

This article examines what it is legal (and not legal) for debt collectors to do when collecting debt from customers.

## Regulation of Debt Collectors

The conduct of debt collectors is regulated by the Debt Collector's Act, as well as by our common law relating to harassment, intimidation and other criminal acts of a similar nature, and in certain instances is also regulated by other pieces of legislation such as the attorneys act, the rules of the applicable law society, the National Credit Act, the Consumer Protection Act, and specifically in relation to municipalities, the Electricity Regulation Act and the NERSA regulations.

## Registration of Debt Collectors

In term of the Debt Collectors Act any person who engages in the act of collecting debt on behalf of another person or entity, must be registered with the Debt Collectors Council. In addition, any company or close corporation that does debt collecting must have every director/member registered as well. This applies both to fully-fledged debt collectors, as well as staff members employed by those debt collectors who perform any function for that debt collector that counts as debt collection in terms of the Debt Collectors Act.

## Exclusions from the requirement of being registered

Note that at the moment the requirements of the Debt Collectors Act do not apply to attorneys and their staff members and trainees; however an amendment to the Act has been proposed which, if passed, will include attorneys and all of their employees within the ambit of that Act.

## Penalties for not being registered

Collecting debt as defined in the Debt Collectors Act without being registered constitute an offence in term of that Act, and renders the offending person liable to a fine or imprisonment of up to 3 years. It also renders any agreement entered into between that debt collector and his client (ie the person for whom the money is being collected), or employee (the person employed by the debt collector to assist in debt collection duties), invalid. Interestingly enough, the Act does not seem to invalidate agreements entered into between the debt collector concerned (who is not registered)

and the person that he/she/it is collecting debt from.

If you are being harassed unreasonably by debt collectors, a first step in putting a stop to this harassment would be to ask that debt collector for a copy of their registration certificate to prove that they are duly registered, and to advise such debt collector that you are aware that collecting debt without being registered in terms of the Debt Collectors Act is an offence and may lead to penalties for that person, which you will then report them for should it turn out that they are not duly registered.

## Debt Collection by Attorneys

Attorneys are regulated by the Attorneys Act and by the rules of the law society that operates in the province that the attorney conducts business in. In terms of these rules, it is unethical (and regarded in the attorneys' profession as unprofessional conduct, which can lead to the attorney being sanctioned by the law society that governs him/her) for any attorney to contact the client of another attorney directly about a matter where both parties are represented by attorneys.

If it so happens that you have an attorney on brief in relation to any legal matter, and the attorney of the opposition is contacting you about the matter (including asking you for payment of amounts that you are disputing) this constitutes unprofessional conduct and you can report this to the relevant law society, which then would investigate the matter and if applicable take action against that attorney for unprofessional conduct.

Note that this does not apply to instances where your opposition has no attorney on record but you have an attorney on record, although it is widely understood across most industries that in such cases your opposition should be liaising with your attorney of record and not with you directly. Unfortunately at this stage there is nothing in any law to prohibit your opposition from contacting you directly even if you do have an attorney on record, but in the majority of cases simply referring the opposition to your attorney should be enough to get the opposition to stop harassing you and to liaise with your attorney about the matter.

## Lawful Times to Debt Collect

In terms of the Code of Conduct prescribed in terms of the Debt Collectors Act, debt collectors are only allowed to contact customers at certain times. Debt collectors are not allowed to contact

customers on a Sunday or between 9 pm and 6 am on any day. Contact within these times constitutes unprofessional conduct in terms of the Debt Collectors Act and may result in disciplinary action being taken by the Debt Collectors Council.

## Threats Made by Debt Collectors

In terms of the Code of Conduct referred to above a debt collector cannot untruthfully threaten that legal proceedings will follow non-payment, if there is no true intention to carry out that threat. It is unlawful (and constitutes unprofessional conduct) for a debt collector to threaten you with a laundry list of action that will be taken against you if you don't pay, unless that debt collector actually has instruction to follow-up on that action if payment is not made. It's quite difficult to judge when a threat is an empty one when you are receiving these threats from a debt collector, but cases where the same debt collector contacted you repetitively and repetitively makes the same threats but doesn't follow-up on them, this is a good indication that the debt collector never had the mandate or intention to take further legal action as threatened in the first place, and this can be reported to the Debt Collectors Council.

## Listing on ITC

A consumer can only be listed with ITC or any other credit bureau if the provisions of the National Credit Act have been complied with by the service provider in sending the consumer a notice advising the consumer that if they don't pay within a period of 28 business days, that consumer will be listed on the relevant credit bureau. This letter also needs to contain certain warnings to the consumer that allows the consumer to understand and exercise its other options in law (such as, if the consumer is over indebted, to apply to a debt counsellor for assistance).

If the applicable notice with the relevant warning has not been sent to the consumer, or the relevant period of time has not elapsed, listing on any credit bureaux is unlawful. Note further that strictly speaking only debt that is unpaid in relation to agreements that constitutes "credit agreements" in terms of the National Credit Act can be reported to the credit bureau. There are many types of agreements that do not fall within the ambits of the National Credit Act such as residential leases. However the listing system is often abused and consumers would do well to know in which instances it is unlawful for a supplier to list you when dealing with a threat of being listed.

## Harassment and Intimidation

Harassment occurs when a debt collector continually contacts a consumer in relation to the same debt, when that consumer has already paid the debt, explained to the debt collector that the debt has been disputed and has given the debt collector proof of same, or has referred the debt collector to his or her attorney. Harassment can also occur when a debt collector continuously contacts a consumer for payment outside of the lawful times to do so, and/or makes persistent threats of further legal action which are not carried out. Intimidation occurs when a debt collector threatens a consumer in order to induce that consumer into making payment of debt concerned. However this only constitutes intimidation if the threats result in the consumer paying the debt which otherwise the consumer would not have paid because that debt is disputed. Both of these kinds of conduct are prohibited in terms of the Debt Collectors Act, as well as in terms of our common law. Such conduct can be reported to the Debt Collectors Council or your local police station, which should then open a case and investigate the matter for you. In extreme cases of harassment and intimidation a protection order or a restraining order can be obtained against the person harassing or intimidating you. If the prosecution services find enough evidence of the debt collector committing the crimes of harassment and intimidation, then the debt collector may also end up with a criminal record for its conduct.

## Extortion

Extortion occurs where a debt collector uses unlawful behaviour to pressure a consumer into making payment or signing acknowledgement for a debt which that consumer would otherwise in the ordinary course never had paid or never had acknowledged the indebtedness of. The most common cause of extortion that the authors are aware of happens when a municipality threatens to terminate the supply of services to a consumer's home or business if that consumer does not immediately make payments of all or a portion of the disputed debt, or sign an acknowledgement of debt in respect of same. The debt collectors concerned do not explain to the consumer that once they have paid or acknowledged the disputed debt, that their legal right to continue disputing this debt falls away. This essentially destroys a portion of the consumer's dispute with the municipality. This is illegal and anyone who has experienced such extortion should report this to the local police station, open a case and insist that it be investigated. In addition it can be reported to the Debt Collectors Council and should also be reported to the senior officials of the entity for whom the debt collector is collecting debt. You can also approach an attorney for assistance in revoking any

acknowledgements of debt signed when you are extorted into doing so, although it's not one hundred percent clear from our law as to how successful you will be in this regard.

## Prescribed Charges

In certain (not all) instances it is unlawful for a debt collector to insist on payment of amounts that have prescribed. For example in terms of the National Credit Act it is unlawful for a debt collector to attempt to collect prescribed charges. In terms of the NERSA regulations it is further unlawful for any supplier (which in this context usually pertains only to ESKOM and municipalities) to collect or even invoice a consumer for amounts that have prescribed. A contravention of both of these acts can lead to a fine or imprisonment for the entity for which the debt collector is collecting debt or a fine or imprisonment for that debt collector personally.

## Taking Further Legal Action

Note that in the majority of instances a debt collector will not be the person or entity that takes any of the action threatened if payment is not forthcoming (except where the debt collector is threatening to list you on ITC, which many debt collectors have the power and authorisation to do). In most instances the matter will be referred to an attorney and the attorney will take the further legal action threatened. However it is still important for a consumer to know their rights in relation to when further legal action can be taken, as this helps the consumer to assess whether the threats of further legal action made by the debt collector are legitimate.

The authors have seen countless cases where termination of municipal supply, or the listing of a consumer on ITC is threatened – but where the relevant preconditions for the taking of these actions have not yet been complied with – rendering the taking of these legal actions at the time that the actions are threatened, a completely empty threat. Knowing your right in this regard may be enough for you to dispose of any continued harassment or intimidation by the debt collector, simply by bringing to the debt collector's attention that you are aware that the threats that the debt collector is making are idle and by advising the debt collector that should they not back-off you will report his or her conduct to the relevant body for sanctions.

## Fees Charged by Debt Collectors

In terms of the Debt Collectors Act, debt collectors are very limited in terms of the amounts that can be charged to a debtor for debt collection action. Any consumer who receives an account from a debt collector should look very carefully at the charges and compare them to the limit set out in the Act to make sure that they are not being over charged.

Note that at present this does not apply to attorneys however an attorney is not legally entitled to present a consumer from whom he is collecting debt on behalf of another with an invoice for his services in collecting that debt unless the attorney's client has obtained a taxed bill of costs following on from a judgement in court, which entitles the attorney's client to recover those taxed costs from the debtor concerned. If you are presented with such an invoice, and you are certain that you are not legally obliged to make payment on these charges, bring this to the attorney's attention and if the attorney insists in collecting same, report the matter to the relevant law society.

## Co-Author

### **Gary Boruchowitz**

Associate at Schindlers Attorneys

Phone: +27 (0) 11 448 9701

boruchowitz@schindlers.co.za

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