



IT'S ESTIMATED more than R1 billion rand has been illegally over-deducted from thousands of distressed debtors by unscrupulous credit providers.

On Wednesday, Stellenbosch Law Clinic filed an application in the Western Cape High Court, seeking judicial intervention on the manner in which debt is collected. It believes debt collection needs to be regulated and that costs must be capped.

The clinic is joined by Summit Financial Partners in representing 10 of their clients. All the major role players in the credit industry are involved, with 49 respondents, including all the major banks, the lending institutions, the ministers of Justice and Trade and Industry, and the National Credit Regulator.

Stephan van der Merwe, senior attorney at the university's Law Clinic, says there's widespread abuse in the industry.

"We have a lot of situations where people have been garnished with emolument attachment orders against their salaries. When you sit down and look at it you find amounts in excess of five, six, seven times the principal debt and they're expected to continue making payments on it," he says.

In one case, a client was granted an initial loan of R600, but had paid back more than R5 000 – about eight times the initial loan amount. In another, a farm labourer, earning R2 000 a month, has R970 garnished from his monthly salary. Back in 2011, he was given a loan of R16 000 and has repaid in excess of R31 500 – yet the creditor alleges he owes R37 000.

Van der Merwe says the reason they get away with it is because there are no rules that the costs levied against the debtor are taxed.

"What you have is the creditors going to their attorneys or their collection agents and telling them to collect on the debt but the charges are borne by the debtor.

"This is why the debtors end up paying these astronomical amounts for small loans, because the attorney and collection agency fees are dumped on them."

The common law in *duplum* rule says that interest cannot accrue to more than the capital amount. Since 2007, when the National Credit Act (NCA) came into effect, the statutory in *duplum* rule has been interpreted by institutions in a myriad ways.

"This is why we are going to court: to request a declaratory order that the statutory in *duplum* is applicable to all the interest, the costs, including the legal fees that are levied against the debtor – irrespective of whether a judgment has been granted."

Van der Merwe says on a proper interpretation of the relevant sections of the NCA, it would mean that if the debtor is in default under the credit agreement these amounts may not exceed the unpaid balance of the principal debt at the time of default.

"When a consumer is in default all the combined interest, the collection costs and so on cease to run when they reach the unpaid balance of the principal debt."

"The problem is creditors say legal costs don't form part of it, or that this isn't applicable after judgment."

In addition to the two declaratory orders, the writ



SEEKING CLARITY: Stellenbosch Law Clinic believes debt collection needs to be regulated and that costs must be capped.

PICTURE: SIMPHIWE MBOKAZI

Debt collectors taken to task

Stellenbosch University's Law Clinic wants the high court to rule on allowable debt collection fees

for clarity on how sections 101 and 103 of the NCA are interpreted, the clinic is also asking that the court declare that legal fees may not be recovered from the debtor unless they have been taxed.

"Nowhere in the National Credit Act is a distinction drawn between legal fees and collection costs.

"What we're saying is that creditors want to use expensive attorneys to collect on miniscule debts; debtors can't be expected to pay those fees.

"We shouldn't allow debtors to be abused in this way – we need to the court to make a ruling."

Once the court has clarified allowable collection costs, the clinic wants it to order that an independent expert recalculate the applicants' indebtedness and then order that if there is an over-payment, the money must be repaid to the debtors.

But before consumers get excited about having collection fees and interest repaid, Van der Merwe says prescription might be at play. "You might have trouble in court claiming that money back because prescription would have to be taken into consideration.

"There will be clarity: everyone will know what is expected and people will be able to budget accordingly as a result of uncertain legal interpretation."

Van der Merwe says they are not attempting to vilify small cash loan providers, the credit industry or attorneys in general: "We applaud those creditors who are honest, give loans responsibly and collect responsibly: they play an important part in our economy.

"We are not tackling the industry in general – we have an issue with unscrupulous guys who don't play by the rules. We are not going to assist so called 'professional debtors' either, who abuse the system by getting loan after loan at creditors' expense if there are no merits in their cases.

"We have a problem with creditors who abuse low-income earners by coaxing them into enticing loans which they would never be able to service based on their limited wages."

In 2016, the law clinic won a landmark case in the Constitutional Court, which found that several practices relating to the abuse of emolument attachment orders were unconstitutional.

"The court also considered the validity of the initial loan agreements which regularly included interest of 60% annually and they were concluded absent of any, or alterna-

tively after severely defective, affordability assessments. Those transactions were conducted in breach of section 81 of the NCA which talks about reckless credit.

"Those specific creditors want to extend reckless credit to consumers, who they know won't be able to repay the loans, and then they abuse the situation by putting debtors into a debt trap that they'll never be able to get out of.

"People like that shouldn't be able to shirk responsibility in their collection when they use illegal practices. They cause economic catastrophe in the lives of those clients."

Van der Merwe says that after the Marikana massacre of August 16, 2012, clear linkages were drawn between the demands for higher wages and the abuses in the credit industry.

"Those workers demanded more money to allow them and their families to make a living because their salaries were severely garnished by credit providers that were instituting emolument attachment orders that were illegal and unconstitutional.

"We are trying to avoid those situations arising in the future by asking the court to assist us in fostering a healthy and responsible credit environment."