

Failure to discharge. A discussion of the insufficient legal recourse afforded to judgment debtors in the South African context.*

Summary:

University Legal Aid Clinics are often confronted with aspects of the law which are quite alien to those faced by our colleagues in private practice. One such area is that of assisting judgment debtors who have fallen afoul of disreputable and often immoral money lenders and other judgment creditors. These creditors unilaterally charge exuberant and unlawful fees for interest and 'legal' costs, which amounts are simply added to the judgments *ex post facto*. The issue of discharge then becomes hugely problematic as the courts do not *mero motu* step in to cancel emoluments attachment orders and other tools of collection employed by these creditors. It is argued that the South African legal system, including legislation in this regard, lends insufficient protection and recourse to indigent legal aid clients faced with this situation.

Opsomming:

Gebrek aan ontslag. 'n Bespreking van die onvoldoende regsmedele beskikbaar aan vonnisskuldenaars binne die Suid-Afrikaanse konteks.

Universiteit regshulpklinieke word dikwels blootgestel aan aspekte van die reg waarmee ons kollegas in die privaat praktyk nie gekonfronteer word nie. Een van hierdie areas is die bystand wat verleen moet word aan vonnisskuldenaars wat ingelooop word deur ongure en immorele gelduitleners en ander skuldeisers. Hierdie skuldeisers hef eensydiglik kwistige en onwettige fooie vir rente en 'regskoste', welke bedrae eenvoudig *ex post facto* by die vonnis gevoeg word. Die kwessie van ontslag raak dan uiters problematies aangesien die howe nie *mero motu* intree om besoldigingsbeslagbevele en ander invorderings metodes van die skuldeisers te kanselleer nie. Dit word geargumenteer dat die Suid-Afrikaanse regsisteem en wetgewing wat hiervoor voorsien, onvoldoende beskerming en regsmedele bied aan armlastige regshulpbehoewende kliënte wat voor hierdie situasie te staan kom.

· Practising Attorney and Notary Public of the High Court of South Africa, Lecturer in Civil Procedure, Legal Skills and Practical Legal Training at the Legal Aid Clinic, University of Stellenbosch.

* This article emanates from a conference paper delivered at the 5th International Journal of Clinical Legal Education Conference, held at the University of the Witwatersrand in Johannesburg on 9 to 11 July 2007.

1. Introduction

University legal aid clinics are often confronted with aspects or sides of the law which are quite alien to those faced by our colleagues in private practice. The same can also be said for any institution which renders legal aid exclusively to the indigent. It is not uncommon to find that these organisations specialise in areas of law such as assisting refugees,¹ enforcing social security for the unemployed,² representing dismissed employees³ and opposing unlawful evictions of farm labourers and squatters.⁴ Private law firms will in general seldom get involved in these so called “poverty law” cases as a result of the inability of these clients to pay their fees.⁵

It is also more often than not the case that these clinics and institutions rely on sponsorships for their existence, and that they thus have limited means, in terms of finances and human resources, at their disposal.⁶ This is in stark contrast to the deep pockets belonging to huge private commercial law firms and their clients. It can be argued that in a capitalistic driven society even in the legal system money talks – when it doesn’t shout it at least whispers!

It can also be argued that because of the vast resources available to invest in the law protecting the interests of those fortunate enough to be able to afford such help, these areas of the law develop at a more rapid pace and receive more public exposure. This can easily be seen in the often shocked response of the general public when offences against the basic rights of marginalised members of society are eventually brought to the fore.⁷

Responsible organisations involved in the provision of legal aid to the poor should thus view the exposure of these large scale infringements on the rights of their clients as one of their primary functions. It would not be altogether far-fetched to recognise that, at least in certain areas of law and / or jurisdictions, there exists a culture of disrespect for the rights of those who struggle to have access to proper legal representation. One such area, which all law clinics have been faced with, is that of assisting judgment debtors who have fallen foul of disreputable and often immoral money lenders and other judgment creditors. As is the case with the unemployed, the refugee and the evicted, debtors seldom have the financial means

¹ e.g. University of Cape Town Law Clinic.

² e.g. University of Johannesburg Law Clinic, Black Sash Paralegal Movement, Legal Resource Centre.

³ e.g. University of the Witwatersrand Law Clinic, Social Law Project.

⁴ e.g. University of the Western Cape Law Clinic, University of Stellenbosch Legal Aid Clinic, University of Kwazulu Natal Law Clinic, Rural Legal Trust.

⁵ The situation is compounded by the fact that assistance to debtors is excluded in Chapter 3, page 49 par 3.1 of the Legal Aid Board’s Legal Aid Guide.

⁶ In practice these organisations and their clients for example do not have the means to afford advocates to represent them in Court or to prepare legal opinions, as is the case with private law firms.

⁷ In South Africa the public were initially just as disbelieving and skeptic when the whole Saambou Bank scandal surfaced as many now are regarding the accusations surrounding the JD Group. <http://www.bankgate.co.za/test/news.htm> (accessed on 26 June 2008).

to afford the services of powerful private attorneys to protect their rights. As a result it is crucial that these persons are properly assisted by the clinical law movement.

2. Injustice, what injustice?

Bad debt means big business in South Africa. In the first quarter of 2007 alone, 60 826 judgments for debt with a total value of R519,8 million were granted by our courts. A staggering 121 986 summonses were issued for debt during this short period.⁸ Anyone who has spent some time working in a legal aid (law) clinic or similar institution should be fairly well acquainted with the following scenario:⁹

A client, whom we shall call Mr Nopay, walks into the clinic and complains that he is being overcharged for some debt which he has incurred. He is specifically aggrieved because he has already repaid the amount of the initial debt and a substantial amount more. In many cases this debt has also been formalised by way of court judgment entered against him. Often these judgments are then followed by court orders arranging for monthly deductions from either his bank account or by way of garnishee order direct from his salary.

Getting to the bottom of Mr Nopay's complaint usually requires making a couple of telephone calls as well as the perusal of the contract underlying the debt, where same has been provided to him. By making these enquiries and some elementary mathematical calculations it is possible to establish what the initial capital amount and total repayments to date have been. Determining the total *legal* amount due and payable could however be considerably more painstaking, as it is necessary to establish applicable legal costs and interest rates. This is usually no easy task, as it could be dependent on the application and implementation of various acts and common law principles,¹⁰ not to mention complicated interest and accountancy calculations.

In many cases it will be found that Mr Nopay's complaints can be attributed to his own ignorance or to that of his employer. Employers will occasionally only deduct the judgment amount from the debtor's salary, without taking interest and legal costs into consideration. It is also possible that Mr Nopay has simply miscalculated his own repayments to the creditor.

The following actual case studies of matters handled by the Legal Aid Clinic of the University of Stellenbosch however goes to show that there are cases where there exist merits in the complaints of Mr Nopay and other debtors.

2.1 Checkers employees – Kuilsriver Court

⁸ <http://www.statssa.gov.za/publications/statskeyfindings.asp?PPN=P0041&SCH=3918> (accessed on 18 June 2007).

⁹ In an informal questionnaire sent to six University Law Clinics in South Africa (Witwatersrand, North West: Mmbatho, North West: Potchefstroom, Rhodes, Stellenbosch and Pretoria) on 25 May 2007 all participants indicated that they received complaints in this regard.

¹⁰ For example the in duplum rule, which has now been given statutory authority in the *National Credit Act 34/2005*.

During 2001 the clinic was approached by 6 employees of Checkers, Brackenfell, a big chain store in South Africa. They informed that they had been approached at work by two agents who offered them immediate cash in exchange for signing various contracts and blank documents. They were not informed of the content of the documents and were schooled on average only to the 8th grade. They were only told that they would have to pay back twice the amount that they borrowed.

Amounts of between R500 and R800 were handed to each person. They were supposed to repay the amounts to the agents personally, who were to collect same. This did not happen and the debtors were not provided with any documentation to indicate where or how alternative payments were to be made.

By the time they approached the clinic it had transpired that two separate judgments had been taken against each of them based on the same loan. Amounts ranging from R4487 to R7360 had already been deducted from each of their salaries (of R2100 per month) through two garnishee orders amounting to between R710 and R900 per month. When the creditor was initially approached on the matter he indicated that amounts of approximately R3200 were still due and payable on each account.

2.2 Berco employees – Bloemfontein Court

During 2004 the clinic was approached by 10 employees of Berco cleaning services. Their monthly salaries were approximately R1400 per month. It transpired that they were all approached during their 45 minute lunch breaks by an agent offering cash loans and were induced to sign contracts in a language which wasn't familiar to them. Again these persons had very little schooling and educational training.

Amounts of between R820 and R1820 were paid to each person. Garnishee orders were then issued from the Bloemfontein court, where the creditor resided, even though the debtors were employed in Stellenbosch.¹¹ Amounts ranging from R4000 to R7000 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 in 2002. By March 2003 a garnishee order of R212 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 had been deducted from Mrs C's salary. At this stage the creditor indicated that the amount still due was R7953. By July 2004 a further R1062 had been paid over to the creditor, who informed that the balance was now R8391!

2.3 Mr K and Ms A – Bellville Court

¹¹ According to section 65A(1) of the *Magistrate's Court Act 32/1944*, an emoluments attachment order can only be issued by the court where the employer of the debtor carries on his business.

Ms A also fell in the trap of borrowing money from an unscrupulous money lender. Even though she was employed in Stellenbosch a garnishee order was issued against her by Bellville court. This happened after the office where she was making weekly payments closed down without providing her forwarding details to facilitate further payments. She borrowed an amount of R850 and paid over approximately R3000 before seeking legal assistance.

Mr K borrowed an amount of R2900 when he was approached by 4 agents at his place of employment in Stellenbosch. Later two separate garnishee orders were issued against him for this same cause of action by the Stellenbosch and Bellville courts.

In all of above discussed matters garnishee orders were issued by the Clerk of the court. These orders were rife with various amendments made in pen, and it was impossible to say whether these amendments were made before or after the order was granted. In at least one instance an amendment to the total judgment (debt) was proven to be made unilaterally by the creditor after the order was obtained. Many of the orders were issued from the wrong court, where the creditor abused the tactical advantage of going to a court practically inaccessible to the debtor.

Except for the above matters handled by the Stellenbosch Clinic, reports of other similar matters abound. One such report alleges that a lady borrowed an amount of R5 000 from a reputable financial institution, and already repaid nearly R20 000 on this loan. This institution alleges that she still owes a further R35 130,31 before her debt can be settled. In the same report a spokesperson for the relevant financial institution, when confronted with this situation, admitted that “we do around 10 000 new transactions every month and it is unavoidable that things might go wrong in the odd instances”.¹²

Recently a prominent furniture company has been exposed on national television for the way in which it conducts its hire purchase transactions.¹³ Although the matter is still sub judice, it seems fairly clear that the company endorsed a policy of informing their clients that they entered into hire purchase agreements, with limited interest charges,¹⁴ when they were in fact signing for loan agreements at much higher interest rates.¹⁵ Their collection costs have also been questioned as it has been shown on their own bills of account that they charge illegal fees. It is further alleged that in certain instances more than one garnishee order has been issued for the same debt. Even more alarming is the allegations, as substantiated by the relevant company’s own policy documents, that when a debtor’s account goes into credit with the company, these amounts are simply transferred to an unclaimed balances account where they are eventually written off.¹⁶

¹² Article in “*Die Kaapse Son*” 8 June 2007: 2.

¹³ Televised broadcast of Carte Blanche on the JD Group – 25 March and 20 May 2007.

¹⁴ Around 20 percent. <http://www.carteblanche.co.za/Display/Display.asp?Id=3316> (accessed on 22 June 2007).

¹⁵ Charged at 32,5 percent. <http://www.carteblanche.co.za>.

¹⁶ <http://www.carteblanche.co.za>.

Mr Clark Gardner of Summit Financial Partners¹⁷ audited 70 000 of the 1,75 million garnishee orders that have been set in motion by South African Courts.¹⁸ According to him the system is riddled with abuse. “If we had to extrapolate our audit findings there must be over a billion rand being over-deducted from already distressed borrowers and going into the pockets of unscrupulous lenders and collectors alike.”¹⁹

From the above summation it is clear that some creditors unilaterally charge exuberant and unlawful fees for interest and ‘legal’ costs, which amounts are simply added to the judgments, sometimes even ex post facto. The sum total then being that debtors are charged to pay illegal amounts of money as repayment of their debts. One does not need to think too long to imagine the negative impact this has on the lives of debtors who are burdened with these payments; the negative cycle of indebtedness and the resulting big business lives on.

3. But how can this be possible?

A loathsome and regrettable combination of factors gives rise to this situation.

The average debtor in South Africa lacks the necessary numeracy-, literacy- and legal skills to make judgment calls on complicated legislation and calculations. The calculation of the total legal amount due and payable by a debtor, especially in the case of cash loans, is often quite complicated. These calculations are made unilaterally by the creditor, who simply provides the debtor with the total amount due. Upon being (often repeatedly) requested to provide a detailed account, creditors will in all likelihood produce a complicated statement spanning several pages and just conveying enough information to put the debtor further in the dark.

Creditors further empower themselves by including, in most credit agreements, a clause in which the debtor agrees that a statement or certificate signed by the appropriate officer of the creditor constitutes sufficient proof of both the debtor’s default and the exact amount thereof. When entering default judgments against debtors this certificate also serves to get the Clerk of the court, responsible to rubberstamp the judgment, off the hook.²⁰ She can now rely on this and is not required to calculate whether the amount entered as judgment is correct. Even where no certificate is produced the Clerk of the court can not be expected to engage in mental gymnastics in each request for default judgment brought before her. The court thus relies on the bona fides of the judgment creditor in a system where the Clerk of the court is already heavily overburdened with responsibilities.

The heavy workload placed on the average Clerk of the court cannot however excuse him from blatant ignorance as to the rules of the court regarding jurisdiction. As shown in the examples dealt with above,²¹ it quite often happens that judgments

¹⁷ <http://www.summitfin.co.za/> (accessed on 22 June 2007).

¹⁸ In the informal questionnaire Rhodes University indicated that 60 percent of their grades 1 – 5 staff members have emoluments attachment orders against their salaries.

¹⁹ <http://www.cartelblanche.co.za/Display/Display.asp?Id=3316> (accessed on 22 June 2007).

²⁰ It is general knowledge that the vast majority of default judgments are granted by the Clerk of the court in terms of rule 12 of the *Magistrate’s Court Act*.

²¹ See paragraph 2.

and emoluments attachment orders are granted by Clerks of courts who have no jurisdiction over the matter. The lack of accountancy and numeracy skills on the part of many civil officers are thus compounded by their frequent lack in basic legal knowledge.

The court's reliance on the creditor's bona fides gets even more serious after the judgment has been awarded. It is practically impossible for the court to keep abreast of each debtor's payments and reducing balances in respect of the judgments entered under its jurisdiction. Understandably, the issue of discharge then becomes hugely problematic as the courts do not mero motu step in to cancel judgments and the resulting emoluments attachment orders and other tools of collection employed by these creditors.

It can be argued that the lack of accountancy and numeracy skills present in debtors and court officials are not necessarily absent from creditors either. Judging by the number and frequency of accounts being overcharged, it seems that creditors are however inclined to rather err on the side of charging too much when they themselves seem to be unsure as to whether a certain debt has been discharged. This situation is compounded when a debt is handed over to attorneys or debt collectors, who often add their own fees and costs illegally to that already charged by the creditor.²² It also stands to argue that many creditors may justify this overcharging of debtors who are able to pay, because they have attachable assets or a salary which can be executed against, by balancing this with their bad debt book.

Against this background it might not be surprising that many creditors are more than willing to play the percentages in a society where illiteracy and a lack of basic numeracy skills abound. Combined with the limited access to proficient legal aid, debtors are seldom informed enough to lodge their complaints in a manner as to force the creditor and courts to properly attend to it.

4. Assisting the overcharged debtor

Let's assume for the sake of argument that our Mr Nopay has in fact been overcharged in the calculation of his debt. He has already paid the considerable amount of R3000 more than he was legally obliged to do.²³ He now looks to the specific legal aid institution to assist him in not only stopping the creditor from deducting monthly payments from his bank or salary, but also to reverse payment of the overcharged amount.

Typically the clinic would now approach the creditor with the recalculation of the debt. It will be found in many cases that the creditor will be interested in negotiating

²² Most Law Societies allow for a collection commission of only 10 percent. Creditors however often add the full amount in terms of their own arrangements with their collection agencies to the debtor's account.

²³ This information would be available to the Clinic after having received the basic details of the transaction and repayments and having conducted its own investigations and calculations or after having made use of the services of an expert.

a settlement with the debtor, especially if he is able to clean the slate and avoid the risk of a counterclaim for the overcharged amount.

The new National Credit Act²⁴ should also play a considerable part in regulating these types of discussions in the future. In terms of this act, which aims to protect over-indebted consumers, the creditor can be forced to enter into talks with a debt counsellor acting on behalf of the debtor before he approaches a court.²⁵ Subsequent renegotiations of the total debt or instalment payments are also facilitated.²⁶ Where judgment has however already been entered against the debtor the Act does not seem to play much of a role.²⁷

Should no judgment have been entered against Mr Nopay he would be advised to simply cease payment and to close his bank account, where deductions were being made from, if necessary and should the creditor be unwilling to cooperate and initiate the stop-order on his own. If the creditor then starts legal proceedings against Mr Nopay said action can be defended and the appropriate counterclaim, based on the *condictio indebiti*,²⁸ filed. Negotiations and / or legal summons can also be pursued against the creditor to repay the amount of R3000.

A claim for the repayment of interest illegally charged by a credit provider was recently brought before the court in the matter of *Mndi v Malgas*.²⁹ In this case the debtor relied on enrichment to recover excess usurious interest that she paid to the creditor. The lender agreed to lend the borrower an amount of R6000 at an interest rate of 30 percent per month, on which loan the debtor eventually paid back an amount of R34692,60. The court granted the debtor's claim in the amount of R26772,60, being the difference between the interest paid at the agreed rate and the interest payable at the legal rate of 15 percent per annum.

Judgments against debtors subjugated to the collection process are in practice mostly found to be entered by default.³⁰ The reason for this is that these debts are typically a result of money lending, hire purchase of goods or services or other credit providing activities. Before these agreements are entered into creditors normally have their clients sign lengthy documentation, providing inter alia for consent to default judgments and garnishee orders, in order to simplify and hasten the collection process for the creditor and his collection agents.³¹

If default judgment was entered against Mr Nopay and the creditor is amenable to settle the matter, he would simply agree to the rescission of the judgment in terms of rule 49(5) of the Magistrate's Court Act, which reads as follows:

²⁴ Act 34/2005.

²⁵ sec 88(3), 129.

²⁶ sec 86.

²⁷ sec 86(2).

²⁸ Harms, *Amler's Precedents of Pleadings* 4th ed: 68

²⁹ 2006(6) SA 182 (E).

³⁰ Chapter 8 of the *Magistrate's Court Act* allows in sec 57 and 58 for a shorter method to collect outstanding debt, widely used by credit providers, debt collectors and attorneys alike.

³¹ The minority of cases where judgment is entered by means other than by default is regulated by sec 36 and rule 49(7) and (8) of the *Magistrate's Court Act* and falls outside the scope of this article.

“Where a plaintiff in whose favour a default judgment was granted has agreed in writing that the judgment be rescinded or varied, either the plaintiff or the defendant against whom the judgment was granted may, by notice to all parties to the proceedings, request the court to rescind or vary the default judgment, which request shall be accompanied by written proof of the plaintiff's consent to the rescission or variation.”

After the order has been granted it will then be brought to the attention of Mr Nopay's employer who will cease the deductions from his salary where an emoluments attachment order has been issued. Similarly any pending legal execution against Mr Nopay's property will also be set aside. Again it is now possible to consider the option of initiating action to reclaim the overpaid amount.

The scenario where default judgment was entered against Mr Nopay and where the judgment creditor is unwilling to accede to the request to rescind the judgment is however considerably more problematic. It is in this regard specifically that this article argues that the South African legal system, including relevant legislation, lends insufficient protection and recourse to indigent legal aid clients faced with questionable collection methods and calculations of unscrupulous creditors.

Opposed rescission of default judgment applications in Magistrate's courts,³² same being creatures of statute, are ordained by section 36 and in practice regulated by rule 49(1) and (3) of the Act. The relevant rules specify the following:

“49 Rescission and variation of judgments

- (1) A party to proceedings in which a default judgment has been given, or any person affected by such judgment, may within 20 days after obtaining knowledge of the judgment serve and file an application to court, on notice to all parties to the proceedings, for a rescission or variation of the judgment and the court may, upon good cause shown, or if it is satisfied that there is good reason to do so, rescind or vary the default judgment on such terms as it deems fit.
- (3) Where an application for rescission of a default judgment is made by a defendant against whom the judgment was granted, who wishes to defend the proceedings, the application must be supported by an affidavit setting out the reasons for the defendant's absence or default and the grounds of the defendant's defence to the claim.”

From the wording of the Act it is clear that the court will only entertain applications for the rescission of judgments taken by default where there are merits in such an application and where the application is brought before the court *within 20 days after obtaining knowledge of the judgment*.³³

This last restriction is highly problematic in the situation at hand. It will often happen, as was the case in the case-studies presented above,³⁴ that the debtor has

³² In other words where the debtor wants to defend the action against him.

³³ rule 49(1). A similar restriction is placed on applications for the rescission of High Court judgments in rule 31(2)(b) of the *High Court Act 59/1959*.

³⁴ See par 2.

knowledge of the judgment against him well in advance of his objection to the continued enforcement thereof. A person can easily fall upon hard times and be unable to repay his agreed monthly payment for a period of time. As has been shown in the case-studies shrewd money lenders can also manipulate the system to make it impossible for debtors to repay the agreed instalments. The debtor realises that judgment has been entered against him when he is informed of this by his employer, who deducts amounts from his salary in accordance with the emoluments attachment order. Initially the debtor reluctantly agrees to this measure, as he realises that he does owe an amount to the creditor.

When, after several months or years of substantial payments, the outstanding balance according to the creditor still increases with every instalment paid, the debtor develops an issue with the current existence, justification and enforceability of the judgment. Should the creditor refuse to grant his consent in terms of rule 49(5) the debtor is now, maybe years after the initial judgment came to his knowledge, barred from attacking the illegally enforced judgment by the provisions of rule 49(1).

Mr Nopay's only salvation might lie in the provisions of rule 60(5) of the Magistrate's Court Act, which reads as follows:

"[A]ny time limit prescribed by these rules ... may at any time, whether before or after the expiry of the period limited, be extended-

- (a) by the written consent of the opposite party; and
- (b) if such consent is refused, then by the court on application and on such terms as to costs and otherwise as may be just."

Rule 60(5) grants the court a discretion that has to be exercised judicially. The rule does not prescribe exactly how this discretion is to be exercised, but it seems that the court has a wide discretion in this regard. It is important that the purpose of the rule is kept in mind, as was explained in the case of *Evander Caterers (Pty) Ltd v Potgieter*³⁵ as follows:

"Generally speaking, a time limit in the rules of court is directed at a delay in the particular procedural step. It is not concerned with the merits of the case as such, and, because of the existence of the sub-rule under consideration, it is not intended without more to deprive a litigant of his claim or defence, as the case may be. It is merely intended to prevent delay or an injustice being done owing to delay. It would seem to follow that an extension of a time limit should not be granted as a matter of course, merely for the asking, and it should also not be lightly refused if the delay did not prejudice the other party in respect of the merits or in the conduct of his case, other than the procedural advantage gained by him owing to the existence of the time limit. Indeed everything should be done to secure a fair trial between the parties in the litigation so that the disputes and questions may be settled on their merits."

The principle seems reasonable enough, and assuming that the uncooperative creditor will not consent in terms of sub-clause (a), the court should be able to encourage fairness through the application of sub-clause (b). Returning to the case

³⁵ 1972 (3) SA 312 (T).

studies dealt with by the Stellenbosch Legal Aid Clinic, the danger and inconsistencies of trusting this duty to the discretion of the court can however be clearly illustrated:

When faced with an application under rule 60(5) the Bloemfontein court in the Berco matters decided that the fact that the applicants were initially, though reluctantly, ad idem with the judgment and that they only much later indicated that they were now no longer so, proved insufficient cause for it to grant condonation. This opinion was shared by the Bellville court in the matters of Mr K and Ms A, where the learned magistrate was of the opinion that the explanation of the applicant failed to convince the court that there existed “good cause”. A different interpretation was followed by the magistrate of the Kuilsriver court in the Checkers matters, where he agreed that the change of circumstances surrounding the judgment and the applicant’s lack of legal prowess was sufficient grounds for the court to exercise its discretion in the applicant’s favour. The strict interpretation of the first two courts is apparently also not favoured by the magistrate of the Mafikeng court, who “fortunately takes quite a lenient view when it comes to legal aid clients, especially if these clients approached us late due to their ignorance.”³⁶

It would thus seem that the success of an application in terms of rule 60(5) is by no means guaranteed. This makes an application for rescission of judgment in terms of rule 49(1) a risky proposition in the circumstances in which Mr Nopay and thousands of other debtors find themselves in.

Should it be impossible to rescind the judgment itself as a result of the 20 day limit of rule 49(1) and a restrictive interpretation of rule 60(5), as was the attitude of the Bloemfontein and Bellville courts, the only further option is to deal with the symptoms of the judgment. By this is meant specifically to tackle the garnishee order issued against Mr Nopay’s salary.³⁷ Section 65J(7) of the Magistrate’s Court Act provides for the relevant application:

“Any emoluments attachment order may at any time on good cause shown be suspended, amended or rescinded by the court, and when suspending any such order the court may impose such conditions as it may deem just and reasonable.”

A very noteworthy exclusion from the content of the above section is that of the 20 day restriction prevalent in rule 49(1). It is thus possible to attack the validity of the garnishee order, or at least decrease the amount garnished in terms thereof, without consideration as to the time already lapsed since the judgment came to the debtor’s attention. As was the case in the Berco, Mr K and Ms A matters, these orders are and should be granted fairly easily on a court’s consideration of the facts of overpayment.

The results are that the garnishee order is rescinded, and no more deductions are made from Mr Nopay’s salary. The threat of the looming impenetrable judgment against him is however not in the least bit diminished. Mr Nopay is still “black-listed”

³⁶ Results of above mentioned informal questionnaire.

³⁷ An application in terms of sec 73 of the *Magistrate’s Court Act* can also be lodged to attempt to force the creditor to accept installments instead of continuing with a sale in execution where the debtor’s assets have been attached.

as a debtor owing an amount of money established by unilateral fabrication by his creditor. His creditor can now still issue a warrant of execution against his debtor's property and also simply return to court with another application for the reinstatement of an emoluments attachment order.³⁸

A further practical problem which exists and which has been encountered in the case studies has been the ineffectiveness of the human resource departments of the employers of garnishee debtors. In the Berco matter³⁹ the emoluments attachment orders of 10 employees of a large cleaning company were set aside in terms of rule 65J(7). The relevant court orders, ordering the employer to cease deductions from the salaries, were faxed and hand delivered to the employer's human resource department. When the stop orders were not implemented in the following month, the relevant employer informed that he could not be held responsible for this as the resulting administration took more than a month to finalise. Some months after the relevant orders were eventually administrated, debtors returned to the clinic with complaints that deductions had again been made from their salaries. Upon further investigation it transpired that the creditor and / or his attorney had simply addressed a letter to the employer informing him that a certain amount was still outstanding on the debt and to continue subtracting the garnishee. Human resources acted on these instructions, under the threat that the employer could be directly responsible for payment of these debts if he failed to pay on behalf of his employees.

Although it is clear that the employer and the creditor acted negligently and / or dishonestly in these instances, reimbursing the debtor for these additional amounts subtracted from his salary could be a further labour-sapping exercise for the legal aid provider.

5. Recommendations

From the above discussion it is argued that current South African legislation provides insufficient protection and remedies to the debtor who wishes to challenge the validity of the continued existence of a judgment and the extent of the amount of the reducing (or increasing!) balance on his debt. As in all instances when legislation fails to provide an answer, one might look to the common law to come to the rescue.

The issue of whether there exists, at common law, a concept of rescission of judgment was dealt with in the matter of *Bakhoven v Howes*.⁴⁰ In casu it was found that a judgment could well be rescinded in terms of the common law should there exist sufficient cause to do so.⁴¹ This case was however dealt with by the High court, where this court's general jurisdiction allows it to take cognisance of the common law. In the Magistrate's courts it is now trite law that the grounds for rescission, as set out in section 36, are exhaustive.⁴² There is thus no real scope to

³⁸ This is done quite easily by requesting the issuing of a Certified Copy of Judgment from one court to be lodged at another and simply continue with the process in a court which would have no knowledge of the previous application in terms of sec 65J(7).

³⁹ See 2.2 above.

⁴⁰ 1992 (2) SA 466 (E).

⁴¹ At 468G.

⁴² Erasmus, *Jones & Buckle* 8th ed: 142.

remedy the shortcomings of the statutory provisions in the Magistrate's courts through application of the common law.

A fairly obvious solution to addressing at least some of the concerns raised in this article would be to invest in better and proper training for court officers. The Clerk of the court plays too important a role in the whole process of debt recovery and collections to be ignorant or ill-informed as to the basic rules of court, for example those pertaining to jurisdiction.

With the signing into law of the new National Credit Act debtors in future should be protected from at least some of the deficiencies of the current system. It is foreseen that the negotiation process provided for by section 129 and 130 of the Act will have to be followed by creditors before they are allowed to approach the court for a judgment. A further consequence of the new legislation is that in all probability the Clerk of the court will in future have to refer all requests for default judgments based on credit agreements to the court. She will therefore no longer be able to grant these without judicial inspection of the matter.⁴³

Although a thorough analysis of how this problem is dealt with by foreign jurisdictions falls outside the scope of this article, it is interesting to briefly examine the English and Australian positions with a view to the weight that foreign law might carry in this argument.

In England the Civil Procedure Rules⁴⁴ dictate that a court has a discretion to rescind a default judgment.⁴⁵ One of the factors which the court must take into consideration in the exercise of its discretion is whether the application for rescission was brought "promptly".⁴⁶ If this has not been the case, the applicant should produce reasons for his tardiness. The lapse of time before the application is brought to court is however only one of the factors to be taken into consideration. In *Citoma Trading Ltd v Brazil*⁴⁷ the court of appeals ruled that the lapse of time in itself should not deny the granting of a rescission of a default judgment.

In Australia a similar approach is followed with regard to the absence of prescriptive timeframes for the filing of rescission applications. Again this lapse of time is only one of the factors taken into consideration in determining whether the application would bring about some unreasonable prejudice to the creditor.⁴⁸ It is argued that no such prejudice would exist in the instance under discussion, and that it would thus be possible for the court to grant the rescission order to the distressed debtor.

Another solution might be found by looking closer to home at the procedures put in place to regulate the process for administration orders.⁴⁹ This process is somewhat similar to that of collections by creditors, in so far as that a specified amount of the debtor's monthly income is paid over to the court appointed administrator for

⁴³ *Magistrate's Court Act*, rule 12(5).

⁴⁴ 1998 (SI 1998/3132).

⁴⁵ rule 13.3.

⁴⁶ rule 13.3(2).

⁴⁷ [1999] 2 Lloyd's Rep 750, CA.

⁴⁸ <http://www.cclcnsw.org.au> (accessed on 27 June 2007).

⁴⁹ sec 74 of the *Magistrate's Court Act*.

distribution to the debtor's various creditors. According to section 74J(1) and (5) of the Act the administrator is obliged to render a detailed account of the debtors affairs, which account has to be updated on a quarterly basis and must further be placed for inspection in the court file. In this way it is possible for the debtor and any other interested parties to keep up to date with the reducing balances and also to query any suspicious costs added to the account. It is argued that these accounts should then be audited or at least thoroughly verified on a regular basis.⁵⁰

A more drastic approach is however ultimately necessary to alleviate the situation and to discourage the large scale financial abuse of debtors so prevalent in this country. It is argued that the relevant sections and rules of the Magistrate's Court Act dealing with the rescission of judgments will have to be revisited with the view of providing relief and ensure justice and fairness to the interests of debtors and not only to those of creditors.

The inclusion of a 20 day time restriction arguably makes sense in the normal run of the mill application for rescission where one may want to discourage debtors from further clogging the courts with applications brought long overdue. It makes sense to require that a debtor acts within a reasonable time to combat the existence of a judgment that should never have been granted. The rules as they are now however fail to cater for those matters where the judgment, which might have been proper to start off with, is now being abused to squeeze every last drop of blood from debtors.

6. Conclusion

It would probably be impossible to ever measure the full social and economic impact of unlawful collections on the lives of debtors and their families. Because of the stigma associated with debt, most people carry this burden with silent shame. Yet people find themselves in this situation not only due to their own irresponsibility, but due to a combination of factors. These factors often include aggressive advertising and marketing, reckless lending, a previously unregulated credit industry, lack of appropriate policies and laws associated with credit, historical disadvantages, a lack of consumer education and desperation to meet basic needs such as food and clothing.

The cycle of bad debt drags these people under and adds to the moral and civil decay of our society. We must not allow those who choose to make a living from the suffering of these marginalised members of society to longer go unhindered in their practices. They should not be allowed to escape responsibility by cases being thrown out of court based on technical limitations in stead of being judged on their merits.

The clinical movement and clinical legal education have an important role to play in support of this cause. The availability of skilled professional staff who assist students in tackling these cases is crucial. In assisting persons like Mr Nopay the student consultant is also gaining valuable experience in basic legal skills such as consulting, negotiating, drafting and engaging in legal research.

⁵⁰ As facilitated by sec 74J(6) of the *Magistrate's Court Act* with regard to administration orders.

Bibliography

Books and Journals

Erasmus,
1988. *Jones & Buckle. The civil practice of the Magistrate's Courts in South Africa.* 8th ed. Cape Town: JUTA

Harms,
1993. *Amler's Precedents of Pleadings.* 4th ed. Durban: BUTTERWORTHS

Case Law

Bakhoven v Howes 1992 (2) SA 466 (E)

Citoma Trading Ltd v Brazil [1999] 2 Lloyd's Rep 750, CA

Evander Caterers (Pty) Ltd v Potgieter 1972 (3) SA 312 (T)

Mndi v Malgas 2006(6) SA 182 (E)

Internet Sources

<http://www.bankgate.co.za/test/news.htm>

<http://www.cartelblanche.co.za/Display/Display.asp?Id=3316>

<http://www.cclcnsw.org.au>

<http://www.statssa.gov.za/publications/statskeyfindings.asp?PPN=P0041&SCH=3918>

<http://www.summitfin.co.za/>

Legislation

Civil Procedure Rules
1998 (SI 1998/3132)

High Court Act
1959. Act No 59 of 1959

Magistrate's Court Act
1944. Act No 32 of 1944

National Credit Act
2005. Act No 34 of 2005