Date: 26 July 2018

**MANAGING AGENTS EXCLUSION FROM THE DEBT COLLECTORS ACT**

**INTRODUCTION**

There has been a long history between the actions of managing agents and the statutory regulator for the debt collection industry, the Council for Debt Collectors established in terms of Section 2 of the Debt Collectors Act, 1998 (Act 114 of 1998).

Prior to 1998 only attorneys and agents referred to in Section 22 of Act 32 of 1944 were entitled to recover from debtors any fees or remuneration in connection with the collection of any debt. (See Section 60 of the Magistrate’s Court Act, 1944 (Act 32 of 1944)

“unless expressly provided otherwise 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 a debt.”

When the Debt Collectors Act was passed and, later, the National Credit Act (Act 34 of 2005) Section 60 was amended so as to entitle persons referred to in the two aforementioned Acts to, also, recover fees or remuneration in connection with the collection of debts.

The conclusion is inescapable that every time legislature intended to provide for exemptions or extensions of Section 60(1) of the Magistrate's Court Act, such exemptions or extensions were specifically and in particularity enacted. No such exemption has been granted in respect of estate agents or managing agents. I am therefore of the opinion that it may well be argued that legislature never intended estate agents or property managers to recover any fees or remuneration when collecting arrear debts. Moreover, should they do so they would be contravening Section 60(2) of the Magistrate's Court Act, and could be charged in a criminal court for contravening the aforesaid Section, unless they have been registered as debt collectors in terms of the Act.

As a point of departure, one should look at the definition of a debt collector in the Debt Collectors Act which reads as follows:

“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.”

1. If an estate agent merely collects rent monies, levies, etc that is not in arrears, with or without sending out letters, invoices, etc, he acts as an estate agent and nothing more;
2. If an estate agent does more than that and takes some steps to recover arrear payments, but does so without reward, he will also not be a debt collector; and
3. If an estate agent acts as in (b) above for reward, he will, per definition be a debt collector.

In terms of the Debt Collectors Act a debt must be due and payable at not been paid before it can be considered as a debt for collection purposes.

The problem arises when a tenant falls behind in his payments and the managing agent starts a process of recovering that arrear amounts. The Council received a huge amount of complaints against managing agents who charged exorbitant fees for the collection of those arrear amounts.

What would typically transpire is that a body corporate together with the managing agent would determine their own fees for the recovery of any arrear amounts. The managing agent would then recover and keep those fees as the estate agents Act made no provision for any fees neither does the new proposed Property Practitioner Bill.

On a regular basis the Council would receive complaints where charges between R250 to R350 would be added to a tenants account for any correspondence or letter of demand and R125 for telephone calls ect. This was at a stage where a debt collector would only be entitled to R12 for any such correspondence or phone call and their fees were capped. The exploitation of tenants who had fallen into arrears was often referred to by the managing agent industry as the goose that lays the golden egg.

This situation was untenable and in 2009 the Council instituted a disciplinary inquiry against one such managing agent in Cape Town (Brunello) who was subsequently convicted of collecting debt without being registered as a debt collector and charging fees not provided for by the Minister of Justice in terms of the Debt Collectors Act. After this judgment managing agents who collected arrear amounts registered with the Council and charged only those fees that the Act provides for.

**EXCEMPTION**

After the Brunello judgment, NAMA (National Association of managing Agents) lodged an application for exemption from the Debt Collectors Act in terms of Section 26 of the Debt Collectors Act. The Council was asked to provide reasons on why the exemption application should not be considered.

It is of importance to note that NAMA accepted that estate agents are, in certain instances, also debt collectors.

Although the application enjoyed the support of the Institute of Estate Agents of South Africa(a voluntary body), it is a fact that the controlling body of estate agents, namely the Estate Agency Affairs Board, did not support the application.

It was during the course of numerous discussions that NAMA decided to withdraw their application for exemption as the parties was in agreement that the recovery of arrear rent and levies for reward placed those managing agents who recovered those amounts squarely under the Debt Collectors Act.

An agreement was reached with NAMA to address some of the practical issues surrounding registration of managing agents as debt collector's. The issues that were clarified and agreed to was around trust account requirements and provisions.

Since this agreement managing agents who collect arrear rents and levies for reward has been registered with the Council and have been forced to comply with the provisions of the Debt Collectors Act and its Code of Conduct.

**THE PROPOSED AMENDMENT**

In terms of the proposed amendment there is an attempt to amend the Debt Collectors Act by inserting the exclusion of managing agents from the Act.

The Act itself makes no mention of any debt collection functions, regulation control or provision of a disciplinary or fee structure but at the end of the act in Schedule 1 the following is found.



Such an exclusion will have a devastating impact on tenants who have fallen behind in their payment of rent and levies. It would mean a return to a situation where a body corporate and managing agent would be allowed to determine their own fees for the recovery of debts. The proposed Property Practitioners Bill makes no provision for any fee structure or enforcement process when it comes to the collection of arrear amounts by managing agents. There is not even a code of conduct to determine what a managing agent will be allowed and not allowed when it comes to the recovery of debts.

There is no provision made under sanctionable offences under Section 61 for abuses when recovering debts.

The catastrophic consequence of such an exclusion on the public cannot be underestimated.

If the goal is to remove managing agents from the jurisdiction of the Council for Debt Collectors and have their debt collection conduct regulated and controlled by another entity the following should be considered:

a) Only Debt Collectors, attorneys and for specific functions Credit Providers are entitled to charge specified regulated fees for the recovery of a debt by way of a provision in the Magistrates Court Act. There is no such provision for managing agents nor is one sought. Without such a provision every managing agent who for reward collects arrear rental and levies would be criminally liable.

b) There is currently an amendment before parliament that would remove the exclusion of attorneys from the Debt Collectors Act. Including attorneys but at the same time excluding managing agents makes no sense. This amendment was precisely proposed to curtail the abuses committed against debtors by attorneys who do not currently fall under the jurisdiction of the debt collectors Act and whose fees are not capped.

c) The duplication of a statutory body whose function is to regulate the debt collection industry with another body doing exactly the same would create numerous practical difficulties.

d) The proposed amendment act makes no provision for any such body or control and one can only assume that for debt collection functions managing agents would once again become unregulated.

**CONCLUSION**

It is of great importance to note that legislature specifically excluded attorneys from the definition of a debt collector but intentionally did not exclude estate agents. To my mind this is very significant. Legislature did not intend to exclude estate agents from the Debt Collectors Act because their actions might involve debt collecting. Legislature is, after all, presumed to be aware of the existing law.

It is standard legislative procedure that fees are prescribed by regulations promulgated in terms of an enabling act. In turn, the enabling act must contain a suitable enabling clause for the promulgation of such regulations. Regulations promulgated in the absence of an appropriate enabling clause are ultra vires.

No such enabling provision is contained in the new Property Practitioners Bill.

In terms of Section 8 of the Debt Collectors Act, every person “who is concerned with debt collecting” has to be registered as a debt collector. In terms of Section 25 of the aforesaid Act it is a criminal offence for such a person to act as a debt collector without being registered. Once registered, the Act, Regulations and Code of Conduct in terms of the Debt Collectors Act are binding upon such an individual. The same principle does not appear to apply in the case of property practitioners.

In terms of the Property practitioners Bill Act any person employed by a property practitioner is a property practitioner if he or she performs on behalf of the estate agent any of the services of a property practitioner. Excluded appears to be an employee who merely collects and receives monies payable on the account. Consequently, an employee of a property practitioner who collects or receives monies payable on a lease is not considered to be a property practitioner and therefore the Property Practitioners bill, Regulations or Code of Conduct are not binding upon such an employee.

For practical reasons they would therefore fall outside the ambit of any regulation and would therefore be allowed to do what they want insofar as the collection of arrear rent and levies is concerned.

The enactment of the Debt Collectors Act emanated from a report by the South African Law Reform Commission. In its investigation the Commission pointed out that debt recovery by extra-judicial institutions is a worldwide phenomenon. A number of causes giving rise to debt were pointed out including rentals and levies on sectional title units. In its comprehensive report the Commission came to the conclusion that legislation should be adopted to establish control over the activities of debt collectors – hence the enactment of the Debt Collectors Act. The provisions of this Act are specifically aligned and crafted to the requirements to regulate the registration and activities of those who collect debts. The Property practitioners Bill was enacted for different reasons and is therefore not aligned to the requirements necessary to regulate the recovery of debt.

The proposed amendment should it be granted would have a severe negative impact on consumers. The actions and fees charged by managing agents would be unregulated and as has happened in the past would lead to exploitation of consumers who have fallen into arrears with their rents and levies. We only became aware of the proposed amendment when one of our registered managing Agents inquired whether he can now deregister and charge his own fees.

The Council was not informed of the proposed amendment nor asked for comment. The Council was not even consulted as a stakeholder as can be seen from the stakeholders consulted as set out in Paragraph 4 of the Memorandum to the proposed Bill.

I hope that the Councils concerns can be addressed before the Bill is approved.

Kind Regards

**Andries Cornelius**

**Chief Executive Officer**