Paying a small claims court judgment debt in instalments

By Fareed Moosa

In *First Rand Bank Ltd v Maleke and Three Similar Cases* 2010 (1) SA 143 (GSJ) the court commented, with reference to s 73 of the Magistrates' Courts Act 32 of 1944 (MCA) and the National Credit Act 34 of 2005 (NCA), that:

'Invoking this provision [ie, s 73] could very well lead to the stated purpose of the [NCA], to ensure the "satisfaction by the consumer of *all responsible financial obligations*", provided the defendants participate in such process' (my emphasis).

In light of the italicised portion, this article considers whether s 73(1) of the MCA may be invoked by a debtor against whom the small claims court (SCC) has granted a judgment for the payment of money in circumstances where no court order was granted under s 39(2) of the Small Claims Courts Act 61 of 1984 (SCCA).

In this article I will express an opinion on whether the cumulative effect of ss 39 and 40, read with s 45, of the SCCA is that the jurisdiction of the magistrate's court has been ousted for purposes of s 73(1) in relation to applications for the payment of an SCC judgment in specified instalments.

At the outset, it is necessary to deal with the relevant provisions of the MCA and the SCCA.

Section 73(1) of the MCA provides:

'The court may, *upon the application of any judgment debtor* … and if it appears to the court that the judgment debtor is unable to satisfy the judgment debt in full at once, but is able to pay reasonable periodical instalments towards satisfaction thereof … suspend execution against that debtor either wholly or in part on such conditions as to security or otherwise as the court may determine' (my emphasis).

The relevant extract from s 39 of the SCCA provides:

‘(1) When a court grants judgment for the payment of a sum of money, the court *shall* inquire from the judgment debtor whether he is able to comply with the judgment without delay and, if he indicates that he is unable to do so, the court *may*, *in camera*, conduct an inquiry into the financial position of the judgment debtor and into his ability to pay the judgment debt and costs.
(2) After such an inquiry the court *may* –
(*a*) order the judgment debtor to pay the judgment debt and costs in specified instalments or otherwise;
…
(*c*) suspend the order under paragraph (*a*) either wholly or in part on such conditions as to security or otherwise as the court may determine’ (my emphasis).

The word ‘shall’ in s 39 reflects a legislative intention that the court’s duty to make the relevant inquiry is peremptory or imperative (affirmative) in nature. As litigants appearing in the SCC are deprived of their right to legal representation, it is incumbent on commissioners to fulfil their statutory obligations in a manner that does not prejudice such unrepresented lay litigants, who may be unaware of their rights. The court must therefore come to their aid within the constraints of the law.

It is in this context that the duty imposed by s 39(1) to make an inquiry is of critical importance. It is submitted that this inquiry is designed to assist judgment debtors wishing to settle their debts responsibly by not overextending themselves beyond their available financial means. This objective is consistent with the goals envisaged by the NCA. Consequently, failure by a commissioner to comply with the categorically imperative provisions of s 39(1) is, in my view, a gross irregularity that renders the proceedings reviewable under s 46(*c*) of the SCCA read with s 24(1)(*c*) of the Supreme Court Act 59 of 1959.

The word ‘may’ is permissive or facultative in nature: *Prima facie* it reflects an element of discretion (see *Sayers v Khan* 2002 (5) SA 688 at 691D). Consequently, the decision to hold a financial inquiry is directory only and is not compulsory. The same applies equally to a decision pursuant to s 39(2). Accordingly, the failure to conduct a financial inquiry and the refusal to grant an order under s 39(2)(*a*) for the payment of the debt in instalments is not *per se* an irregularity. However, it is certainly prejudicial to a litigant who is in financial difficulty and is willing but unable to settle the judgment debt without delay. In my view, a gross irregularity would only be present if the cumulative effect of the court’s conduct is such that it can be concluded that, based on the facts known to the court, no reasonable decision-maker would have declined to conduct such a financial inquiry or grant an order under s 39(2)(*a*) for the payment of the debt in certain instalments (as the case may be). In such circumstances, the decision is arbitrary or unreasonable and is thus reviewable (see *Geldenhuys v Resident Magistrate, Sutherland* 1914 CPD 62; *Nigrini v Resident Magistrate, Sutherland* 1914 CPD 661).

Section 40 of the SCCA provides:

‘If no order has been made in terms of section 39(2), *the judgment debtor may within ten days after the court has granted judgment for the payment of a sum of money, make a written offer to the judgment creditor to pay the judgment debt and costs in specified instalments* or otherwise, and if such an offer is accepted by the judgment creditor, the clerk of the court shall, at the written request of the judgment creditor, accompanied by the offer, order the judgment debtor to pay the judgment debt and costs in accordance with his offer, and such an order shall be deemed to be an order of the court in terms of section 39’ (my emphasis).

This section creates a mechanism designed to enable a judgment debtor to settle the judgment debt in specified instalments despite the SCC's failure to grant an order to this effect under
s 39(2)(*a*). In my view, the opening words 'if no order has been made in terms of section 39(2)' have the effect that the opportunity afforded by s 40 remains irrespective of whether or not the court's failure to order same is reviewable. This is so because the only prerequisite for its application is that no such order must have been granted. The reason bringing about this *de facto* situation is legally irrelevant. However, the benefit conferred by s 40 is subject to the judgment creditor's consent. It is to be noted that there is nothing in law obliging the judgment creditor to accept any such offer and he has an unfettered discretion as to whether to acquiesce to same. Thus, the judgment debtor is at the mercy of the judgment creditor, whose decision on the matter is final and binding. If the offer is rejected and the judgment debt is not settled, the judgment creditor is entitled to initiate legal proceedings in the magistrate's court to execute the judgment. This entails the judgment creditor applying under s 41(2), by way of an affidavit lodged with the clerk of the SCC, for a transfer of the SCC judgment to the clerk of a competent magistrate's court. On receipt by the clerk, the judgment is, under s 41(3), recorded in the relevant register. In practice, a magistrate's court case number is then allocated to the case.

In terms of s 41(1), the legal effect hereof is that the judgment is treated '*as if* … granted in the magistrate's court … for the amount mentioned in the affidavit referred to in subsection (2)' (my emphasis). In other words, for purposes of execution, the SCC judgment is deemed to be an order of the relevant magistrate's court. This is akin to the position of a statement filed under s 91(1)(*b*) of the Income Act 58 of 1962 and s 40(2)(*a*) of the Value-Added Tax Act 89 of 1991 (see 2012 (Apr) *DR* 30).

Section 45 of the SCCA provides:

'A judgment or order of a court shall be final and no appeal shall lie from it.'

At this juncture the legal issue to be dealt with is whether s 45 ousts the magistrate's court's jurisdiction regarding applications by the deemed judgment debtor under s 73(1) of the MCA in circumstances where the SCC exercised its discretion under s 39 against the granting of an order under s 39(2) and its decision is not reviewable.

At the same time, it is critical to consider whether, as a general rule, s 73(1) ought to be applicable to all deemed judgment debtors arising from s 41(1) of the SCCA. I am unaware of any judicial authority or academic writing dealing with these issues. Accordingly, the opinions expressed below are rooted in the general principles of statutory interpretation.

In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO and Others* 2001 (1) SA 545 (CC), at 558E, Langa DP said that the new constitutional order requires that 'all statutes must be interpreted through the prism of the Bill of Rights'. Section 34 of the Constitution, which is housed in the Bill of Rights, provides: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

There can be no doubt that s 73(1) confers on judgment debtors the opportunity to access a magistrate's court with the objective of obtaining the relief catered for therein. Such relief may be required in circumstances where, for example, the judgment creditor refused to accept a written offer made under s 40 of the SCCA or where there has been a change in the debtor's financial position since the time the SCC made a decision in respect of the financial inquiry under s 39(1).

In order for s 45 of the SCCA to operate as an ouster of the magistrate's court jurisdiction, consideration must be given to the legislature's intention. In *Kuhne & Nagel (Pty) Ltd v Elias and Another* 1979 (1) SA 131 (T), at 133E–F, the court held that, in order to ascertain the intention of the legislature, consideration must be given 'to the language used, the scope and object of the enactment as a whole, and the *consequences in relation to justice and convenience* of adopting one view rather than the other' (my emphasis).

The rules of statutory interpretation include a presumption against the legislature intending to interfere with or oust a court's jurisdiction (see L du Plessis *Re-Interpretation of Statutes* (Durban: LexisNexis 2007) at 169 to 173 and the authorities cited therein). Consequently, any such legislative intention must be clear from the express provisions of the SCCA and cannot be inferred. This is particularly so in view of the constitutional value designed to promote the right of access to courts.

I submit that there is nothing in the wording of the SCCA indicating that the legislature intended an ouster. The absence of such an intention is consistent with the express wording used in s 73(1) of the MCA: '[A]ny judgment debtor'. The word 'any' indicates a legislative intention to cast an extremely wide net around the affected judgment debtors. This reinforces the view that it encompasses deemed judgment debtors under
s 41(1) of the SCCA. Consequently, although ss 39 and 40 of the Act provide a mechanism for a court order to be obtained for a judgment debt to be paid in specified instalments, there is nothing that indicates a legislative intention to deny a deemed judgment debtor a further 'bite at the cherry' under
s 73(1) of the MCA. This is a common-sense approach that not only promotes the objectives of the NCA, but also provides a legal remedy for those deemed judgment debtors who were, for whatever reason, either not afforded the opportunity of a financial inquiry under s 39(1) or whose written offers under
s 40 were rejected by the judgment creditor.

An application under s 73(1) is neither a review nor an appeal against an adverse decision by the SCC not to grant an order under s 39(2). Instead, it is an independent proceeding arising from a new intervening act, that is, the judgment creditor's referral of the case to the magistrate's court under s 41(2) and the recording of the details of the judgment by the clerk of the court under s 41(3) so that it is, under s 41(1), regarded 'as if' it is an order of the relevant magistrate's court.

It must also be borne in mind that s 73 is part and parcel of the execution provisions in the MCA. It caters for an application different to the mechanism embodied in ss 39 and 40 of the SCCA, which does not involve an application to any court at the behest of the judgment debtor. This is unlike the position catered for by s 73(1).

A further consideration militating against an ouster of the magistrate's court's jurisdiction is that the judgment debtor's financial position may change adversely after the completion of the financial inquiry under s 39(1). The SCCA does not provide for a reconsideration of the judgment debtor's financial position at any time after the SCC has decided not to grant an order under s 39(2). That court is then *functus officio*.

In my opinion, a purposive approach to interpreting the relevant provisions of the MCA and the SCCA leads to the conclusion that s 73(1) must, of necessity, be broadly construed so that it encompasses all the deemed judgment debtors under s 41 of the SCCA. Such an interpretation ensures that such persons are not left without legal recourse to obtain a court order authorising the payment of a judgment debt in specified instalments.

In conclusion, s 41(1) of the SCCA grants the deemed judgment creditor the right of access to the relevant magistrate's court for purposes of execution. I submit that it would be inherently unfair and inequitable and would constitute unequal treatment of litigants if the deemed judgment debtor in the same case were to be deprived of a right of access under s 73(1) to the magistrate's court in relation to the same subject matter of execution. Judicial involvement or oversight in the process of execution is, in my view, always desirable and welcome.

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