I write this opinion piece in reaction to the article ‘Cashing in on collections’ by Gerhard Buchner and CJ Hartzenberg in the July issue of De Rebus (2013 July) DR 30. As of late quite a number of people have been calling for the repeal of ss 57 and 58 of the Magistrates’ Courts Act 32 of 1944 which, in my opinion, offer some of the few remaining effective tools for the debt collector. It seems that the main reason for calling for the repeal of these sections is the behavior of unscrupulous attorneys and debt collectors who exploit debtors.

I am of the opinion that repealing these sections would be rather shortsighted and could affect not only attorneys and debt collectors negatively, but could also be seriously prejudicial to creditors who are suffering heavily under new consumer legislation in South Africa.

Firstly, the National Credit Act 34 of 2005 (NCA) requires creditors to produce original credit applications when issuing summons and applying for default judgment. Quite a number of creditors with branches throughout the country could not produce these applications due to various reasons, one being that debtor A applied for the credit facility in Pretoria in, for example, 1981 and since then he or she has moved to many different towns in South Africa. Debtor A only defaulted on his or her payments in 2010 and the creditor is now expected to produce the original application. When the account was opened in 1981, the NCA was not a consideration and therefore no effort was made to ensure compliance with its provisions.

Secondly, the new magistrates’ courts rules, the introduction of the regional court and changes to the scales in the fee structures have seriously affected debt collectors and attorneys dealing with claims on a party-and-party basis, but, due to the fact that the fee scales have changed, most debt collectors and attorneys dealing with claims for amounts that used to fall under scale B or C now have to do the same work on scale A tariff, resulting in huge losses for the firms.

The argument offered to counter these losses has been that the difference should be collected from the creditors, but unfortunately their positions have also been overlooked in making this proposal. Many creditors are small businesses or professional sole practitioners, for example, medical practitioners. Considering that a medical practitioner has a small claim of less than R 1 000, it does not seem like much but, if he or she has 50 or a 100 debtors owing R 1 000 each it is quite a considerable amount. These professionals look for attorneys or debt collectors who are willing to collect these debts on the basis that all the legal fees should be collected from the debtor, which – in all fairness – is understandable.

Attorneys and debt collectors try to collect these accounts in the shortest possible time and in the cheapest possible way. The current rules are without teeth and are open for exploitation by ‘clever’ debtors. Some attorneys, for example, do not resort to issuing warrants of execution at all, the reason being that the costs involved in paying the sheriff and the results of any auction usually favour only the sheriff and no one else. Another problem is that many debtors are finding ways to institute interpleader summonses, resulting once again in such an escalation in costs as to render the sale in execution process useless to creditors.

The only option left is a s 65A(1) procedure, which is, to say the least, not very effective. Not only do attorneys struggle to get the sheriff to personally serve the s 65A(1) notice on time and on the debtor personally, but they also have to issue a warrant for arrest due to the debtor not showing up in court. This procedure is, once again, of little value as nothing happens to the debtors who should be arrested. They are usually warned a number of times to appear in court on a different date and, when they eventually do appear, they come unprepared without any proof of income or expenses. The matter has to be postponed, starting the whole process of issuing another warrant of arrest again. There has been instances where a warrant of arrest has been issued for the same debtor at least six or seven times and attorneys have to carry the sheriff’s costs for this. Should the debtor eventually appear in court, there simply is no way of knowing whether he or she is telling the truth and attorneys will most likely have to accept their word and the installment they offer to pay, unless, by some miracle, attorneys can obtain some knowledge regarding their finances that will enable them to obtain a better offer.

Regarding the reason for charging collection commission, as mentioned in the article, I am of the opinion that this has not been fully considered. Consider an attorney having to receive payment of R 100 per month on a debt of R 4 000 in his or her bank account. He or she will have to identify the transaction, allocate it to the correct file and make payment to the creditor, again with a relevant entry in his or her books. I have always considered it rather poor compensation for all the work associated with these tasks – attorneys are able to charge only R 10 for all this work. If a debtor had made a once-off payment, as he or she should have, then attorneys would not have been entitled to charge collection commission.

In my opinion, the s 58 procedure in particular is one of the only good tools available to collect debt, not only for the debtor but also for the attorney and client. It is usually a much faster process, therefore limiting the interest that the debtor will have to pay. It also cuts out a big part of the formal debt collection process and consequently all the associated processes, notices and sheriff’s fees. I am of the opinion that this process also protects debtors, since they are usually unaware of the fact that they will end up paying for all the warrants of arrest, etcetera, if they ignore the court appearances.

I do not have an answer for the problem of dealing with unscrupulous attorneys and debt collectors who exploit debtors, but I would suggest introducing safeguards to protect or limit against exploitation rather than repealing legislation that is effective. Why not include a notice in enlumments attachment orders drawing debtors’ and employers’ attention to relevant sections of the NCA dealing with the percentage of an employee’s salary that may be deducted and referring them to someone who will be able to advise them on the legality of the court order and the fees charged.

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