

Managing debt in the context of illness

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Introduction

People become sick because they are poor, they become poorer because they are sick, and they become even more ill as their poverty increases.

—W.K. Asenso-Okyere, 1994

Palliative care addresses the needs of the whole patient and we are aware of the conundrum that ‘the sick become poor and the poor become sick’. In order to fully assist patients and family members, hospices provide quality palliative care free of charge, assist patients in accessing social grants and may offer programmes that promote economic empowerment. However, many people that we help are also worried about the fact that they are in debt. This is a problem that many carers also face in the current economic situation.

Many people today owe money as a result of the purchase of goods or the loan of money, as they do not have sufficient funds to pay for what they need, or think they need. Some people prefer to avoid getting into debt, and try to save money before buying what they want. In this way they avoid paying interest on outstanding debt, but rather earn interest on their savings. But many people with very low income feel that they have no choice but to borrow money or buy on credit, and for them debt is a daily reality. These transactions are called credit agreements which come at a great price, too often forgotten by the unwary consumer.

Credit agreements

The cost of credit

Credit providers (sellers of goods or lenders of money) charge interest on outstanding debt, as well as other fees, the most important of which are initiation and monthly service fees. Although the National Credit Act 34 of 2005 has placed limits on the cost of credit, the total cost is still extremely high and must be carefully calculated. The smaller the credit, the more expensive it is likely to be, and the cost of small loans in particular is exorbitant. The maximum interest rate that money lenders may charge is five per cent per month, but many lenders unlawfully charge interest much higher than this, some as much as 100 per cent per month. **For further information in regard to the cost of credit, see the pamphlet *The Cost of Credit* which is found in the Resources Section at the end of this book.**

Consumer rights and duties

The National Credit Act provides many measures to protect consumers who purchase or borrow on credit, such as the right to pre-agreement disclosure, the right to protection against certain marketing practices, and the right of cooling off. These rights and others are explained briefly in the pamphlet *Consumer Rights and Duties* found in the

Terms you will read in this chapter:

Contempt of court: crime of deliberately failing to appear in court or to respect the authority of a court of law

Credit agreements: agreements by which buyers can take possession of something and pay for it later or over time, usually in monthly instalments

Credit bureaux: offices/departments for keeping records of credit owed by every citizen

Default judgment: judgement taken without opposition by the customer, usually based on the failure of the customer to meet payments

Emoluments attachment order: the legal instruction given to your employer to deduct the money you owe from your salary

Initiation fees: the fees charged for starting/initiating the credit process

Pre-agreement disclosure: sharing of all the facts, interest to be charged and hidden costs with the customer before they sign any credit agreement

Pro rata basis: a debt administrator can pay what you owe to your various creditors according to a fixed proportion e.g. a bigger portion to the one who is owed the most

Service fees: the fees charged for handling the credit process

To attach assets: to seize property or a salary legally for non-payment of debts

Resources Section at the end of this book. Consumers' prospects of obtaining credit are influenced by their credit record, and credit records are kept by certain credit bureaux. **Consumers' rights (regarding information held by credit bureaux) are set out in the pamphlets *Consumer Rights and Duties* and *The Credit Bureaux* in the Resources Section.**

Reckless credit

Before entering into a credit agreement, the credit provider must assess the consumer's (i) understanding of the risks and costs of the proposed credit, (ii) debt repayment history and (iii) financial means, prospects and obligations. A credit agreement is reckless if the credit provider fails to do this, and a court may set aside or suspend all or part of the consumer's rights and obligations (e.g. the consumer might not have to repay the credit provider).

The unlawful use of identity documents, bank cards or PIN numbers

Frequently identity (ID) books or bank cards (credit, debit or ATM cards) are held by credit providers (e.g. money lenders) as security for debt. Money lenders also use these documents to collect on a debt, for example:

- Money lenders control ID documents in order to recover the proceeds of borrowers' social security grants (e.g. old age state pensions).
- Money lenders use bank cards and PIN numbers to withdraw money directly from borrowers' bank accounts (frequently money lenders withdraw far more than they are entitled to, leaving borrowers with little to live on).

These practices are not just unlawful, but are a criminal offence. If consumers who are victims of these practices report them, such money lenders should be arrested, charged and convicted, which could stamp out these widespread unlawful practices. Unfortunately this does not happen frequently enough.

Enforcement of debt

The letter of demand

The collection of debt usually begins with a letter of demand addressed to the debtor (a 'default notice' in the case of credit agreements), requiring payment within a stated time or by a date indicated. It is essential that debtors respond by the due date, either personally or through a legal representative. This response could be payment of the

debt or an offer to pay off the debt in specified instalments (unless, of course, the debtor has a defence to the claim). Failure to respond could result in a summons being served on the debtor. This will also lead to an increase in legal costs that can be avoided by proactive behaviour on the part of the debtor.

Summons and judgment

Court action is started by the issue of a summons. A summons is the legal document that initiates legal proceedings in court. It is issued by the court and served on the defendant (the debtor) by the Sheriff of the Court. In the case of credit agreements, summons may not be issued until (i) the debtor has been in default for 20 business days and (ii) 10 business days have passed since the credit provider delivered the default notice (these periods may run concurrently). It is essential that the debtor seeks legal advice when s/he receives summons, or obtains proper assistance from elsewhere. The debtor must respond within five court days (business days) of receipt of the summons by (i) paying the debt, (ii) negotiating payment of the debt in instalments, or (iii) formally defending the action.

Failure to respond will almost certainly result in default judgment being granted against the debtor, without the need for a court hearing, and the debtor will be ordered to pay the judgment costs. For this reason it is essential that the debtor acts immediately on receipt of a summons.

Debt collection

Once judgment is obtained, the judgment creditor has three options to recover the judgment debt:

- (a) Attach and sell attachable assets (movable or immovable property) by way of a warrant of execution. This method is preferred if the debtor has attachable assets.
- (b) Give notice to the debtor to appear in the debtor's court for a financial enquiry, when the court may order the debtor to pay off the debt in instalments which s/he is able to afford. This method will be used if the debtor has no assets, but has a steady income. (Note that if the debtor fails to appear in court as required, s/he may be arrested for contempt of court).
- (c) Obtain an emoluments attachment order in terms of which the employer of the debtor is required by the court to deduct from the debtor's salary a specified amount each month and pay it to the creditor. This method is preferred to (b) above if the debtor is in secure employment.

Administration orders

It is possible for a debtor who has a lot of debt which s/he is struggling to pay off to have him/herself placed under administration by the court. This can also be initiated by a creditor. The debtor is ordered to pay a certain monthly sum to an administrator appointed by the court, who then distributes the proceeds of these payments to all creditors on a pro rata basis. An advantage of this process for the debtor is that no creditor may take independent action against the debtor to enforce the debt. A major disadvantage is that the administrator takes a large fee for the work done, and the debtor is further impoverished as a result. For this reason, administration orders are not recommended.

Debt re-structuring

In any court proceedings involving a credit agreement, a court may declare a consumer to be over-indebted, usually upon the recommendation of an independent debt counsellor. The court can then order that one or more of the debts be re-structured (e.g. by extending the period of time within which the debt must be paid and requiring smaller payments, and/or by postponing the dates of payments). This is a new provision of the National Credit Act which has not been used much yet, and depends to a large extent on the availability of a registered debt counsellor.

What happens to debt upon the death of the debtor?

A person's debt is also known as a 'liability'. Upon death, all assets and liabilities 'vest' in the deceased estate. A new legal entity comes into being (e.g. Estate Late Dhlamini) which owns the assets and is responsible for payment of the liabilities. The Executor or estate representative is responsible for the payment of all debt in/liabilities of the deceased estate from the proceeds of the assets in the estate. Once all liabilities are paid, the balance of the assets is distributed to the heirs in accordance with the will or the laws of intestate succession (if there is no will).

If the liabilities in the estate exceed the assets, then the creditors of the deceased estate will be paid on a pro rata basis, with preference being given to certain creditors (e.g. former employees of the deceased). Note: the heirs of the deceased never become personally responsible for the debts of the deceased (whether or not the assets exceed the liabilities); rather, the deceased estate is responsible for such debts prior to the estate being wound up.

A credit provider may require a consumer to take out **life insurance cover** for the outstanding amount due in terms of the credit agreement. Indeed, it is advisable for consumers to maintain insurance cover in order to protect their heirs. Upon death, the insurer will pay out to the credit provider the outstanding amount due under the credit agreement. Insurance premiums are usually paid monthly together with the monthly instalment in repayment of the capital and credit costs (interest and fees).

A credit provider may also require a consumer to take out life insurance cover for immovable property (e.g. a house) subject to a mortgage bond, or against loss or damage to any other property which is the subject of the credit agreement (e.g. furniture).

The pamphlet entitled *The Cost of Credit*, as mentioned earlier, is found in the Resources Section at the end of this book.