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## THE POSSIBILITY OF EXECUTING A JUDGMENT OBTAINED IN THE HIGH COURT AGAINST CREDITOR LIVING ABROAD

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There are Acts of parliament, both South African and in other countries which apply to enforcement of a foreign judgment. As an example (an example, I believe, which is pertinent), I shall be using the situation as is current between Australia and South Africa.

### **SOUTH AFRICAN LEGISLATION**

There are various pieces of legislation providing for international co-operation in civil matters. This is achieved by way of designation of countries where one may execute a civil judgment under the different Acts. To date, only a few states have been designated for the purposes of such co-operation. In respect of judgments relating to money, Namibia is the only country designated under the enabling regulations to the **Enforcements of Foreign Civil Judgments Act** as a country with reciprocal enforcement procedures. The rest of the “countries” designated under the enabling legislation are the former TBVC states, as well as the various “self-governing territories”, which “countries” no longer exist . There are broader provisions relating to recovery of maintenance, which we shall not deal with here.

Common law enforcement, therefore, seems to be the only method of enforcement.

There has been a South African Law Commission report published regarding the question as to whether this legislation needs to be revised in relation to the growing part that South Africa is playing in the global economy post 1994 (Project 121, “Consolidated Legislation Pertaining to International Co-Operation in Civil Matters”)

## **AUSTRALIAN LEGISLATION**

Research into the Australian position demonstrates that the Australian **Foreign Judgments Act** and the associated regulations do not prescribe South Africa as a country with which there are reciprocal rights. The effect of this is that the judgment cannot simply be executed (or “registered”) in Australia.

## **SOLUTION**

1. Common law enforcement in either the Magistrates Court, District Court or Supreme Court of the relevant area, depending on the quantum of the judgment. The jurisdictional limitations in respect of each court will have to be confirmed, as well as the potential costs involved.
2. Commence (new) proceedings in the foreign country. Again, jurisdictional limitations in respect of each court and potential costs involved in each court will have to be confirmed.

Taking the position in Australia as an example, we shall deal with these points below:

**Ad 1.** Australian Courts will generally not allow the challenging of the merits of a foreign judgment. Therefore, assuming that the judgment debtor is not entitled to deny the jurisdiction of the South Africa Court, the judgment creditor would be entitled to commence proceedings and obtain judgment for the Australian Dollar equivalent of the judgment. The action would be a commencement of proceedings seeking damages for the liquidated amount in Australian Dollars, relying on the judgment as a debt owed by the judgment debtor to the judgment creditor. We would be required to show:

- a) The South African Court had jurisdiction over the judgment debtor at the time of commencement of proceedings; and
- b) The judgment Debtor submitted to jurisdiction by filing an appearance to defend the action or any other court document, or by receiving documents as filed by us in the original action.

**Ad 2.** A completely new action can be brought in the matter, relying on

- a) the cause of action in the proceedings; and
- b) one or more aspects of estoppel preventing the judgment debtor from raising any defences that were available to him in the proceedings.

## **POSSIBLE PROBLEMS**

1. A Defendant would be entitled to raise a defence in new proceedings on the basis of a defect in the judgment by way of denial of natural justice;
2. The Australian Courts have the discretion to order a stay of proceedings and may be inclined to do so once an appeal is filed in South Africa.
3. The costs of repatriating any recovery would also have to be borne in mind.

The institution of new proceedings would be the safest way of proceeding. However, the costs aspect of this must be borne in mind, given the quantum of the claim and the “duplication” of fees.

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