;
- Making phone calls to debtors; and
- Visiting debtors.

This process is regulated by the Debt Collectors Act. Both debt collectors and attorneys are entitled to deal with this phase of the process

Litigation

When it becomes clear that there is no cooperation from the debtor, or that a factual dispute exists between the parties, the only way to resolve the issue is to approach a court. The litigation process is regulated by inter alia the Magistrates' Courts Act and High Court Act, which reserve this kind of work to legal practitioners. By law, debt collectors are not entitled to represent creditors in litigation

There is underliably a role to play for debt collectors, but we submit that it is with good reason that the litigation process is reserved for legal practitioners.

Before a summons can be issued against a debtor, the following aspects must *inter alia* be considered:

- The identity, citation and locus standi of the parties;
- Cause of action:
- Terms of the agreement:
- Jurisdiction;
- Applicable legislation; and
- Prescription.

Debt collection can become complicated, especially opposed matters which require an understanding of various pieces of legislation and court judgments. Attorneys are, due to their training and academic qualification, in a position to utilise more effectively the legal system provided for in the Magistrates' Courts and High Court Acts and to represent persons in courts of law.

A person can only be admitted and enrolled as a legal practitioner in terms of the Attorneys Act if he or she has:

- a. satisfied all the requirements for the LLB degree;
- b. served articles of derkship;
- c. attended a training course of performed community service;
- d. passed a practical examination; and
- e. applied to the High Court for admission.

Section 26 of the Legal Practice Act contains similar requirements which will apply to all legal practitioners in future.

Most importantly, attorneys are officers of the Court, admitted by the Court and can be removed by the High Court.

Debt collection is referred to in the Debt Collectors Act as an 'occupation'. Debt collectors have to comply with certain standards of conduct as laid down in the Debt Collectors Act and must not be disqualified from becoming a debt collector to maintain registration with the Council. No formal academic or vocational training is required to qualify as a debt collector. Section 23(2)(c) of the Debt Collectors Act provides that the Minister 'may' make regulations regarding the training of debt collectors.

The Council for Debt Collector's 2015 Integrated Report² states that: 'The total number of approved applications since the inception of the Council reached the number of 72 694 on 28 February 2015.' The Report further states that: 'During the year under review (2014/2015) 8 263 applications were received of which 7 960 were approved.' Interestingly, the Report comments that; 'The difference between applications received and applications approved is as a result of cancellations before registrations at the request of the applicants.' It appears that, except for the registration fees, there are no qualification barriers to entry into the debt collector industry.

4.6 REGULATION OF FEES

The Bill is seemingly aimed at equating the fees of qualified attorneys with that of unqualified debt collectors. As already indicated, there is virtually no comparison between the academic qualifications and nature of business of attorneys and debt collectors.

The transitional provisions of the Bill contained in section 16 provides that the Rules Board for Courts of Law (the Rules Board) must meet with the Council for Debt Collectors to discuss bringing the amounts charged by attorneys as per the tariffs set out in the Magistrate's Court Act into line with those that are prescribed for debt collectors. This must happen within 12 months of the commencement of the Bill.

² Page 38 of the Council's Integrated Report 2015

Section 16(2)(c) of the Bill provides that the Rules Board and the Council for Debt Collectors must, in conjunction with each other, consider and address the review of those tariffs in the Rules which have a bearing on the collection of debts and which relate to the payment of expenses and fees in respect of litigious matters, in order to ensure that they are reasonable, fair and equitable.

Who should be consulted on legal fees?

The provisions of the Bill, with reference to the role of the Council for Debt Collectors in determining attorneys' fees, are problematic for a number of reasons, including:

- a. The Council for Debt Collectors is ill-equipped to advise on tariffs set out in the Magistrates' Courts Act as it is not geared towards dealing with litigious matters. The Law Societies and, when in operation, the South African Legal Practice Council are more appropriate professional bodies to consult with in dealing with the tariffs set out in the Magistrates' Courts Act;
- b. One of the purposes of the Legal Practice Act, as captured in section 3(b)(i), is to broaden access to justice by putting in place a mechanism to determine <u>fees chargeable by legal practitioners for legal services</u> rendered that are within the reach of the citizenry. Also one of the objects of the South African Legal Practice Council, as captured in section 5(b) of the Legal Practice Act, is to ensure that <u>fees charged by legal practitioners for legal services rendered are reasonable and promote access to legal services</u>, thereby enhancing access to justice:
- c. Pursuant to section 34 (4) of the Legal Practice Act, the South African Law Reform Commission must, within two years after the commencement of Chapter 2 of the Legal Practice Act, investigate and report back to the Minister of Justice and Correctional Services with recommendations on the desirability of <u>establishing a mechanism which will be</u> <u>responsible for determining fees and tariffs payable to legal practitioners</u>;
- d. The intended reduction of tariffs in debt collection matters will have a negative impact on the economy and the ability of creditors to collect debts due to them. This will in turn have a detrimental effect on innocent parties who will inevitably fund unrecoverable legal costs and levies; and
- e. The Council for Debt Collectors is unlikely to be in position to contemplate the potential consequences of the reduction of tariffs in the Magistrates' Courts.

It is evident from the above that ample provision is made in existing legislation and the Legal Practice Act for suitable bodies to consider, investigate and report on fees and tariffs for legal practitioners. To this extent, the South African Law Reform Commission is given a two-year timeframe to investigate a matter that is unquestionably complicated.

Matters concerning litigation and litigious fees simply fall outside of the capability and mandate of the Council for Debt Collectors.

Fees and access to courts

Legislation must, justifiably, draw a distinction between pre-litigation, litigation and post litigation fees. As discussed in paragraph 4.5, both attorneys and debt collectors are able to engage in the pre-litigation procedures which don't require legal knowledge and skill.

The litigation process ordinarily starts with the letter of demand issued pursuant to section 56 of the Magistrates' Courts Act. Only attorneys are in position to represent creditors from this point onwards. This is because attorneys are legally qualified to deal with the legal, procedural and technical requirements involved in the litigation process.

Legal costs are often generated by debtors who deliberately drive up costs by implementing evasive and delaying tactics. This naturally increases the expenses and costs relating to the litigation process. In the event that attorneys' fees will be capped pursuant to the provisions of the Bill, the creditor will not be able to recover the expenses and fees which have escalated because of an elusive debtor.

The debtor's liability for the legal costs should be a deterrent for evasive and delaying tactics. Failure to incur such liability means that debtors will unduly benefit from the legal system at the expense of creditors. It will simply erode the principles of justice that underpin the South African legal system and may infringe upon a creditor's constitutional right to access a court of law pursuant to section 34 of the Constitution.

4.7 IMPACT OF BILL ON SMALLER FIRMS AND THEIR CLIENTS

The smaller firms constitute the bulk of practising attorneys in South Africa – in excess of 75% This is extremely important to achieve access to justice. Many litigants approach smaller firms for advice, which is often provided free of charge or for an insignificant amount of money. Many members of the public who visit small law firms do not have the means to pay, but are able to get assistance. These firms are also more likely to undertake the collection of smaller debts.

Increased regulation and registration fees will negatively impact on smaller law firms, many of whom can hardly afford the registration fee of even one regulatory body.

The Bill may negatively impact on the availability of legal services to vulnerable members of society, by alienating attorneys who are inclined to render such assistance.

4.8 VALIDITY OF AGREEMENTS BETWEEN ATTORNEYS AND CLIENTS

Section 8(3) of the Debt Collectors Act provides that: "Any agreement concluded between a debt collector and his or her client or between a debt collector and his or her employee either <u>before or after</u> the date referred to in subsection (1) which is incompatible with the prohibition contained in that subsection shall be invalid to the extent of such incompatibility."

This means that it will render any agreement entered into between an attorney and his or her dient (which involves debt collection) invalid if the attorney is not registered with the Council for Debt Collectors.

This section will have far-reaching implications for the overwhelming majority of law firms and their dients. To its logical extent, it may invalidate millions of agreements (or parts thereof) entered into between attorneys and their dients involving immeasurable funds and spanning over many years.

This alone should earnestly prompt the Department to reconsider the Bill, given its disturbing implications.

4.9 THE IN DUPLUM RULE

The wording of section 15(1)(g) of the Bill is perceived to create a variation of the *in duplum* rule, contrary to that of the common law and the National Credit Act.

4.10 THE COUNCIL FOR DEBT COLLECTORS

The Debt Collectors Act was never meant to regulate attorneys, it was meant for pre-litigation procedures embarked upon by debt collectors which do not include attorneys. This is evident from:

- a. The composition of the Council for Debt Collectors which consists of only one attorney nominated by a representative body or bodies; and
- b. The main object of the Council, as listed in section 2(2) of the Debt Collectors Act, being 'to exercise control over the occupation of debt collector'.

Accordingly, the proposed changes to the Debt Collectors Act, as contained in the Bill, are profoundly flawed as they relate to attorneys. Regrettably, the remedy offered pursuant to the Bill will, in its current format, require the registration and regulation of the overwhelming majority of attorneys (including their employees), as debt collectors.

It is doubtful whether the Council for the Debt Collectors has the resources to execute this mandate effectively for more than 24 000 practising attorneys and almost 6 000 candidate attorneys, as well as staff members. This is simply not feasible. Attorneys are already regulated and face harsh penalties if found guilty of unethical conduct.

Currently, the disciplinary departments of the four statutory law societies attend to all complaints against attorneys. These departments are staffed by well-trained attorneys to follow due legal process.

The withdrawal of a registration certificate in terms of the Bill, will result an attorney having to cease practice. For that reason, the stakes are much higher for a practising attorney and the disciplinary process will not be a simple one, but will without doubt be contested by the alleged defaulting attorney, well represented by counsel. It is unlikely that the Council for Debt Collectors in its current form will be able to attend effectively to complaints against attorneys.

5. CONCLUSION

The LSSA believes that the proposed amendments to the Debt Collectors Act go too far. There are more fitting ways to effectively address the Legislature's concerns, in addition to solutions already alluded to in this submission, including:

- a. Incorporating the proposals made to the Department of Justice on the Working Document: Magistrates' Courts Amendment Bill, attached hereto, will to a large extent prevent abuses regarding the collection of debt;
- b. Promoting the adoption of a Code of Conduct, similar to that for debt collectors in terms of the Debt Collectors Act, by law societies for attorneys engaging in defined debt collection activities. The LSNP has already embarked on a process to introduce a Code of Conduct for its members that are in the business of collecting debts; and
- c. Providing for a simplified and swift initial complaint and investigation procedure to assess complaints received by debtors to determine if a matter can be resolved without adopting a formal procedure and, where applicable, recommend a formal disciplinary process.

COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA (LSSA) ON THE WORKING DOCUMENT: MAGISTRATES' COURTS AMENDMENT BILL RELATING TO AMENDMENTS TO SECTIONS 36, 57, 58, 65, 65J AND 86

The Law Society of South Africa (LSSA) has considered the Working document on the Magistrates' Courts Amendment Bill and comments as follows:

<u>PART A – Amendment of Sections of the Magistrates' Courts Act dealing with Section 57 and 58</u> judgments and instalment orders as well as emoluments attachment orders (EAO's)

 The following areas were identified as focal points where there has been abuse of the EAO's, alternatively abuse was facilitated:

1.1 Consents

Credit providers who, in contravention of the National Credit Act No. 34 of 2005 (NCA), insist on the debtor signing a variety of papers <u>before</u> the loan is granted i.e. at the time the transaction is concluded. In a few instances, it was reported that some credit providers had forged signatures on these documents by using sophisticated techniques involving the scanning of a genuine signature on to these documents and then submitting them to the Courts with a "lost document" affidavit. These documents include:

- 1.1.1 Consent by the debtor to the jurisdiction of a Magistrate's Court which would not otherwise have jurisdiction in terms of Sections 28, 29 or 45;
- 1.1.2 Consent to judgment; and
- 1.1.3 Consent to an order to pay such judgment by way of instalments.

It is common cause that credit providers and their attorneys, through these consents, routinely have the judgments and EAOs granted in distant Courts where the debtor neither resides nor is employed, making it expensive for the debtors to oppose the granting of the EAO.

Recommended solution

a. The ambiguity of Section 45 of the Magistrates' Courts Act and its apparent conflict with Section 28 have facilitated the abuse of getting a debtor to consent to the jurisdiction of a Court which has no jurisdiction in a matter either in terms of Section 28 or 29. It is suggested that the following amendments (in bold) be made:

i. Section 45 be amended as follows:

"Subject to the provisions of Section 46, the Courts shall have jurisdiction to determine any action or proceedings otherwise beyond its jurisdiction in terms of Section 29 (or, as an alternative, "in terms of Section 29(1)(g)"), if the parties consent in writing thereto: Provided that no Court other than a Court having jurisdiction under Section 28 shall, except where such consent is given specifically with reference to particular proceedings already instituted or about to be instituted in such Courts, have jurisdiction in any such matter."

- ii. The consent to jurisdiction where the procedure in Sections 57, 58 and 65J is utilised should be limited to the Court where the debtor is employed or resides. This will ensure that judgment is granted and the EAO issued in that jurisdiction. This is in line with what the legislature envisaged in terms of Sections 90(2)(k)(vi)(bb) and 91(a) of the NCA. This will require some surgery to the provisions of Sections 28, 29, 45 and 65J.
- b. The EAO should only be confirmed after the debtor and/or his employer have been given an opportunity to oppose the granting thereof a right which appears to already exist in Section 65J(5) and Rule 12(7)(b) of the Magistrates' Courts Act. In this regard, it is suggested that the credit provider's attorney be required to serve a notice (hereinafter referred to as the "pre-EAO Notice"), together with copies of ALL supporting documents, on the debtor and his employer in which:

- They are informed of the credit provider's intention to seek an EAO in accordance with the debtor's consent;
- ii. The full amount of the capital debt (substantiated by a statement of account by the credit provider) as well as interest and costs are quantified and set out;
- iii. They are informed that, unless they serve and file on the Court and on the credit provider's attorney a notice of intention to oppose the granting of the EAO within, for example, 15 (fifteen) Court days from date of service of the notice, the EAO (in its amended format referred to below) will be granted on an unopposed basis and issued, in accordance with the debtor's consent, either by the Clerk of the Court or the Magistrate (depending on whether or not the debt falls within the ambit of the NCA); and
- iv. The debtor and/or his employer are provided guidelines upon which the granting of an EAO can be opposed.
- c. The aforementioned notice of intention to oppose must state the grounds upon which the debtor and/or his employer wish to oppose the granting of the EAO – preferably in affidavit format. As the debtor's consent to an EAO is prima facie proof of its contents, the grounds upon which the application for EAO may be opposed will be limited to where:
 - The consents referred to in Paragraph 1.1 were obtained under duress or by fraud; or
 - ii. The amounts claimed in the notice (capital, interest and costs) are erroneous or not in accordance with law, or
 - iii. A large portion of the debtor's salary is already committed to EAOs and the debtor will be left with very little to survive on. In this regard:

- The Law Society is of the opinion that the decision to utilise this ground as a basis for opposing the proposed EAO should be left in the discretion of the debtor and/or his employer rather than relying on a percentage cap being placed on the debtor's salary in determining the level at which the debtor's salary may be considered to be over committed to EAOs.
- There are distinct advantages to the Law Society's school of thought as it affords both the creditor's attorney and the debtor the opportunity to test the issue of affordability (of which EAOs are only a part) under judicial supervision of a full financial enquiry. This includes, inter alia, the possibility of additional sources of income, expenditure committed to luxuries, essential expenditure by the debtor not necessarily subject to an EAO and, if necessary, a review of all EAOs against the debtor (similar to that provided in Section 87 of the NCA).
- It is envisaged that the debtor's employer will play a significant role in the event of the basis of opposition being that a large portion of the debtor's salary is already committed to EAOs. The integral part of the employer's role will be the submission of an affidavit with the notice of opposition setting out full details of all existing EAOs against the debtor, including contact details of the attorneys dealing with such other EAOs, and attaching a copy of the debtor's payslip in proof thereof. The ultimate intention is that, in this instance, the Courts, after considering all the facts before it, will have the discretion to order an enquiry (similar to a debt review) where not only the proposed EAO is considered but also <u>all</u> existing EAOs are reviewed (similar to the provisions of Section 87 of the NCA).
- It is respectfully submitted that using a percentage cap of the debtor's salary as a means of determining the level at which the debtor's salary is considered over committed to EAOs has its inherent

clangers in that, apart from having to decide at what percentage to peg the cap, it does not take into account the wide variance of salary levels debtors may earn — the well earning debtor may still have sufficient income to survive on despite the EAOs against his salary having exceeded the percentage cap. More importantly, the proponents of the percentage cap theory envisage that the credit provider whose EAO falls after the percentage cap has been reached will have to delay the enforcement of his judgment (and consequently his EAO) until some of the EAOs that are being enforced against the debtor have been satisfied and the percentage of the debtor's salary again falls below the cap. The Law Society believes that this will have undesirable consequences on the manner in which credit providers will resort to collecting debts and it will ultimately adversely affect the lower income group's ability to access credit.

- d. In the event of a notice of opposition being filed by the debtor and/or his employer, it will be then incumbent on the credit provider's attorney to set the application for the EAO down for hearing in open Court, requiring service of the set down on the debtor and, if the opposition is based on over-commitment of the debtor's salary to EAOs, on all the attorneys representing the credit providers of such EAOs it is submitted that the presence of the employer at the hearing is not required in the light of his affidavit referred to in sub-paragraph iii of paragraph c. above. This will provide the necessary judicial oversight only where the circumstances warrant it and will not unnecessarily overburden the magistracy.
- e. In the event that the debtor and/or his employer does not oppose the application for an EAO or in the event of the Court granting the EAO or reviewing all the debtor's EAOs at the Court hearing referred to in sub-paragraph d. above, the credit provider's attorney/s will be required to serve the EAO on the debtor and his employer, which EAO will have to set out the capital amount, the interest and costs (both calculated and quantified, including disbursements), the monthly payment amount, the day of the month by which the monthly payment must be effected and the date of the last payment.

f. The practice of obtaining the aforementioned consents before the transaction is completed should be criminalised and such consents, as well as any consents found to be forged, should be declared unenforceable.

1.2 High Interest Rates on Micro loans

- 1.2.1 The lower income consumer will usually not have any assets to secure a loan nor is he likely to have a credit history and repayment track record to acquire an unsecured loan at an attractive interest rate. This means that the only type of credit that he can access is a micro loan, especially if he needs credit urgently.
- 1.2.2 Microloans fall into the category of what the NCA defines as "a short-term credit transaction" – namely, one where the amount does not exceed R8, 000.00 and is payable within a maximum of six months.
- 1.2.3 For this type of loan the debtor can be charged interest of no more than five percent a month or 30 percent over six months – or 60 percent a year, if he continually borrows against the loan.
- 1.2.4 The NCA stipulates that interest rates on these particular loans must be disclosed as a monthly interest rate, but not whether the interest rate is nominal or effective. It does however state that "the interest rate must not exceed the maximum prescribed interest rate applicable to the category of credit agreement concerned" and provides formulas for how interest must be calculated.
- 1.2.5 Some credit providers offering short-term loans extend to the debtor additional credit (up to his original loan amount) as soon as he has made his first or second instalment. In doing so, they are effectively giving the debtor revolving credit which allows him to keep borrowing up to a limit and he can end up paying interest of 60 percent per annum, or more if the interest is compounded.

1.2.6 In the end, the most financially vulnerable consumers (which are the very people that the NCA seeks to protect) still pay the most for credit because these extremely expensive micro loans are the only credit they can access.

Recommended solution

- a. The National Credit Regulator, together with the Department of Trade and Industry must come to the rescue of these consumers and reduce the rates.
- b. Despite the fact that the NCA came into operation some years ago, consumers are still not yet fully informed about the various credit agreements available to them and the maximum interest rates that apply to each. They become more vulnerable, especially if they need credit urgently and do not necessarily choose the most cost effective credit.

1.3 Reckless lending on the part of credit providers

It was noted that, in many instances, the debtor could not afford the debt in the first place with total deductions (including EAOs) on his / her salary already excessive and leaving the debtor with very little salary to survive on. The reality is that the vulnerable impecunious debtor would rarely have the financial ability to pursue this avenue.

- a. The Consumer Protection Act No. 68 of 2008 "CPA) and the NCA (particularly Part D of Chapter 4) provide excellent protection for the consumer. The enforcement of the provisions of the CPA and NCA are, however, problematic.
- For example, Debt Counsellors are, by and large, poorly trained in respect of the following:
 - i. little financial training;
 - ii. little ability to negotiate at high level with major credit providers such as the banks; and

iii. little knowledge on aspects of the law and the drafting of documents to be lodged at Courts.

This causes unnecessary delays and the statutory provisions should be amended to ensure the appointment of properly qualified counsellors.

- c. Furthermore, the applicant in the Debt Review should be the debtor and not the Debt Counsellor for, inter alia, the following reasons:
 - i. The Debt Counsellor is often in a different jurisdiction to that of the debtor;
 - ii. The creditor's right to test the debtor's personal circumstances under cross-examination is severely hampered as the Debt Counsellor is not always in a position to respond to such questioning. This results in unnecessary postponements and unnecessary costs being incurred to the detriment of the debtor.
- d. Whilst the NCA has created forums outside of the Courts for debtors to approach, these forums were only created in the main urban areas which are not always easily accessible to the rural consumer.
- e. Whilst Section 81(1) of the NCA places an obligation on the consumer to fully and truthfully answer any requests for information made by the credit provider in order for the latter to make the assessment required in terms of Section 80 of the NCA, it imposes no sanction on the consumer if he fails to do so and, at best, the credit agreement will be enforceable as against the consumer. The enforceability thereof will be severely hampered if the consumer's salary is already substantially committed to EAOs. As a deterrent to reckless borrowing, consideration should therefore perhaps be given to imposing a statutory obligation on a consumer, when incurring further debt, to disclose that his salary is already subject to EAOs (and possibly criminalising it in a fashion similar to Section 74 S of the Magistrates' Courts Act). This will enable the credit provider to make a proper assessment in terms of Section 80 of the NCA.

1.4 <u>Misrepresentation</u> by some credit providers or their agents (alleged "tracers") who seek, under the pretext of being traced, to get the debtor to sign incomplete or blank forms containing the consents referred to in paragraph 1.1.

Recommended solution

Same as that referred to in Paragraph 1.1 above.

1.5 <u>Lack of perusal or explanation</u>

The failure by the debtor to properly peruse the documents that he or she is being requested to sign, or the failure by the credit provider or its agent to properly explain these documents to the debtor. It has, for example, been reported that some credit providers charge for insurance that does not exist or that is far in excess of the actual charge by the insurer. Furthermore, the consent to an EAO by the debtor is often lacking in detail and not always signed under oath.

- a. The debtor's consent to an EAO form (wherever it may appear in the Magistrates' Courts Act) should make it obligatory for the debtor to set out full details of his income and expenditure (including his monthly commitments to creditors under Court's order, EAO or agreement) as well as details of all his assets and liabilities. These details should be supported by documentary evidence wherever possible. This detailed consent to the EAO must be signed by the debtor under oath. This document becomes important for the Courts (whether it be the Clerk of the Court or a Magistrates) to ensure that, after satisfaction of the EAO, the Court is satisfied that the judgment debtor will still have sufficient means to maintain himself and those dependent on him [as specifically required by Section 65J(6) and Form 38 of the Magistrates' Courts Act].
- b. An educational program for ALL stakeholders (Credit Providers, Debtors, Employers, Clerks / Registrars of the Courts, Sheriffs and Attorneys) is

necessary. This must include an explanation of the nature and processing of the EAO. In this regard it is suggested that:

- The pre-EAO Notice and the EAO itself should go to some lengths in explaining the rights and obligations imposed on the debtor and his employer; and
- ii. Sheriffs of the Courts can greatly assist and, perhaps for an additional fee, explain the nature of the pre-EAO Notice to the debtor and employer as well as the nature of the EAO when effecting service thereof.
- 1.6 <u>Lack of knowledge by Clerks / Registrars of the Courts</u> in the proper application of the provisions of the Magistrates' Courts Act relating to the jurisdiction of the Courts either when the matter is initiated [in particular Sections 28 and 45] and/or when the EAO is authorised and issued [in particular Section 65J(1)(a)].

- a. The education program referred to at Paragraph 1.5 above.
- b. The recommendations referred to in Paragraph 1.1 together with judicial supervision where the matter is opposed on the happening of any of the events referred to in sub-paragraph c thereunder.
- c. The specific amendment to Section 65J(1)(a) which only allows the issue of an EAO in the jurisdiction where the debtor resides or is employed. This is in line with what the legislature envisaged in terms of Sections 90(2)(k)(vi)(bb) and 91(a) of the NCA.
- d. The assistance of the Sheriffs of the Courts who, as officers of the Courts, are entitled, if not obliged, to return to the Court / attorney EAOs which, ex facie the document, have been issued out of the wrong Court.
- 1.7 The attorney's costs which, although in some instances are correctly charged in terms of the Magistrates' Courts Act / Rules, are immorally high vis-à-vis the usually small initial

capital amount required to be recovered. The problem appears to lie with the attorney's costs <u>after</u> the EAO has been authorised. The attorney's costs prior to the authorisation of the EAO should present no problem as the Clerk of the Court or Magistrate, when authorising the EAO, would not authorise any costs to which the attorney is not entitled either in terms of the Magistrates' Courts tariff or the recommended tariff of the relevant provincial law society.

- a. It must be noted that the work required to be done by an attorney in implementing an EAO is the same regardless of the quantum of the capital.
- b. The fees that an attorney is entitled to recover from the debtor is governed by Part 1 of Table B to Annexure 2 of the Magistrates' Courts Rules and rules of the various provincial law societies (if the debtor has agreed to be liable for costs on the attorney and client scale). This is so regardless of the fee arrangement that the attorney may have with his client (including where the attorney is acting on a contingency basis).
- c. The proposed pre-EAO Notice and particularly the current EAO form used in the Magistrates' Courts should be amended so as to reflect the capital amount, the interest and costs (both calculated and quantified, including disbursements), the monthly payment amount, the day of the month by which the monthly payment must be effected and the date of the last payment. In this way, the EAO will not be granted if the attorney seeks to recover any costs which are not in accordance with Part 1 of Table B to Annexure 2 of the Magistrates' Courts Rules and the rules of the law societies.
- d. In so far as the attorney may want to recover any additional fees and disbursements from the debtor post the granting of the EAO, it is recommended that:

- Necessary disbursements (e.g. the Sheriff's fees for service of the EAO) should be recoverable merely on presentation of proof thereof to the debtor and employer; and
- ii. Additional fees post EAO should only be recoverable if authorised by the Court either by way of a further application [perhaps under Section 65J(7)] on notice to the debtor and employer or where the Court has had to review all existing EAOs against the debtor (as referred to in sub-paragraph c of paragraph 1.1 above.
- e. The debtor should similarly be able to approach the Court under Section 65J(7) for a rescission of the EAO where the attorney seeks to recover excessive amounts not reflected on the EAO or not subsequently authorised by the Court. Consideration should perhaps be given to creating a Magistrates' Courts Rule to facilitate a cheap and simple procedure for the debtor to approach the Court. There appears no reason why debtors with existing EAOs cannot already approach the Court for a variation or rescission of the EAO if excessive amounts are being claimed from them. In so far as it is believed that this may cause a deluge of applications under this section, it is suggested that, as an interim measure, Commissioners in the Small Claims Courts be authorised to hear such applications where the amount of the EAO in dispute falls within the jurisdiction of such Courts.
- f. In so far as the issue of disciplinary action against the attorney is concerned, it is re-iterated that:
 - i. The disciplinary powers of the provincial law societies are limited to the imposition of a fine on the transgressing attorney for unprofessional conduct and, in transgressions of a more serious nature, an application to Court for the suspension or striking off of the transgressing attorney from the roll of attorneys. It is not empowered to order the transgressing attorney to refund the judgment debtor any amount that may have been overcharged – this must be done through a Court of law; and

ii. The law societies can only react to complaints which have been lodged before them or where the particular transgression comes to their notice. In this regard, it should be noted that the Magistrate dealing with the debtor's application for rescission of the EAO under circumstances referred to in sub-paragraph e above does have the right to bring this transgression to a law society's notice.

1.8 <u>In duplum rule</u>

The lack of knowledge regarding the implementation of the common law *in duplum* rule and statutory *in duplum* rule as expounded by the Supreme Court of Appeal in the matter of Nedbank v National Credit Regulator [2011] ZASCA 35. In this regard:

- 1.8.1 It is important to note that the common law in duplum rule still applies to those transactions that are not subject to the NCA. In terms of the common law in duplum rule:
 - 1.8.1.1 Firstly, where the total amount of arrear and unpaid interest has accrued to an amount equal to the outstanding capital sum, interest ceases to run, but any payment made by the debtor thereafter will lead to the amount of interest decreasing after which interest again starts to accrue to an amount equal to the outstanding capital amount; and
 - 1.8.1.2 The in duplum rule is suspended pendente lite, and the lis is said to commence upon service of the initial process, whereafter interest runs again.
- 1.8.2 The statutory in duplum rule is set out in Section 103(5) of the NCA which states that "the amounts contemplated in section 101(1)(b) to (g) that accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance on the principal debt under that credit agreement as at the time that the default occurs". Section 101(1)(b) to (g), refers to the following: (b) an initiation fee; (c) a service fee; (d) interest; (e) cost of any credit insurance; (f) default administration charges; (g) collection costs. There

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appears to be uncertainty as to whether the "collection costs" referred to in Section 101(1)(g) of the NCA includes the litigation costs incurred by the credit provider's attorney.

Recommended solution

- a. A declarator by the Courts to get full clarity on the statutory in duplum rule, particularly with regard to Section 101(1)(g) of the NCA, is required. It is respectfully submitted that the "collection costs" referred to in that section can only mean the collection costs incurred by the credit provider prior to the launching of litigation by its attorneys. It could not have been the legislature's intention that it should include the "litigation costs" as to do so will create a dangerous precedent for the simple reason that it may force the credit providers to look to other methods other than the Courts in recovering its claims. Just as the credit provider has the right to seek the Court's assistance to recover its debts, so has the debtor the right to seek the Court's assistance in defending such claims and it is common cause that litigation costs can be quite substantial, especially in defended actions; and
- b. The education program referred to at Paragraph 1.5 above.

1.9 Lack of judicial oversight in the granting of the EAO

The necessity for judicial oversight in the granting of an EAO is apparent from what has hereinbefore been mentioned, not only because of the abuses that occur in obtaining the consents from the debtor, but also to ensure that, after satisfaction of the EAO, the Court is satisfied that the judgment debtor will still have sufficient means to maintain himself and those dependent on him [as specifically required by Section 65J(6) and Form 38 of the Magistrates' Courts Act].

Recommended solution

It is recognised that the magistracy would probably not be able to cope with all applications for an EAO being heard in open Court. In order to minimize this problem,

the pre-EAO Notice procedure recommended at sub-paragraphs b, c and d of Paragraph 1.1 above is suggested.

1.10 The service of EAOs by email / post / persons other than the Sheriffs of the Courts.

Recommended solution

The Magistrates' Courts Act and its Rules should make provision that the pre-EAO Notice recommended above as well as the EAO will have no force and effect unless served by the Sheriff of the Court whose duty it is to explain the nature of the document to the debtor and employer when effecting service, as well as their rights and obligations thereunder.

1.11 Add-ons

In many instances different items and further obligations to the debtor are added on both pre and post the EAO without proper consultation with the parties or without authority from the Courts.

Recommended solution

It is recommended that the pre-EAO Notice (referred to in sub-paragraph b of paragraph 1.1) should set out the full amount of the capital debt (substantiated by a statement of account by the credit provider) as well as quantify interest and costs to the date of such notice. It is further recommended that the whole EAO form itself be amended so as to reflect the date on which the payments are to commence, the date on which the monthly payments are to be made, the date of the last payment and the amount of each instalment as well as the total amount payable in terms of the EAO over the payment period – in other words, it must set out the judgment debt, the interest quantified over the payment period, the costs quantified to the date of the EAO and the collection commission that will fall due on payments to be made over the payment period. Provision must also be made on the EAO form for the Sheriff to insert his charges for service of the EAO. If the attorney wishes to recover any further fees incurred after the EAO has been granted, it will be necessary for him to make

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application to the Court, on notice to the employer and debtor in terms of Section 65J(7) of the Magistrates' Courts Act.

1.12 Allocation of payments

In most instances, the debtor's payments are first allocated towards costs and interest which, if minimal, hardly reduces the principal debt.

Recommended solution

Barring any agreement to the contrary, common law dictates that a debtor's payments should first be appropriated towards the debt that is most onerous to the debtor. It follows that where interest accrues on the capital amount of a debt, payments are credited first to discharge interest and then only to capital. Legal costs should follow interest and capital to ensure that the consumer's interest is looked after.

1.13 Delays

Unnecessary delays on the part of employers (particularly the State and parastatal entities) in putting the EAOs into operation, usually due to the red-tape administrative requirements of the employer.

Recommended solution

Section 65J(4)(a) of the Magistrates' Courts Act requires the employer to effect payment in terms of the EAO at the end of the month following the month in which the EAO was served on the employer. The employer is, in terms of Section 65J(10), awarded 5% commission for facilitating the EAO on the employee's salary. He should therefore have a greater obligation to control the EAO, particularly its implementation and its termination. This is particularly important in determining whether the debtor's salary is already overcommitted to EAOs as the employer is probably the best person to bring this to the Court's notice when the pre-EAO Notice is served on him. If the employer delays in implementing the EAO beyond the period referred to in Section 65J(4)(a), the

interest that may have accrued on the judgment debt as a result of such delay ought to be paid by the employer out of the 5% commission earned by the employer.

1.14 Termination of the EAO

It appeared that, in many instances, the employer effected payments beyond what was required of him in terms of the EAO and the EAO was never terminated.

Recommended solution

The amended form referred to in paragraph 1.11 which specifically sets out the date of the last payment should resolve this issue.

2. The necessity for an effective debt collecting process

- 2.1 The granting of credit is the astonishingly simple truth of money creation in a free market economy. It is therefore important to emphasize that in a credit market, there must be an effective debt collecting process. This is recognised by the Legislature and one only needs to refer to the provisions of Section 3 of the NCA which deals with the purpose of the Act. Section 3(i) provides that one of the aims of the NCA is to provide for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.
- 2.2 The generally accepted methods of collecting a judgment debt are as follows:
 - 2.2.1 A warrant of execution against the judgment debtor's movable assets. This is perhaps the most severe form of debt recovery. Sales in execution of the debtor's movable property are forced sales and the proceeds realised at these sales often do not even cover the judgment debt. The costs attached to these sales are substantial and sometimes surpass the amounts realised at the sale, thereby adding to the financial burden of the judgment debtor.

- 2.2.2 A financial hearing into the debtor's financial affairs under Section 65 of the Magistrates' Courts Act. It is generally accepted that this is a procedure "without teeth" for the following reasons:
 - 2.2.2.1 The procedure is entirely dependent on the judgment debtor appearing at the enquiry. If the debtor does not appear, the Court will authorise a warrant for his arrest based on the contempt of Court rationale, the purpose of the warrant being for the Sheriff of the Court to bring the debtor to Court to explain his absence at the hearing and to thereafter conduct the originally intended financial enquiry. However, the Courts will generally not authorise such warrant unless there has been personal service of the Section 65A(1) notice on the debtor. It is a relatively easy task for the skilful debtor who is reluctant to appear in Court for the enquiry to avoid personal service of the notice. This causes unnecessary delays and costs and the judiciary should perhaps give consideration to relaxing the requirement of personal service of the notice to the limited extent that a warrant of arrest will be authorised if the debtor fails to appear at the hearing, even if the notice is served on a family member at the debtor's residence or on a work colleague at the debtor's place of employment. Part of the objective of the warrant of arrest is after all to ensure the debtor's presence at the financial enquiry to develop a structured repayment plan.
 - 2.2.2.2 Even if the Court does order the judgment debtor to repay the judgment debt in specified instalments at such hearing, the section does not provide any form of sanction if the debtor fails to adhere to the Court's order. Additional costs are therefore incurred in having the debtor recalled to Court who, at best, will receive a "slap on the wrist".
 - 2.2.2.3 Even if the judgment debtor is present at Court for the hearing and the Court orders him to repay the judgment debt in specified instalments, the Court is usually reluctant to simultaneously

authorise an EAO until such time as the judgment debtor has been afforded the opportunity to comply with the repayment order on his own. Again, on default, it creates unnecessary delays and extra costs in having to recall the debtor to Court. It is accordingly respectfully suggested that the judiciary should reconsider its attitude in granting an EAO under such circumstances.

- 2.2.3 The EAO This is perhaps the most effective manner in which a judgment debt is collected and, provided it is implemented in a proper and structured manner, will ensure that the consumers obligations are met, which is after all one of objectives of the NCA. To get rid of this procedure altogether, as has been suggested in some circles, will have dangerous repercussions including, inter alia, creditors resorting to more drastic and expensive methods of debt recovery (e.g. sales in execution of movable property), the resurgence in extreme cases of unlawful methods of debt collection and making it costly, if not impossible, for historically disadvantaged consumers to access credit.
- 2.3 The provisions of Sections 57 and 58 of the Magistrates' Courts Act (which were reasonably new to the Act), coupled with the EAO procedure, were introduced to create a cheap and quick process to assist both credit providers and consumers. Unfortunately, the abuses of the process hereinbefore mentioned have created the necessity for a revision of the provisions regarding the jurisdiction of the Courts and required some judicial oversight over the whole process. It is submitted that complete judicial oversight of the whole judgment process under Sections 57 and 58 as well as the EAO procedure is unnecessary and costly and will create an unnecessary burden on the judiciary.
- 2.4 It is respectfully submitted that the recommended suggestions hereinbefore mentioned will collectively go a long way in ensuring that the procedure is not abused by any of the stakeholders in the process. These recommendations will, inter alia, require drastic surgery to the provisions of Sections 57, 58 and 65 of the Magistrates' Courts Act and, to a lesser extent, to the provisions of Sections 28, 29 and 45 thereof. A substantial part of the recommendations hereinbefore set out do not form part of the proposed amendments contained in the Magistrates' Courts Amendment Bill as set out in the

working document. The LSSA would therefore like the opportunity to consult with the Department of Justice and Constitutional Development in the drafting of any amendment to the relevant sections in order to give effect to its recommendations.

Part B – The apparent conflict between the provisions of Rule 12(5) and Sections 57 and 58 of the Magistrates' Courts Act

- Sections 57(2) and 58(1) currently provide that the <u>clerk of the Court shall</u> enter judgment in favour of the Plaintiff upon compliance of the requirements mentioned therein. This has created the legal interpretation that only clerks of the Court may grant judgments in terms of this section. Rule 12(5), on the other hand, provides that <u>the clerk of the Court shall refer to the Court any</u> request for judgment on a claim based on an agreement governed by the NCA.
- 2. The Law Society has taken note of the judgments referred to at paragraph 3 of the working document, particularly the concerns raised in the minority judgment in the matter of African Bank Ltd vs. Myambo N.O. [2010(6) SA 298(GNP)] and is of the opinion that any legal uncertainty will be cleared if the word "shall" is deleted in both Section 57(2) and Section 58(1) and substituted with the words "may, subject to the provisions of Rule 12(5) of these rules" immediately after the words "clerk of the Court".

<u>Part C – Rescissions and abandonments of judgment as provided for in Sections 36 and 86 of the Magistrates' Courts Act respectively.</u>

1. Section 36 – Rescission of judgment

1.1 Careful consideration must be given to the effect of the proposed amendment as its purpose is predominantly to facilitate the "cleansing" of the debtor's credit bureau profile so that the debtor can once again enter the credit market. This will impact on a credit provider's right to utilise the credit bureau information in assessing whether a consumer presents a credit risk where such consumer seeks new credit.

- 1.2 Having said that and having considered the discussion and the case law cited at paragraph 4 of the working document, the Law Society is, in principle, in favour of the proposed amendment to Section 36 subject to the following:
 - 1.2.1 The first option to Section 36(2)(b) is preferred.
 - 1.2.2 Section 36(2)(d) must make provision for the rescission or variation to be effected by way of application on notice to the judgment creditor for hearing in an open Court. There may be good reason why the judgment creditor is uncooperative in consenting to the rescission of the judgment despite the full settlement of the judgment debt and the judgment creditor should be given the opportunity to air his opposition thereto in an open Court.

2. Section 86 – Abandonment of judgment

The LSSA is not in favour of any amendment to this section for the following reasons:

- 2.1 Section 86 falls within the Chapter of the Magistrates' Courts Act dealing with appeals and reviews in civil matters where the provisions of Section 86(1),(2) and (3) may be specifically necessary.
- 2.2 The purpose behind the proposed amendments to Section 86 as set out in the working document is identical to the proposed amendment to Section 36 (as set out at paragraph 1 of Part C above), namely to facilitate the "cleansing" of the debtor's credit bureau profile once he has paid the judgment debt, interest and costs so that he can once again enter the credit market.
- 2.3 There is absolutely no necessity for the amendment to Section 86 as the debtor can utilise the provisions of Section 36. The provisions must remain as is for the purpose for which it was originally intended namely in appeals in civil matters.