

The Council for Debt Collectors

Versus

Brunello Property Management CC

1st Respondent

GW Howell

2nd Respondent

The Respondents were on 6 April 2009 charged with improper conduct before Adv. J Noeth, Chairman of the Council.

The Council was represented by Adv. A. Cornelius. The Respondents were represented by Mr. Hein von Lieres of the firm Von Lieres, Cooper and Barlow.

The Respondents were charged with the following charges:

“CHARGE 1

That the debt collector acted in contravention of Section 19(1)(a) and (b) of the Act, Act 114 of 1998 and Section 5(3)(a) of the Code of Conduct by attempting to recover an amount to which the debt collector was not entitled in that:

During the period April 2006 to October 2008 you recovered/attempted to recover the following costs from Mr. Irvine

- a) Telephone demands in the amount of R 175.00
- b) Telephone calls in the amount of R 55.00 each
- c) Letters of demand in the amount of R 125.00
- d) Letters iro rules or collection in the amount of R 175.00
- e) Letters iro rules or collection in the amount of R 250.00

CHARGE 2

That the respondent is guilty of a contravention of section 15(1)(g) read with Section 8(1) of the debt collectors Act, Act 114 of 1998 in that:

That during the period April 2006 to August 2008 the debt collector acted as a debt collector, by recovering/attempting to recover a debt from a Mr. Irvine a debtor from whom the Respondent had been instructed to recover a debt, whilst he was/is not registered as a debt collector and whilst knowing/should have known that he was/is not registered and should have been registered.”

Both Respondents pleaded not guilty to both the charges.

At the beginning of the proceedings Mr. Von Lieres, on behalf of the respondents, lodged the following special plea.

“The First and Second Respondents deny that the Council for Debt Collectors has jurisdiction over them because:

1. The First and Second Respondent are and were at all relevant times acting in their capacity as Estate Agents as defined in Section 1 of Act 112 of 1976, and not as debt collectors as defined in Section 1 of Act 114 of 1998.
2. As such, the First and Second Respondents’ activities are not regulated by, nor are they subject to the provisions of Act 114 of 1998, by virtue of which the Council for Debt Collectors derives its authority.”

In the Respondent’s heads of argument in support of this special plea it is stated that they were at all relevant times acting in their capacity as Estate Agents as defined in Section 1 of Estate Agency Affairs Act and not as debt collectors as defined in section 1 of the Debt Collectors Act. Accordingly the Respondents case is that the Council for Debt Collectors does not have jurisdiction over them.

They then continued as follows:

“THE RESPONDENTS CASE

3. The main thrust of the Respondents’ submission (which will be expanded upon below) in respect of the Council for Debt Collectors’ lack of jurisdiction in this matter is that:
 - 3.1. The Debt Collectors Act is a statute of general application, whilst the EAA Act is a statute of specific application. The former does not abrogate or amend the latter.
 - 3.2. Properly interpreted, the Debt Collectors Act is not applicable to Estate Agents who carry on business as either Property Managing (Rental) Agents or Sectional Title Managing Agents and who as part of their functions as such collect and receive for reward rental or levies on behalf of another.

THE DEFINITION OF ‘ESTATE AGENT’ AND ‘DEBT COLLECTOR’

Estate Agent

4. The EAA Act defines an ‘estate agent’ as *inter alia*:
 - (a) ... any person who for the acquisition of gain ... in any manner holds himself out as a person who ... on the instructions of or on behalf of any other person –
 - (iii) collects or receives any moneys payable on account of a lease of immovable property or any business undertaking; or
 - (iv) renders any such other service as the Minister on the recommendation of the Board may specify from time to time by notice in the Gazette’.
 - 4.1.1 One of the ancillary services specified by the Minister in terms of section 1(a)(iv) of the EAA Act is:
'Collecting or receiving -

(a) money payable by any person to ... a body corporate in terms of the Sectional Titles Act, in respect of a unit ...'

5. It is accordingly submitted that the occupation of managing agent of a sectional title scheme very clearly falls within the ambit of the definition 'estate agent' as is contained in the EAA Act.
6. The EAA Act, clearly confers upon an estate agent, the right to collect debt in the limited circumstances where the debt relates to:
 - 6.1. moneys payable on account of a lease of immovable property or any business undertaking; and to
 - 6.2. collect or receive money payable by any person to a body corporate in terms of the Sectional Titles Act, in respect of a unit.
7. The authority to collect and receive debt is limited to debts in respect of rental levies only."

It is further submitted that the word "debt" is not defined in the Debt Collectors Act.

The following argument is then advanced.

"The point is this: The Debt Collectors Act is a statute of general application that has its aim to control the occupation of debt collectors and protect the public from unscrupulous debt collection practices and excessive collection costs. The Act is applicable to the collection of all debts no matter what the underlying cause of the debt may be. The EAA Act on the other hand, regulates the profession of estate agents the right to collect debts which relate to levies and rental only.

The provisions in the EAA Act that confer limited debt collection rights on estate agents are special provisions, which in the absence of a clear legislative intent in the Debt Collectors Act, can not be said to have been interfered with by the promulgation of the Debt Collectors Act".

For a proper assessment of the matters in dispute it is essential to look at the purpose of the Debt Collectors Act, 1998 in particular and the definition of a debt collector in terms of this Act. Should this definition include estate agents who carry on business as either Property Managing (Rental) Agents or Sectional Title Managing Agents and who as part of their functions as such collect and receive for reward rental or levies on behalf of another then they have to register as debt collectors unless they have been specifically excluded in terms of the relevant legislation.

The purpose of the Debt Collectors Act, 1998 (Act 114 of 1998) is stated as follow:

"To provide for the establishment of a council known as the Council for Debt Collectors, to provide for the exercise of control over the occupation of debt collector and to amend the Magistrates' Courts Act, 1944, "so as to legalise the recovery of fees or remuneration by registered debt collectors; and to provide for matters connected therewith".

The underlined words are very important in view of the fact that prior to this Act section 60 of the Magistrates' Court Act, 1944 provided as follows:

"Section 60 Prohibition of recovery of fees or remuneration by certain persons in connection with the collection of debts.

Unless expressly otherwise provided in this Act or the rules no person other than an attorney or an agent referred to in section 22 shall be

entitled to recover from the debtor any fees or remuneration in connection with the collection of any debt.”

The important words in this regard is that “no person” other than an attorney shall be entitled to recover from the debtor “any fees or remuneration in connection with the collection “of any debt”.

This provision was specifically amended in section 27 of the Debt Collectors Act, 1998 to read as follow:

“(i) Unless expressly otherwise provided in this Act or the rules and subject to the provisions of section 19 of the Debt Collectors Act, 1998, no person other than an attorney or an agent referred to in section 22 shall be entitled to recover from the debtor any fees or remuneration in connection with the collection of any debt.”

This absolute prohibition was amended to make provisions for debt collectors registered with the Council to recover the limited fees as set out in Annexure B to the regulations of the Debt Collectors Act.

A further provision was especially enacted in 2005 to make an exception in terms of the National Credit Act, 2005.

This prohibition now reads as follow:

“60 Prohibition of recovery of fees or remuneration by certain persons in connection with the collection of debts

- (1) Unless expressly otherwise provided in this Act or the rules and the National Credit Act, 2005, and subject to the provisions of section 19 of the Debt Collectors Act, 1998, no person other than an attorney, an agent referred to in section 22 or a person authorized by or under the provisions

of the National Credit Act, 2005, to do shall be entitled to recover from the debtor any fees or remuneration in connection with the collection of any debt.

- (2) Any person who contravenes any provisions of subsection (1), shall be guilty of an offence and on conviction be liable to a fine not exceeding R 4 000, or in default of payment, to imprisonment for a period not exceeding 12 months, or to both such fine and such imprisonment.”

From these provisions it is clear that every time the Legislature intended to make any exception to this clear prohibition it was specifically enacted.

These provisions are unambiguous and clearly reflect the intention of the Legislature.

What is also clear is that nowhere any exception has been made in section 60 of the Magistrates' Courts Act, 1944 for estate agents or their agents' to charge "any fees or remuneration in connection with the collection of any debt". This is also not the case in the Estate Agents Act nor any amendment thereof. Similarly there is no exclusion for estate agents in the Debt Collectors Act, 1998 which was enacted long after the Estate Agency Affairs Act, 1976 (Act 112 of 1976).

From the above it is clear that the legislature never intended to allow estate agents and Sectional Title Managing Agents to recover any fees or remuneration when collecting arrear debts should they do so they are contravening section 60(2) of the Magistrates' Courts Act, 1944 and can also be criminally charged for such a contravention unless they have been registered as debt Collectors with the Council.

This aspect of the matter is further emphasized by the following provisions of the Debt Collectors Act, 1998.

Section 1 of the Act provides as follows:

“debt collector” means a person other than an attorney or his or her employee or a party to a factoring arrangement, who for reward collects debts owed to another on the latter’s behalf.”

In terms of this provision only attorneys and a party to a factoring arrangement are excluded from the provisions of this Act.

This provision is confirmed in section 8(1) of the Debt Collectors Act, 1998, which provides as follow:

“As from a date fixed by the Minister in the Gazette, no person, excluding an attorney or an employee of an attorney, shall act as a debt collector unless he or she is registered as a debt collector in terms of this Act.”

Estate agents are in terms of these sections not excluded from the specific provisions of this Act. The word “shall” used in section 8(1) indicates that this is a peremptory provision. What is not specifically excluded in this section as an exception is in my view clearly included.

These provisions are unambiguous and clearly reflect the intention of the Legislature.

The Debt Collectors Act, 1998 was passed after the Estate Agents Affairs Act, 1976 (Act 112 of 1976) and the Legislature is presumed to know the existing law, but nowhere was provision made for estate agents to be excluded if they were collecting debts, and in the process satisfy the definition of a debt collector as contained in the Debt Collectors Act, 1998.

It is also to be noted that the Debt Collectors Act in section 10 disqualify certain persons from becoming debt collectors if they were for example convicted of an offence involving violence, dishonesty, extortion or intimidation in the preceeding 10 years. These disqualifications are not imposed on estate agents.

Apart from this debt collectors are in terms of section 14 of the Debt Collectors Act, 1998 subject to a very strict code of conduct when they are in the process of debt collecting. In terms of section 14(3) of the Act this Code is binding on all debt collectors. I cannot foresee why the legislature would have excluded estate agents from these provisions when they in all respects are performing the same functions as a debt collector. That would result in two sets of governing rules for persons performing the same functions. The playing fields will not be level. This will result that the behaviour of estate agents who are doing debt collecting will not be subject to any control when collecting debts. These provisions were clearly enacted in the Debt Collectors Act, 1998 to protect the public from unscrupulous debt collecting practices and it can therefore be accepted that the Legislature would not exempt others performing the same function from these provisions.

In my view the legislature was fully aware of the services that estate agents render and did not intend to exclude them from the provisions of the Debt Collectors Act, 1998.

In the Respondents special plea it is denied that they are subject to the provisions of the Debt Collectors Act and that the Council for Debt Collectors, consequently has no jurisdiction over them.

The respondents are described as managing agents of sectional title schemes.

In charge 1 of the charge sheet it is alleged that as such agents they attempted to recover from Mr. Irvine amounts far in excess of the amounts recoverable from a debtor in terms of the Debt Collectors Act.

Mr. Von Lieres admitted in his argument that the collecting entity in this case is the body corporate of the sectional titles scheme. The Respondents are the managing agents who collect arrear amounts on behalf of the body corporate. They are therefore clearly not collecting their own debts but debts owed to another and they are therefore collecting the debts on behalf of the other person. They are in fact collecting arrear levies which have not been paid.

The next question to be considered is who is a debt collector in terms of the Debt Collectors Act, 1998 (Act 114 of 1998). If estate agents fit the requirements of this definition they have to register as debt collectors before they can collect arrear debts. In this regard it is essential to consider the definition of a debt collector as contained in section 1(a) of the Act.

1. “debt collector” means -
“a person, other than an attorney or his or her employee or a party to a factoring arrangement, who for reward collects debts owed to another on the latter’s behalf.”

From this definition it is clear that

- (i) a person
- (ii) who for reward
- (iii) collects debts
- (iv) owed to another on the latter’s behalf

is a debt collector.

Person

Although the first respondent is a close corporation it is included in the definition of a person as contained in section 1 of the Debt Collectors Act, 1998. This part of the definition is thus satisfied.

Debt

A debt has not been defined in the Act. A debt in the New Edition, English Dictionary by Geddes and Grosset is defined as follow:

“debt a sum owed; a state of owing; an obligation”

In the Concise Oxford Dictionary Ninth Edition the following is given:

“debt

1. Something that is owed, esp. money
3. a state of obligation to pay something owed”

See also:

Cape Town Municipality v Dunne SA 1964(1) 741 Joint Liquidators of Glen Avril Development Corporation Limited (in liquidation) v Hill Samuel SA Limited 1982(1) SA 103(A) at page 110 the following is stated:

“It seems to me that it can be said that, in ordinary parlance a debt is a firm obligation to pay, whether now or later”.

A “debt” is defined in section 55 of the Magistrate’s Courts Act, 1944 (Act 32 of 1944) as follows:

“55 Definition

In this Chapter, unless the context otherwise indicates – ‘debt’ means any liquidated sum of money due. [Sec 55 substituted by s 1 of Act 63 of 1976.]

The following comments are then made:

‘Liquidated sum of money’. The procedures under Chapter VIII of the Act are available only in those cases where the debt is a ‘liquidated sum of money due’. If the debt is not liquidated, for example a claim for damages, the plaintiff will have to issue summons in the ordinary way and, after obtaining a judgment in his favour, proceed under s 65A if the judgment remains unsatisfied.

As to what constitutes a liquidated sum of money, see the notes to rule 14(1) in vol II. An indebtedness evidenced by a liquid document is clearly a debt for a ‘liquidated sum of money’ for the purposes of this Chapter.

‘Due’. The liquidated sum of money constituting the debt must be ‘due’, that is ‘owing and already payable’.”

From this explanation of “due” it is clear that a “liquidated sum of money” constitutes a debt in terms of the Magistrates’ Courts Act, 1944 when it is –

- (i) due and
- (ii) owing and already payable

In my view this is the meaning which must be attributed to the word “debt” when estate agents are collecting arrear debts. Estate agents and managing agents are debt collectors if they are required in terms of their mandates to start demanding payments for rentals and levies which are overdue. Once they advance this process they take legal steps to compel defaulters to pay what is not merely due but also already payable. This is also clear from Mr. Von Lieres’ argument (page 12) to the Council when he stated the following: “The collection

of debt is an incidental function of the managing act.” He admitted that the primary function of a managing agent is not that of debt collection. It is in fact a secondary function. It is this secondary function which is subject to the provisions of the Debt Collectors Act, 1998.

If estate agents collect such arrear amounts on behalf of another they are not performing the functions of an estate agent but the legal collecting function which is preserved for attorneys and debt collectors.

Adv Cornelius on behalf of the Council in my view correctly pointed out that the Estate Agent Affairs Act, 1976 was written to control estate agents in their functions as estate agents. The Debt Collectors Act, 1998 on the other hand was written to monitor debt collectors and their functions. Nowhere in the former Act is it mentioned that estate agents can recover debts which are overdue.

As I have already pointed out there are major differences in the provisions governing the two professions.

There is a very clear distinction between the functions of an estate agent and a debt collector. The moment the estate agent starts his ancillary function of collecting debts he becomes a debt collector and is in respect of this part of his function subject to the provisions of the Debt Collectors Act, 1998.

As far as estate agents are concerned I am of the view that a clear distinction must be drawn between the receiving of rentals and levies on a monthly basis from tenants as stipulated in the lease agreement and arrear rentals and levies. Before the tenant defaults with his stipulated monthly payments this obligation is simply an obligation to pay which has its foundation in the terms of the lease agreement. An estate agent who merely receive amounts which are payable in terms of a lease agreement on or before the date when it is due and payable will not fall within the definition of a debt collector as set out in the Act. This is the

case when he routinely receives timeous payments from persons normally willing to pay on or before the due date. His obligations are then only covered by the lease agreement to receive the rentals which are payable and he will therefore not be able to collect the fees as set out in section 19 (1)(b) of the Debt Collectors Act 1998, from the tenant or any other fees.

The dividing line is, in my view, when an estate agent or managing agent is collecting arrear rental which are clearly debts in terms of section 55 of the Magistrates' Court Act, 1944. In such a case he is no longer performing the functions of an estate agent as set out in the Estate Agency Affairs Act but is engaging in activities which are exclusively carried out by attorneys and debt collectors. He is entering a different profession to wit that of an attorney or the exception to that section namely that of a debt collector. He is no longer performing the functions of an estate agent. In such a case he can only perform this task if he is admitted as an attorney or registered as a debt collector in terms of the Debt Collectors Act, 1998.

When estate agents as managing agents collect arrear amounts they do not do so for their own account but for the body corporate. In other words they are collecting debts owed to another person on the latter's behalf. This in my view brings them squarely within the definition of a "debt collector" as defined in the Debt Collectors Act. They are collecting a debt and is also, as I have pointed out, prohibited in terms of section 60 of the Magistrates Court's Act, 1994 to recover from the debtor any fees or remuneration unless they are admitted attorneys in terms of the Attorneys Act or registered debt collectors in terms of the Debt Collectors Act, 1998.

If they do recover fees and they are not empowered in terms of the relevant provisions they are in my view also committing criminal offences as set out in section 60(2) of the Magistrates Courts Act, 1944 and section 25 of the Debt Collectors Act, 1998.

The position as far as estate agents is consequently as follows. When they collect or receive any money payable on account of a lease of immovable property or any business undertaking, these are amounts which are “due” but not “owing and already payable”. They are entitled to perform this function in their capacity as estate agents.

The words “due and already payable” in my view refer to arrear debts. When they collect such debts they are in my view entering the sphere of professional attorneys and debt collectors in terms of the Debt Collectors Act.

In order to collect arrear rental or levies they have three options

- (i) Refer the debts to an attorney for collection in terms of the formal legal process as prescribed in the Magistrates Courts Act 1944.
- (ii) Contract a registered debt collector in terms of Debt Collectors Act, 1998 to collect such debts.
- (iii) Register themselves in terms of the Debt Collectors Act as debt collectors and become subject to the provisions of the Debt Collectors Act, 1998 and in particular the control of the prescribed fees which are recoverable in terms of this Act.

The fact that both the Estate Agency Affairs Act, 1976 and the Debt Collectors Act, 1998 requires that a trust account must be opened does in my view not pose a problem in practice. There are many debt collectors with more than one trust account. All that is required is that the estate agent must open two trust accounts, one for the purpose of the Estate Agency Affairs Act, 1976 and the other in terms of the Debt Collectors Act, 1998. Moneys collected in terms of the different Acts must be deposited into the relevant account.

At the moment there are a number of estate agents registered with the Council and these provisions do not appear to create any practical problems.

Collect

It is helpful to look at the definition of collect as contained in the New Edition the English Dictionary by Geddes and Grosses “collect – to bring together, gather or assemble, to ask for or receive money or payment”.

In the Concise Oxford Dictionary Ninth Edition collect is inter alia defined as follows:

1. bring or come together; assemble, accumulate.
2. systematically seek and acquire (books, stamps, etc.)
3. obtain taxes; contributions from a number of people;
4. call for; fetch

This is exactly what the respondents are doing, they “fetch” or “call for” overdue levies.

Du Plessis JC and Goodey J state in this regard in Practical Guide to Debt Collecting the following:

“What is debt collection?”

Debt collection in the narrow sense of the word means the legal proceedings against a debtor by a creditor for the collection of debt due to the creditor. While such legal proceedings may, in theory, be taken by anyone, including the creditor himself, the proceedings prescribed in the Magistrates’ Courts Act, 32 of 1944 and its rules are difficult for a layman to apply for reasons which will appear later.

In a wider sense debt collection means any steps, judicial and extra judicial, legal and illegal, taken for the collection of debt. This definition includes mild steps such as telephone calls or letters of demand, as well as drastic extra judicial and illegal measures like threatening the debtor or his family with harm or using force to repossess goods which have not been paid for.

Debt collection also includes the collection of liquidated as well as unliquidated amounts of money. Collecting money due to an insurance company for damages arising out of collisions involving its insured, is as much debt collection as suing for goods sold and delivered.”

I therefore find that the respondents were collecting debts in that they were involved in collecting outstanding levies which were overdue.

It is not disputed that the respondents are remunerated for collecting the overdue amounts.

I therefore find that the respondents were rewarded for the services they rendered to the clients.

The amounts which the respondents were collecting were debts owed to another on the latter's (body corporate) behalf.

From the above and consistent with the ordinary meaning of the words as contained in the definition of a “debt collector” in the Act I find that both the respondents are debt collectors and that they are in the circumstances set out subject to the provisions of the Debt Collectors Act, 1998 and cannot collect arrear amounts which are due and already payable.

The respondents are found guilty on counts 1 and 2.

From charge 1 in the charge sheet it is obvious that the respondents were not only recovering fees but also amounts hugely in excess of the maximum amounts which are recoverable by registered debt collectors as contained in Annexure B of the regulations in terms of the Debt Collectors Act.

As far as this aspect is concerned it would on the face of it appear that they were busy what was referred to by Mr. Von Lieres as unscrupulous debt collection practices and excessive collection costs. The Debt Collectors Act was enacted precisely to protect the public from such practices.

In terms of the Annexure B to the regulations of the Debt Collectors a registered debt collector can only collect R 12.60 from a debtor for a necessary letter. An attorney can collect R 17.00 from the debtor for such a letter. The amounts charged by the respondents in terms of charge 1 is as follow.

During the period April 2006 to October 2008 you recovered/attempted to recover the following costs from Mr. Irvine

- f) Telephone demands in the amount of R 175.00
- g) Telephone calls in the amount of R 55.00 each
- h) Letters of demand in the amount of R 125.00
- i) Letters iro rules or collection in the amount of R 175.00
- j) Letters iro rules or collection in the amount of R 250.00

This to say the least is shocking. This would on the face of it appear to be the kind of unscrupulous debt collecting which the Legislature intended to prohibit when enacting the Debt Collectors Act. Moreover this state of affairs is further exacerbated by the fact that tenants up to now had nowhere to complain about these amounts. This practice will as a result of this judgment be rectified and properly controlled.