COUNCIL FOR DEBT COLLECTORS
COUNCIL IN TERMS OF ACT 114 OF 1998

Caseno: 8/6SNY024/05

In the matter
COUNCIL FOR DEBT COLLECTORS THE COUNCIL
and
SNYMAN & VENNOTE
as represented by

HG LUBBE RESPONDENT

NOTICE IN TERMS OF REGULATION 7(8)(a) OF THE REGULATIONS RELATING TO DEBT COLLECTORS, 2003

WHEREAS: the Council for Debt Collectors received a complaint from Mr. Devadasen;

AND WHEREAS: the Respondent is a registered debt collector in terms of Section 8(1) of the Act, Act 114 of 1998 with the Council for Debt Collectors registration number 0002044/03

AND WHEREAS: the Respondent is herein represented by Mr. HG Lubbe with Council for Debt Collectors registration number 0001853/03.

NOW THEN TAKE NOTICE THAT: The Council for Debt Collectors (hereinafter called the Council) as per decision of the Executive Committee of the Council on 30 June 2006 decided to charge the Respondent with the following improper conduct:

CHARGE 1

That the Respondent is guilty of contravention of Section 8 and read 15(g) of the Act, Act 114 of 1998, in that:

During the month of September 2005 the debt collector employed an individual Mr. Carikos to act as a debt collector, by contacting and attempting to recover a debt from a Mr. Devadasen a debtor from whom the Respondent had been instructed to recover a debt, whilst the individual Mr Carikos was/is not registered as a debt collector and whilst knowing that he was/is not registered and whilst knowing that he had to be registered.

TAKE FURTHER NOTICE THAT:

a. In terms of Regulation 7(9) you **must within 14 days** from service of this notice, reply in writing to the charge as set out above, by either admitting or denying the charge. Should you admit guilt the Council will deal with the matter as set out in Section 15(3) of the Debt Collectors Act 114 of 1998.
b. Provide the Council, together with the above mentioned notice, with a physical address were you will accept service of process and notices in this matter.
c. That failure to respond as requested above will not prohibit the Council from continuing with the process as set out in Regulation 7.

DATED AT PRETORIA ON THIS THE 26 DAY OF JULY 2006.

ADV. A CORNELIUS
LEGAL OFFICER
COUNCIL FOR DEBT COLLECTORS
RENTMEESTERPARK
WATERMEYER STREET 74
VAL DE GRACE
PRETORIA

TO: SNYMAN & PARTNERS
WHITE LODGE
49 DORADO ROAD
ORMONDE
FAX 086 630 6945

In terms of the regulations this notice should be served by the sheriff. You may however in writing acknowledge the receipt of this notice, and grant permission for the notice to be served by fax.

COUNCIL FOR DEBT COLLECTORS
COUNCIL IN TERMS OF ACT 114 OF 1998

In the matter

COUNCIL FOR DEBT COLLECTORS THE COUNCIL

and

SNYMAN & VENNOTE
as represented by

HG LUBBE RESPONDENT

HEADS OF ARGUMENT

The tribunal has requested short heads of argument in this matter.

1

The matter has been extensively argued before the tribunal and the main arguments set out by the Respondent is the following:

1.1 On whether Mr. Carikos acted as debt collector in contravention of Section 8.
1.2 What is the meaning of collect and recover?
1.3 Was Mr. Carikos employed by the Respondent?
1.4 Was there a contravention of Section 15?
1.5 Even if there was a contravention of Section 15, that the Respondent is not vicariously liable for the conduct of Mr. Carikos.

2.

Did Mr. Carikos act as a debt collector?

2.1 It is common cause that Mr. Carikos approached the complainant and had an Acknowledgementof Debt signed, and that Mr. Carikos was an independent contractor instructed by the Respondent to do so. And that he at the time of doing so was not a registered debt collector.

2.2 Mr. Scholtz made the following statement "we not saying that Mr. Carikos on that day decided to go and pursue Mr. Devadeson he went to Mr. Devadeson because Snyman and Vennote told him to go to this debtor they gave him the address and they asked him to obtain the acknowledgement of debt that is not in dispute, but we say that in so doing Mr. Carikos did not act as a debt collector."

2.3 The basis of the argument can be found in the following statement from Mr. Scholtz

"now, did Mr. Carikos act as a debt collector? Our argument is no he did not act as a debt collector, first of all he did not collect a debt, second he did not recover a debt as alleged to the charge, third he was not an employee of Snyman and Vennote who is a registered debt collector as alleged in the charge sheet, the charge sheet said he was employed by them, he was not employed by them it is admitted that he was an independent subcontractor."

2.4 Mr. Scholtz extensively argued the question of whether or not Mr. Carikos collected a debt. His argument is that the mere calling for is not sufficient… The following authority was quoted " ordinary meaning of collect is to gather in or together or to gather to assemble the equivalent used to the Afrikaans is "insamel" it does appears that the offense is collecting which is that case concerned with collecting dagga does not embrace conduct which amounts to no more than the acquisition calling for or fetching, now all that Mr. Carikos did was he went to the debtor and he called for the debt, he went to the debtor he said please pay, he did not even say that he went to the debtor with an acknowledgement of debt"

Vide: Rex v Singh SINGH 1960(3)SA489

The tribunal quite rightly in my submission pointed out to him that any step taken to call for the debt was indeed debt collection.

"Mr. Chairman: It is a book by du Plessis and Goddy J Practical Guide to Debt Collection, on page 1 of the book they state debt collection in the narrow sense means any legal proceedings against a debtor by acreditor or the collection means any step judicial or extrajudicial legal and illegal taken for the collection of the debt this definition includes mild steps as a telephone call, letters of demand as well as drastic extra judicial or illegal methods by threathening the debtor or his family with harm or using force to repossess…"

2.5 I am of the opinion that there can be no doubt that the position as set out above is the correct one, and not as it is seen by my opponent. The reason for that is the allegation that collects means to receive money. Annexure "B" the permissible fees clearly indicates that there is much more to debt collection than just the receipt of money. Only one of the nine items deals with the receipt of money, the rest are all amounts for actions that leads up to ultimately the receipt of money and one of those fees that can be charged is indeed for the signing of an acknowledgement of debt. In essence should this line of argument from Mr. Scholtz be accepted it would mean that no person who does not actually receive money need to register as a debt collector.

2.6 The argument was then amended to state that no Mr. Carikos only acted as a messenger, nothing else. That he was in effect an automaton.

"Mr. Scholtz: My argument essentially is this Mr. Chairman, if Snyman and Vennote phones the debtor establishes where the debtor is establishes from the debtor that the debtor is prepared to sign an acknowledgement of debt, all that Mr. Carikos does is he gets in his car drives to the debtor, gives the debtor an acknowledgement of debt to sign, the acknowledgement of debt so signed Mr. Carikos gets back into his car and drives to Snyman & Vennote and says here is the acknowledgementof debt which you asked me to go and get signed if that is all he does he does not act as a debt collector, that is what I'm saying…"

In light of the evidence heard during the trial it is very clear that this argument simply cannot stand. That is found at the end of the record where the evidence of Miss le Roux is corrected to the following:

"she might have said something in her evidence which is, could be inaccurate she cannot recall whether she said that Mr. Carikos.. or whether she said that previous telephonic contact had been made with the debtor in this case, she drew my attention to the fact that if you look at her letter dated 12 December to Mr. Cornelius you have a copy, the consultant whose is person we normally in charge of making calls, from the Pinetown branch tried to establish telephonic contact with the debtor but was unable to do so as he was nightshift she left a message requesting he call her…"

Mr. Chairman; I think she said the consultant made contact.

Mr. Scholtz: Yes and then, if that is the case she would like to correct her evidence on that point of accuracy. I don't know if you wish her to confirm that…"

From this passage it is abundantly clear that Mr. Carikos was not only a messenger, that he went to the com-plainant and obtained the acknowledgement. As there was no previous negotiated agreement that means he must have concluded the agreement and therefore he acted as a debt collector.

Even without the evidence as set out above there is in my mind no doubt that the action of approaching a debtor and having him sigh an acknowledgement is debt collection. An acknowledgement is no less than a demand for payment which the debtor agrees to.

3.

What does employment mean?

3.1 Mr. Scholtz: during argument referred the tribunal to the Labor Relations Act that defines an employee Section 2(1)(3) as any person excluding an independent contractor who works for another person. He referred to the various tests that has been formulated in order to determine the status of a supervision and control test, the organization and integration test, the dominant impression test. Asked whether the relationship between Mr. Carikos and Snyman and Partners is Agency, Mr. Scholtz conceded that Mr. Carikos was their agent.

3.2 The gist of his argument was that the Respondent did not employ Mr. Carikos as he was an independent subcontractor. This purpose of the argument is to find a deficiency in the charge sheet. References are made of the fact that the prosecution attempted to hang the charge on the word employ and therefore the charge cannot stand.

"because the prosecution in the charge allege that he was employed that was nexus in making him a debt collector and his nexus with Snyman and Vennote."

This in my view is quite correct.The nexus between Mr. Carikos and the Respondent is indeed found in his being employed by the Respondent.

3.3 Mr. Scholtz would also rather have the Tribunal use the strict interpretation of the word employ which would probably lead to a deficiency in the charge sheet and not the wider understanding of the word which would counter and sink his argument.

"Mr. Scholtz: with some respect that loose use of the word wmployed cuts across speeches our law makes between the contract of employment, the contract of mandate, and various other forms of contracts in terms of which you procure the services of a person, one cannot if you are charged a Company or individual use loose wording to hold that person liable, one must use the precise and legal wording of words to hold people liable. If one adopts a very loose interpretation of the word employed you are seriously prejudicing the accused. One must look at the various forms of procuring the services of an individual or a company and for what purpose to establish what you actually wanted from that person, in this regards I do submit the significant that the word employee is defined in the act'

In response to this argument I wish to mention a section of Mr. Scholtz's own argument and I quote:

"Langley Fox V Devalance and the reference is 1991(1)SA1… and what was said there by Mr. Justice Goldstone who now prosecutes people (unclear), the general rule of our law is that the employer is not responsible for the negligence or wrong doing of an independent contractor employed by him"

From this quote it is clear that the word employed is used correctly in the charge sheet. And this argument of Mr. Scholtz cannot stand. Even the AD refers to the relationship between the parties as the one being employed.

3.4 The point was also made that Mr. Carikos is an agent and not an employee, and there the charge sheet is wrong.

It was never alleged that he was an employee only that he was employed. The charge says that the debt collector employed an individual Mr. Carikos. That with respect is in facts of the case, that the debt collector Snyman and Vennote employed a subcontractor.

Whether as an agent or in any other capacity does not matter in casu there's no other way for an agent to work than to be employed by somebody, and that is what happened here.

3.5 Ms. Le Roux conceded that Mr. Carikos is an agent, then once that is conceded this matter becomes very simple. You look at the definition of a debt collector, under section 1(c) a debt collector is a person who as an agent or employee of a person referred to in paragraph (a), and then there's no doubt that Mr. Carikos is a person as referred to in (c) he's an agent of Snyman and Vennote, and therefore he should have been registered.

4.

Section 15

4.1 Mr. Scholtz then raised the issue of Section 15 in that a debt collector may be found guilty by the Council if he or she or a person for whom he or she is vicariously liable… contravenes or fails to comply with any pro-vision in this Act.

Mr. Scholtz originally raised the argument that he or she referred to only natural people and not to juristic persons. But this argument cannot in light of the definitions furnished by the Act stand and the arguments were not further canvassed.

5.

Vicarious Liability

5.1 The last issue that was raised and debated extensively was the question of vicarious liability. Mr. Scholtz is of the opinion that the general rule of our law is that an employer is not responsible for the wrong doing of the independent contractor.

5.2 It is my respectful submission that vicarious liability should not even enter in this matter.

If Mr. Carikos was employed by the Respondent to fulfill certain obligations which he did, and he did so without being registered, then it is not vicarious liability that makes the Respondents accountable it's pure non compliance with the Act.

It is not the wrong doing of Mr. Carikos that is being scrutinized, but the wrong doing of the Respondent.

5.3 It is not a question of the Respondent being held re-sponsible for the actions Mr. Carikos took in performing his agreement. The issue is that he was asked to perform those actions by the Respondent whilst not being registered. This debate could possibly have been raised had the charge been that Mr. Carikos in fulfilling his obligations to the Respondent had assaulted or threatened the debtor. Then the question of vicarious liability might have become relevant.

6.

Summation

6.1 This matter is with respect a relatively simple one. One has to look at the charge which is in essence the following:

That the Respondent is being charged with a contravention of Section 15 read with Section 8 in that the debt collector employed an individual Mr. Carikos to act as a debt collector by contacting and attempting to recover a debt from Mr. Devadasen a debtor from whom the Respondent had been

instructed to recover a debt, whilst the individual Mr. Carikos was not registered.

6.2 There are with respect only four questions that need to be answered in the affirmative in order to convict the Respondent of this charge and they are:

6.2.1 Is the Respondent a registered debt collector which brings them under the control of the Council and subject to the Act, Regulations and Code of Conduct?

This has been admitted and therefore the answer is yes.

6.2.2 Did the Respondent employ Mr. Carikos to act on their behalf?

This aspect has been dealt with and the answer to this must be yes.

6.2.3 Did Mr. Carikos contact the debtor and attempt to recover a debt on behalf of Snyman and Partners?

This aspect has been dealt with and the answer must be yes.

6.2.4 Was Mr. Carikos registered as a debt collector at the time?

It is admitted that he was not.

Once these questions have been answered in the affirmative then the tribunal has with respect no other option than to convict this Respondent as charged.

Signed at Pretoria on this the 6th day of October 2006

A. Cornelius

BEFORE A COMMITTEE OF THE COUNCIL FOR DEBT COLLECTORS CONVENED IN TERMS OF ACT 114 OF 1998

Case no: 8/6SNY024/05

In the matter

COUNCIL FOR DEBT COLLECTORS THE COUNCIL

and

SNYMAN & VENNOTE RESPONDENT

RESPONDENT'S HEADS OF ARGUMENT

1. The first argument advanced on behalf of the Respondent at the hearing on 30 August 2006 may be summarized as follows:

1.1 Mr. Carikos did not act as a "debt Collector" as defined in section 1 of the Debt Collectors Act 114 of 1998 ("the Act") because he:

1.1.1 did not collect a debt, within the ordinary meaning of the word "collect" as it is used in the definition of "debt Collector" in section 1 of the Act;

1.1.2 did not recover a debt (as is alleged in the charge) if the ordinary meaning of the word "recover" is applied; and

1.1.3 was not an employee of the Respondent (the charge sheet reliesonly on the word "employed" as a nexus for liability).

1.2 These points were extensively debated during the hearing and I will not belabor them further in these heads of argument in the light of the

concession on behalf of the Council that Mr. Carikos was not an employee in the strict sense of the existence of a contract of employment between Mr. Carikos and Snyman & Vennote (which was not the case), but an independent contractor.

1.3 In the light of the concession, it is not necessary further to debate whether or not the word "employed" should be read in the looser, wider sense contended for by Mr. Cornelius.

1.4 As long as it is understood that Mr. Carikos was an independent contractor and not an employee (which has been admitted and is common cause), little purpose will be served by further debating the meaning of the word "employed" in the charge sheet.

2. The second argument on behalf of the Respondent is that it did not contravene section 8 of the Act for the following reasons:

2.1 At all relevant times the Respondent, Snyman & Vennote (Pty) Ltd, was registered as a debt collector, as were all its directors and officers concerned with debt collecting.

2.2 Section 8(1) of the Act provides that if a debt collector is a company (which the Respondent is) then every director and officer of the company who is concerned with debt collecting must also be registered. Mr. Carikos was neither a director nor an officer of Snyman & Vennote.

2.3 It is common cause that Mr. Carikos was never appointed as a director of the Respondent, nor is he registered as such with the Registrar of Companies.

2.4 Neither was Mr. Carikos an officer of the Respondent. In **Ketteringham v City of Cape Town** 1934, AD 89, De Villiers JA described an officer as "an employee appointed to perform prescribed duties connected with the administration of (the function in question)" (my underlining). It is submitted that Mr. Carikos was not such a person.

2.5 The word "officer" is also defined in the shorter Oxford English Dictionary as "a functionary authoritatively appointed or elected to execute some public, municipal or corporate function". Mr. Carikos was not such a person and held no such appointment within the Respondent. He was merely an independent contractor.

2.6 It is accordingly submitted that it is not Snyman & Vennote who contravened section 8 but, if anybody, Mr. Carikos in his personal capacity.

3. The third argument on behalf of the Respondent is that it did not contravene Section 15(1)(g) of the Act, which provides as follows:

15(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 –

(g) contravenes or fails to comply with any provision of this Act [such provision alleged to be section 8 of the Act in the present case]."

3.1 It is trite law that a juristic person cannot in and of itself actually act, but that it can only act vicariously through its officers and employees, for whose actions the juristic person is then vicariously liable. It is for this reason that section 15(1) refers to vicarious liability.

3.2 Section 15(1) deals first with the situation where the debt collector is a natural person ("he or she") who is directly liable and then secondly deals with vicarious liability, which brings a debt collector which is a juristic person within the ambit of the section (although vicarious liability may, of course, also attach to a natural person).

3.3 Vicarious liability arises when the person committing the delict or contravention is an employee of the per- son sought to be held vicariously liable. However, it has long been settled law that a contract of mandate

with an independent contractor (which is the contract which Mr. Carikos had with the Respondent) does not give rise to vicarious liability.

3.4 Dealing with the requirements for delictual or criminal vicarious liability, Neethling, Law of Delict (4th Edition, 2002) says at 347:

"Thus a contract of service (location conduction operarum) must exist. The contract of mandate (location conduction operis) on the other hand, concerns an agreement in terms of which one person also undertakes to render services to another for remuneration without, however, being subject to the control of the other. The contract of mandate involving an independent contractor, therefore does not found vicarious liability. (my underlining)

3.5 The Appellate Division authoritatively confirmed that this is the law in the case of **Langley Fox Building Partnership (Pty) Ltd v De Valence** 1991(1)SA1, where Goldstone AJA held as follows at 8A:

"The general rule of our law is that an employer is not responsible for the negligence or the wrongdoing of an independent contractor employed by him: **Colonial Mutual Life Assurance Society Limited v MacDonald** 1931AD412, especially at 428, 431-2; **Dukes v Martlinusen** 137AD12 at 17. That is also a general rule of the English Law."

3.6 The **Langley Fox** case remains the last word by the Supreme Court of Appeal (or the Appellate Division as it then was) on this aspect of our law. It has not been overruled.

3.7 During argument, I was referred to the recent case of **Minister of Safety and Security v Luiters** 2006(4)SA160(SCA) and invited to consider whether or not that case had any impact on my argument. I have read the case carefully and respectfully submit that it has no bearing on the present matter. The **Luiters** case deals with the factors for determining the vicarious liability of an employer for the delictual or criminal acts of his employee. In that case the employer was the Minister of Safety and Security and the employee was a police officer.

3.8 It is respectfully submitted that the **Luiters** case is of no application to the present matter before the Committee as it is distinguishable on the facts as well as on the law. That was a case dealing with principles to be applied when determining the vicarious liability of the Minister of Safety and Security for the delictual and criminal acts of police officers, who are his employees. The case refines the law relating to that form of vicarious liability and does not deal with the position of an independent contractor at all. There is no reference to the **Langley Fox** case, which is not surprising, as there was no need to deal with the well-settled common law rule on the non-liability for the acts of independent contractors.

3.9 There was a suggestion during argument that the Act might have overruled the common law by imputing vicarious liability for the independent contractors. I am not sure if this suggestion is seriously persisted with, but it is respectfully submitted that the Act does not in any way alter the common law. If anything, the Act takes cognizance of and entrenches the common law position. In the interpretation of statutes, there is a well-known presumption against altering the common law, and statutes are held to have amended the common law only when it is done in the clearest of language. That is not the case here.

3.10 Steyn **Die Uitleg van Wette**, (5th Edition) states the law as follows:

"Hierdie vermoede bring mee dat 'n wet, sover doenlik, so uitgelê moet word dat sy bepalings met die bestaande reg ooreenstem, of so min moontlik

daarvan afwyk. Vir 'n verandering van die bestaande reg is 'n duidelike bepaling of wetsduiding nodig. Hierdie reel skyn te berus op 'n veronderstelde eerbied aan die kant van die wetgewer vir die histories gewordende regsorde." (at 97)

"'n Wet moet dus, as dit moontlik is, sonder om sy bepalings geweld aan te doen, so uitgelê word dat dit by die gemene reg inpas." (at 98)

"Nou verwant aan hierdie vermoede is die reel dat wette, behalwe waar hulle heeltemal van die gemene reg afwyk, deur en in die lig van die gemenereg uitgelê moet word." (at 100)

3.11 Accordingly, it is submitted that the Respondent did not contravene Section 15(1), because the Respondent was not vicariously liable for the individual who acted.

4. Determining the liability or otherwise of the Respondent is accordingly not as simple a matter as is suggested in Mr. Cornelius's Heads of Argument. The four questions posed in paragraph 6.2.1 to 6.2.4 of his Heads of Argument are not, with respect, the essential questions to be answered in this matter, nor do the answers that he provides to those questions solve the difficulties which are posed by a proper interpretation of the Act.

5. If anyone contravened the Act, (which is not conceded) it was Mr. Carikos himself acting as an independent contractor while not being registered as a debt collector.

6. In the circumstances, it is submitted that the Respondent, Snyman & Vennote, did not contravene the Act as charged.

JOHANNESBURG, 9 OCTOBER 2006

JW SCHOLTZ
WEBBER WENTZEL BOWENS
Attorney for the Respondent

Investigation in terms of section 15(2), Act 114 / 1998
Ondersoek i.g.v artikel 15(2), Wet 114/ 1998

1. Held at **Pretoria** on **24/10/2006**
Gehou te……..op……200
2. Investigating Committee (Sect 15(2) and Reg 7(1)(a))
Ondersoek Komitee (Art 15(2) en Reg 7(1)(a))
Chairman / Voorsitter **Adv. J. Noeth SC**
Member / Lid
Member / Lid **Mr. C Johnston**
3. Particulars of Debt Collector(s) charged / Besonderhede van Skuldinvorderaar(s) aangekla
- As per annexure
- First Respondent convicted on charges
4. Person appointed to lead evidence (Reg 7(8)(b))
Adv. A Cornelius
5. Particulars of person(s) appearing on behalf of Debt Collector(s) / Besonderehede van persone wat namens Skuldinvorderaar(s) verskyn
Mr. Johan Stolz of Webber Wentzel and Associates
6. Charge(s) / Klagte(s)
As per chargesheet annexed hereto / Soos per klagstaat hierby aangeheg.

7. Plea / Pleit: **Not Guilty**
8. The proceedings are recorded by mechanical means/ Die verrigtinge word meganies opgeneem
9. Finding/Bevinding: **Guilty**
10. Sentence / Vonnis:

In terms of section 15(3) (e) of the Act the Respondent is ordered to reimburse an amount of R4000.00 in respect of the costs incurred by the Council. This amount must be paid to the Council on or before 24 November 2006.

The Respondent is in terms of section 15(3)(c) of the Act fined R10000.00. This amount must be paid on or before 24 November 2006 to the Council.