

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSCAAL PROVINCIAL DIVISION)

Date: 2008-03-17

Case Number: 48692/07

In the matter between:

CREDITWORX S&V (PTY) LIMITED

Applicant

and

THE COUNCIL FOR DEBT COLLECTORS

Respondent

JUDGMENT

SOUTHWOOD J

[1] The applicant applies for orders declaring that –

- (1) When a debtor, in his or her agreement with a creditor, has agreed to any tracing costs or all costs incurred by the creditor, a debt collector is entitled to recover from the debtor all expenses reasonably incurred in tracing such a debtor;
- (2) A debt collector is entitled to recover 10 % of each instalment paid in redemption of a debtor's debt, which includes all

amounts legally due to the creditor including interest and allowable fees and expenses, subject to the maximum amount prescribed in the Regulations from time to time;

- (3) A debt collector is entitled, subject to the maximum amount prescribed in the Regulations from time to time in respect of letters, faxes or e-mails to charge a fee for SMSs sent to debtors.

[2] These orders are unclear. None of them refers to the relevant provisions of the Debt Collectors Act 114 of 1998 ('the Act') or the schedule of expenses and fees promulgated in terms of the Act. During argument it became clear that the applicant seeks an order declaring that tracing fees or expenses incurred pursuant to an agreement between the debtor and the creditor that the debtor is to be liable for 'tracing costs' or 'all costs incurred by the creditor' is a 'debt' for the purposes of section 19(1)(a) of the Act (first declarator); an order declaring that the word 'debt' in item 9 of the schedule of expenses and fees, includes interest and all fees and expenses recoverable in terms of the schedule (second declarator) and an order that item 2 of the schedule of expenses and fees includes SMSs (third declarator). The applicant did not seek an amendment of the three declarators sought to add clarity and place them within their statutory context. Nevertheless the issues will be considered as they were argued.

[3] The applicant states that a dispute exists between it and the respondent in respect of these matters and that the judgment given by the respondent's Disciplinary Committee after the enquiry held on 28 November 2006 is based on an incorrect interpretation of the Act and the schedule of expenses and fees promulgated in terms of the Act. Relying on this interpretation the Disciplinary Committee found the applicant guilty of contravening the Code of Conduct by recovering from a debtor expenses and fees other than those prescribed by the Minister in accordance with section 19(1)(b) of the Act.

[4] The respondent did not file an answering affidavit but filed a notice in terms of Rule 6(5)(d)(iii). Briefly summarised, the questions raised in the notice are as follows:

- (1) the applicant is, in effect, requesting the court to extend the ambit of the tariff prescribed in the regulations – which is not appropriate for a declarator;
- (2) the application is a disguised application for a review of the finding made by the respondent's committee at the disciplinary enquiry and the applicant has not exhausted its internal remedies; and has brought the application outside the time limit prescribed by section 7(1) of the Promotion of Administrative Justice Act, 3 of 2000 ; and

- (3) the application does not comply with Rule 53 of the Uniform Rules.

[5] The first question is clearly wrong. The applicant seeks a declarator as to the correct interpretation of the relevant section of the Act and the relevant items of the schedule of expenses and fees. The applicant does not wish the court to legislate. The respondent did not persist with the other two questions and it is accordingly not necessary to consider them.

[6] The purpose of the Act is to create a Council for Debt Collectors ('the Council') whose object is to exercise control over the occupation of debt collector. Debt collector is defined in section 1 of the Act and does not include a legal practitioner. A person may not act as a debt collector unless he or she is registered as a debt collector in terms of the Act. The Council must adopt a Code of Conduct for debt collectors and must publish such code in the Gazette. The council may find a debt collector guilty of improper conduct if he or she, or a person for whom he or she is vicariously liable *inter alia* –

- (1) contravenes or fails to comply with a provision of the Code of Conduct; and
- (2) contravenes or fails to comply with any provision of the Act.

The Council may withdraw the registration of a debt collector *inter alia* if he or she is found guilty of improper conduct.

- [7] Against that background it is clear that the applicant, as a debt collector registered in terms of the Act, is an interested party with regard to the fees and expenses which it is entitled to under the Act and the schedule of expenses and fees. The proper interpretation of the Act and the schedule will be binding on the applicant and the respondent as well as all registered debt collectors and will create certainty for all concerned. The applicant is therefore entitled to seek declaratory orders as to the meaning of the Act and the schedule of expenses and fees and the court must decide whether or not to grant the relief sought. See ***Ex parte Nell 1963 (1) SA 754 (A)*** at 760A-C; ***Reineke v Incorporated General Insurances Ltd 1974 (2) SA 84 (A)*** at 93A-B and ***Cordiant Trading CC v Daimler Chrysler Financial Services 2005 (6) SA 205 (SCA)*** paras 16-18.

- [8] Section 19(1) of the Act provides that –

‘(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 fees prescribed by the Minister in the Gazette after consultation with the Council.'

[9] The provisions of paragraphs (a) and (b) of section 19(1) are therefore of decisive importance in determining what the debt collector is entitled to recover. They clearly and unambiguously provide that a debt collector may recover only the capital amount of the debt, the interest legally due and payable thereon for the period during which the capital amount remains unpaid and the necessary prescribed expenses and fees. The debt is contrasted with the interest payable and the prescribed expenses and fees. The intention is obviously to prevent abuse of the consumer by clearly defining what the debt collector is entitled to recover.

Tracing fees

[10] The schedule of expenses and fees is silent about tracing fees or expenses. It provides only for 'other necessary expenses not specifically provided for'. The applicant contends that where a debtor agrees with the creditor to pay 'tracing fees' or 'all costs incurred', a tracing fee is a debt owed to the creditor. According to the argument, there is no difference between the debt incurred in respect of tracing fees and any other debt which the debt collector collects on behalf of a

creditor: tracing expenses constitute a separate substantive debt owed by the debtor to the creditor which is covered by section 19(1)(a) of the Act. The respondent contends that this interpretation is not correct. The word 'debt' must be restricted to the primary debt owing pursuant to the obligation in question.

- [11] The answer lies in the meaning to be given to the word 'debt' and the expression 'capital amount of a debt' in section 19(1)(a) of the Act and the proper characterisation of tracing fees. The word 'debt' is not defined in the Act but it usually has a very wide meaning. The Shorter Oxford English Dictionary defines 'debt' as 'that which is owed or due; anything (as money, goods or service) which one person is under obligation to pay or render to another' and 'a liability to pay or render something'. See also ***Leviton & Son v De Klerk's Trustee* 1914 CPD 685** at 691 where the court said:

'I am disposed to take the word "debt" in a wide and general sense as denoting whatever is due – *debitum* – from any obligation'.

Is this limited in any way by the preceding words 'capital amount' or by the context?

- [12] As already mentioned the capital amount of the debt is contrasted with the interest payable thereon: i.e. the actual amount owing pursuant to the obligation as opposed to the ancillary interest which may be

claimed thereon. It is also contrasted with the necessary prescribed expenses and fees. The words 'capital amount' and the context therefore restrict the meaning of 'debt'. It is the principal amount owing in terms of the obligation. That clearly fits in with the scheme of the Act read with the schedule of expenses and fees which specifically provides for 'other necessary expenses not specifically provided for'.

- [13] Clearly the applicant is attempting to overcome the difficulty that the prescribed expenses and fees do not expressly include an item for tracing costs. Instead of regarding tracing expenses as a necessary expense incurred in collecting the debt it seeks to have tracing costs dealt with as a separate substantive debt because the debtor agrees to be liable for them. I cannot agree with this characterisation of tracing costs. Whether the debtor agrees to pay them or not they are still expenses incurred in recovering the debt just as legal costs are. It is therefore wrong to treat them as a substantive debt and not an expense. This is borne out by the applicant's deponent who describes a tracing fee as 'the necessary expenses incurred in tracing a debtor' and refers to the fact that in the magistrates' court 'any amount necessarily and actually disbursed in tracing a debtor is a recoverable expense'. Accordingly, when a debtor has agreed to pay tracing costs or all costs incurred by the creditor the tracing costs incurred are not a separate debt owing to the creditor and are not recoverable in terms of section 19(1)(a) of the Act.

- [14] A further difficulty is that the applicant contends that the word 'debt' should include only the reasonable tracing costs. The word 'reasonable' must be part of the declarator to ensure that no abuse takes place. I cannot find any justification for this in the wording of the Act. The applicant is therefore not entitled to the first declarator.

Receipt fee

- [15] Item 9 of the Schedule provides that a debt collector is entitled to a fee of 10 % on every instalment received in redemption of the debt subject to a maximum amount of R250. The applicant contends that the word 'debt' has the same meaning as in the Act: i.e. whatever is due from any obligation. It therefore includes not only tracing fees but interest and expenses and fees under the Schedule. I have found that the word 'debt' referred to in section 19(1)(a) has a limited meaning: it is the principal amount owing in terms of the obligation and it excludes interest and expenses and costs incurred in recovering the debt. The applicant is therefore not entitled to the second declaratory order.

SMSs

- [16] The schedule makes provision for a fee for a necessary letter, registered letter, facsimile or e-mail and a necessary phone call. It is silent as to SMSs. The applicant contends that an SMS is in essence a written telephone call. That may be an apt way to describe it but it

does not assist the applicant. The technology was in existence before the schedule of expenses and fees was adopted. Section 19(1)(b) expressly provides that a debt collector may not recover anything other than the prescribed expenses and fees and the prescribed expenses and fees make no provision for SMSs. The applicant therefore is not entitled to the third declarator.

Order

[17] The application is refused with costs.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

CASE NO: 48692/2007

HEARD ON: 4 March 2008

FOR THE APPLICANT: ADV. G.C. PRETORIUS SC

INSTRUCTED BY: E.E. Wessels of Wessels & Associates

FOR THE RESPONDENT: ADV. D.F. BLIGNAUT

INSTRUCTED BY: P. Cavanagh of the State Attorney

DATE OF JUDGMENT: 17 March 2008