

Short notes on:

ENFORCEMENT OF CLAIMS BASED ON ACKNOWLEDGMENTS OF DEBT IN THE MAGISTRATE'S COURT V THE HIGH COURT

Introduction

A debtor and creditor may enter into an Acknowledgement of Debt (AOD) where the debtor acknowledges that he or she owes a particular sum of money to the creditor, and undertakes to repay what is owing on the terms agreed between the parties. This agreement can be used as a shortcut to the judicial process of obtaining a judgment against a debtor, should the debtor not commit to the payments as agreed in the AOD.

Magistrate Court Provisions

The AOD should be drafted in terms of Rule 11 and Section 57 of the Magistrate Court Act No. 32 of 1944, as amended. These provisions enable the creditor to approach the court for a judgment in default for the amount that the debtor has acknowledged being owed. The judgment granted in terms of section 57(2)(ii) of the Act is considered as if issued under section 65A(1).

After the court has given judgment, the debtor must make payment within 10 (ten) days of the judgment or order. If this does not happen, the creditor may issue a notice in terms of section 65A(1) calling on the debtor to appear before court on a specified date to enable the court to enquire into the debtor's financial position and make such an order as the court may deem just and equitable. The notice must be issued by the court of the district in which the debtor resides, carries on business or is employed.

High Court Provisions

In terms of Rule 31(1) of the Uniform Rules of Court, the Defendant may at any time confess in whole or in part the claim contained in the summons. Such confession shall be signed by the defendant personally and his signature shall either be witnessed by an attorney acting for him, not being the attorney acting for the plaintiff, or be verified by affidavit. The confession shall then be furnished to the plaintiff, whereupon the plaintiff may apply in writing through the registrar to a judge for judgment according to such confession.

In *Citibank NA v Thandroyen Fruit Wholesalers CC and Others*¹ the court held that a confession to judgment must be founded on a cause of action contained in summons or motion. Where the claim is founded on a settlement agreement or acknowledgment of debt, Rule 31(1) cannot be applied.

AODs and the National Credit Act

In *Carter Trading (Pty) Ltd v Blignaut*² the court held that an acknowledgement of debt agreement, in terms of which a credit provider undertakes to supply goods to a consumer and to defer the consumer's obligation to pay any part of the cost of such goods, together with any charge, fee or interest payable to the credit provider in respect of any amount so deferred, is regarded as a credit facility and therefore to be a credit agreement.

However, in the recent judgments of *Grainco (Pty) Ltd v Broodryk en Andere*³ and *Rodel Financial Service (Pty) Ltd v Naidoo and Another*⁴, the courts have declined to apply the National Credit Act 34 of 2015 (NCA) to acknowledgements of debt when asked to do so by debtors. At this point, it remains unclear when the court will apply the provisions of the NCA to an acknowledgment of debt.

Conclusion

An AOD can be a useful shortcut mechanism to debt enforcement as it provides an unequivocal admission of liability by the debtor which speeds up the legal process. However, it cannot always be used to bypass all other steps and apply for default judgment such as in Magistrate Court. In the High Court, one must still issue summons first when enforcing the agreement. It is important to also be careful how you frame your AOD to ensure that it does not attract application of the NCA. Contact a professional at SchoemanLaw for assistance with AODs.

¹ [2007] ZASCA 61; [2007] SCA 61 (RSA) ; 2007 (6) SA 110 (SCA) (28 May 2007)

² 2010 (2) SA 46 (ECP)

³ 2012 (4) SA 517

⁴ 2013 (3) SA 151