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# The Obiter Dicta

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*"We welcome your feedback and comments"*

# Execute, before it's too late.

In 16th century Holland, a rule of practice developed whereby the executability of judgment debts lapsed after a certain period of time. This development, effectively, marked the birth of what we know today as the superannuation of judgment rule.
According to the superannuation of judgment rule, after the lapsing of a certain period of time, a judgement becomes superannuated and execution can only be carried into effect if the judgment is revived. In simple terms, the superannuation of judgment can be described as when a judgment becomes too old to use and thus becomes 'of no use'.

The purpose of superannuation was somewhat plain: to prevent a judgment debtor from being taken by surprise by a Plaintiff who suddenly decides to execute, even after the lapsing of many years. The rule was thus introduced for the benefit of a debtor, who, however, could waive it.

Debate has existed as to whether the superannuation rule is still applicable in our law, in Zimbabwe. Historically, superannuation was provided for in our law in Order 49, Rule 448 of the High Court Rules, 1971, which provided that judgments became superannuated after six years. After that, such judgments would need to be revived by the Court on notice of motion to the debtor.

This Rule, however, was repealed by Statutory Instrument 80 of 2000, thus lending the question of whether superannuation remained applicable in our law.

This question was aptly elucidated in the recent judgment, by Mafusire J, in Nzara & Others v Kashumba & Others. The matter in Nzara involved over sixteen years of complex and arduous legal wrangling. At the centre of the dispute, was the question of whether an agreement of sale for an immovable property, between the first applicant and the Late Dzingayi Kashumba, was ever duly cancelled. The applicants contended that it was, whilst the first respondent contended that it was not.

A key point of contention, that formed the substance of the dispute, was whether the transfer of the property, on 3 May 2006, on the basis of a court order granted on 9 May 2001, was proper, especially in light of the superannuation rule. Various counter submissions were made as to both the applicability and inapplicability of the rule in our law.
In coming to his decision, the learned Judge took into account two main considerations.

Firstly, the learned Judge took into consideration the fact that the superannuation rule was an expression of the Roman-Dutch common-law position , as affirmed in Segal and Another v Segil. By virtue of Section 192 of the new Zimbabwean Constitution, as read with Section 89 of the old Constitution, Roman-Dutch is also our common-law . As such, upon the repeal of Order 49, Rule 448, the common-law position revived, thus making the superannuation rule still part of our law. The period of superannuation, in line with such common-law position, was further established as being three years.

In support of this position, the learned Judge, further, took into consideration the continued existence of Order 40, Rule 324 of the High Court Rules, 1971 in our law, even after the repeal of Rule 448. Rule 324 explicitly provides that that no writ of execution shall be issued after a judgment has become superannuated, unless that judgment has first been revived. The remnants, therefore, of superannuation were not completely extinguished upon the repeal of Rule 448, but remained in our law.

Of relevance is, of course, the Prescription Act [Chapter 8: 11], which dictates that judgment debts lapse after a period of thirty years. This was further considered in Nzara, wherein the learned Judge observed that prescription and superannuation are different concepts. Whilst prescription constitutes an absolute bar to claim, superannuation refers to something that may just be too old to be used, but may be used after revival. Prescription, therefore, was rightly deemed immaterial, in the context of superannuation.

Ultimately, in Nzara, it was held that the transfer of the property on 3 May 2006, on the basis of a court order granted on 9 May 2001, was incompetent as the court order of 9 May 2001 had superannuated after the lapsing of the three year period.
It is, therefore, clear that the superannuation of judgment rule remains applicable in our law, on the basis of both common-law and the provisions of our Rules.

What is debatable, however, is whether the rule continues to serve any purpose. Questions have been posed as to whether a debtor who knows that judgment was given against him can really be taken by surprise; and further whether a debtor who fails to pay can really complain that the timing of the execution process has not met his financial convenience. These are undoubtedly valid questions which, thus far, remain unanswered.

Despite them, the validity and applicability of the superannuation of judgment rule in our law remains unquestionable, at least for now.

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# Execute, before it's too late.

**INTRODUCTION**

As the world becomes more of a global village coupled with the harsh economic conditions that have befallen this country since the turn of the Century, many Zimbabweans have resorted to migrate elsewhere in search of "greener pastures". This has resulted in People Moving to countries like the United Kingdom, the United States of America, Australia, Canada and our neighbouring South Africa. Many of these Zimbabweans since moving have acquired citizenship or permanent residence in those respective countries and some have even gone before the courts and received judgments particularly pertaining to matrimonial issues. The problem In this brief article I seek to address the registration and enforcement of a Foreign Judgment in the courts of the Republic of Zimbabwe.

**THE LAW**

1. From the onset it must be stated that a foreign judgment constitutes a separate cause of action in Zimbabwe. In the case of Wheeler v Egglestone HH 99-16 the court stated that:

"…a foreign judgment cannot be enforced without invoking internal processes. An individual or entity cannot come into the country brandishing a foreign judgment and run the breadth and width of the country seeking to enforce or execute the judgment on his own."

2. The issue of registration of a foreign judgment is regulated by the Civil Matters (Mutual Assistance) Act [Chapter 8:02]

3. Accordingly in 1995, the Civil Matters (Mutual Assistance) Act [Chapter 8:02] came into force in Zimbabwe. According to the long title, the Act was enacted inter alia, "to provide for the enforcement in Zimbabwe of civil judgments given in foreign countries and territories". However, such foreign judgments can only be enforced after the process of 'registration' as provided for in terms of the Act. Further, there is a peremptory requirement that such judgments should emanate from one of the designated countries as specified in the Civil Matters (Mutual Assistance) (Designated Countries) Order, Regulations of 1998 published in Statutory Instrument Number 9 of 1999. The countries are Australia, Bulgaria, Germany, Portugal, South Africa, Italy, Zambia and Slovak Republic.

4. The process of registration shall be set out below.

5. In terms of Section 5 of the Civil Matters (Mutual Assistance) Act application for registration can be done as provided below:

5. Application for registration of foreign judgment

(1) Subject to subsection (2), a judgment creditor under a judgment given in a designated country may apply to an appropriate court for the registration of that judgment in the appropriate court.

(2) An application under subsection (1) for the registration of a judgment—

(a) may be made at any time within six years after—

(i) the date of the judgment; or

(ii) the determination of any proceedings by way of appeal or review, where such proceedings have been instituted in respect of the judgment; and

(b) shall be made in the form and manner prescribed in rules of court applicable to the appropriate court.

6. After the application for registration has been completed the Court can either grant or deny the application. Section 6 which provides for this is set out below:

6 Grant or refusal of application

(1) Subject to this section, in an application under section five, an appropriate court shall direct the registration of the judgment concerned if the court is satisfied that it is just and convenient for the judgment to be enforced in Zimbabwe.

(2) An appropriate court shall not direct the registration of a judgment if the court is satisfied that—

(i) the court or tribunal that gave the judgment had no jurisdiction to do so; or

(ii) the judgment is not a final and conclusive judgment of the court or tribunal concerned; or

(iii) the judgment could not be enforced wholly or partly by execution in the designated country in which it was given; or

(iv) the judgment has been set aside by a court of competent jurisdiction; or

(v) the judgment has been wholly satisfied; or

(vi) the judgment has become prescribed under the law of the designated country in which it was given; or

(vii) enforcement of the judgment would be contrary to any law or to public policy in Zimbabwe; or

(h) the judgment is for the payment of—

(i) any tax, duty, rate or similar charge; or

(ii) a fine or other penalty; or

(iii) maintenance for any person; or

(i) the judgment was obtained by fraud; or

(j) the applicant is not a judgment creditor vested with a right to seek enforcement of the judgment; or

(k) the judgment debtor, as defendant in the proceedings that gave rise to the judgment, was not able to appear and defend the proceedings because he did not receive reasonable notice of them.

**CONCLUSION**

7. It is evident from the provisions above that a foreign judgment can only be enforced after the process of registration. This procedure is very important to all those seeking that the judgments they receive become executable in Zimbabwe. However it should also be noted that this is only applicable to

those so called Designated countries. Unfortunately at present this has the effect of limiting Diasporans who are in countries such as Canada, Britain and other countries which do not qualify as Designated Countries. This is definitely an area which the Legislature must consider looking into as time moves on. Doing so would definitely not be unreasonable at all as we have a considerable number of Zimbabweans living outside its borders in countries far and wide.

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## JOKE OF THE MONTH

*Judge: You stated that the stairs went down to the basement, is that correct?*
*A: Yes.*
*Judge: And these same stairs, did they also go up?*

## Disclaimer

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