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THE PORTFOLIO COMMITTEE ON JUSTICE AND CORRECTIONAL SERVICES
C/O Mr. Ramaano

Per Email: vramaano@parliament.co.za

12 August 2016

Dear Sir/Madam

SUBMISSIONS SUBMITTED BY THE ASSOCIATION OF DEBT RECOVERY AGENTS (NPC) TO THE COURTS OF LAW AMENDMENT BILL (B8 – 2016)

The Association of Debt Recovery Agents ("ADRA") represents the vast majority of the formal debt collection industry and is formally recognized by all relevant legislative and regulatory authorities as the official representative of the formal debt collection industry.

It is ADRA's objective to promote the debt recovery industry as a responsible and significant participant in the credit life cycle, creating a platform for a sustainable and rewarding industry balancing the interests of its members and all industry stakeholders such as creditors (private and public sector), debtors and industry regulators. ADRA established and maintains the reputation of the debt recovery industry through discipline, education, advocacy and services. ADRA enforces an elevated standard of ethics and professionalism over and beyond the minimum standards set by legislation and statutory regulation.

ADRA's Historical Interest in the Subject Matter of the Bill

ADRA realises the absolute need for a responsible industry. Abusive practices by individual industry participants directly threatens security and industry sustainability and must be eradicated and guarded against at all times. Often legislation lends itself to differing interpretations, legal uncertainty and an opportunity for abuse. Prevention of technical manipulation of such legal uncertainty is problematic as abusers often justify their conduct on credible legal opinion. In overcoming this hurdle ADRA endorsed and enforces the overriding principle that moral responsibility usurps technical legal argument which lends itself to morally questionable outcomes. In terms of section 4.2 of ADRA's Disciplinary Code:

"Members will not exploit debtors in any manner and shall, if specific conduct is on a

strict interpretation of the law legally permissible but such conduct shall in practice have a result not aligned with the objectives, Code of Conduct or values of the Association or in any other manner have a morally questionable result, refrain from such conduct.

The inclusion of section 4.2. was occasioned by the need for ADRA to protect the industry against reckless and unscrupulous industry participants and itself against industry participants who threatened ADRA with legal action for not allowing such questionable industry participants membership of ADRA whilst they could legally justify their business modules.

Since 2012 ADRA has been actively involved in initiatives aimed at amending the legislation under review in the Bill. ADRA took a leading role in the Industry Garnishee Task Team, chaired by the Credit Ombudsman and convened with the objective of deliberating the provisions now to be amended in the Bill, finding an industry consensus on how abusive conduct can be prevented whilst maintaining a practical and cost effective debt collection regime. The principles and procedure underpinning such self-regulatory code of conduct was presented to National Treasury and the Department of Trade and Industry, including the office of the National Credit Regulator. The Code of Conduct was supported by comprehensive consumer data on existing EAO's, included data from the private sector credit industry and data provided by National Treasury of all existing EAO's enforced against government employees. The effective implementation of the code required endorsement by National Treasury and the Department of Trade and Industry. For inexplicable reasons the relevant departments abandoned the project.

During December 2013 ADRA joined the so-called Stellenbosch matter as Respondent[1]. The purpose of our participation was to ensure that the morally responsible industry interests are presented and represented. None of the other opposing Respondents (credit providers, law firm and debt collector) are members of ADRA and were their conduct publically condemned. As clearly stated in legal process and as per our oral argument in the court-a-quo and the Constitutional Court during confirmation/appeal proceedings, we are strongly opposed to any debt collection practice which lends itself to a morally questionable outcome, as was the case with the matters of the individual consumers in the Stellenbosch matter.

Although each and every abuse which was perpetrated against the individual consumers in that matter should have been avoided by due application and enforcement of existing law and as such was the result of a lack of either knowledge, application or discipline by the applicants and court officials involved in granting those orders, we respect the Department of Justice and Constitutional Development's attempt to emphatically prevent such abusive outcomes in future.

Objectives of the Bill

The objectives underpinning the Bill can be summarized as follows:

1. Ensuring judicial oversight in debt enforcement proceedings.

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2. Ensuring consumers has easy physical access to the court in which such debt enforcement proceedings takes place, including the amendment, review, abandonment and rescission thereof.
3. Ensuring that quantum of instalment orders and EAO's do not infringement upon the constitutional rights, such as the right to dignity, education, healthcare, housing etc.
4. Simplifying procedure to be followed by consumers, employers and other interested parties in enforcing available remedies.
5. Protecting the consumer against the negative consequences of exorbitant and/or unjustified legal cost.
6. Ensuring that the cause of action itself underlying the debt enforcement proceedings is lawful and that the debt is due and payable.

Although not stated in the introduction to the Bill, it can safely be assumed that the Department of Justice and Constitutional Development has as an objective of the Bill the creation of a responsible and sustainable debt enforcement mechanism balancing the interest of the creditor, consumer and accommodating the interest of the population in general and more specifically the South African economy. The court should also have as an objective a user friendly legal system for all parties concerned and should consider the capacity of the court system to accommodate the proposed amendments.

ADRA applauds the afore-stated objectives and focusses these submissions on provisions which might have the effect of eroding or undermining these fundamental principles. The submissions which follow are therefore not in chronological order following the numbering of the various sections of the Bill but rather centered on the identified principles and the various provisions relevant to such individual fundamental principle.

Evaluation of the Bill

AFFORDABILITY

The Bill introduces a cap of a maximum of 25% of a consumer's salary which may be attached[2] as well as a comprehensive "sufficient means" test which is to be evaluated in a financial enquiry. We respectfully submit that the cap as introduced in the Bill is based on a misconception of foreign law, notably the wage attachment regime as applicable in the USA.

Purpose of a Cap

The purpose of capping the amount or percentage of a consumer's salary which may be attached for purposes of repaying arrear debt is to grant the consumer protection whilst simultaneously expediting proceedings thereby avoiding unnecessary legal costs and alleviating the pressure on limited court resources. All foreign jurisdictions researched which

[2] Section 65J(1A)

applies a cap, does so in either avoiding altogether or minimizing court proceedings. The capped amount/percentage of a consumer's wages represents a deemed amount which is required for the maintenance of the consumer and his/her dependents.

Evaluation of Foreign Jurisdictions

In the USA two forms of wage attachment (EAO) exist.

Firstly a consumer may consent in the original contract from which the debt originate or in writing at any time thereafter to a "Voluntary Wage Assignment". In terms hereof the consumer agrees that should the consumer not honour his/her payment arrangements the consumer's employer is authorized to make the deduction from the consumer/employee's wages and pay same over to the creditor. No court process is involved and no limit is set on the installment amount of a Voluntary Wage Assignment. The installment amount is a matter of agreement between the consumer and his/her employer and is the right of self-determination of the consumer recognized.

In terms of the RAGGIE Convention, to which South Africa is a signatory, the employee's right to self-determination is recognized and is the employer expressly compelled to honour his employee's election and instruction on how wages must be allocated and distributed.

Secondly, should the consumer not have consented to a Voluntary Wage Assignment and obtained judgement against the consumer, the consumer has 10 days in which to settle the judgement debt. Should the consumer not settle the judgement debt in full within the 10 day period, the creditor simply applies to the same court which granted the judgement for a Writ of Garnishment. The writ contains no installment amount. Once the writ is served on the employer the employer is compelled to file with the creditor or its attorney only a Wage Garnishment Work Sheet (Form SF-329 C) and the Employer Certification (Form SF 329D) which contains the consumers salary and the calculation of the installment calculated on the formula contained in the Consumer Credit Protection Act, which installment may not, together with all other such wage attachments, exceed 25%. No portion of a wage equal to or less than the minimum wage of $290 per week may be attached whereby the minimum wage is granted absolute protection. The employee has 30 days from date of service of the writ to oppose the writ if he/she so wish. If the consumer does not oppose the writ within the time period, the writ becomes enforceable against the employer without any court intervention.

Should the employee wish to oppose the implementation of an EAO, the onus is on the employee (not the creditor) to prove his/her income and expenses and his/her inability to afford the installment after having met all necessary expenses required for the maintenance of himself/herself and his/her dependents.

The cap as applied in the USA also does not include wage attachments for debts resulting from arrear federal and state taxes, education loans, spousal and dependent maintenance etc. With the inclusion of these wage attachments, the total percentage of the attachable wage is 60%.

It is our respectful submission that should a cap be introduced to the South African EAO regime, that it be done in a similar manner as in foreign jurisdictions, namely that it is introduced in lieu of court proceedings. In foreign jurisdictions the cap represents deemed necessary expenses to meet the necessary financial obligations for the maintenance of the consumer and his/her dependents and replaces a court enforced financial enquiry or "sufficient means" test.

Unintended Consequences

The implementation of the cap in the format as provided for in the Bill only holds advantages to higher income earning consumers. Lower income earners will always pay the maximum amount which they can afford to pay after having met their necessary obligations in maintaining themselves and their dependents. Higher income earners on the other hand who can often afford to pay more than 25% of their salary towards arrear debt will receive additional protection in that, irrespective of what a court rules after having applied the "sufficient means" test as contemplated in sections 57 or 58 and section 65, the installment amount of all EAO's will always be limited to 25% of the consumer's salary as provided for in Section 65J(1A). There appears to be no rational to this limitation of judicial discretion and the additional protection granted to higher income earners.

For example, the total amount of installments payable on EAO's by a consumer earing R50 000 pm is R12 500 leaving the consumer a monthly income of R37 500. A consumer earning only R4 000pm on the other hand is left with a monthly income of R3 000pm. It is assumed that one of the primary objectives of the Bill is to protect lower income earners where an EAO may threaten such consumer's constitutional rights to nutrition, housing, education, and healthcare etc. The cap in the format introduced in the Bill does not achieve this objective.

In Germany, Australia and England the cap is however progressive in that the higher the income of the consumer the higher the percentage of income which may be attached. This cap in these jurisdictions also makes provision for the number of dependents and physically/mentally handicapped dependents. Higher income earners are therefore not provided the preferential treatment the cap introduced in the Bill will occasion.

The cap as introduced in the Bill will render debt review and the debt restructuring process contained in the National Credit Act redundant. Due to the short notice period for submission granted it was not possible to obtain statistic on the average percentage of consumer's salary which is allocated towards settlement of debt under debt review. It can however be safely assumed that on average well over 25% of a consumer's income is allocated towards payment of the consumer's restructured debt. With a non-progressive cap set at as low as 25%, it will be to the advantage of most consumers under debt review to rather allow EAO's to be obtained against their salary as, combined such EAO installments will be substantially less than what the court found after having applied the "sufficient means" test was the amount a consumer can afford to pay under debt review.

The further obvious unintended consequence is that the implementation of a 25% Cap will have the absurd result that a consumer who can afford to pay more than 25% of his/her salary towards arrear debt but who is prevented from doing so by the implementation of the cap might very well still qualify for new credit in terms of the affordability assessment contained in Chapter 3 of the National Credit Regulations Including Affordability Assessment, Regulation No 202 published in the Government Gazette No 38557 on 13 March 2015.

In granting credit the underlying principle to the affordability assessment is that the consumer must have sufficient funds available after meeting **all obligations** to afford the installments of the credit. The underlying principle to the "sufficient means" test in granting an installment order (Section 57 or 58) and an EAO (Section 65) is that the consumer must have sufficient funds available to meet **only necessary obligations** towards the maintenance of the consumer and his/her dependents. These principles implies that the "sufficient means" test in determining which portion of a consumer's wages are attachable in settling arrear debt is stricter in the sense that sufficient funds for only **necessary expenses** are to be protected, whereas sufficient funds to pay **all expenses** are to be protected in the affordability assessment in granting credit. The cap has the opposite outcome resulting in a material number of circumstances where creditors are unable to recover arrear debt from a consumer due to the protection the cap provides whilst that same consumer qualifies to incur new credit.

In the above premise it is submitted that the format of the cap as introduced in the Bill does not recognize the applicable underlying principles and will have the effect of frustrating the objectives of the National Credit Act in both what that act attempts to achieve with debt review and creating a responsible lending regime.

The cap as currently proposed will further create legal and industry uncertainty. The cap for example does not state whether the 25% of attachable income is gross or net income. It also does not provide for households with multiple incomes or spouses married in community of property or debts which is the joint responsibility of spouses married out of community such as education and health care of a person over whom both spouses has a duty of maintenance and care.

During oral argument in the Stellenbosch matter Desai J asked counsel for the Human Rights Commission who introduced evidence of foreign jurisdictions whether it is the Human Rights Commissions submission that a cap is suitable for South Africa considering the disparity between incomes and socio-economic circumstances and whether it is requesting that the court in its judgement recommend that the legislature introduces a cap. Their response was that a cap requires extensive further research and consultation and that limiting attachable wages to a mere percentage of that wage are simply not practical, that it will have numerous unintended consequences and that no such remedy is applied for. Counsel for all parties as well as Desai J agreed that such remedy is not appropriate without detailed industry research and consultation and should not be further entertained by the court. ADRA wholeheartedly supported that approach during court proceedings and still do. Extensive research is required and must such cap be based on scientific research so as to ensure that it meets the demands of South African consumers. Comprehensive data on EAO's is available and in possession of National Treasury and Mrs. Ingrid Goodspeed in person. This data reflects all EAO's enforced

against the wages of all government employees, their salaries as well as their so-called "take home pay". This is exactly the data required for the requested scientific research.

In the above premises ADRA respectfully submit that should a cap be introduced, that such cap:

1. Be thoroughly researched, and
2. Provides protection of minimum wages, and
3. Does not create an undue preference for higher income earners, and
4. Is structured in such a manner as to achieve its intended objective, namely to alleviate pressure on an already over-extended court capacity, and
5. Reduces legal costs which are for the account of the consumer, and
6. Compliments, rather than frustrate, other consumer protection legislation

"Sufficient Means" Test

In addition to the cap introduced by the proposed section 65J(1A), Sections 57, 58 and 65 provides for a very comprehensive "sufficient means" test. As stated above the purpose of introducing a cap is negated by also compelling a parallel "sufficient means" test and financial enquiry. Our further evaluation of the "sufficient means" test must be read against our primary contention in this regard that, should a cap be introduced, the "sufficient means" test should be reserved only for opposed matters where the consumer or any interested party (such as the employer or a dependent) opposes the application for an EAO or requests its amendment on the grounds that after having paid the capped amount the consumer will be left with insufficient funds to meet the necessary obligations in maintaining himself/herself and his/her dependents.

The question arises as to what information the court requires to determine whether the debtor will have sufficient means left for his, and his dependents', maintenance after an instalment order is made and an EAO is issued.

It is respectfully submitted that only the following information can reasonably be obtained by the creditor and that this information is sufficient for purposes of the "sufficient means" test:

(a) full particulars of the debtor's monthly or weekly income and expenditure, supported where reasonably possible by the most recent written proof of which the debtor possesses;[3]
(b) particulars of all court orders in terms of which the debtor was ordered to pay a judgment debt or other obligation in specified instalments or otherwise;[4]
(c) particulars of agreements with other creditors for the payment of debt in instalments or otherwise as furnished by the debtor.
(d) A credit bureau report reflecting the debtor's reported credit exposure which report must not be older than three months at the time the application for consent

[3] The information referred to in subparas 5.3.1 and 5.3.3 will, of necessity, have to be obtained from the debtor (or with the debtor's consent, from the debtor's employer).
[4] The information referred to in subpara 5.3.2 will appear from the debtor's Credit Bureau record.

judgement and an instalment order is filed.

As regards sections 57(1A)(a)(iii) and 58((1A)(a)(iii) the proposed requirement that full particulars of the debtor's assets and liabilities be furnished has no bearing on the debtor's ability to pay the judgment debt in instalments. It will only be relevant if the court is also granted the authority in determining the affordable instalment of an instalment order or EAO that the consumer liquidates certain assets.

If such requirement is retained, the value of the assets and the extent of the liabilities of the debtor will have to be determined. The question arises as to how this should be done and who would be obliged to obtain such information. In respect of those assets and liabilities for which written proof is not (readily) available, the value or extent as provided by the debtor will have to suffice.

In the premises, it is submitted that the requirement that particulars of the debtor's assets and liabilities be furnished with the additional requirement that documentary proof thereof be provided by the creditor, be excluded.

As regards the proposed sections 57(1A)*(c)* and 58(1A)*(c)*:

(a) a defendant's "*bank statements*" cannot show "*that the defendant will have sufficient means for his or her own maintenance and that of his or her dependents after payment of the instalment*";
(b) additional information of what the debtor's requirements in respect of the maintenance referred to in the proposed subsections are, would be required;
(c) in addition, certain expenses in respect of such maintenance might already be provided for as a deduction on the bank statement;
(d) to the extent that the "*written proof by the defendant's employer*" involves or constitutes the defendant's salary advice, the same argument as set out in subparagraphs (b) and (c) above, holds true.

Apart from a credit bureau report, the availability and accuracy of the written proof of the debtor's expenditure will depend on that which the debtor furnishes (and is able to furnish) to the creditor. The same apply to any contribution the debtor's employer can make to the "sufficient means" test. The employer will likewise be entirely dependent on the debtor to provide relevant information other than existing enforced deductions from the debtor's salary as already appears on the debtor's salary advice.

Certain debtors will be in possession of and be able to furnish "written proof" or "documentary evidence" of most of their expenses while the majority will not be in a position to do so. Documentary proof simply does not exist for many items of necessary expenses such as where debtors pay in cash for transport by all forms of public transport, groceries, rent, infant/child day-care etc. We also live in a day and age which places much emphasis on paperless communication. It has for example become common practise to provide proof of payment electronically via SMS/USSD and other electronic means. Even if such communication includes a function allowing for the message to be re-produced in written

form, most consumers will not have access to compatible devices to reproduce same in written form from their mobile devices on which such messages are received.

The use of the word "…must…" in section 57(1A) and the corresponding provision in the proposed section 58(1A) will in view of even a cooperative debtor's inability to provide documentary evidence as elaborated on above and/or a contravention of other legislation render the entire process of obtaining an instalment order in terms of sections 57 or 58 and a resulting EAO in terms of section 65 a nullity.

We further submit that an untenable onus is placed on the creditor to place all "particulars"[5], "…written proof…"[6] and "…documentary evidence…"[7] as described above before court. If all the particulars, written proof and documentary evidence is not available to the debtor or to a court when interrogating a debtor in court it can hardly be expected of a credit provider to satisfy this onus prior to entering into a section 57 or 58 undertaking and approaching a court for relief in terms thereof.

These provisions will make it impossible for a credit provider to successfully enforce its rights and create an unequitable position in the credit cycle.

On the plain reading of these provisions a section 57 and 58 undertaking is of no force or effect unless the written proof and documentary evidence in support of the "sufficient means" test is available and forms part of the undertaking at the time the undertaking is given by the consumer and the court file when the court considers the application.

The practical inability to comply with this provision is further compounded by sections 57(1A)(d) and 58(1A)(d) when respectively read with sections 57(2B)(a) and 58 (1C)(a). In terms hereof the "documentary evidence" filed by the creditor must not be older than 3 months and may the court when considering the application request from the creditor to obtain and file the "latest documentary evidence".

In practice it invariably takes more than three months for the court to process an application for judgment and an order for the payment of the judgment debt in instalments in terms of sections 57 or 58, and to have an EAO authorised. The undisputed evidence (statistics) presented and accepted during proceedings in the Stellenbosch matter is that prior to the June 2014 amendments to Rule 12 compelling clerks to refer section 57 and 58 application based on a cause of action founded in the National Credit Act to a magistrate it took on average 7 months for such application to be considered and the orders granted. With all section 57 and 58 applications to be referred to magistrates and without dramatically increasing the number of magistrates in all jurisdictions it will invariably take substantially longer than 7 months for magistrates to consider section 57 and 58 applications.

As a result of the "*three months*" requirement, a creditor will probably not be able to place sufficient recent "*documentary evidence*" before the court as, by the time that the court

[5] Section 57(1A)(a)(i) to (iii) and Section 58(1A)9a)(i) to (iii)
[6] Section 57(1A)© and Section 58(1A)©
[7]. Section 57(1A)(d) and Section 58(1A)(d)

considers the application, whether it is the initial application or such application supplemented by more recent "*documentary evidence*", the more recent information would already be older than the "*three month*" requirement. This would turn into a vicious cycle resulting in it becoming impossible for a creditor to obtain judgment and an order to pay the judgment debt in instalments and to have an EAO authorised and issued.

In addition, the "*three month*" requirement would discourage any arrangement with a debtor to pay the debt other than in one amount or by means of an EAO, as a breach of the arrangement could result in a situation that the "*documentary evidence*" in possession of the creditor would have become stale (i e older than the required three months). This could potentially be to the detriment of a debtor who wishes to repay the debt earlier than what would be the case in terms of the authorised EAO.

This provision also does not accommodate the nature of a section 57 undertaking. The purpose of a section 57 undertaking is to grant the consumer a last opportunity to settle his/her debt with the creditor. As such the right of the creditor to approach a court of law with a section 57 application is suspended until such time as the consumer reneges on the undertaking contained in the section 57 undertaking to settle the debt in specific instalments. In the norm, creditors therefore approach courts for relief in terms of section 57 some months or years after the section 57 undertaking was obtained. In the vast majority of section 57 applications filed at court the documentary evidence required in terms of section 57(1A)(d) will invariably be older than 3 months at the time the creditor acquires the right to approach a court for relief based on the breach of the section 57 undertaking.

As regards the proposed amendments of sections 57, 58 and 65 of the Act, it will be extremely difficult, and for all practical purposes just about impossible, for creditors to submit documentary evidence other than the following:

1.1.1 The debtor's salary advice;

1.1.2 A statement by the debtor regarding the debtor's expenses;

1.1.3 The credit bureau record of the debtor.

Due to the high prevalence of identity theft and others forms of fraud most consumers are opposed to or extremely reluctant to provide such written/documentary proof and documentary evidence which contains otherwise protected personal information. It must further be considered that the Bill requires these documents to be filed at court which places information which is otherwise highly protected and sensitive within the public domain. Compelling creditors or courts to place a multitude of consumer's bank statements in the public domain is particularly alarming and is cautioned against. Such conduct may well be in violation of **inter alia** The Protection of Personal Information Act.

In this regard it is suggested that the proposed amendments should be re-worded in order to require that the following should be provided by the creditor seeking judgment:

(e) full particulars of the debtor's monthly or weekly income and expenditure, supported where reasonably possible by the most recent written proof of which the debtor

possesses;[8]

(f) particulars of all court orders in terms of which the debtor was ordered to pay a judgment debt or other obligation in specified instalments or otherwise;[9]
(g) particulars of agreements with other creditors for the payment of debt in instalments or otherwise as furnished by the debtor.
(h) A credit bureau report reflecting the debtor's reported credit exposure which report must not be older than three months at the time the application for consent judgement and an instalment order is filed.

As regards section 65J(3)(b)

Section 65J(3)*(b)* provides that once a court has granted an EAO the clerk of the court must ensure that the court-

"(i) has authorised the emoluments attachment order; and
(ii) has jurisdiction as provided for in subsection (1)(a)"

and may request "…more information" from the creditor.

The wording of this provision lends itself to a degree of confusion. Prior to granting a judgement, instalment order or EAO the court must satisfy itself that it has jurisdiction. The authority granted to a clerk in verifying jurisdiction should be clearly limited only to the re-issuing of an EAO in instances where an EAO is transferred from one area of jurisdiction to another such as would be the case where, after an EAO has been granted, the debtor takes up employment with another employer in an area of jurisdiction other than the area of jurisdiction of the court which originally granted the EAO.

Ensuring Physical Appearance

The general scheme of section 57, 58 and 65 lends itself to the debtor appearing in court in order to apply the "sufficient means" test.

It is ADRA's contention that in practice the issuing of subpoenas in order to secure the attendance of the debtor for procedures in terms of section 65A does not work. In terms of section 65A a debtor that fails to appear must be arrested by the sheriff, who must bring the debtor before the court at the first possible opportunity. Most sheriffs refuse to execute such warrants as they do not have the capacity to arrest and detain consumers until they have appeared in court. Most magistrates' courts also do not have the capacity to deal with such matters at the time when the sheriff brings the debtor before the court.[10] As a result, sheriffs do not arrest the debtor but simply warns the debtor to appear before the court on a specific date[11] and informs the attorney for the creditor of such date. If the debtor appears on the

[8] The information referred to in subparas 5.3.1 and 5.3.3 will, of necessity, have to be obtained from the debtor (or with the debtor's consent, from the debtor's employer).
[9] The information referred to in subpara 5.3.2 will appear from the debtor's Credit Bureau record.
[10] The exception is, apparently, the Magistrate's Court, Bloemfontein, which has mechanisms in place to deal immediately with a matter when the sheriff brings the debtor before the court.
[11] This would be the date on which the particular magistrate's court normally deals with section 65 matters.

specified date, the investigation into the debtor's financial affairs proceeds in terms of section 65. In the event that the debtor does not appear a further subpoena is issued and the aforesaid process starts anew. Should a debtor be arrested and brought before court and should that debtor be convicted of contempt of court for his/her non-appearance it very seldom happen that a court imposes any sanction other than to warn the debtor not to commit a similar transgression in future. It must borne in mind that the debtor's presence was required as a result of his/her inability to pay his/her debt. It makes little sense under those circumstances to impose a fine which further curtails the debtor's ability to pay arrear debt. It is also common practise that employees forfeit their salary for the time they are absent from work for purposes of attending civil court proceedings. Debtors are financially prejudiced by the number of court appearances the Bill will cause. On account of the fact that there are no real consequences for a debtor who ignores the sheriff's warning/s to appear before the court, very few debtors heed the sheriff's warning/s to appear on a specific date.

The section 65A(1) notice specifies what "documentary evidence" the debtor needs to bring to court. For a variety of reasons such as illiteracy and/or unwillingness to cooperate and/or inability to cooperate as elaborated on above, debtors seldom bring the minimal documents required at present to court. The compulsory and extended onus contained in the Bill to provide "written proof" and "documentary evidence" will further frustrate or even prevent the completion of the contemplated financial enquiry.

The procedure is further undermined in that the Bill does not provided for an instance where the debtor does not appear or is incapable of providing relevant information and/or supporting "written proof" and "documentary evidence" that an order is made in the debtor's absence (i e by default) or based only on the available information, "written proof" and "documentary evidence".

Cost

Legal cost incurred is invariably for the account of the judgement debtor. As submitted, a proper structuring a capped system will greatly reduce cost for the judgement debtor as unnecessary court appearances and work by the creditor's attorney will be avoided. In addition hereto, various other provisions of the Bill relevant to cost need to be reconsidered.

The requirement that the EAO also be served on the debtor in terms of section 65(J)(3)© should only apply in instances where the debtor was not present in court when the order was granted. Where the debtor was present the debtor will obviously be aware of that an EAO had been authorised by means of which the instalments would be deducted from the debtor's monthly or weekly emoluments. Compelling this additional service by sheriff only serves to increase the cost for which the debtor is ultimately responsible.
It is suggested that in such instances and in order to save costs and resources a letter to the debtor by registered post should suffice, *alternatively* that the employer be compelled to furnish the employee with a copy of the EAO.

There is a clear tendency towards limiting attorney's fees and costs. This does not accord with the arduous onus placed on the creditor and additional work required by the proposed

additional evidentiary requirements and the court appearances necessitated by the provisions of the Bill.

As regards the proposed sections 57(2B)*(d)* and 58(1C)*(d)* It is suggested that the proposed subsection should be replaced with the following:

> "*(d) Notwithstanding the defendant's consent to pay any scale of costs, make a costs order on the scale of costs it deems fit.*"

The reason for the suggestion is that the proposed subsection, as it now reads, makes it possible for the court to make no costs order or to order that each party pay their own costs. Such an order would fly in the face of the terms of an agreement between the parties in terms of which the debtor expressly undertook liability for the legal costs.

As regards the proposed section 65J(6)*(d)* It is submitted that the court ought to have a discretion to make a costs order in an appropriate case. It could be that the garnishee's belief or motive for instituting the procedure is shown to have been unreasonable in the circumstances, warranting an appropriate costs order to compensate the creditor for costs incurred.

It is suggested that the subsection should have a proviso which reads as follows:

> "*Provided that the garnishee acted reasonably in giving the notice required in paragraph (a).*"[12]

As regards the proposed section 14(2)*(e)* it is submitted that the court ought to have a discretion to make a costs order in an appropriate case. It could be that the debtor's, or affected person's, belief is shown to have been (proved to have been) unreasonable or totally unfounded in the circumstances, warranting an appropriate costs order to compensate the creditor for costs incurred in respect of the review application. It is suggested that the subsection should have a proviso which reads as follows:

> "*Provided that the judgment debtor or affected person who applies for the review contemplated in paragraph (a), acted reasonably in bringing the application.*"

Conclusion

It is submitted that the Bill will not achieve the noble objectives it sets not to achieve.

It is submitted that the purpose and structure of the cap to be introduced is reconsidered and that a scientifically researched cap is introduced providing in all the interests stated above.

[12] This should curb any abuse of the process such as is currently experienced with fictitious disputes regarding the "validity" of debit orders which increases perceptibly during the months of April and December to allow debtors an (unwarranted) respite in payment of amounts due.

It is submitted that a financial enquiry should only follow should the judgement debtor or an interested party oppose the implementation of an EAO instalment calculated in terms of the cap.

In circumstances where a financial enquiry is required, it is submitted that the information required, and the manner of presentation of such information be reconsidered.

It is submitted that provision be made for ensuring a judgement debtor's presence and cooperation in court and where such appearance or cooperation cannot be secured that a court may grant a judgement, instalment order and/or EAO in the judgement debtor's absence and/or based on the available evidence.

The comments contained herein will also result in an alleviation of pressure on already over-extended court resources and expedite court proceedings. We cannot allow that justice is denied by unreasonable delays.

It is our submission that a failure to consider the above and align the Bill accordingly, will lead to an untenable and unsustainable market place where consumers are almost encouraged not to honour their financial obligations, and creditors are left with very little or no recourse at all to enforce their rights, leading to the cost of credit and the enforcement thereof escalating as a consequence.

ADRA further accept the invitation to participate in public hearings as contained in the invitation to submit written comments on the Bill. Communication regarding attendance at such public hearings are to be forwarded to Mr. Marius Jonker per email at marius@adraonline.co.za

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