OF RENT COLLECTORS AND DEBT COLLECTORS

1 Introduction

This note examines the question whether an estate agent collecting or receiving monies in the course of his or her business as an estate agent is also a "debt collector" as defined in the Debt Collectors Act 114 of 1998. The matter is of some importance: if the answer is in the affirmative it would mean that estate agents mandated to collect rentals, levies or other monies payable in terms of sale or lease transactions must register with both the Estate Agency Affairs Board ("the Board") in terms of the Estate Agency Affairs Act 112 of 1976 *and* the Debt Collectors Council ("the Council") in terms of the Debt Collectors Act. They will have to pay levies to both the Board and the Council and comply with the codes of conduct published by both statutory bodies. Improper professional conduct may lead to disciplinary action instituted by either the Board or the Council, or both. They will have to open and keep two trust accounts (one in terms of s 32 of the Estate Agency Affairs Act and the other in terms of s 20 of the Debt Collectors Act) and will often be confused as to which monies must be paid into which of these accounts.

In my view the question under discussion is to be answered as follows:

(a) Estate agents who *receive*, as opposed to *collect*, rent, levies, sale deposits or instalments, *etcetera* before, on or after the due date thereof are not debt collectors, even if a fee is specifically charged for doing so in addition to the normal commission or fee.

(b) Estate agents who *collect,* as opposed to merely *receive,* rent, levies, sale deposits or instalments before, on or after the due date thereof are debt collectors if a fee is charged for doing so, directly or indirectly, whatever the fee is called. In this context the word "collect" means taking steps which are aimed at recovering payment by compelling or bringing pressure on a debtor to pay an amount which otherwise it would not, or did not, pay. By way of example this means that –

  – estate agents who send out routine invoices or reminders for rent, levies, sale deposits or instalments, *etcetera* before or after the due date for payment thereof are not debt collectors, even if a fee is charged for doing so in addition to the normal letting or management fees;

- estate agents are debt collectors if they are required in terms of their mandates to send out letters of demand to rent or levy defaulters stating that summons will be issued unless payment is made on or before a certain date;
- an estate agent who does not personally attend to the collection (in the sense described above) of arrear rent, levies, sale deposits or instalments but is mandated to appoint an attorney or debt collector to do so, is not a debt collector;
- an estate agent who goes from door to door at month end to obtain or fetch payment of rent or levies and to issue receipts is not a debt collector, provided this is not accompanied by steps to *collect* such payment or arrears (using the word "collect" in the sense described above).

(c) Estate agents who are remunerated for receiving rent, levies, sale deposits or instalments and paying these over to the persons entitled thereto, are not debt collectors if they, as a service to the latter, attend to the collection of these monies *free of charge* (using the word "collect" in the sense described above). Whether the service is in fact rendered free of charge, and not paid for indirectly, will depend on the facts and circumstances of each case.

(d) A person who on behalf of others collects rent or levies (in the narrow sense described above) for reward is both an estate agent (if the other requirements of the definition of "estate agent" in the Estate Agency Affairs Act are met) and a debt collector. Estate agents rendering a levy and/or rent collection service and who wish not to be governed by the Debt Collectors Act, can achieve this by simply confining their activities to receiving payments and sending out invoices or reminder letters, and leaving it to debt collectors or attorneys to take steps to recover arrears from defaulters.

The grounds on which this view is based are set out below.

2 Analysis of the definitions of "estate agent" and "debt collector"

Section 1 of the Estate Agency Affairs Act (read with regulations promulgated under R1469 of 29 June 1990 and R2752 of 30 November 1990) recognises five categories of estate agents, namely:

(a) companies, close corporations and private individuals acting as estate agents either alone or in partnership (commonly known as "principal estate agents");

(b) directors of companies, as well as certain members of close corporations, that are estate agents;

(c) persons employed by principal estate agents and who render certain defined services on the latter's behalf (commonly known as "employee estate agents");
(d) employee estate agents who have not yet obtained full status (commonly known as "candidate estate agents"); and
(e) persons employed by attorneys who render certain services on their behalf (other than another attorney or a candidate attorney).

For present purposes only the first category requires further examination. In terms of the Act a principal estate agent is defined as –

> "any person who for the acquisition of gain on his own account or in partnership, in any manner holds himself out as a person who, or directly or indirectly advertises that he, on the instructions of or on behalf of any other person -
> (i) sells or purchases or publicly exhibits for sale immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvas a seller or purchaser therefor; or
> (ii) lets or hires or publicly exhibits for hire immovable property or any business undertaking or negotiates in connection therewith or canvasses or undertakes or offers to canvass a lessee or lessor therefor; or
> (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*."

Acting in terms of paragraph (iv) of this definition the Minister of Trade and Industry specified three services as estate agency services (R1485 of 17 July 1981), two of which are relevant for the present purposes. Broadly stated this relates to collecting or receiving levies on behalf of a share block company or the body corporate of a sectional title scheme.

A person *collecting* or *receiving* rent and/or levies in sectional title or share block schemes is therefore an estate agent provided the other requirements of the definition are met. (These are not the only monies which an estate agent may collect or receive in the course of its business. In fact any money collected or received by an estate agent in respect of an estate agency service referred to in paragraphs (i)–(iv) of the definition of "estate agent" constitutes "trust money" (s 1 of the Estate Agency Affairs Act) and must be dealt with in the manner prescribed by the Act. A selling agent, for example, would ordinarily also receive or collect deposits on sale agreements and instalments in respect of instalment sale transactions.)

In terms of section 1 of the Debt Collectors Act a "debt collector" means -

> "(a) 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;
> (b) a person who, other than a party to a factoring arrangement, in the course of his or her regular business, for reward takes over debts referred to in paragraph (a) in order to collect them for his or her own benefit;

(c) a person who, as an agent or employee of a person referred to in paragraph (a) or (b) collects the debts on behalf of such person, excluding an employee whose duties are purely administrative, clerical or otherwise subservient to the actual occupation of debt collector."

For present purposes it is not necessary to focus on paragraphs (b) and (c) of this definition. It is also not necessary to examine the nature of a "factoring arrangement" as referred to in paragraph (a).

It is to be noted that the legislature specifically excluded attorneys from the definition of "debt collector" but not estate agents. This requires closer investigation. The purpose of the Debt Collectors Act, according to its long title, is amongst others "to provide for the exercise of control over the occupation of debt collector". Attorneys are officers of the court and their conduct is controlled by the respective Law Societies in South Africa. It is therefore clear that the legislature considered it unnecessary in these circumstances to also control attorneys through the Debt Collectors Act; hence their exclusion from the definition of "debt collector". But why were estate agents not also excluded, given the fact that their conduct is specifically controlled in terms of the Estate Agency Affairs Act?

It may be argued that the legislature was aware of the nature of estate agents' services as specified in the Estate Agency Affairs Act and did not exclude estate agents from the definition of "debt collector" because it did not consider those services to amount to the collection of debts. In other words, it did not regard a levy or rent collector as a debt collector, hence it was not necessary to specifically exclude estate agents from the definition of "debt collector". On the other hand, it may be argued that the legislature was quite aware of the services rendered by estate agents and that it specifically did not intend to exclude estate agents from the Debt Collectors Act insofar as their services may also involve debt collection.

I favour the latter argument. As will be explained below, rent or levies also constitute a "debt", and rent or levies may be collected in the same way as other debts. If the legislature wanted to exclude from the Debt Collectors Act estate agents who collect rent or levies in much the same way as debt collectors would collect other debts, it would have said so in clear terms. Estate agents are not officers of the court and their conduct, although regulated in terms of the Estate Agency Affairs Act, is not regulated in the same way as that of attorneys. Moreover, the Debt Collectors Act imposes certain restrictions on debt collectors and persons intending to become debt collectors, which are not imposed on estate agents in terms of the Estate Agency Affairs Act. For example, in terms of section 10(1)(a) of the former Act a person convicted of an offence involving violence, or a person under the age of 18 years, is disqualified from being registered as a debt collector. No such restrictions are imposed on persons wishing to become estate agents. In my opinion the legislature did not wish to exclude estate agents

from the Debt Collectors Act because it knew that a person may well be qualified to become or remain an estate agent, but not a debt collector. In short: the fact that estate agents, unlike attorneys are not specifically excluded from the Debt Collectors Act, evidences an intention on the part of the legislature to include estate agents under the latter Act insofar as they may be rendering services that amount to the collection of debts.

In terms of paragraph (a) of the definition of "debt collector" quoted above, an estate agent would only be a debt collector if he or she, on behalf of someone else,

1 *collects*;
2 money (be it rent, levies, sale deposits or any other monies) constituting a *debt*; and
3 the collection of the debt is done *for reward*.

Each of these elements is now examined more closely.

3 The meaning of "collect" in the context of the Estate Agency Affairs Act and the Debt Collectors Act

The expression "collect" is not defined in either the Estate Agency Affairs Act or the Debt Collectors Act. I have searched in vain for an authoritative definition of the word in the context of debt collecting and rent collecting. The Oxford *Complete Wordfinder* defines it as

> "gather (together), get or bring or come together, amass, accumulate, assemble, compile, pile up, heap up, rack up, convene, congregate, converge, rally, meet, receive, fetch".

In my view the word "collect" has more than one meaning when it comes to the collection of money. Du Plessis and Goodey (*Practical Guide to Debt Collecting* (2003) 1) draw a distinction between debt collection in a narrow sense and debt collection in a wider sense. According to them debt collection in the narrow sense "means the legal proceedings against a debtor by a creditor for the collection of debt due to the creditor". In the 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".

It is unnecessary for present purposes to analyse the correctness or otherwise of the distinction drawn by the authors. Suffice to say that I am in agreement that a distinction is to be drawn between debt collection in a wide and narrow sense. Opinions may differ as to what collection steps fall in either category. I prefer to refer to debt collection in a *wider context* as the

steps routinely taken to gather payment from persons normally willing to pay, such as sending invoices, reminder letters, *etcetera*. In a *narrow sense*, however, it denotes some process or steps to recover payment from persons who otherwise would not, or did not, pay freely. The image of the traditional *rent* collector is that of a person going from door to door to "fetch" or "receive" rent from tenants as and when it becomes payable, issuing receipts and delivering letters to defaulters to the effect that the matter would be handed over to an attorney or a debt collecting agency if the debt is not paid on or before a certain date. By contrast the image of the normal *debt* collector is that of a person taking certain definite legal or other steps to compel or force recalcitrant debtors to pay what they owe. The traditional rent collector therefore collects money, using the word "collect" in a wider context. The normal debt collector, in turn collects money in a narrow sense.

Whether in a particular statute the word "collect" is used in a narrow or wide context (or both) depends on the intention of the legislature as expressed in the Act in question. This begs the question: what does the word mean in the context of the Debt Collectors Act and the Estate Agency Affairs Act?

3 1 Meaning of "collect" in the context of the Debt Collectors Act

The long title to the Debt Collectors Act explains its aim as follows:

> "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; 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."

In terms of section 2(2) the Council for Debt Collectors has one object only, namely to "exercise control over the occupation of debt collector". To this end the Act obliges debt collectors to register with the Council (s 8) and prohibits certain persons from being so registered (s 10). Included in the list of persons who cannot be registered (unless exempted from the prohibition by the Minister) are persons under 18 years of age and persons who in the preceding 10 years have been convicted of an offence of which violence, dishonesty, extortion or intimidation is an element. Section 15 empowers the Council to find a debt collector guilty of improper conduct. It reads as follows:

> "(1) A debt collector may be found guilty by the Council of improper conduct if he or she, or a person for whom he or she is vicariously liable –
>
> (a) uses force or threatens to use force against a debtor or any other person with whom the debtor has family ties or a familial or personal relationship;
>
> (b) acts towards a debtor or any other person with whom the debtor has family ties or a familial or personal relationship, in an excessive or intimidating manner;
>
> (c) makes use of fraudulent or misleading representations, including-

(i) the simulation of legal procedures;
(ii) the use of simulated official or legal documents;
(iii) representation as a police officer, sheriff, officer of court or any similar person; or
(iv) the making of unjustified threats to enforce rights;

(d) is convicted of an offence of which violence, dishonesty, extortion or intimidation is an element;

(e) spreads or threatens to spread false information concerning the creditworthiness of a debtor;

(f) …"

Having regard to these provisions it is clear in my view that the substantive aim of the Debt Collectors Act is to introduce some control over persons who employ (or can be expected to employ) unscrupulous techniques to pressurise or force debtors to settle their debts. It was not the intention to introduce legislation to control those who do no more than send out ordinary invoices or reminders to persons in respect of amounts that are due and payable at that point in time or in the near future, or who merely fetch or receive rent, levies or other amounts as and when they becomes payable. A debt collector does more than this: his or her function is to get debtors to pay what they did not, or do not want to, pay on time.

In my view, therefore, the word "collect" in the definition of "debt collector" is used in a narrow sense. It refers to taking steps which are aimed at recovering payment from debtors by compelling or bringing pressure on them to pay amounts which otherwise they would not, or did not, pay.

From this it follows that an estate agent who merely *receives* rent or levies, as opposed to *collecting* them (using the word "collect" in the narrow sense described above), is not a debt collector as contemplated in the Debt Collectors Act. The same applies to an estate agent who collects rent or levies in the wider sense of the word, that is, by sending out invoices or reminders or personally fetching payment as and when it becomes due. An estate agent would only be a debt collector if he or she collects debts (in the narrow sense) for reward.

3 2 Meaning of "collect" in the context of the Estate Agency Affairs Act

In my view the word "collect" in the Estate Agency Affairs Act covers both the ordinary and the narrow meaning of the word. Estate agents not only collect rent or levies in the wider sense of the word (*ie* by sending out routine invoices, *etc*), but may also be mandated in their capacities as estate agents to take certain steps to collect arrears (using the word "collect" in the narrow sense of the word). Estate agents mandated to collect arrears (in the narrow sense) therefore act in a dual capacity, namely as estate agents and as debt collectors. They wear two hats at the same time and must comply with the provisions of both the Estate Agency Affairs Act and the Debt Collectors

Act. By the same token debt collectors who collect arrear rent and levies must also comply with the two Acts; they too wear two hats. This may seem strange at first glance, but in my view this is exactly what the legislature intended to achieve. A rent or levy collector (using the word "collect" in a narrow sense) is regulated by the Estate Agency Affairs Board insofar as such a person acts as an estate agent, and by the Council for Debt Collectors insofar as he or she acts as a debt collector. What may be improper conduct for an estate agent is not necessarily improper conduct for a debt collector, and vice versa. Hence the need for two regulatory regimes.

An estate agent who collects levies and rentals and who wishes not to be governed by the Debt Collectors Act can achieve this by simply confining his or her activities to levy or rent collection in the wider sense of the word and leave other (narrower) collection work to debt collectors or attorneys.

4 Meaning of the word "debt"

The word "debt" is not defined in the Debt Collectors Act. In *Cape Town Municipality v Dunne* (1964 1 SA 741 (C)) the court had the following to say about its meaning (743D):

> "The word 'debt' is not defined in the Act nor is it one having a precise meaning. In the context of different statutory enactments it has been differently construed. Thus in *Leviton and Son v De Klerk's Trustee*, 1914 CPD 685, Kotzé, J., stated that he was disposed to take the word 'debt' – as it appeared in sec. 22 of Cape Ordinance 6 of E 1843, the old Insolvency Ordinance – in a wide and general sense as denoting whatever was due (debitum) from any obligation; while in *Whatmore v Murray*, 1908 T.S. 969, the word 'debt' in sec. 6 of Ord. 12 of 1904 (T) was construed to mean a liquidated money obligation. It seems to me, therefore, that in construing the proviso to sec. 74 (1) of Act 32 of 1944 it is important to have regard to the general context of the enactment."

In *Joint Liquidators of Glen Anil Development Corporation Ltd (in liquidation) v Hill Samuel (SA) Ltd* (1982 1 SA 103 (A)) the court described the ordinary meaning of the word as follows (110A):

> "The ordinary meaning of debt is
>
> > 'that which is owed or due; anything (as money, goods or services) which one person is under obligation to pay or render to another'.
>
> See Shorter Oxford English Dictionary. See also *Leviton and Son v De Klerk's Trustee* 1914 CPD 685 at 691 *in fin* :
>
> > 'Whatever is due - debitum - from any obligation'."

The court continued to analyse various decisions in which the ordinary meaning of the word was explained and arrived at the following conclusion (111E):

> "To sum up so far, the ordinary meaning of debt is a firm obligation to pay, whether now or later. A conditional liability is not a debt – it might become a debt, but it also might not."

In my view it may be argued that the word "debt" in the Debt Collectors Act has a wider meaning than the ordinary meaning ascribed to it by the court in the *Glen Anil* case and that it also includes conditional debts. However, for present purposes it is not necessary to examine this any further. What the case makes clear is that the word "debt" is not confined only to payments that are in arrear; it covers sums that are owing now or later. In my opinion this is also the meaning to be attached to the word "debt" in the Debt Collectors Act. A debt collector ordinarily collects sums that are in arrears, but such person could also "collect" debts that are owing in the future, for example by pressurising tenants who defaulted in the past not to miss payments that fall due in future.

The nature of the transactions giving rise to debts is not defined in the Debt Collectors Act. Ordinarily debt collectors attend to the collection of all debts, irrespective of the underlying transaction giving rise to the debt. Estate agents on the other hand only receive or collect monies owing in respect of property transactions (sale or lease) or sectional title and share block property development schemes. This does not mean, however, that a person who *only* attends to the collection of such monies is not a debt collector. There is no indication in the Debt Collectors Act that the legislature intended to exclude persons from the Act who do not collect debts generally but specialise in the collection of certain debts only.

From this it follows that an estate agent who collects rent or levies, whether or not payment is in arrears, is a debt collector if the collection (used in the narrow sense described above) is done for reward.

5 Meaning of the expression "for reward" in the Debt Collectors Act

A person is a debt collector only if he or she collects debts "for reward". The expression "for reward" is not defined in the Debt Collectors Act, but clearly refers to any form of remuneration, whatever it may be called by the creditor, debtor or debt collector. A person who on behalf of another collects rent or levies (using the word "collect" in the narrow sense as described above) is therefore a debt collector if a fee is charged for doing the collection, whether the fee is called a letting fee, commission, collection charges or otherwise.

The Debt Collectors Act does not specify by whom the reward must be paid. As the Act reads, a person is a debt collector if the reward is paid by the creditor, the debtor, partly by the debtor and partly the creditor, or even a third party. An estate agent who is paid commission by a lessor to collect rent from tenants is therefore a debt collector (using the word "collect" in the narrow sense as described above).

Mandates given to letting and property managing agents often stipulate a composite fee covering all the services to be rendered by the agents, without breaking up the fee in respect of each specific service. Difficulties may arise in respect of such mandates where an estate agent is specifically required in terms of the mandate to receive rent or levies *and* take steps (even if only to send a letter of demand) to collect arrears (using the word "collect" in the narrow sense described above). It may be argued that letting agents who are paid a fee for receiving rent *and not an identifiable additional fee for collecting arrears*, are remunerated, essentially, for receiving or getting the rent and not for the *collecting work* as such; accordingly they are not debt collectors. In my view there is no substance in this argument. The Debt Collectors Act does not require that the reward payable in respect of the collection work must be separately stipulated or agreed upon. Where an estate agent is paid a fee to receive rent or levies and to attend to arrears, the remuneration is paid for rendering that composite service, that is, the estate agent is paid the amount agreed upon for receiving rent and for collecting arrears insofar as such collection work may be necessary.

Situations may arise where an estate agent is mandated to receive rent and not specifically to attend to the collection of arrears. In these cases it may be contended that if the estate agent does on occasion attend to the collection of arrears, this is done as a free service to the lessor. Hence the collection work is not done for reward and the estate agent would not be a debt collector. Whether collection services are *in fact* rendered free of charge, and not done for reward indirectly, would depend on the facts and circumstances of each case.

6 Conflicting provisions between the Debt Collectors Act and the Estate Agency Affairs Act

Certain provisions in the Debt Collectors Act are at variance with the provisions of the Estate Agency Affairs Act, such as section 20 which deals with trust accounts. The Estate Agency Affairs Act requires of every principal estate agent to open and keep a trust account and to deposit into such account all monies collected or received. Interest earned on deposits must be paid to the Estate Agency Affairs Board unless the estate agent has written instructions to the contrary from the parties concerned. By contrast section 20 of the Debt Collectors Act requires of a debt collector to open a trust account and to pay to *the creditor* the interest earned on debts collected. Moreover, it is not entirely clear whether the monies collected, such as arrear rent, must be paid into the trust account opened under the Estate Agency Affairs Act or the account opened in terms of the Debt Collectors Act.

It is submitted that these and other differences between the two Acts have to be ironed out by the Council for Debt Collectors and the Estate Agency Affairs Board as a matter of urgency.

7 Concluding remarks

It may be argued that it would be in everyone's interest if estate agents who attend to rent or levy collection are regulated only in terms of the Estate Agency Affairs Act, and debt collectors (who are not otherwise also estate agents) by the Debt Collectors Act only. The Debt Collectors Act empowers the Minister of Justice, after consultation with the Minister of Trade and Industry and the Council for Debt Collectors, to exempt any person or category of persons from the provisions of the Act. The Estate Agency Affairs Act, in turn, empowers the Minister of Trade and Industry to exempt certain persons or category of persons from the provisions of the Estate Agency Affairs Act. Both Acts allow the relevant Ministers to impose conditions when granting exemptions. In my view it would be quite possible to exempt estate agents from the one Act and debt collectors from the other, without harming the public interest.

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