

Newsletter no 1 of 2004

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1. Introduction

The staff of the Council would like to take this opportunity to welcome all registered debt collectors to the Council. As the Council, just started off, the registration process was a learning curve and we would like to thank everybody for their patience and friendliness during the process. We trust that the way forward will be a fruitful and happy experience.

To assist you to contact the right person with your queries here follows a list of the relevant personnel:

1. Mr. O de Meyer – Executive Director (acting)
2. Adv E Nieuwoudt – Legal Administration Officer
3. Mrs. Ronelle Coetzer – registrations and the register
4. Ms. Lulekwa Morgan – secretary

Also in the office is Ms. Lillian Mabaso (general office assistant) and Mrs. Annetjie Smith (bookkeeper)

Up to date the Council has registered **6900** debt collectors. This includes companies, close corporations, trusts, sole proprietors and employees .

2. Trust account:

Part 1

From enquiries received from debt collectors it is clear that a number of them, especially newcomers to the industry, do not fully understand how a trust account must be operated. The following are a few basic principles that apply to trust accounts.

In terms of section 20 of the Debt Collectors Act 114 of 1998, a registered debt collector must keep a separate trust bank account at a banking institution in the Republic. This trust bank account, the records and the trust ledgers must be audited by a registered accountant or auditor. Money held, received or collected by a debt collector, on behalf of any person, must immediately be deposited in the trust account and be paid

over within a reasonable or agreed time to the person on whose behalf the money was received or held.

Trust money remains the property of the client on whose behalf the money has been received or is being held. As long as this money is in the hands of the debt collector, it must be safeguarded to the best of his / her ability. Trust money does not form part of the assets of the debt collector and may therefore not be claimed by a creditor of the debt collector.

It is important to distinguish between business money and trust money at all times. Two bank accounts as well as control accounts for trust creditors and business clients (debtors) are kept. Remember that trust money is held in trust and may never be used for any other purpose.

If the trust bank statement is debited with bank charges, the debt collector must transfer money from the business account to the trust bank account to cover these bank charges because there must never be a deficit on the trust bank account. The alternative method to ensure that bank charges cannot create an overdraft situation on the trust bank account, is for the debt collector to make an arrangement with his / her bank to transfer charges on the trust bank account to the business bank account.

If the money held in trust earns interest, the interest shall be paid to the person(s) on whose behalf the money was deposited.

The trust account of a debt collector must be audited annually before the last day of the financial year of the debt collector. The certificate issued by the accountant or auditor shall state specifically that payments made in terms of section 20 (3) of the Act, were duly made to persons on whose behalf money was deposited in the trust account. The certificate must also include the fact that the balances of the trust creditors account total up to the same amount that appears in the trust creditor control account as well as the trust bank account. The certificate shall be forwarded to the Council within 90 days from the date of completion of the audit.

In a follow-up newsletter the handling of the different fees will be discussed.

3. Frequently asked questions:

From all the calls the Council received we chose the following to discuss, as it seems that these are the issues which are uppermost in debt collectors' minds:

What does the Council do for debt collectors?

The Debt Collectors Act established a Council to exercise control over the profession of debt collectors and legalize the recovery of certain fees from debtors. Although this is the main objectives of the Act, the Council in order to promote professionalism amongst debt collectors will in future have to assist with the training and empowerment of debt collectors. The

funds available to the Council will, however, dictate to what extent the Council will be able to do so in the foreseeable future.

A fair percentage of the complaints the Council received are about entities who collect their own debts and others who are involved in debt collecting, but who are exempted from registering with the Council. The Council felt that the playing-field between debt collectors and others involved in debt collecting should be more equal. As a consequence representatives of the Council had meetings with the Law Society of the Northern Provinces as well as with the Executive Director of the Consumer Credit Association. As a result of the meeting with representatives of the Law Society concerned a code of conduct basically similar to that of the Council was adopted by the relevant Law Society and will in future apply to members of that Law Society involved in debt collecting. The Code of Conduct was also referred to the Law Societies of SA for consideration on a national level.

The Executive Director of the Consumer Credit Association also undertook to investigate the possibility of making the Council's code of conduct applicable to members of his Association.

The Council has also taken the initiative to make representation to the Department of Justice for the utilization of debt collectors by the Department.

Must a debt collector have a trust account?

In terms of section 20 of the Act every debt collector who practices for his / her own account shall open and maintain a trust account. There are no exceptions, even if the debt collector does not handle money.

Must a debt collector have an auditor?

Yes. The debt collector's trust account must be audited once a year by a registered accountant or auditor and therefore he / she needs such a person.

What fees are payable at registration?

At registration there are two fees payable – a registration fee which is once off and an annual fee which will be payable annually. If the registration is unsuccessful the registration fee will be forfeited, but the annual fee will be refunded. To see what fees are payable please refer to Regulation 2 & 6 as amended.

When is the annual fee payable?

The annual fee is payable in advance, once a year on or before the date of registration which appears on the certificate of registration. If not paid timeously the registration will be suspended and may be withdrawn.

Who is responsible for payment of the prescribed fees

The debt collector: An application to register as a debt collector must be accompanied by the application fee (Reg 2(2)) and every registered debt collector shall pay an annual subscription fee (Reg 6). There is, however, nothing preventing an employer from paying the prescribed fees for or on behalf of his / her employee. There is also a duty on an employer to ensure that employees involved in debt collecting are at all times duly registered.

What fees are a debt collector entitled to?

A debt collector can for his / her own account collect from the debtor those fees which are set out in Annexure B to the Regulations. If a fee is not listed there, the debt collector is not entitled to it. The Act does not prescribe the fees a creditor must pay to a debt collector to collect debts on his behalf. That is a matter to be agreed upon between the debt collector and the creditor.

Must the debt collector's registration number be reflected on his / her correspondence?

Yes. In terms of Regulation 4(2)(b) a debt collector must indicate his / her registration number on all correspondence.

Can the Council assist an employee in solving a problem he / she has with the employer?

No. This is a matter between the employer and the employee and the Council does not have jurisdiction to interfere or to negotiate on behalf of the employee with the employer.

If registered as an employee of a debt collector can such employee go on his / her own?

Yes, provided that he /she opens a trust account and furnishes the Council with particulars of his / her business, trust account and name of his / her auditor. A form 1A reflecting the person's new status will have to be completed and the person will have to apply for an amended certificate.

What am I to do if I become aware of an unregistered person doing debt collecting?

Such a person commits a criminal offence and can be prosecuted. The matter should be reported to the police. Whilst it is the Council's aim to bring everybody under the umbrella of the Act, it cannot act on vague allegations. Where the Council is placed in possession of sufficient facts which must be under oath the Council will out of its own accord lay a

charge with the police. The Council has already done so, in 7 cases. In one case the SAPD has made an arrest, whilst the others are still under investigation.

Is a debt collector obliged to respond to a complaint of improper conduct?

No. A debt collector has the right to remain silent. It should however be borne in mind that if there is no response the Council will have to take a decision without the benefit of having heard the debt collector's side of the story. This might result in a debt collector having to appear at a disciplinary hearing which could have been avoided if he / she responded to the complaint.

Up to the end of February 2004 the Council received 24 complaints for investigation.

What interest may a debt collector recover?

Only the interest agreed upon between the creditor and the debtor. In the absence of any agreement, interest may only be raised from the date the debtor has been placed *in mora* and at the rate allowed by the Courts.

Can I just give one amount to the debtor?

In the Council's opinion the answer to this is 'No'. In the first instance a debt collector claims on behalf of his / her client, the creditor and secondly fees on behalf of him / herself. The creditor in the two instances is different, thus it follows that there should be a clear distinction between what is claimed on behalf of the client and the costs the debt collector claims for him / herself.

What is the difference between the Council for Debt Collectors and ADRA?

The Council is a statutory body in terms of the Act (114 of 1998) and debt collectors are obliged by the Act to register themselves with the Council. ADRA is a voluntary Association of Debt Recovery Agents and *inter alia* acts as a conduit between its members and the Council.

Does the Council supply debt collectors with legal advice regarding the Act?

No, the Council is not a firm of Legal Advisors. Legal Advice needs to be sought from the debt collectors' own legal advisors. However, the Council would guide a debt collector through the registration process to become a debt collector.

4. A few facts to remember:

* If there is any change in the information furnished by a debt collector in the application for registration he /she is obliged to inform the Council of such change within 14 days of such change taking place. The certificate of registration must be forwarded to the Council in order for the Council to issue a new certificate, if needed. The fee for a new certificate is R114.00;

* Proper statements must be provided to debtors on request. From the statement the debtor must be able to determine the capital amount outstanding as well as the amount owing on costs. A debtor is also entitled to request a settlement account free of charge once in every six months. Such settlement account shall contain a complete breakdown of all credits and debits pertaining to the said account.

5. Food for thought:

“It’s what you learn after you know it all that counts”