

DISPUTE RESOLUTION ALERT

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INCORPORATING
KIETI LAW LLP, KENYA

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It's not always greener on the other (jurisdictional) side

Enforcing a judgment in South Africa that has been obtained in a foreign jurisdiction is not always as simple as a judgment creditor may expect. A litigant ought to consider the enforceability of a judgment obtained in a foreign court before instituting proceedings in that jurisdiction, in order to prevent obtaining a judgment that is essentially worthless.

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Enforcing a judgment in South Africa that has been obtained in a foreign jurisdiction is not always as simple as a judgment creditor may expect. A litigant ought to consider the enforceability of a judgment obtained in a foreign court before instituting proceedings in that jurisdiction, in order to prevent obtaining a judgment that is essentially worthless.

Recognition and enforcement of a foreign judgment

The Enforcement of Foreign Civil Judgments Act 32 of 1988 was enacted to regulate the recognition and enforcement of foreign civil judgments. However, it only applies to judgments obtained in Namibia. As such, judgments obtained in countries other than Namibia are governed by the common law.

A foreign judgment is not immediately enforceable by a creditor, and as such, the foreign judgment needs to be endorsed by the High Court of South Africa, which can only happen through the creditor bringing motion proceedings.

The underlying principle for the recognition and enforcement of foreign judgments is international harmony. There are, however, certain minimum requirements that are required to be observed before South African courts will endorse a foreign judgment.

A litigant cannot simply forum shop with the intention of circumventing South African legislation and procedures which were enacted to give effect to certain fundamental rights guaranteed in the Bill of Rights.

The basic requirements for the recognition and enforcement of a foreign judgment in South Africa were established in *Jones v Kork* 1995 (1) SA 677 (A), which are:

- the foreign court must have had international competency (jurisdiction to hear the particular matter);
- the judgment must be final and conclusive;
- the judgment is not contrary to public policy, this includes observing natural justice which requires that the parties were given reasonable notice of the proceedings to make representations;



It's not always greener on the other (jurisdictional) side

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- the judgment will not be recognised if it was obtained fraudulently; and
- the judgment does not relate to the enforcement of penal or revue law of the foreign state.

In addition to the above, the court will need to satisfy itself that certain minimum standards of justice were observed by the foreign court, such as the *audi alterum partem* rule, which enforces the principle that every natural person or legal entity must be afforded a fair hearing and the opportunity to respond to the claims and evidence levied against them.

The court's discretion

The requirements, as crystallised in the *Jones vs Kork* case, are not *fait accompli* that a foreign judgment will be enforceable as the court has a discretion prior to giving a foreign judgment a stamp of approval for local enforcement.

There are certain foreign orders that, by virtue of the applicable South African legislative framework, may be inherently unenforceable in South Africa, for example, an eviction order obtained in a foreign jurisdiction for the eviction of an unlawful occupant residing in South Africa. This is due to the enactment of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) which gives effect to section 26 of the Bill of Rights, namely the right to access to adequate housing.

The eviction laws and procedures in a foreign jurisdiction may be inconsistent with PIE, which may result in the foreign judgment conflicting with South African public policy, rendering the judgment unenforceable in South Africa.

A South African court is unlikely to rubber stamp a foreign judgment of this nature due to the procedural steps that are prescribed in terms of PIE, and due to the constitutional considerations that PIE requires a

court to weigh up before granting an eviction order. As such, a litigant would be required to commence eviction proceedings afresh in South Africa, adhering to all constitutional requirements.

In the cases where jurisdiction in a South African court is not immediately competent and the debtor is a *peregrinus* (a debtor who does not reside in South Africa), attachment of the debtor's property may be made in order to confer jurisdiction on a South African court.

Although a foreign court might, in certain circumstances, have international competence, it may be a futile and a costly process to obtain a judgment in a foreign jurisdiction when considering public policy regarding its enforcement. In certain circumstances, it may be more expedient to approach a South African court initially, should it have jurisdiction to hear the matter, as it is not always greener on the other (jurisdictional) side.

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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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