

# Rescinding a court judgment

## Must be within 20 days of default award

WHEN magistrates' court judgment is given by default, it means that the court has decided in favour of the plaintiff (e.g. landlord / landlady).

Let us take the case of a landlord who issued summons for unpaid rentals and cancellation of the lease contract.

The tenant when served with summons has five days to enter his or her intention to defend the landlord's court action.

If the tenant agrees with the landlord's claim then he or she does not defend the action but consents to judgment.

If the tenant denies having received the summons, the sheriff's return of service (discussed in last week's article on January 29, 2008) will be used in support of how the summons was served.

Should the tenant fail to defend the summons within five days, the landlord's attorney may make a written request to the clerk of the court, with the original summons and the sheriff's return of service, for judgment against the tenant.

The default refers to the failure on the tenant's (defendant) to inform the court that he or she intends to challenge the court action.

A tenant may believe that it is not necessary to defend the landlord's summons. The basis of the landlord's claim in the particulars of claim is groundless: the claim for arrear rental may be incorrect or false; the reasons for cancelling the lease are not justified or unlawful.

Or the defendant referred to in the summons is not the tenant and this may lead the tenant to conclude that it is not necessary to defend the action.

The landlord / landlady may not be aware that the defendant is not the tenant and may for good reason or acting in bad faith claim arrear rentals.

However, by instructing the clerk of the court to grant judgment in his or her favour in the absence of the summons being defended, the defendant is considered to be in default and judgment as requested by the plaintiff is granted.

It is vital to seek legal advice so that an action is defended immediately.

### Default Judgment

Whatever the court has granted in favour of the claim(s) made by the plaintiff can be executed against the defendant. The plaintiff's (landlord / landlady) claim for arrear rentals and the ejection of the tenant and all occupants from the dwelling will be carried out on further instructions from the landlord to the sheriff (warrant of execution).

### Cancelling or staying of a default judgment

The defendant who was wrongly sued, within 20 days of having knowledge that a default judgment was made against him / her, can approach the court to have the default judgment rescinded or varied. It is a requirement that all application and court processes must comply with the Magistrates' Courts Act 32 of 1944 (as amended) and must follow certain rules.

The tenant (defendant) who wants to have the default judgment rescinded or stayed must follow certain procedure. He or she will have to file an application in court and on all parties to the court proceedings (e.g. the plaintiff).

The tenant must set out the reason(s) in an affidavit when making an application to court to consider rescission of the judgment and must show good cause in his or defence to the landlord's claims. The landlord is given the opportunity to defend the rescission application to inform the court why the default judgment should not be cancelled or changed. If the magistrate is satisfied that good cause exist, the default judgment will be set aside.

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