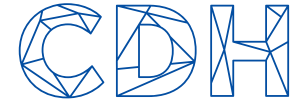


Dispute Resolution

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Provisional sentence proceedings: A special procedure that can be used to immediately enforce a foreign judgment

International contracts are contracts concluded between two parties situated in different countries. A jurisdictional clause in an international contract typically states which country's court will hear a dispute if one arises between the parties. The country's court that hears the matter and hands down judgment may not be where the adverse party is situated. The principle of national sovereignty means a state has supreme authority within its territory and, based on this principle, a judgment obtained in one country is not automatically enforceable in another.

When a party to a foreign judgment wishes to enforce the foreign judgment in South Africa, that party will first need to have the foreign judgment adjudicated by a South African court of law and request the court to recognise and enforce the judgment.

The Supreme Court of Appeal (SCA) in the case of *Jones v Krok* [1994] ZASCA 177 held that a foreign judgment will be recognised and enforceable when the following criteria are met:

- the court that pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by our law with reference to the jurisdiction of foreign courts;
- the judgment is final and conclusive in its effect and has not become superannuated;

- the recognition and enforcement of the judgment by our courts would not be contrary to public policy;
- the judgment was not obtained by fraudulent means;
- the judgment does not involve the enforcement of a penal or revenue law of the foreign state; and
- enforcement of the judgment is not precluded by the provisions of the Protection of Businesses Act 99 of 1978, as amended.

Provisional sentence

Applying to court to have a foreign judgment recognised and enforceable on the principles set out in *Jones* is not the only way to enforce a foreign judgment in South Africa. South African courts have recognised that a foreign judgment may be immediately enforceable on the granting of provisional sentence proceedings.

Provisional sentence is a special procedure where a creditor can obtain provisional relief against a debtor on a liquid document prior to the hearing of action proceedings. Final judgment will still need to be rendered in the principal case.

An application for provisional sentence depends on whether the document is liquid. The SCA defines a liquid document as a written instrument in which the debtor unconditionally acknowledges their indebtedness to the creditor for a fixed amount of money. The debt must be fixed, definite, sounding in money, and evident on the face of the document relied upon. Generally, leading extrinsic evidence will destroy the liquidity of the document.

Provisional sentence proceedings: A special procedure that can be used to immediately enforce a foreign judgment

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Liquid document

In the matter of *Lindsey and Others v Conteh* (774/2022) [2024] ZASCA 13, the SCA was required to determine if a series of orders and two writs granted by the Superior Court of the State of California in the US constituted liquid documents and could therefore be enforced by way of provisional sentence in South Africa.

The background of the matter is as follows: Alieu Badara Mohamed Conteh transferred shares to his own companies without permission from African Wireless Incorporated (African Wireless). The Superior Court of the State of California handed down a default judgment and a judgment for the return of the shares and issued a writ of possession and a writ of execution in respect of those shares or their monetary value (Californian court orders).

African Wireless sought to enforce the Californian court orders against Conteh, who was a US citizen resident in South Africa. African Wireless applied to the Johannesburg High Court to enforce the Californian court orders by way of provisional sentence.

The main contention by African Wireless was that the Californian court orders were enforceable in South Africa because they were capable of being enforced "*in the same manner*" as a money judgment for the value of the shares that African Wireless sought to recover from the respondent.

African Wireless argued that the orders, taken cumulatively, constituted a final binding money judgment, meaning that their claim would be based on a liquid document which could be enforced by way of a provisional sentence in our courts.

In analysing African Wireless' argument, the SCA said that the contention that the Californian court orders were enforceable in the same manner as a money judgment did not per se render the Californian judgment a money judgment. The Californian court orders first had to be enforced through the writ of possession and taking possession of the shares. If that was not possible, then a means of enforcement would be to execute upon the value of the shares.

Importantly, the Californian judgment did not order the respondent to pay a sum of money, it only ordered him to deliver the specified shares. If the shares could have been obtained using the writ of possession, there would be no option to enforce the Californian judgment as a money judgment. The SCA thus held that the Californian court orders did not constitute a money judgment and, in turn, a liquid document.

In conclusion, provisional sentence proceedings provide an effective remedy in immediately enforcing a foreign judgment in South Africa. However, this remedy is strictly confined to liquid documents, and the onus lies with the party wishing to enforce the foreign judgment to satisfy the court that this requirement has been met.

Neha Dhana, Claudia Moser and Denzil Mhlongo

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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