

SOUTH AFRICA

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ENFORCEMENT OF FOREIGN MONEY JUDGMENTS

What Laws Regulate Enforcement

Enforcement of foreign judgments is governed in South Africa by the common law generally and in specific cases by the Enforcement of Foreign Civil Judgments Act 32 of 1988. The Act provides for the enforcement of foreign judgments of designated countries by registration in the magistrates courts of South Africa. The purpose of the Act was to simplify enforcement by registration of certified copies of foreign judgments in the magistrates' court in the area in which the defendant resides, is employed, carries on business or owns immovable property. Once the judgment has been registered and the defendant notified, it has the effect of a civil judgment of that court and operates as an interdict against the judgment debtor preventing removal of any assets if it would prejudice the judgment creditor. However, only one country (Namibia) has been designated in the Act in nearly 30 years of its existence. There is currently no indication that further countries will be designated.

Treaties

South Africa is not party to any treaty regarding the reciprocal enforcement of foreign commercial judgments.

Jurisdiction over Foreign Judgment Debtors

South African courts have jurisdiction in enforcement proceedings against South African judgment debtors by virtue of their residence (or in the case of a body corporate, by registration) in South Africa.

However, in the case of foreign judgment debtors, a South African court will only exercise jurisdiction in enforcement proceedings on the following grounds:

- In the case of a South African plaintiff seeking enforcement, where the plaintiff has attached an asset in South Africa (of any value) belonging to the foreign defendant;
- Where the plaintiff seeking enforcement is also a foreigner, in addition to the attachment of an asset of the defendant in South Africa, there is a factor which links the matter to the South African court (for example the conclusion of a contract, its breach or performance in South Africa).

Requirements for Enforcement

A foreign judgment is not directly enforceable in South Africa but constitutes a cause of action that will be enforced by South African courts if the following requirements are met:

- The foreign court must have had international competence as determined by South African Law. This means that the foreign court must have had jurisdiction over the defendant in terms of its own laws, and in addition that the defendant was either resident or present in the foreign jurisdiction at the commencement of the action, or submitted to its jurisdiction by contract or by conduct (for example by defending the merits of the action in that court).
- The judgment must be final and conclusive and must not have become superannuated. A judgment is deemed to be final if it is unalterable by the court which gave it. This means that judgments pending appeal in the foreign jurisdiction are final for the purpose of enforcement. In such instances the South African court has a discretion whether or not to enforce it.
- Enforcement must not be contrary to South African public policy (which includes the rules of natural justice).
- The judgment must not have been obtained by fraud.
- The judgment must not involve the enforcement of a penal or revenue law of the foreign state.
- Enforcement must not be precluded by the Protection of Businesses Act 99 of 1978. This Act requires ministerial consent for enforcement of foreign judgments relating to transactions directly concerning raw materials. In all other instances ministerial consent is not required.

Authentication and Translation of Judgment

A foreign judgment is required to be authenticated by a competent authority in the foreign jurisdiction. If it is in a language other than English, it is required to be translated into English by a sworn translator of the High Court of South Africa.



Procedure

In instances where a dispute of fact is not anticipated the enforcement process is by way of an application, on affidavit, to court. Enforcement in cases where a dispute of fact may be anticipated is by way of summons in a trial action or by way of Provisional Sentence summons. The latter is a unique remedy limited to the enforcement of instruments clearly evidencing an easily ascertainable debt (such as a judgment).

Provisional Sentence allows a plaintiff to obtain a provisional judgment for enforcement which becomes final unless the defendant pays the judgment debt (against security provided by the plaintiff) and enters into a principal case which involves a trial of the requirements for enforcement and strictly not the merits of the case giving rise to the foreign judgment.

How long does Enforcement take

Depending on the complexity of the defence, enforcement can take between 4 to 12 months.

Judgments in a Foreign Currency

South African courts have the power to grant a judgment in a foreign currency. A judgment debt may therefore be satisfied in South Africa by payment in a foreign currency (or by payment of its equivalent in South African Rand when paid).

Interest

A South African Court will enforce any foreign interest awarded up to the date that the judgment is satisfied, and any court awarded costs.

Merits

A South African court may not review the merits of the case giving rise to the foreign judgment.

Limitation

In terms of Section 11(d) of the Prescription Act 68 of 1969, claims are extinguished by prescription 3 years after they arise.

Prescription begins to run in terms of section 12(3) from the date of which the creditor has knowledge of the identity of the debtor and the facts from which the debt arose.

According to South African private international law, procedural matters are governed by the domestic law of the country in

which the relevant proceedings were instituted (the Lex Fori). Matters of substantive law, however, are governed by the law which applies to the underlying transaction (the Lex Causae). In South African law, prescription is regarded as substantive. Therefore, a South African court seized with the question of whether a claim to the enforcement of a foreign judgment has prescribed will apply the relevant foreign law.

Security for Costs

South African courts are empowered to require a foreign plaintiff to provide security for the costs of the defendant in the event that the defendant succeeds in opposing the enforcement.

ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Relevant laws and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

South Africa is party to the New York Convention, having acceded to it without reservation in 1976.

The New York Convention is given effect to in South Africa by the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977.

Requirements for Enforcement

- The plaintiff is required to provide to the court the original arbitration agreement and the award, or certified copies of them. If these documents are in a language other than English, they are required to be translated into English by a sworn translator of the High Court of South Africa.
- The award must not be contrary to South African public policy.
- The parties to the arbitration agreement under the foreign law must have had capacity to contract and the agreements must be valid under the foreign law.
- The defendant must have received notice of the arbitrator's appointment or of the proceedings and must have been able to present his case.
- The award must deal with disputes which fall within the reference to arbitration.



- The constitution of the arbitration tribunal and the proceedings must be in accordance with the relevant arbitration agreement or with the law of the country in which the arbitration took place.
- The award must be binding on the parties and must not have been set aside or suspended by a competent authority of the country in which the award was made.
- The award must not fall foul of the Protection of Businesses Act 99 of 1978. This Act requires ministerial consent for the enforcement of foreign arbitral awards relating to transactions directly concerning raw materials. In all other instances ministerial consent is not required. The Enforcement Act will soon be repealed and incorporated into the International Arbitration Act which is due to be passed in early 2017. The International Arbitration Act will also repeal the Protection of Business Act insofar as it relates to foreign arbitral awards.

Procedure

Enforcement is by way of application to court to which the original arbitration agreement and award, or certified copies, are annexed. Enforcement will take approximately 4 to 9 months depending on the complexity of the defences.

Limitation

As with the enforcement of foreign judgments, a South African court seized with the question of whether a foreign arbitral award as presented, will apply the governing foreign law.

How long will Enforcement take

Depending on the complexity of the defence, enforcement can take between 4 and 12 months.

Security for Costs

South African courts are empowered to require a foreign plaintiff to provide security for the costs of the defendant in the event that the defendant succeeds in opposing the enforcement.

