

Short notes on:

BUSINESS LITIGATION: DEBT COLLECTION

Introduction

It is not uncommon for businesses to sell goods or services to consumers on credit. However, once a consumer has accepted a credit agreement, they become liable for the payment of that debt, usually by way of monthly instalments. Therefore, when a consumer defaults on their instalments, the business is entitled to institute legal action against the debtor to recover the outstanding debt. This article will discuss how a company can recover an outstanding debt using the litigious process.

Letters Of Demand

Generally, the creditor has no obligation to deliver a letter of demand on the defaulting debtor before instituting legal action. However, the letter serves to alert the debtor of the amount of the debt and specify the default. It is important to note that such notification is a requirement under Section 129 of the National Credit Act 34 of 2005, as amended.

The letter further serves to notify the debtor that the creditor will initiate action against them should they remain in default. In other words, an opportunity is afforded to the debtor to settle the debt outside of court, thus saving the creditor legal costs. Should the debtor remain in default, the creditor may proceed with the litigious process i.e issuing summons.

Obtaining A Warrant Of Execution

When a summons is delivered to the debtor, and they do not defend it, the creditor may obtain a judgment against the debtor to pay the outstanding debt plus interest and the legal costs incurred. It is important to note that a debtor must deliver their notice to defend the claim within 10 days after receiving a summons¹. The creditor can thereafter use the judgment to obtain a warrant of execution against the debtor.

¹ Rule 13(1) of the Magistrate's Court Rules and Rule 19 of the High Court Rules.

A warrant of execution will be used to instruct the Sheriff to attach the debtor's property, which will then be auctioned, and the proceeds will be used to recover the outstanding debt and all other costs incurred during the litigious process. A warrant of execution can be obtained in respect of both movable² and immovable³ property. Alternatively, the creditor may obtain a garnishee order⁴ (where the outstanding debt will be paid by a third party if that party is indebted to the debtor) or an emoluments order⁵ (where a portion of the debtor's salary is attached to the outstanding debt). Finally, a creditor apply for the court to conduct an enquiry into the financial status of the debtor and make any order it deems just and equitable in order to settle the outstanding debt.⁶

Conclusion

Businesses offering credit facilities are likely to encounter debtors who refuse to pay off their debts. As such, the litigious process allows these creditors to recover monies owed to them, thus preventing substantial loss.

Contact an attorney at SchoemanLaw for your civil litigation needs.

² Rule 41 of the Magistrate's Court Rules.

³ Rule 43 of the Magistrate's Court Rules.

⁴ Rule 47 of the Magistrate's Court Rules.

⁵ Rule 46 of the Magistrate's Court Rules.

⁶ Section 65A of the Magistrate's Court Act 32 of 1944.