MUNICIPAL LAW

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The Risks of Municipal Acknowledgements of Debt

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INTRODUCTION

For a property owner facing the threat of municipal disconnection, an Acknowledgment of Debt (**"AOD"**) can seem like an attractive solution when the municipality alleges that a substantial amount is outstanding. Faced with the inability to settle the full amount immediately, the property owner may be offered an AOD, which allows the alleged debt to be repaid in instalments.

But there is another question that is often overlooked: What exactly is the property owner acknowledging?

An AOD is not necessarily a harmless payment arrangement. Depending on its wording and circumstances, it can have significant consequences for prescription, existing disputes and the debtor's future legal position.

AN AOD IS A LEGAL INSTRUMENT

Section 14 of the Prescription Act 68 of 1969 (**"the Prescription Act"**) provides that prescription may be interrupted by an express or tacit acknowledgment of liability. That principle makes an AOD particularly significant where the underlying municipal debt is historic.

Consider a municipality claiming R1 million. The property owner disputes R600,000 on the basis that: the municipality applied an incorrect tariff; the amount includes historical charges; payments were incorrectly allocated; or the account contains duplicate charges. The municipality nevertheless requires an AOD acknowledging the full R1 million.

The property owner may believe that they are simply agreeing to pay the amount over time. Legally, however, the wording may amount to something much more significant. Therefore, it is important that the property owner make clear that the AOD is being entered into under protest where the outstanding amount includes disputed amounts.

South African courts have considered the effect of acknowledgments of debt in a number of decisions. In **Absa Bank Ltd v Erasmus 2007 (4) SA 48 (SCA)**, the Supreme Court of Appeal confirmed that an unqualified acknowledgment of debt interrupts prescription, even where the debtor did not intend to waive a defence. Similarly, consent-to-judgment clauses in AODs have been held to be enforceable, provided they are not contrary to public policy (see **Schierhout v Minister of Justice 1926 AD 99** and, more recently, the approach in **Barkhuizen v Napier 2007 (5) SA 323 (CC)** regarding the enforceability of contractual clauses). Property owners should therefore be alive to the possibility that a broadly worded AOD may have consequences well beyond the immediate payment arrangement.

AN AOD SHOULD NOT AUTOMATICALLY ERASE A DISPUTE

There is a significant difference between "I acknowledge that I owe R100,000 and agree to pay it over 12 months" and "I dispute the account but agree to pay an interim amount while the dispute is investigated."

A carefully drafted agreement should identify whether the parties are admitting liability, compromising a dispute, making an interim payment arrangement, reserving rights or settling the underlying dispute completely.

Property owners should be particularly cautious where an AOD contains provisions stating that the entire municipal balance is admitted, prescription is waived, all defences are waived, the municipality may obtain judgment immediately upon default, or the underlying account cannot be disputed in the future. Such provisions may materially change the property owner's position.

THE DISCONNECTION DILEMMA

The problem becomes particularly acute where the property owner is facing disconnection. A property owner may perceive limited practical alternatives where the consequence of not signing is the potential disconnection of electricity or water services. Municipalities have statutory powers to enforce payment of legitimate municipal debts, but those powers must be exercised within the framework of the Local Government: Municipal Systems Act 32 of 2000 (the **"Systems Act"**), applicable credit-control policies and constitutional principles.

In this regard, section 27 of the Constitution of the Republic of South Africa, 1996 guarantees the right of access to sufficient water, and section 26 protects the right of access to adequate housing, which has been interpreted to include access to basic municipal services. The Constitutional Court's jurisprudence, including decisions such as **Mazibuko v City of Johannesburg 2010 (4) SA 1 (CC)**, has affirmed that disconnection of essential services must be lawful, procedurally fair and proportionate. A municipality may not use the threat of disconnection to coerce a property owner into waiving legitimate disputes.

Where a property owner intends to continue disputing part of a municipal account, that intention should be recorded expressly and unambiguously in the agreement. Merely describing an AOD as being signed "**under protest**" may not, without more, adequately protect the property owner's position.

The agreement should, where appropriate, identify the disputed amount, record the basis of the dispute and state expressly that the payment arrangement does not constitute an admission of liability in respect of the disputed charges and does not constitute a waiver of any rights or defences available to the property owner.

The above being said, it is the writers experience that municipalities have their standard AOD and refuse to accept same, if the signatory attempts to make any changes thereto. The property owner can try and insist that any of the below clauses be inserted into the AOD, but if this is the only manner in which you can stop a disconnection or ensure the reconnection of services, it is practically understandable that you may not want to push this aspect. If the municipality in question has made it clear that it is unwilling to accept any changes to its AOD, please immediately after signature (or preferably before signature) address correspondence to the municipality advising of the dispute and the reasons for entering into the AOD and that same is being entered into under protest. That way, even if you cannot add any clause to the AOD noting your dispute, you are still preserving your rights with the municipality and it becomes clear that the AOD was only entered into for the purposes of stopping a disconnection or a reconnection and not because you do acknowledge the amounts set out in the AOD. (This is of course only applicable where there is a valid dispute with regard to the outstanding amounts).

WHAT SHOULD PRACTITIONERS LOOK FOR?

Before advising a client to sign a municipal AOD, practitioners should consider the following:

1. Whether the underlying debt has been verified - The practitioner should confirm that the municipality's account is accurate and that the balance has been reconciled against available records, meter readings and payment history.

2. Whether the age of each component has been considered - Municipal accounts often include charges spanning several years. Each component should be assessed individually, as older charges may be subject to prescription.

3. Whether any part of the debt has prescribed - Debts arising from municipal services generally prescribe after three years under the Prescription Act. If any component is older than the applicable prescription period and has not been interrupted, it may no longer be enforceable.

4. Whether the account has been formally disputed - If a dispute has been lodged, the practitioner should confirm whether it has been acknowledged, investigated or resolved by the municipality.

5. Whether the AOD acknowledges the entire balance - An AOD that acknowledges the full outstanding amount, including disputed portions, may prejudice the property owner's position in any subsequent challenge.

6. Whether it contains an express acknowledgment of liability - An express acknowledgment may interrupt prescription and may be relied upon by the municipality as an admission in subsequent proceedings.

7. Whether it waives any defences - Some AODs include clauses purporting to waive all defences. Such clauses may deprive the property owner of the ability to raise legitimate challenges.

8. Whether it provides for judgment upon default - A consent-to-judgment clause allows the municipality to obtain judgment without further litigation if the debtor defaults. The implications of such a clause should be carefully explained to the client.

9. Whether it is intended to settle the dispute or merely to facilitate payment - There is a material difference between a settlement (which extinguishes the underlying dispute) and a payment arrangement (which addresses cash flow without resolving the merits). The practitioner should ensure that the AOD accurately reflects the parties' intention.

CONCLUSION

Whilst an AOD may appear to be a straightforward payment arrangement, its legal effect may extend considerably further. It can affect prescription, admissions of liability and future litigation. The critical question for any debtor is what they are legally acknowledging by signing the document. For municipalities, AODs should likewise be used as instruments of legitimate revenue recovery rather than as a substitute for resolving genuine billing disputes.

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