

## **BACK TO BASICS: HOW TO BE A PRUDENT CREDITOR – Outule Keatimilwe (Associate)**

Has someone owed you money for some time, offering unfathomable excuses? Fear not, this article aims to help.

**Rule number one** is whenever you loan anyone any amount of money, reduce the agreement to writing. By putting an agreement in writing you eliminate the risk of potential disputes. In your agreement, always ensure that there is the following:

- a) Loan amount; and
- b) Payment terms;

Failure to include these terms may render your agreement incomplete and thus unenforceable. Where the loan amount is expressed but the payment terms are not expressed, the debtor is given a “reasonable time” within which to repay the debt. If you have not concluded a written agreement, don’t despair, an oral agreement is also binding and enforceable. However, do not be surprised when a debtor raises issues that were never agreed upon let alone discussed.

A written agreement has another advantage relating to that of prescription. Prescription (extinctive) is defined in the Prescriptions Act as the rendering unenforceable of a right by the lapse of time. Simply put, an obligation to pay can expire. The Act states that a debt due under an oral agreement prescribes after three years whereas a debt due under a written agreement prescribes after six years.

**Rule number two** is do not sit on your agreement. Assuming your debt has not already prescribed, if you keep making demand and payment is not forthcoming the debt is ripe for litigation. Litigation procedures are laid out in the Rules of the High Court and Magistrate’s Court. If the debt is within the jurisdiction of the High Court the following steps are taken;

- a) A Writ of Summons is filed demanding payment of the outstanding amount, interest at the agreed rate or at 10% per annum and legal costs. A Writ of Summons is called the originating process because it commences legal action.
- b) The debtor is given a specified number of days depending on his location to respond to the Writ. If the debtor has a defence, he will file an Appearance to Defend setting out a summary of the defence.
- c) Should the debtor fail to file the Appearance to Defend timeously, the creditor is entitled to apply for Default Judgment. This means that the creditor has been granted judgment as the debtor has defaulted in filing an appearance to defend.
- d) In the event that the debtor files an Appearance to Defend, the creditor is given time within which to file a Declaration and Affidavit. These amplify and/or confirm the claims as set out in the Writ. If the creditor is of the opinion that the debtor has filed an Appearance to Defend solely for delay or to avoid judgment, he may also apply for Summary Judgment. This is a proceeding which seeks judgment from the Court even if the debtor has filed an Appearance to Defend on the basis that the debtor does not have a “bona fide” or genuine defence and has entered appearance merely for the purpose of delay. If the Court grants Summary Judgment, then that is the end of the matter.

- e) Should the creditor not apply for Summary Judgment, or has applied for Summary Judgment but the Court declined it, after filing the Declaration and Affidavit, the debtor is given time to file a Plea and Affidavit. These set out the grounds of the debtor's defence.
- f) Thereafter, the creditor may file a Replication, which answers the contents of the Plea filed by the debtor. This is the last pleading.
- g) After pleadings are closed, the parties embark on Judicial Case Management, a process in which the parties explore possibilities of settlement and prepare for trial.
- h) If the parties cannot settle their dispute, the matter is enrolled for trial, a process in which witnesses give oral evidence before a judge who then makes a determination.
- i) If judgment is given in favour of the creditor, the debtor is compelled to pay the debt failing which, a Writ of Execution may be obtained to attach and auction the property of the debtor.

The process above doesn't always go on such a predictable path. So next time you lend someone money, just think about what you may have to go through to recover it.