Separating the baby and the bath water
Garnishee and emoluments attachment orders
By Brett Bentley

Emoluments attachment orders (EAOs) are commonly, but mistakenly, referred to as 'garnishee orders'.

An EAO is granted in terms of s 65J of the Magistrates' Courts Act 32 of 1944 (MCA) and orders an employer (referred to as a 'garnishee', hence the confusion) to make deductions from a debtor's salary or wages and pay these over to the creditor or his/its attorneys.

A garnishee order, in terms of s 72 of the MCA, authorises a creditor to attach any debt owed, or which will become due, to the debtor by a garnishee.

In a joint statement on 1 November 2012, the Minister of Finance and the chairperson of the Banking Association of South Africa (BASA) stated that, as a result of *inter alia* 'abuse of debt and garnishee orders, and of direct payroll deductions', the parties had agreed (among others) that:

- 'BASA members commit not to use garnishee orders against credit defaulters, as they believe the use of such orders for credit is inappropriate.
- BASA and the national treasury will promote and support enforcement initiatives against credit providers that issue pre-signed garnishee orders. The national treasury will also engage with the Department of Justice about the abuse of garnishee orders and suggest that their use be restricted to maintenance orders' (www.treasury.gov.za/comm_media/press/2012/2012110101.pdf, accessed 24-1-2013).

It is clear that the statement meant to refer to EAOs, but it is concerning that the treasury is proposing the virtual abolition of a lawful debt collection process without apparently reading the relevant provisions of the MCA or seeking legal advice on the issue and the implications of the proposals.

Notwithstanding this, concerns about abuses in the debt collection process, particularly relating to unsecured loans, need to be addressed.

The background to the joint statement referred to above includes:

- A 2008 report by the University of Pretoria Law Clinic, 'The incidence of and the undesirable practices relating to garnishee orders in South Africa' (2008) (www.ncr.org.za/publications/GARNISHEE-ORDERS-STUDY-REPORT.pdf, accessed 24-1-2013).
- A forensic investigation by law firm ENS of over 40 000 employees of a multinational company, including a number with EAOs against their salaries, which found that approximately 59% of orders served on the employer were invalid or defective. Further, 39% of the orders were reportedly stopped once inquiries were initiated.
- In September 2012, of the 19,69 million credit-active consumers that credit bureaus held records for, 47% had impaired credit records ('Credit Bureau Monitor', www.ncr.org.za/pdfs/publications/CBM%20September%202012-%20Final.pdf, accessed 5-2-2013). This, coupled with the rapid growth in the unsecured lending industry, prompted an investigation by the treasury into financial stability risks.
- Failure of debt counselling procedures in terms of the National Credit Act 34 of 2005 (NCA) to give over-indebted consumers proper relief (B Bentley 'Debt counselling: Challenge and proposed solution' 2012 (Aug) *DR* 36).

On 30 November 2012, at a debt collection industry summit on 'garnishee orders', the keynote speaker Ingrid Goodspeed, chief director for financial sector development at the national treasury, seemingly adopted the position that the treasury remained of the view that garnishee orders should be abolished but it was open to considering alternatives.

A common reaction to this recommendation has been: 'They are throwing out the baby with the bath water.'

The focus should be on dealing with bad elements and malpractices, rather than compromising ethical and law-abiding credit providers' chances of recovery because of these.

I submit that a number of the abuses complained of by Ms Goodspeed do not have a direct relationship to EAOs but rather relate to other aspects of the unsecured lending process, particularly the NCA and its implementation.

I submit that the 'baby and the bath water' can be separated and, with the introduction of changes, some of which are proposed in this article, ethical and law-abiding credit providers can still use the EAO process without abuse.

Abuse

The issues raised regarding abuse can be separated into four categories.

Credit granting

This includes illegal lending by credit providers, which involves usurious lending rates and other practices prohibited by the NCA. It also includes reckless credit granting as envisaged in the NCA, with consumers being extended credit (particularly with high interest rates), which they cannot afford.

While EAOs give reckless credit providers a means of securing repayment, this is not the root problem – rather, it is the poorly drafted provisions of the NCA relating to reckless credit granting and the failure of the National Credit Regulator (NCR), consumers and debt counsellors to take action against these abuses (be this as a result of the vagueness of the NCA, inability or incapability). This is reflected in the dearth of reported judgments relating to reckless credit granting and the lack of NCR reports of significant action against such parties.

Interest rates and capping of interest

The complaint here relates to excessive interest collected on debts by means of EAOs. Again, the real issue is the NCA and the policing of the Act.

If the issue is that –

• the interest charged is illegal in terms of the NCA, then appropriate action must be taken by the NCR and other relevant parties to stop such practices;

• the permitted interest rates being charged are too high, then the provisions of reg 42 of the regulations in terms of the NCA need to be amended;

• the total interest charged over a period of time is too high, then the problem is the vagueness of the provisions relating to the capping of interest in terms of ss 101 to 105 of the NCA, the interpretation of which, despite the efforts of the Supreme Court of Appeal to give guidance in *Nedbank Ltd and Others v The National Credit Regulator and Another* 2011 (3) SA 581 (SCA), remains a bone of contention. I submit that the solution lies in either amending the NCA to clarify the position or seeking another declaratory order on the interpretation of these provisions and taking action against those who exceed the limit.

Debt collection costs

This complaint is against attorneys' or debt collectors' charges being excessive, with the legal costs exceeding the capital debt in a number of instances.

Legal collection process

• Abuse of jurisdiction: Judgments and EAOs are authorised in courts in which the debtor neither resides nor works, creating problems for debtors to oppose or rescind such orders.

• Fraudulent and illegal consent to judgment and consent to EAOs: Signatures on s 58 consents to judgment have been forged in instances. Another illegal practice is the premature signing of consents to judgment before the debt is due.

• Fraudulent court orders: Sometimes fraudulent orders are made and sent to employers to obtain payment.

• Amount granted for monthly deduction excessive: Where courts allow direct s 65J(2)(*a*) applications, sometimes the amounts are arbitrary and, in some instances, excessive.

Legal position

A brief overview of the debt collection methods in terms of the MCA is important to assess the viability of alternative collection methods.

The four main methods are:

• Warrants of execution.
• Section 65A financial inquiries.
• Section 65J EAOs.
• Section 72 garnishee applications.

Briefly, the reasons below set out why EOAs are, in my opinion, the best option for debt collection.
In my experience, the vast majority of debtors, even when personally served by a sheriff, fail to appear at court.
A watershed case for debt collection was *Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth Prison and Others* 1995 (4) SA 631 (CC), in which the Constitutional Court struck out certain provisions in the MCA that provided for imprisonment of judgment debtors. The court held, *inter alia*, that certain words in s 65A(1) were invalid as they permitted imprisonment of a debtor. This decision thus removed the fear of, or actual, imprisonment as the real collection mechanism of s 65A.
This case resulted in the amendment of s 65A, which now provides a warrant of arrest as the sanction for failing to appear at court. In terms of this process, the sheriff is authorised to arrest the debtor and take him to appear before a magistrate to conduct a financial inquiry.
However, in my experience, as a creditor's attorney is often not present at such time to conduct the inquiry, the usual practice is for the magistrate to warn the debtor to appear at court at a future date and the sheriff advises the creditor's attorney of such date.
Although the new provision allows for imprisonment for contempt of court for failure to appear, this is a last resort and the process of calling a debtor to court can be repeated a number of times before this drastic step is taken. This results in lengthy delays and mounting legal costs, to be footed by the creditor (and ultimately the debtor), with no real certainty of a successful collection.
Warrants of execution against the property of consumer debtors also present problems, including –

- attached goods being subject to instalment sale agreements or other forms of third party ownership prohibiting their sale;
- interpleader proceedings with false claims of ownership of the debtor's goods and the onus on the creditor to show the debtor's ownership; and
- sales in execution realising little, with costs being high, leaving the debtor without household goods and a large portion of the outstanding debt, to the frustration of both debtor and creditor.

Section 72 garnishee applications can be used in limited instances where the creditor knows of a specific debt owed to the debtor.
Therefore, I submit that EAOs have proved to be the most effective means of legal debt collection.
In terms of the MCA, the two main methods of obtaining an EAO are:

- The debtor has consented to the order – s 65J(2)(*a*).
- A court application in terms of s 65J(2)(*b*).

In my experience, in practice most EAOs are obtained by the debtor signing a s 57 or s 58 consent to judgment incorporating a consent to an EAO to pay the debt in specified instalments.
Du Plessis J in *African Bank v Myambo NO and Others* 2010 (6) SA 298 (GNP) noted the following in respect of s 58:
'The section 58-procedure is a particularly cost-effective and speedy one. … Provided that the provisions of section 58 and those of the NCA are applied properly and with due regard to the parties' rights, it is in the interests of credit providers, of consumers and of justice that the procedure be utilised.'
Court applications in terms of s 65J(2)(*b*) have proved problematic due to different interpretations of the procedure to be followed. In my experience, some magistrates follow the route of allowing direct applications for an EAO where the onus to oppose the application *in toto* or the amount of the monthly emolument deduction lies with the debtor, based on the authority of *University of Natal, Pietermaritzburg v Ziqubu* 1999 (2) SA 128 (N).
Other magistrates follow *Minter NO v Baker and Another* 2001 (3) SA 175 (W), in which the court held that the correct procedure for a court application for an EAO is to start with s 65A, conduct a financial inquiry and then make an application for an EAO in terms of
s 65(J)(2)(*b*).
I submit that while the judgment in *Minter* is to be preferred as it is, in my view, better reasoned and was delivered after the amendments to s 65, from a practical perspective it results in a large number of unsatisfied debts as the granting of EAOs are a rare occurrence because of the failure of many debtors to appear at court.
Proposals

I submit that the following changes would assist in addressing the abuses referred to above.

Interest and capping

Creditors wanting the benefit of an EAO must accept simple interest at the maximum rate permissible in terms of the Prescribed Rate of Interest Act 55 of 1975 from the date of the EAO. This is because they are achieving a greater degree of security with the EAO and the debtor will most likely pay the debt over an extended period – something the NCA drafters did not envisage when prescribing some of the higher maximum interest rates.

This will also discourage those credit providers charging high interest rates from granting reckless credit premised on the probability that they can secure their debt and high interest return by aggressive use of EAOs.

Legislative changes to the s 65J process

EAOs by written consent

While the lack of judicial oversight could be resolved by amending s 65J(2)(*a*) to provide for this, consideration must be given to whether civil magistrates will cope with this massive administrative workload increase or if the Justice Department has the budget to increase the number of magistrates. I submit that recent new laws and legislative changes gave scant regard to whether the supporting infrastructure could cope with the new duties imposed, resulting in an inability to deal with some of them properly.

Should magistrates not be able to cope with this amendment, I submit that continuing to allow EAOs to be dealt with by the clerks of court would suffice, on the basis that the other safeguards suggested here would protect against abuses.

EAOs by court order

I submit that the court application route set out in s 65J(2)(*b*) is vague and, if interpreted per the *Minter* judgment, is subject to the uncertain, cumbersome and expensive s 65A process.

I propose that s 65J(2)(*b*) be amended to provide for:

- A direct application without having to first rely on s 65A, on the proviso that –
  - – there is personal service of the application on the debtor, as well as on the employer – with the right to oppose the application;
  - – the creditor provide all information on the debtor's financial position that it/he has in its/his possession, and the employer be obliged to provide the court or creditor with the debtor's salary advice;
  - – the amount of the proposed monthly deduction be subject to a maximum amount to be specified in terms of r 46 of the magistrates' courts rules; and
  - – the court be given discretion to grant an order lower than this and, further, that the magistrate should have due regard to the proposed national register of EAOs and statutory cap (see below).

Statutory cap on percentage of remuneration garnisheed

The 2008 University of Pretoria Law Clinic report states:

'While regulation 23.3.6 in terms of the Public Finance Management Act 1 of 1999 caps the emoluments attachment to 40% of the state employee's salary, no such cap exists for debtors employed in the private sector. In most European jurisdictions, caps are applicable. The same applies to the United States of America' ((*op cit*) at 9).

It is proposed that a total cumulative cap of 40% of a debtor's salary be incorporated into s 65J.

Capping of legal costs

I propose that collection costs in terms of s 65J recovery be capped at an acceptable fixed amount dependent on the size of the debt plus collection commission at 10% per instalment, up to a set capped amount per instalment, and the collection of attorney and client costs to be prohibited.

Court authorised schedule of costs and interest

Rule 46 should be amended to provide that no EAO can be authorised by the clerk of the court without a full schedule of costs and interest properly calculated on the reducing balance.

Should the creditor's costs increase, he/it would have to apply to court, on notice to both the judgment debtor and the employer, to vary the amount and to have a new repayment schedule authorised by the court and served on the debtor and the employer.

Further, all EAOs should be properly recorded on the proposed national register of EAOs (see below).

No employer is entitled to deduct an emolument attachment amount unless –

• the EAO is served by the sheriff together with the costs schedule;
• implementing such an order does not result in the statutory cap of 40% of the debtor’s salary being exceeded;
• the order appears in the proposed national register of EAOs; or
• if an employer fails to make payment of an EAO, the creditor’s attorney would not be permitted to issue a warrant of execution against the employer in terms of s 65J(5), but that this subsection would be amended to provide that such warrant can only be authorised by the court on application, notice of which is to be served on the employer, who can oppose it on the basis of non-compliance with the above points or that the debtor is no longer in its employ.

Amending s 57/s 58 and s 65J to deal with jurisdiction

Sections 28 and 45 of the MCA limit the granting of s 57/s 58 default judgments to the court in which the debtor resides or works, although there are unreported High Court judgments that hold that parties to EAOs can consent to a specific magistrate’s court’s jurisdiction (see the 2008 University of Pretoria Law Clinic report (*op cit*) at 42).

In addition, s 65J(1)(*a*) refers to ‘the court of the district in which the employer of the judgment debtor resides, carries on business or is employed’. As an example, a debtor who works in Durban may have to attend a s 65J application in Cape Town if that is where the head office of the employer is based, which is unfair to such a debtor. These sections need to be amended to provide that only the courts in which the debtor works or resides have jurisdiction in such matters.

Creation of a credit bureau-based register of EAOs

Such a register would record all court-authorised EAOs.

All magistrates and clerks would have access to the register, enabling them to enforce the statutory cap of the maximum percentage of remuneration that can be subject to EAOs.

In addition, employers who do not already have access to credit bureaus could be given access to their employees’ details on the register through use of a tax number or another form of unique code.

The register would also assist credit providers in avoiding the granting of reckless credit in terms of the NCA.

In addition, the Justice Department must provide training to magistrates and clerks on the provisions relating to the NCA, EAOs, interest and costs. Further, external audits should be conducted on magistrates’ courts to ensure proper practices are being followed and to eliminate abuse.

Law society action to stop abuse by attorneys

It has been alleged that attorneys have taken part in collection practices that are illegal or unethical. In doing so, the image of the attorneys’ profession has been tarnished and the public perception is that the law societies have done little to act against such behaviour.

It is proposed that –
• the Law Society of South Africa and all provincial law societies appoint standing committees to investigate complaints of alleged debt collection abuses by members of the public;
• national rulings be passed relating to attorney debt collection to tie up with any future legislative changes;
• a national call centre be established to facilitate the lodging of complaints;
• a national campaign be undertaken to advertise the call centre and investigation service; and
• appropriate steps be taken against members found guilty of debt collection abuses.

Conclusion

It is hoped that this article highlights the vital role played by EAOs in consumer debt collection, as well as the challenges that exist to their lawful and ethical use. It is also hoped that the changes proposed will result in such abuses being curbed and even eliminated.

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