

ENFORCEMENT OF US JUDGEMENTS IN SOUTH AFRICA

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A successful plaintiff that is awarded a judgement in the United States may often experience frustration if the proper enforcement thereof is, to some extent, dependent upon its recognition in a jurisdiction outside the United States. Historically, enforcement of such judgements in South Africa involved a fair amount of red tape and diplomatic effort due to the country's political isolation and resultant inexperience in these matters. Fortunately, South African law has caught up with the need for the enforcement of foreign civil judgments by prescribing a few basic requirements:

- 1 the judgement to be enforced must be final. The court that pronounced on the matter must be *functus officio* and therefore must be unable to alter the judgement. Provisional judgements will not comply with this criterion. If an appeal has been noted against the judgement, the South African court has discretion whether it will enforce or stay the recognition pending the decision by the court of appeal;
- 2 the foreign court must have had jurisdiction over the matter in terms of the South African law pertaining to the jurisdiction of foreign courts, in other words, the South African Private International Law;
- 3 the judgement will not be enforced if it is contrary to the South African public policy or the rules of natural justice. The principles of natural justice are summarized in the rules of *nemo iudex in sua causa* and *audi alteram partem*, which are followed strictly in South African law;
- 4 the judgement must not be contrary to the provision in Section 1 of the Protection of Businesses Act 99 of 1978. This section provides that certain foreign orders, judgements, interrogatories or arbitration awards will not be enforceable, unless with the consent of the Minister of Trade and Industry. These orders are widely defined as this that have been handed down in connection with any mining activity, any type of production, possession of any tangible property and almost any other act or transaction in, outside, into or from South Africa. It is submitted that this act is still a vestige of the previous dispensation under apartheid, when the aim was to protect domestic policy against foreign influence. As a practical matter, the Minister's consent is rarely withheld. Furthermore, in 1995 it was held by the South African High Court that the act does not apply to judgements sounding in money which arose from a delict (tort) or contract and that the prohibition on the enforcement of punitive awards pertains only to cases of product liability.

The rule against the enforcement of a foreign judgement for punitive damages has been part of the South African law for a long time. Recently, the judiciary pronounced that the fact that the ground on which the award is based is unknown in South Africa does not constitute a reason to refuse its enforcement. If the enforcement would serve

justice, our courts will allow it. This serves as yet another milestone in the process of aligning and integrating the South African judicial system with the international principles.

Another effective way of enforcement is by way of a provisional sentence action, whereby the plaintiff is granted a judgement with the exact contents of the original foreign judgement provisionally. Provisional sentences only can be given on a so-called liquid document (i.e., a document containing an unconditional acknowledgement of indebtedness, a court order, etc). For the defendant to be allowed to present his whole case to court, he must first provide security for the full amount of the judgement. Those with a weak defence are thereby dissuaded from opposing the matter.

Thus, it is clear that the South African judiciary has come a long way in making the process accessible and eliminating the possibility of debtors and other liable parties to use South Africa as a haven against performance of foreign judgements.

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End Notes : Since preparing the above article, the judgments of *Mynhardt J in Society of Lloyd's v Price*; *Society of Lloyd's v Lee 2005 (3) SA 549(T)* and *Blanchard, Krasner & French v Evans 2004 (4) SA 427(W)* have been delivered. In the first case, the learned Judge held that in terms of s 11(a)(ii) of the Prescription Act 69 of 1969 (of the Republic of South Africa) any judgment debt becomes prescribed after 30 years. A foreign judgment is not a "judgment debt"; accordingly the right to enforce a foreign judgment in a South African court does not prescribe after 30 years. The normal 3 year prescription period applies. This is a very important judgment. The second case deals with issues relating to and amendment to the summons and the argument raised by the defendant that the judgement granted against him was not "final" or "final and conclusive". Both of these judgements (and the cases to which they refer) should be studied.