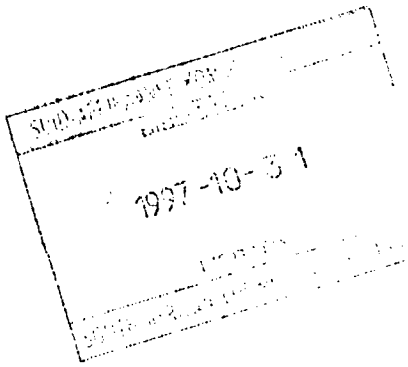
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REPUBLIC OF SOUTH AFRICA

DEBT COLLECTORS BILL

(As introduced)

(MINISTER OF JUSTICE)



[B 102—97]

REPUBLIEK VAN SUID-AFRIKA

WETSONTWERP OP SKULDINVORDERAARS

(Soos ingedien)

(MINISTER VAN JUSTISIE)

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GENERAL EXPLANATORY NOTE:

Words underlined with a solid line indicate insertions in existing enactments.

BILL

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.**

BE IT ENACTED by the Parliament of the Republic of South Africa as follows:—

Definitions

1. In this Act, unless (he context otherwise indicates—
"Council" means the Council for Debt Collectors established by section 2;
"debt collector" means—
(a) a person, other than an attorney or his or her employee. who for reward collects debts owed to another on the latter's behalf;
(b) a person who, 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;
"Director General" means the Director General of the Department of Justice;
"Minister" means the Minister of Justice;
"prescribe" means to prescribe by regulation;
"this Act" includes any regulation or notice made or issued under [his Act.

Establishment and objects of Council for Debt Collectors

2.(1) There is hereby established a juristic person to be known as the Council for Debt Collectors.

(2) The objects of tbe Council are to exercise control over the occupation of debt collector.

Composition of Council

3. (1) The Council shall consist of eight members appointed by the Minister.

(.2) The Minister shall appoint as members of the Council—

(a) as chairperson, a judge of a High Court;

(b) as members-

(i) a magistrate;

(ii) an attorney nominated by a representative body or bodies;

(iii) two debt collectors who are natural persons and who have exercised the occupation of debt collector for at least five years and who. in the Minister's opinion, are qualified to serve as members of the Council;

(iv) two persons who, in the Minister's opinion, are tit and proper persons to serve on the Council; and

(v) one person from nominations submitted by institutions representing consumer interests.

(3) The Council shall from time to time elect from among its members a vice-chairperson, who shall in the absence of the chairperson have all tbe powers and duties of the chairperson, and if neither the chairperson nor the vice-chairperson is present at a meeting of the Council, the members present shall elect a person from their own ranks to preside at that meeting.

(4) A member of the Council shall hold office for a term, not exceeding three years, determined by the Minister at the time of the member's appointment: Provided that the Minister may withdraw an appointment of a member at any time and. provided further, that a member may be reappointed at the expiration of his or her term of office.

(5) No person shall be appointed as a member of the Council if he or she—

(a) is an unrehabilitated insolvent;

(b) fails to comply or is not capable of fully complying with a judgment or order, including an order for costs. given against him or her by a court of law in a civil case;

(c) in the preceding 10 years has been convicted of an offence of which violence, dishonesty. extortion or intimidation is an element and has been sentenced in respect of that offence to a period of imprisonment without the option of a fine; or

(d) does not permanently reside in the Republic.

(6) A member of the Council shall vacate his or her office if he or she—

(a) becomes subject to a disqualification contemplated in subsection (5);

(b) becomes of unsound mind;

(c) in the case of a member appointed in terms of subsection (2)*(b)*(iii), ceases to be a debt collector;

(d) is absent without the leave of the chairperson for more than two consecutive meetings of the Council; or

(e) in the case of a member appointed in terms of subsection (2)*(b)*(iii), has been found guilty in terms of section 18 of improper conduct.

Meetings of Council

4.(1) The Council shall meet for the first time at the time and place determined by the chairperson and thereafter at least three times in every financial year at the times and places determined by the chairperson or, in his or her absence, the vice-chairperson.

(2) The quorum for a meeting of the Council shall be a majority of its members.

(3) The decision of a majority of the members of the Council present at a meeting of the Council shall, subject to subsection (2) and section 13(3), be a decision of the Council and, in the event of an equality of votes on any matter, the person presiding at the meeting concerned shall have a casting vote in addition to his or her deliberative vote.

Executive committee

5.(1) The Council may appoint three of its members as an executive committee of the Council which shall, subject to the provisions of subsection (2) and the directions of the Council, be competent during the periods between meetings of the Council to perform or exercise all the powers and functions of the Council: Provided that the majority of the

members of the executive committee shall be members of the Council other than those appointed in terms of section 3(2)(*b*)(iii).

(2) The executive committee shall not be competent, except in so far as the Council may otherwise direct, to set aside or vary a decision of the Council.

(3) Any act performed or decision taken by the executive committee shall be valid in so far as it is not varied or set aside by the Council.

Remuneration and allowances of members of Council

6. Out of the funds of the Council—

(*a*) such remuneration shall be paid to a member of the Council who is neither a judge nor in full-time employ of the State; and

(*b*) such allowances for traveling and subsistence expenses incurred by a member of the Council, shall be paid to him or her in the performance of his or her functions as such a member,

as may be determined by the Minister from time to time generally or in any particular case.

Appointment of personnel

7. The Council may appoint such personnel as it may deem necessary for the efficient performance of its functions and management of its administration and may determine the remuneration and conditions of service of such personnel.

Persons prohibited from performance of certain acts

8. (1) 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 and, in the case of a company or close corporation carrying on business as a debt collector, unless, in addition to the company or close corporation itself, every director of the company and member of the close corporation and every officer of such company or close corporation. not being himself or herself a director or member but who is concerned with debt collecting, as the case may be, is registered as a debt collector.

(2) A notice under subsection (1) shall be published at least 1 SO days before the date referred to therein.

(3) Any agreement concluded between a debt collector and his or her client or between a debt collector and his or her employee either before or after the date referred to in subsection (1) which is incompatible with the prohibition contained in that subsection shall be invalid to the extent of such incompatibility.

(4) Any person who contravenes a provision of subsection (1) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years.

Application for registration as debt collector

9. (1) An application for registration as a debt collector shall be lodged with the Council on the prescribed form and shall be accompanied by the prescribed application fee.

(2) A person who applies for registration as a debt collector in terms of subsection (1), shall furnish such additional particulars in respect of his or her application as may be determined by the Council.

(3) If the Council is of the opinion that the provisions of this Act have been complied with in respect of an application referred to in subsection (1), it shall, subject to the provisions of section 10, grant the application and register the applicant as a debt collector.

Disqualifications

10. No person shall be competent to be registered as a debt collector—

(*a*) in the case of a natural person, if—

(i) in the preceding 10 years he or she has been convicted of an offence of

which violence. dishonesty, extortion or intimidation is an element and has been sentenced in respect of that offence to a period of imprisonment without the option of a fine;

(ii) he or she has been found guilty in terms of section 18 of improper conduct;

(iii) he or she is of unsound mind and has been so declared or certified by a competent authority; or

(iv) he or she is under the age of 18 years; and

(b) in the case of a company or close corporation, if a director of the company or a member of the close corporation is in terms of paragraph *(a)* not competent to be registered as a debt collector.

Register

11. (l) The Council shall keep a register of the names and prescribed particulars of every debt collector whose application for registration has been approved under section 9(3).

(2) The register contemplated in subsection(1) shall be available for inspection by the public at the prescribed places and times.

Certificate of registration

12. The Council shall issue to every person registered as a debt collector, a certificate of registration on the prescribed form.

Withdrawal of registration by Council

13. (1) The Council may withdraw the registration of a debt collector—

(a) if it appears that in his or her application for registration the applicant has given information that is false in a material respect;

(b) if at any time after his or her registration—

(i) he or she is convicted of an offence of which violence, dishonesty, extortion or intimidation is an element and is sentenced in respect of such offence to a period of imprisonment without the option of a fine;

(ii) he or she is found guilty in terms of section 18 of improper conduct; or

(iii) he or she becomes of unsound mind and is so declared or certified by a competent authority; or

(c) in the case of a debt collector who is a company or close corporation. if the registration a debt collector of a director of the company or a member of the close corporation or an officer of the company or close corporation, not being himself or herself a director or member. as the case may be, is withdrawn in terms of paragraph *(b)*.

(2) The Council shall not withdraw the registration of a debt collector unless he or she has been given the opportunity to be heard.

(3) The Council shall give written notice to a debt collector of the withdrawal of his or her registration.

Withdrawal of registration by court

14. (1) If there are grounds other than those mentioned in section 13 or 16(2) justifying the withdrawal of the registration concerned, the Council may by way of application on notice of motion apply to a court for an order withdrawing the registration of a debt collector.

(2) Any High Court within whose area of jurisdiction the debt collector concerned is resident, employed or carrying on business, shall have jurisdiction in respect of an application in terms of subsection (1).

Return of certificates of registration on withdrawal of registration

15. (1) Whenever the registration of a debt collector is withdrawn under sections 13, 14 or 16(2), the debt collector shall forthwith return to the Council the certificate of registration issued to him or her under section 12.

(2) Any person who fails to return a certificate of registration as contemplated in subsection (I) shall be guilty of an offence and liable on conviction to a fine or [o imprisonment for a period not exceeding one year.

Payment of subscription fees

16. (1) Every person registered as a debt collector shall pay to the Council the prescribed fees.

(2) If a debt collector fails to comply with the provisions of subsection (l). the Council may suspend his or her registration as a debt collector until the amount owed by him or her is received by the Council: Provided that if the relevant amount is not paid within three months of the date of suspension of the registration of the debt collector concerned, the Council may withdraw the registration.

(3) Section (2) and (3) shall, with the necessary changes, apply to the withdrawal of the registration of a debt collector under subsection (2).

Code **of conduct**

17. (1) The Council shall, subject to the approval of the Minister. adopt a code of conduct for debt collectors and shall publish such code in the *Gazette.*

(2) The Council may, subject to the approval of the Minister. amend or repeal a code of conduct adopted by it: Provided that such code shall not be wholly repealed by it, unless it is simultaneously replaced by a new code of conduct for debt collectors so adopted and approved by the Minister and, provided further, that the Council shall publish any such amendment, repeal or replacement in the *Gazette.*

(3) A code of conduct drawn up or adopted by the Council and published in the *Gazette* shall be binding on all debt collectors.

(4) To the extent that any other code of conduct for debt collectors conflicts with it. the code published by the Council in the *Gazette* in terms of this Act shall take precedence over any other **such code.**

Improper conduct by debt collectors

18. (I) A debt collector maybe 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, in respect of which the Council decided not to act against him or her in terms of section 13 or, after it acted against him or her in terms of section 13, not to withdraw his or her registration;

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

(f) contravenes or fails to comply with a provision of the code of conduct contemplated in section 17;

(g) contravenes or fails to comply with any provision of this Act; or

(h) behaves or acts in any manner amounting to conduct. other than that mentioned in paragraphs *(a). (b),(c),(d),(e),(f)* or *(g),* which is improper in terms of a regulation or a code of conduct for debt collectors.

(2) The Council may in the prescribed manner investigate an allegation of improper conduct by a debt collector submitted to it in the prescribed manner or have it investigated in the prescribed manner by a committee of members of the Council or by a person or persons nominated by it: Provided that a debt collector whose conduct is being investigated shall be afforded the opportunity, either in person or through a legal representative, of refuting any allegations made against him or her

"(3) If the Council finds a debt collector guilty of improper conduct. the Council may—

(a) suspend his or her registration as a debt collector for a specified period or pending the fulfillment of a condition or conditions or withdraw it in terms of section 13;

(b) impose on him or her a fine of not more than five thousand rand, which fine shall be payable to the Council;

(c) reprimand him or her;

(d) recover from him or her the costs incurred by the Council in connection with the investigation;

(e) order him or ber to reimburse any person who the Council is satisfied has been prejudiced by the conduct of such debt collector and to furnish the Council within a specified period with proof of such reimbursement: or

(f) combine any of the penalties under this subsection.

(4) Payment of a fine imposed under subsection (3)*(b)* may be conditionally suspended.

(5) A fine imposed at an investigation in terms of this section and the costs incurred by the Council in connection with such an investigation, may be recovered by way of legal process in the magistrate's court of the district in which the office of the Council is situated.

(6) The Council may in its discretion delegate any of the powers conferred on it under this section, except a power referred to in subsection (3)*(a)*, to a committee nominated by it in terms of subsection (2), and may rescind or vary a decision of such a committee.

costs

19. (1) A debt collector shall not recover from a debtor any amount other than—

(a) the capital amount of a debt due and interest legally due and payable thereon for the period during which the capital amount remains unpaid; and

(b) necessary expenses and costs prescribed by the Minister in the *Gazette* after consultation with the Council,

(2) Upon request by a debtor and against payment of any prescribed fee, the clerk of a magistrate's court or a costs committee of a provincial law society may tax or assess any account or statement of costs. interest and payments claimed to be owed by a debtor to a debt collector or his or her client.

(3) The provisions of subsection (2) shall not be construed as preventing the taxation or assessment of any further account or statement of costs reflecting further amounts which become payable by the debtor to the debt collector or his or her client and which arise from the same cause of debt as that from which amounts reflected in an already taxed or assessed account or statement of costs arose.

(4) A debt collector shall deliver to a debtor, upon request and against payment of a fee determined by the Council, a settlement account containing a complete exposition of all debits and credits in connection with a specific collection: Provided that a debtor shall be entitled to request a settlement account free of charge once in every six months.

Trust accounts

20. (1) Every person who exercises the occupation of debt collector for his or her own account, shall open and maintain a separate trust account at a bank as defined in the Banks Act, 1990 (Act No. 94 of 1990), and shall deposit therein as soon as is possible

after receipt thereof the money received or held by him or her on behalf of any person.

(2) The money deposited in terms of subsection(1) shall, together with the interest as determined under subsection (3). be paid within a reasonable or agreed time to the person on whose behalf the money is received or held: Provided that a settlement account. containing a complete exposition of all credits and debits reflected in the said account shall be delivered to that person at least once a month.

(3) All interest, if any, on money deposited in terms of subsection(1) shall be paid, as prescribed. to the person on whose behalf the money was deposited.

(4) A debt collector shall keep proper accounting records in respect of all money received, held or paid by him or her on behalf of or to any other person.

(5) The Council may itself or through its nominee at its own cost examine the accounting records of a debt collector in order to satisfy itself that subsections (1), (2), (3) and (4) are complied with and, if during such an examination it is found that the debt collector has not complied with those provisions, the Council may update the accounting records of such debt collector and may recover the costs of the examination and, where applicable, such updating from that debt collector.

Auditing

21. (1) The accounting records and annual financial statements of the Council shall be audited annually by a person appointed by the Council for such purpose.

(2) No person shall be appointed under subsection(1) unless be or she is registered as an accountant and auditor in terms of the Public Accountants' and Auditors' Act, 1951 (Act No. 51 of 1951), and is engaged in public practice.

Financial year

22. The financial year of the Council shall be a year terminating on the last day of February.

Regulations

23. (1) After consultation with the Council the Minister may make regulations—

(a) regarding any matter required or permitted to be prescribed in terms of this Act;

(b) regarding generally, all matters which are reasonably necessary or expedient to be prescribed in order to achieve the objects of this Act.

(2) Without prejudice to the generality of the provisions of subsection (1). the Minister may, after consultation with the Council, make regulations—

(a) prescribing the fees payable by a debt collector to the Council in terms of section 16(1), and the periods within which such fees are payable;

(b) prescribing the circumstances under which a debt collector shall not be bound to pay an amount referred to in section 16(l); and

(c) regarding the training of debt collectors.

(3) Any regulation made under subsection (1) may provide that any person who contravenes a provision thereof or fails to comply therewith shall be guilty of an offence and on conviction be liable to a fine, or to imprisonment for a period not exceeding three months.

Delegation of Minister's powers

24. (1) The Minister may on the conditions that he or she deems fit, delegate any or all of the powers conferred upon him or her by this Act, save a power to make regulations. to the Director-General or an officer of the Department of Justice designated by the Director-General.

(2) No delegation of any power shall prevent the exercise of such power by the Minister.

Amendment of section 60 of Act 32 of 1944, as substituted by section 1 of Act 63 of 1976 and amended by section 2 of Act 4 of 1991

25. Section 60 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), is hereby amended by the substitution for subsection (1) of the following subsection:

"(l) Unless expressly otherwise provided in this Actor the rules and subject to 5 the provisions of section 19 of the Debt Collectors Act, 1997, 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.".

Short title and commencement

26. This Act shall be called the Debt Collectors Act, 1997, and shall come into 10 operation on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE DEBT COLLECTORS BILL, 1997

I. The Debt Collectors Bill, 1997. is one of two Bills emanating from the South African Law Commission's report on debt collecting (Project 74). The first hereof, namely the Magistrates' Courts Amendment Bill [B27—96], was introduced in Parliament (the Senate) during February 1996, but was subsequently withdrawn by the Minister of Justice, as the Senate could not finalise its deliberations on the Bill before the dissolution of that House under the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996). This first Bill. which concentrated on the judicial debt recovery procedure and the abolition of the provisions regarding imprisonment for debt. has since been replaced by the Magistrates' Courts Amendment Bill, 1997.

2. The Debt Collectors Bill, however, focuses on another aspect pertaining to debt collecting, namely the so-called "extra judicial procedure" where creditors appoint other persons to collect their debts for reward, or cede their legal claims to such debt collectors. Numerous objections are frequently being raised by attorneys and members of the public against the conduct of these debt collectors. From a moral perspective the statutory regulation of debt collectors can hardly be questioned. Whereas legal practitioners are bound by prescribed tariffs for the work they do, are subject to disciplinary methods and ethical codes of conduct and. in their conduct. are bound by legislation and rules, no such safeguards exist in respect of the conduct of debt collectors. The Bill consequently purports to make provision for the establishing of a council, to be known as the Council for Debt Collectors, in order to deal with, and to exercise control over, the occupation of debt collector.

3. The provisions of the Bill are briefly summarised hereunder:

(a) A Council is established so as to manage and control the activities of persons who recover debts for reward and who are not attorneys. The Council shall consist of a judge (as chairperson), a magistrate, an attorney. two debt collectors. two other fit and proper persons and one "person representing consumer interests. Council members are appointed by the Minister of Justice. The aim is to keep the Council as small as possible so as to establish a streamlined and cost-effective control mechanism. The Council may also establish an executive committee which could meet regularly.

(b) All persons acting as debt collectors as defined in the Bill must register w ith the Council and pay subscriptions to the Council. It shall be an offence for anyone to carry on business as a debt collector while he or she has not been so registered. and such person shall on conviction be liable to a fine or to imprisonment for a period not exceeding three years. The Council shall generate its own funds, and the payment of subscriptions will, among other things, serve as a source of finance.

(c) Certain powers are conferred on the Council, such as the withdrawal of registration certificates, the drafting of a code of conduct for debt collectors and the imposition of fines on debt collectors found guilty of misconduct.

(d) The money which a debt collector may recover from a debtor is limited in terms of clause 19. The Minister of Justice may prescribe the rates of expenditure and costs which a debt collector may recover in the *Gazette* and any account from a debt collector, or statement of costs, interest and payments made by a debtor would be subject to taxation or assessment by the clerk of a magistrate's court or a costs committee of a law society.

(e) A debt collector must open a trust account and keep proper accounting records. All moneys received or held on behalf of another person *(client)* must be deposited in such account and must, within a reasonable or agreed time. be paid to such person. All interest on moneys deposited in a trust account must be paid to the person on behalf of whom such moneys were deposited.

4. The South African Law Commission consulted a variety of interested parties regarding the Bill, including members of the judiciary, the legal professions, consumers' organisations and numerous debt collecting agencies.

5. The Department of Justice and the State Law Advisers are of the opinion that the Bill should be dealt with in accordance with section 75 of the Constitution of the Republic of South Africa, 1996.