

THE DISAPPEARING DEBTOR HAS BEEN FOUND: WHAT NEXT?



My previous article explored the issue of the disappearing debtor. This is a follow up article and discusses the steps to take when you have located your debtor or, of course, if you know where your debtor is.

Your options at this stage are discussed below.

LIQUIDATION APPLICATION

There is an old saying that liquidation is the best form of debt collection. Although this saying does have some truth, it is too broad. More realistically, and if you are confident that by bringing a liquidation application you will effectively force your debtor into making payment in full or entering into a binding and enforceable payment arrangement, a liquidation application will be an effective method of debt recovery.

Furthermore, and compared to the options outlined below, it is speedy and can generally be brought as a matter of some urgency.

An insolvency application can however only be brought if:

1. There is evidence that the debt is undisputed, and that the debtor is unable to pay; and
2. There will be an advantage to the general body of creditors, meaning in effect that a dividend of approximately 0,20c in the rand to the general body of creditors can be expected. (This requirement i.e. of an advantage to creditors only applies in the context of a sequestration application, and not a liquidation application. A liquidation application

is brought against a company or close corporation and a sequestration application is brought against an individual or a trust)

A creditor bringing a liquidation application will generally not want the application to be successful, but would bring the application tactically i.e. so as to “force” payment. And therein lies the rub: if the application is unopposed, and no settlement offer is made, the creditor will find that he has not only incurred the legal costs of the application, but may also be on the hook for the liquidator’s fees, unless the insolvent entity has sufficient assets to cover – at least – the liquidator’s fees.

Whether or not to bring a liquidation application is a judgment call which needs to be made on the basis of careful consideration of the facts of each matter.

LEGAL PROCEEDINGS IN THE APPROPRIATE COURT

There are two types of legal proceedings. The option which most readers will be familiar with, is proceedings which commence by way of a summons. At the early stage of summons (known by attorneys as “action”) proceedings, legal costs are low. If the debtor does not defend the proceedings, or does not make an acceptable settlement offer, the next step would typically be an application for default judgment followed by the issue of a warrant of execution, and the sheriff of the court will then attend at the debtor’s premises and seek to attach sufficient movable property so as to cover the debt. If there is still no reaction from the debtor, then those items will be removed by the sheriff and sold at a public sale known as a sale in execution.

If however the summons is defended, a long and potentially expense road can lie ahead, resulting in an eventual court hearing which involves oral evidence and cross-examination.

An alternative to summons proceedings, lies in the cheaper and quicker option known to attorneys as application proceedings. These commence with a notice of application to which an affidavit by the creditor is annexed. An application for payment can however only be

brought in the High Court i.e. in general terms, where the amount involved exceeds R400 000,00.

If the debt is clearly undisputed, and there is concern that the debtor may seek to delay if a summons is served on it, or is known to “play” the delay game, then application proceedings are appropriate.

Although slightly more costly at the start, because of the need to prepare an affidavit, application proceedings make it more difficult for a debtor to avoid liability, as it would have to furnish an affidavit to the court, in which it satisfies the court that it has a good faith (bona fide) defence.

Which option to take, and a consideration of the implications of each option, is a judgment call which we are well placed to make in conjunction with you, our client.

Any clients who have any comments on this article, or would like to discuss its contents, or requires legal advice on these or other issues, is welcome to contact us.

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