

## **COLLECTOR'S COLLECTION COMMISSION - (Outule Keatimilwe, Associate)**

The concept of collection commission arises frequently in debt collection matters. Collection commission essentially means a charge by an attorney or commission agent when payments have been received from a debtor. The contentious issue is when is it payable? The answer to this question has been the subject of controversy in the legal fraternity.

One school of thought is that collection commission is payable by the debtor where it is one of the terms of the agreement between the debtor and the creditor. This is based on the notion of freedom to contract, that is, the law of contract gives the parties the freedom to dictate the terms of their agreement provided that such terms are not illegal or contrary to public policy. In other words, if the parties agree that in the event the debtor defaults in the payment of his debt then the creditor shall be entitled to collection commission when he pursues recovery of the debt.

Another school of thought on the issue is that collection commission is only payable by the debtor if the money recovered is as a result of the services of the attorney/agent before legal proceedings are instituted in a court of law. Therefore, collection commission is not payable by the debtor in the event that the money was recovered after judgment has been granted by the court. The rationale for the latter position is that the attorney is compensated by the fees earned in the legal proceedings.

Still others have taken the position that collection commission is payable to an attorney even after judgment has been granted, provided that the debtor has made an undertaking to pay the debt by way of instalments as opposed to a once off payment in full. The rationale for this position is that, if the debtor pays by way of instalments, then the debtor will normally be required to sign an Acknowledgement of Debt and the services of the attorney as a collector of the instalments are still required. Clearly, in order for collection commission to be payable, the instalments must be paid to the attorney and not directly to the creditor.

The Court of Appeal has settled this debate in the recent decision of **Cell Connect (Pty) Ltd v Oseg Group (Pty) Ltd CACGB-043-16 (Unreported)**. The judgment states that attorneys are entitled to charge and recover collection commission from the debtor both before and after judgment is granted. The judgment, however, stipulates that where judgment has been granted against the debtor, collection commission is only payable and recoverable where the debt is paid by way of instalments. In addition, collection commission may only be recovered on each payment (instalment) actually paid. The amount of the collection commission is a percentage of the amount that has actually been recovered by the attorney.

To sum it up, the collector's collection commission is payable for as long as the collector has to use his services to collect the debt before or after judgment has been granted in favour of the creditor.