

Newsletter no 2 of 2004

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1. From the Chairperson

More than 18 months has passed since the first debt collector was registered by the Council. This achievement belonged to Mr. Andre Schreuder of Steynsrus.who registered on 25 February 2003. Since this date the Council has registered more than 9 000 debt collectors in the industry.

This amounts to an average of 445 per month. Anyone who has the slightest knowledge of what is involved in the registration of only one application will realize that this is an excellent achievement. This exceptional achievement has been reached with the dedication of our Acting Executive Officer and only four staff members.

I am convinced that they deserve our utmost admiration and respect for what has been done. On top of it care of every sent has been taken and account can be given for the money entrusted to them. The outside auditors has approved our financial statements and the Swiss Council addressed the following letter to us after they have received a detailed account of the money entrusted to the Council to get the Council out of the blocks:

"We thank you for the Final Report and the audited financial statement on the Establishment of the Debt Collectors Council Project covering the entire project period from 12 August 2002 till 31 July 2004.

As both the reports fulfill our requirements, we will transfer the final amount of R 16 374 to the Debt Collectors account.

We are happy to read, that the project did achieve the goal set and that the Council developed and adopted its own strategy for the future.

We would like to thank you for this very satisfying and successful co-operation. It was a special pleasure for us to be able to accompany the Council for the Debt Collectors on its way to a fully operational, self sustained and independent body.

To you Mr Noeth and Mr de Meyer, we would like to express our special thanks for having been so much committed to this project. We wish you and your organization all the best for the future."

In addition to this they already had to attend to the payment of annual subscription fees and numerous related problems which are dealt with in this letter. They also followed up on complaints of non-registration and a successful prosecution resulted. The first hearings by the Council for transgressions of certain provisions have also been set down for early December. They also considered and drafted amendments to the Act, Regulations and the Code of Conduct which in itself is a very onerous task.

Justifiably I think I may in these circumstances borrow from I think Churchill's famous words: " *So few has achieved so much for so many*". In this regard I thank the South African public at large, the debtors, the debt collectors and the Council as such.

The year has sped pass and the Christmas time is upon us. I therefore take this opportunity to wish you all a blessed Christmas and may we all experience the real meaning of Christmas. May the New Year bring you the joy and experience which is experienced with the utmost devotion to your individual and often very onerous task.

2. From the Council

The Council, during August 2004, held a two day special meeting where its strategy for the future was discussed. After intense discussions the Vision and Mission for the future were formulated.

REGISTRATION OF DEBT COLLECTORS

Since the last newsletter the Council continued to receive a steady stream of new applications for registration. Although this resulted in a marked increase in the number of registered debt collectors, a number of persons also requested that their registrations be cancelled as they are no longer involved in debt collecting. At present just over 9 000 companies, close corporations, trusts, individuals and employees have been registered. However, a substantial number of them, although

still registered, are no longer debt collectors but have failed to cancel their registrations.

PRESENT ACTIVITIES OF THE COUNCIL

Last year the Council was under pressure to process the applications for registration. This year it had to attend to the payment of annual subscription fees and related problems. Whilst we are thankful for the co-operation we received from most debt collectors there are unfortunately some who cause major problems for the Council and its staff resulting in unnecessary additional expenses. Although a subscription control list is sent to employers and individuals with the request to confirm that the particulars thereon, this request is not always acceded to. Even though the consequences, namely suspension of registration if the subscription fee is not paid, are pointed out to debt collectors, many still fail to pay by the due date. When payments are made into the Council's bank account, it is often made without any indication as to the purpose and on whose behalf payment is made. Proof of payment is also not submitted to the Council. This makes it very difficult to reconcile statements and monitor payments, and places an unnecessary additional burden on the staff.

CHANGE OF PARTICULARS

With regard to the payment of the annual subscription, it now transpired that in many cases where a person has been registered as an employee of a debt collector, such employee has long ago ceased to be associated with or to be in the employ of the debt collector. Neither the employee nor the employer, however, informed the Council as required by Regulation 2A.

Owing to the passage of time since such a person left the employ of the debt collector and the Council becoming aware thereof, the follow-up on these persons are difficult. A concern to the Council is that there may be some persons who are in possession of a certificate of registration who are now collecting debt for their own account without the Council being aware of it and without a trust account. The Council is at present investigating two such cases.

Although non-compliance with the requirements of Regulation 2A may result in a registered debt collector being charged with improper conduct, the Council has up to now been very tolerant. However, if the present trend continues, the Council will be forced to take appropriate steps against persons who ignore the provisions of the Regulations.

AUDIT CERTIFICATE

Another cause for concern relates to the fact that the vast majority of debt collectors have to date not submitted audit certificates as required by the Act and Regulations. The Council is not ignorant of the problems debt collectors are experiencing in this regard. Although the Council has requested the Minister of Justice to amend the relevant regulations in order to address the problems experienced, the Council cannot allow non-compliance with the provisions of the Act, particularly where it concerns the trust account of debt collectors.

The following facts regarding trust accounts have now come to the Council's attention:

- (i) Some debt collectors who did furnish particulars of a trust account when they applied for registration in fact never opened a trust account,
- (ii) Other debt collectors who do not handle money closed their trust accounts,
- (iii) In some cases the bank closed the trust account, because there were no transactions on the account.

In terms of section 20 of the Act every person who practices for this or her own must not only open a trust account, but also **maintain** it for as long as such person is registered as a debt collector. The Act makes no provision for any exceptions and the Council will have to act against debt collectors who operate without a trust account, especially those who furnished incorrect information.

DO I GET A NEW CERTIFICATE ANNUALLY?

The answer is no. The certificate issued on registration does not expire and remains valid until the registration is cancelled at the request of the debt collector concerned or the registration is withdrawn by Council in terms of the Act. The Council has, however, taken note of the fact that magistrates and clients expect debt collectors to submit to them new certificates in order to verify that the debt collector is still registered. After considering the practical complications the present certificate creates, the Council decided to approach the Minister to amend the Act and Regulations, thus to enable the Council to issue a certificate which will only be valid for 12 months from date of registration. The Council will in future furnish a

debt collector with a new certificate annually on payment of the prescribed annual fee.

WHAT DOES THE COUNCIL DO FOR DEBT COLLECTORS?

Although this question was addressed in the first newsletter, the question is still frequently asked by debt collectors. The following should be borne in mind:

- (i) The Council was established by an Act of Parliament to exercise control over the occupation of Debt Collector and to provide for matters connected therewith. The Council has only the powers given to it by the Act and cannot get beyond those powers. This does, however, not mean that the interests of the debt collector are not served
- (ii) Every debt collector's application to be registered must be scrutinized and approved to authorize the person concerned to act as a debt collector. A certificate of registration is issued which serves as proof to clients that such person is not only entitled to act as a debt collector, but is also monitored by a council which affords him credibility. The registration as a debt collector also legitimizes the recovery of fees and disbursements by debt collectors for their own account from debtors.
- (iii) The Council on its own accord took several steps in an attempt to level the playing fields with regard to debt collectors and those who also collect debts but are exempted from registration.
- (iv) Debt Collectors now also, through the Council, have access to Government. The Chairman for instance suggested to Government to consider making use of debt collectors to recover debts on behalf of the Government which would otherwise has to be written off.
- (v) The Council has proposed certain amendments to the Act to the Minister. Although it was hoped that some of these amendments would have been passed by Parliament this year, it unfortunately did not happen. The Council will however do everything possible to convince the Minister of the urgency of the amendments. Some of these amendments will benefit Debt Collectors. The Council also, after considering representations it received, recommended an increase in the fees contained in

Annexure B of the Regulations to the Minister. The Minister's decision is awaited.

(vi) Registered Debt Collectors and the public are encouraged to report unregistered debt collectors to the SAPS so that they can be prosecuted. The Council, when supplied with sufficient facts, reported such cases to the police and put pressure on them to investigate it. In this manner Debt Collectors are protected against unfair competition from unregistered persons. One unregistered person has as far the Council is aware, been convicted and sentenced. A number of cases are presently being investigated by the SAPS.

(vii) The Council also supports FASSET in its efforts to assist Debt Collectors, who wish to do so, to equip and develop them for their occupation.

COMPLAINTS AGAINST DEBT COLLECTORS

Members of the public are entitled to lodge complaints against Debt Collectors with the Council and the Council is obliged to investigate such complaints. So far the Council received 113 complaints. 70 of these complaints are still being investigated. The first disciplinary hearings, where debt collectors are charged with improper conduct, will take place shortly. The allegations at the basis of these charges are:

- (i) Use of an unregistered person to collect debts,
- (ii) Operating without a trust account;
- (iii) Non-compliance with the provisions of section 20 of the Act,
- (iv) Misrepresentation of facts in contravention of paragraph 3 of the Code of Conduct; and
- (v) Failure to comply with the provisions of regulation 2A.

A QUESTION FREQUENTLY ASKED IS CAN THE DEBT COLLECTOR SUE IN HIS OWN NAME?

Rule 52 of the Magistrate Court rules determines the representation of parties in that Court. In short it determines that a party may institute or defend, and may carry to completion any legal proceedings either in person or by a practitioner.

Section 1 of the Act describes a practitioner as an advocate, an attorney, an article clerk or an agent.

It therefore follows that in order to institute an action in the magistrate courts a plaintiff may do so in person (Yourself) or through representation of a practitioner.

A debt collector who has been instructed to collect outstanding amounts by his client is not a plaintiff. The client is the plaintiff and he therefore has the right to institute legal proceedings himself or through a practitioner.

CAN A DEBT COLLECTOR BE A PRACTITIONER BY BEING AN AGENT?

The general Rule in terms of Rule 6 is that where an agent concludes a contract in his capacity as agent, whether or not he discloses the name of his principal, only the principal acquires rights or incurs obligations under the contract. The agent does not become either entitled or obliged, and cannot personally sue or be sued under the contract nor can he sue or be sued in his own name, as representing his principal, unless he is given authority to represent his principal in legal proceedings.

This in effect means that with proper authority a debt collector would be able to institute legal proceedings in the name of his principal. This does not mean that the debt collector would be able to institute proceedings in his own name, only that he has the authority to institute such proceedings in the name of his principal.

HOW THEN CAN DEBT COLLECTOR INSTITUTE LEGAL PROCEEDINGS?

CESSION

In terms of Rule 6 the effect of an out and out cession is that every right of the cedent is wiped out by the cession, while the cession stands the cessionary is the *dominus* of the right. The cessionary is substituted as the creditor and he can sue on the document for the full amount thereof.

If a cessionary sues on a document, but *ex facie* the document he is not the creditor, then in terms of Rule 6(5) it is necessary that he allege the cession.

In conclusion it is therefore clear that the only basis on which a debt collector may institute legal proceedings in his own name is if he is in possession of a cession.

TRUST ACCOUNT (PART II)

In the first newsletter which is still available on the council's website, the basic principles that apply to a trust account were discussed. Included in this newsletter is a diagram prepared by Mrs Marina Fourie from MFA Corporate Accounting Services (Pty) Ltd.

The diagram is a schematic explanation of the interaction between the trust accounts and the business accounts.

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The detail regarding the maximum standard fees to be charged for the collection of the money on behalf of the client is stipulated in the Act. All other costs incurred to collect the money (example: tracing fees) is to be recovered on the debt collector's own risk from that creditor