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LEGAL ACTION AND DEBT ENFORCEMENT

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Legal action and debt enforcement

Legal action is a worrisome consequence of not paying your debts, and is one where you no longer have control over your own financial affairs because your credit providers have been forced to take action against you.

Once you have been in default under a credit agreement for at least 20 business days, and you have failed to take one or more of the following steps:

- no action has been taken to bring your payments up to date;
- you have not made any contact with your credit providers to negotiate a new arrangement;
- you have been unable to stick to a new payment arrangement;
- you have not responded to a Section 129 letter of demand and at least 10 business days have passed since the credit provider delivered the notice; and/or
- you have not taken any steps to get yourself out of debt, such as applying for debt review or administration; then

the credit provider can seek to recover the money by taking legal action or taking you to court. If the loan is secured, the credit provider can also obtain permission from the court to sell the asset that was provided as security and can recover any amount still outstanding after the sale.

The following paragraphs provide a summary of all legal action that can be taken against you by the credit provider when you are in default of your credit agreement. An overview of the process is shown below.



Learn more

If you do not respond to the letter of demand, the credit provider may send an agent to your home or workplace with your agreement, to ask you to sign one of the following documents:

- A Section 57 of the Magistrates' Court Act **Acknowledgement of Debt**, where you admit that you owe the money (the amount will be stated), and sign a document where you promise to pay monthly instalments of the stated amount. You also agree that if you default (do not pay) on any instalment as agreed in the Acknowledgement of Debt, the credit provider may take the signed documents to court, and take judgement against you.
- A Section 58 of the Magistrates' Court Act **Consent to Judgement**, where you agree that judgement may immediately be taken against you and that you agree to make regular payments on your judgement debt.

The difference between a Section 57 and 58 agreement is that with a Section 57 agreement you get a second chance. In other words, if you keep to the payment arrangement the creditor will not proceed with judgement against you, and your record stays clean. With a Section 58 agreement, you have agreed to the judgement because you don't want to deal with lengthy court processes, which means that judgement will stand on your record until the earlier of 5 years or until the judgement is rescinded by a court or abandoned by the credit provider. When the judgement debt is paid in full and the credit provider informed the credit bureaus of such, the judgement listing will be removed within 7 days.

Summons and judgement

Once a credit provider has decided to take legal action, and you have failed to act on a Section 129 letter of demand, instead of sending an agent to visit the consumer to sign a S57 or S58, the debt collector or lawyer acting on behalf of the credit provider can get a sheriff of the court to serve you with a court summons – usually at home or at work or at the address you provided in the original contract. If you receive a summons, you have a limited number of days to respond, and state whether you will defend the action or not. If you fail to defend the action, the credit provider may still get judgement against you for the payment of your debt or attachment of your property.

Remember that any legal action will be at your expense. Everything a credit provider does in order to enforce the credit agreement (phone calls, letters, and lawyer fees) will be charged to you. That means your debt will be increasing.



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So you should only allow the matter to go to court if you feel you have a case to defend, otherwise contact your credit providers' attorney immediately and see what arrangement can be made in order to avoid judgement being taken against you.

If you decide to defend the matter, you must then decide whether or not you want an attorney to represent you, and this is a bigger cost. You can also defend the matter yourself, but this is not advisable and the legal processes can be lengthy and very difficult. You should really try to resolve the problem before it gets to the judgement stage, or accept the judgement if you owe the money.

It can cost you a lot if an account is handed over to a legal collections department. You not only have to pay the original debt, but also all the extra interest, and extra charges to attorneys, to debt collectors and to sheriffs.

Take Note



Forced sequestration is when one or more credit providers apply to the court to have you sequestrated because it is in the best interests of all credit providers. The court will then attach all assets and sell them to settle all debts.

Once a debt forms part of a sequestration, credit providers must accept whatever payment they get from the sale of your assets. They cannot take any further legal action against you to demand any payments from you on the shortfall.

Learn more



A consumer may at any time, before the credit provider has cancelled the agreement, **remedy a default** by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.

That means that where an asset, like a vehicle, has been attached, you can – if you pay the arrears – still get the asset back and have the credit agreement reinstated.

If the credit provider has cancelled the agreement, the asset can only be returned to you by settling the total debt in full.



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Execution process

The execution process is the process used to collect the outstanding debt, and is usually in the form of a court order to pay back a judgement debt through an emolument attachment order (EAO) or an attachment and sale of assets to recover the monies.

Where the credit provider has received a judgement for the attachment of goods, a warrant of execution against your property will be issued as soon as possible. The sheriff, with the judgement, will be able to attach moveable property or goods and remove them to a place of storage until the assets can be sold at a public auction (sale in execution). Basically the sheriff may remove anything of value from the premises, except for some necessary property that is excluded under the Magistrates' Court Act.

- If you have a bond where the house is the security for the loan, the house will usually be attached first and sold, and you will be liable for the shortfall.
- However, for unsecured credit, like loans and credit facilities, credit providers will usually attach your home as a last resort, and rather take steps to attach or garnish your salary.
- Goods are seized and then sold at an auction.
- If the amount received from the sale is not enough to settle the account, the credit provider may proceed to recover the outstanding balance from you. The credit provider can approach the court to obtain a further execution order against you; such as an EAO or even an order to sequester your estate.

Take Note



An EAO is only served on your employer and not on you. It is important to note that an employer may not take disciplinary action against an employee because he or she has been served with an EAO. You should also note that an EAO must be issued from a court closest to where your employer runs its business.

FAQ

What is an emolument attachment order (EAO)?

This is one of the ways in which a debt is collected from the consumer after judgement is granted, and is used **only as a last resort**. The EAO is sometimes incorrectly referred to as a **garnishee order**.

Here the court orders the consumer's employer to deduct the amount owed in specified instalments from the consumer's salary and then to pay the instalments over to the credit provider. The employer is known as the emoluments attachment debtor or garnishee.

It is unlawful for the employer to refuse to deduct the money. If an employer refuses, the EAO can be executed against the employer. Your employer can charge up to 5% commission for managing the EAO.

You may apply to the court to have the EAO amended or rescinded if you can show that you are left with insufficient means to support yourself and your family.



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May a sheriff attach property belonging to a third party on the premises occupied by the consumer?

FAQ

Property found in the possession of the consumer may be attached. There is an assumption that such property belongs to him or her. If the property belongs to a third party, written evidence in the form of an affidavit by the alleged owner, along with the documentary proof, must be supplied to the sheriff.

Learn more

Credit bureaus keep both positive and negative (adverse) information on consumers, and they make this information available to credit providers, debt counsellors, or employers when requested, and with your permission. The National Credit Act and Regulations stipulate the **retention of specific consumer information**, as well as how long adverse information can be reflected on your credit profile.

Adverse information is information relating to consumer behaviour and includes classifications such as “delinquent”, “default”, “slow paying”, “absconded”, and “not contactable”; and actions such as “handed over for collection or recovery”, “legal action”, and “write-off”.

No **adverse information** regarding a credit agreement may be retained by a credit bureau once all arrears owing under that agreement is settled. Upon settlement of the amount in arrears, the credit provider must advise the credit bureaus that the arrear amounts have been settled, and the credit bureau must update the consumer’s credit records within seven days of being notified as such.

That means if you have paid up a judgement debt, or you have settled other arrears, and it is still reflected on your credit report, you can contact a credit bureau directly to dispute the incorrect or outdated information. You may contact any of the credit bureaus on the numbers below for enquiries relating to the removal of adverse information and paid-up judgements:

- TRANSUNION – 086 148 2482
- EXPERIAN – 086 110 5665
- XPERT DECISION SYSTEMS (XDS) – 086 112 7334
- COMPUSCAN – 086 151 4131
- CONSUMER PROFILE BUREAU – 086 726 5183