

# DEBT COLLECTION CONSIDERATIONS 2023





## Debt collection considerations

When faced with a situation involving a bad debtor, first establish the applicable contractual terms and whether the contractual relationship in place is a specific contract and/or a standard terms and conditions contract (own Ts&Cs vs debtor's Ts).

### CONSIDER:

- What the terms say about when debt is due (credit terms).
- What the rights/obligations on non-payment are.
- What interest and legal costs claimable on non-payment will be.
- What obligation is there to refer the dispute on non-payment to an alternate dispute resolution process first.
- If there an arbitration clause which may be applicable.



## Court options available in a debt collection scenario: Action proceedings

A standard letter of demand (consider contractual requirements on timing and address for delivery) will typically precede a court summons in action proceedings.

### THE CONTENT OF THE LETTER WILL INCLUDE:

- Contractual framework in place with the debtor and details of debt.
- Time period for payment of the debt (usually 1 week but refer to contract).
- Threat of court process.

If there is no response to the letter of demand, the creditor could proceed with summons or other applicable dispute resolution process outlined in the contract.

### COURT WITH JURISDICTION DETERMINED BY:

- Terms of the contract.
- Quantum of claim, where debt:
  - of up to ZAR 200 000 goes to a District Court.
  - of up to ZAR 400 000 goes to a Regional Magistrates Court
  - greater than ZAR 400 000 goes to the High Court
- Location of debtor's registered or business address.

If there is no defence of the summons, this will result in a default judgment against the debtor. Should the summons be defended, a full trial process will continue.

**Note:** There is an option for an application for summary judgment after the plea stage (in instances where the plea does not offer a bona fide defence to the claim). A summary judgment is decided by the parties filing affidavits and arguing a motion in court.

### TIMING FOR THE JUDGMENT:

- The default judgment is the quickest process as it takes several weeks.
- The summary judgment is a longer process as it takes two to four months.
- A full trial can take approximately 18 months to three years to complete. This is a less desirable option for debt collection practices.

### ONCE A COURT ORDER IS OBTAINED (BY A DEFAULT, SUMMARY OR FULL TRIAL JUDGMENT) THE PROCESS MOVES ON TO THE EXECUTION PHASE WHICH INCLUDES:

- A sheriff of the court (by way of a warrant/writ of execution) can first attach movable property.
- If movable property is insufficient, the sheriff can attach immovable property.
- The attached property is later sold by the sheriff on auction and the proceeds are paid to the judgment creditor.
- If the sheriff cannot find any property, then this is sufficient grounds to apply for liquidation.



## Court options available in a debt collection scenario: Application proceedings

Application proceedings for purposes of a liquidation begin with a Section 345 Notice (statutory demand), which is sent in accordance with section 345 of the old Companies Act.

- It has the same content as a standard letter of demand, but a period of 21 days is afforded within which to settle the debt, failing which the debtor is deemed to be insolvent and can be wound up by court application.
- The application process is through filing of affidavits and therefore quicker.
- The threat of liquidation is a useful tool in the debt collection process as once final liquidation passes, it is the end of the company.

**Note:** Final liquidation is ultimately value destructive as the debtor company will cease trading and all creditors will then be ranked into ordinary, preferent or secured. Ordinary creditors risk not receiving anything.



## Legal costs considerations:

Successful litigants can claim back legal costs from the opposing party, but the quantum of costs will not equal the amount paid to their own attorneys. The costs must go through a taxation process.

- A Bill of costs is prepared with reference to tariff amounts contained in legislation.
- A Bill of costs is considered by a Taxing Master, who will determine the final amount owing in terms of costs.
- A taxed bill of costs has the power of a court judgment.
- Court tariffs are largely out of date with amounts charged by legal professionals. Successful litigants can expect to get back in the region  $\frac{1}{3}$  to  $\frac{1}{4}$  of the amount paid to attorneys.



## Bad debt risk mitigation considerations:

- Companies and individuals behind those companies (shareholders, directors and employees) have separate legal personalities. Individuals are therefore not automatically responsible for the debt of a company that defaults on its payment obligations.
- Only where there is fraud by directors, or they have traded recklessly can personal liability be claimed. Such a remedy is often difficult to achieve.



## To mitigate the risks associated with bad debts, ensure that:

- A contractual relationship is in place and fit for purpose.
- Credit checks and asset searches on companies to be afforded credit are done.

### EXAMPLES OF COMMON FORMS OF SECURITY:

- Personal sureties signed by the principles of the companies.
- Company's book debts ceded as security.
- Bonds registered over movable (general or special notarial) or immovable property (mortgage)
- Bank guarantees are the easiest form of security to realise in the context of a default.

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