

**PROPOSED AMENDMENT TO RULE 12(5) –
MICRO-LENDING TRANSACTIONS**

The Magistrates' Courts Committee proposes that Rule 12(5) of the Magistrates' Courts Rules be amended to require clerks of court to refer to a magistrate all applications for default judgment arising from a money lending transaction in terms of an exemption promulgated under section 15 of the Usury Act, Act 73 of 1968.

This requirement has long applied where the application for default judgment arises from a transaction governed by the Credit Agreements Act, 1980 (Act 75 of 1980), which has as its object the protection of consumers. Micro-lending transaction in terms of an exemption promulgated under section 15 of the Usury Act, Act 73 of 1968 are governed by regulations which are intended to protect the lender and it is important that these regulations be enforced by the Magistrates' Courts, to which thousands of applications for default judgment in respect of such transactions are made each day.

Justice College has been training clerks of the court to consider these applications, but finds that, without the benefit of a law qualification, the clerks have difficulty in dealing with the complex issues which arise.

If this amendment is enacted, clerks will still be able to consider the applications and raise queries, but will have to send them to a magistrate when a decision needs to be made as to whether to grant or refuse the application for default judgment. It is important to note that a clerk of the court may not, in any event, refuse an application for default judgment.

SUGGESTED AMENDMENT OF RULE 12

[] Expressions in **bold type in square brackets** indicate **omissions** from existing rules.

Expressions underlined with a solid line indicate insertions into existing rules.

12 Judgment by default

(1) (a) If a defendant has failed to enter appearance to defend within the time limited therefor by the summons or before the lodgment of the request hereinafter mentioned, and has not consented to judgment, the plaintiff may lodge with the clerk of the court a written request, in duplicate, together with the original summons and the return of service, for judgment against such defendant for-

(i) any sum not exceeding the sum claimed in the summons or for other relief so claimed;

(ii) the costs of the action; and

(iii) interest at the rate specified in the summons to the date of payment or, if no rate is specified, at the rate prescribed under section 1(2) of the Prescribed Rate of Interest Act, 1975 (Act 55 of 1975).

(b) (i) If the defendant has entered appearance to defend, but has failed to deliver a plea within the time limited by rule 19 or within any extended time allowed, the plaintiff may deliver a notice in writing calling upon the defendant to deliver a plea within five days of the receipt of such notice, and, on failure of the defendant to deliver his plea within that period or within such further period as may be agreed between the parties, he shall be in default with such plea, and ipso facto barred.

(ii) The plaintiff may then lodge with the clerk of the court a written request for judgment in the same manner as when the defendant has failed to enter appearance to defend.

(c) When the defendant has failed to enter appearance to defend or, having entered appearance, has failed to deliver a plea within the period specified in the notice delivered to him in terms of paragraph (b) and the plaintiff has in either case lodged a request for judgment, the clerk of the court shall, subject to the provisions of subrules (2), (3), (4), (5), (6) and (7), enter judgment in terms of the plaintiff's request and if the request for judgment was lodged in duplicate notify the plaintiff by returning to him the duplicate copy duly endorsed as to the result and the date thereof.

(d) When a defendant has entered an appearance to defend but has failed to deliver a plea within the period specified in the notice delivered to him in terms of paragraph (b) and the clerk of the court has entered judgment in terms of a request lodged by the plaintiff, costs shall be taxed as if it had been a defended action.

(e) If the original summons cannot be filed together with the request for judgment as required by paragraph (a), the plaintiff may-

(i) file with the clerk of the court a copy or duplicate original of the summons on which the following certificate has been affixed by the plaintiff:

'I hereby certify that court fees have been paid on the original summons of which this is a copy or duplicate original' (as the case may be),

and a copy of the signed return of service received from the sheriff; and

(ii) file a statement together with the above-mentioned documents stating the reasons why the original summons and return cannot be filed.

(2) (a) If it appears to the clerk of the court that the defendant intends to defend the action but that his entry of appearance is defective, in that the memorandum thereof-

- (i) has not been properly delivered; or
- (ii) has not been properly signed; or
- (iii) does not set out the postal address of the person signing it or an address for service as provided in rule 13; or
- (iv) exhibits any two or more of such defects or any other defect of form,

he shall not enter judgment against the defendant unless the plaintiff has delivered written notice to the defendant calling upon him to deliver a memorandum of entry of appearance in due form within 5 days of the receipt of such notice.

(b) Such notice shall set out in what respect the defendant's entry of appearance is defective.

(c) On failure of the defendant to deliver a memorandum of entry of appearance as provided in paragraph (a), the plaintiff may lodge with the clerk of the court a written request for judgment in default of due entry of appearance.

(3) Judgment in default of appearance to defend shall not be entered in an action in which the summons has been served by registered post unless the acknowledgement of receipt referred to in rule 9 (15) (a) has been filed by the sheriff with his return of service.

(4) The clerk of the court shall refer to the court any request for judgment for an unliquidated amount and the plaintiff shall furnish to the court evidence either oral or by affidavit of the nature and extent of the claim. The court shall

thereupon assess the amount recoverable by the plaintiff and shall give an appropriate judgment.

(5) The clerk of the court shall refer to the court any request for judgment on a claim founded on any cause of action arising out of or based on an agreement governed by the Hire-Purchase Act, 1942 (Act 36 of 1942), or the Credit Agreements Act, 1980 (Act 75 of 1980), or a money lending transaction in terms of an exemption promulgated under section 15 of the Usury Act, Act 73 of 1968.

(6) If the action be on a liquid document the plaintiff shall before judgment file of record the original of such document duly stamped or an affidavit setting out reasons to the satisfaction of the court why such original cannot or should not be filed.

(7) The clerk of the court may refer to the court any request for judgment and the court may thereupon-

(a) if a default judgment be sought, call upon the plaintiff to produce such evidence either written or oral in support of his claim as it may deem necessary;

(b) if a judgment by consent be sought, call upon the plaintiff to produce evidence to satisfy the court that the consent has been signed by the defendant and is a consent to the judgment sought;

(c) give judgment in terms of plaintiff's request or for so much of the claim as has been established to its satisfaction;

(d) give judgment in terms of defendant's consent;

(e) refuse judgment; or

(f) make such other order as may be just.

(8) When one or more of several defendants in an action consent to judgment or fail to enter appearance or to deliver a plea, judgment may be

entered against the defendant or defendants who have consented to judgment or are in default, and the plaintiff may proceed on such judgment without prejudice to his right to continue the action against another defendant or other defendants.

(9) Judgment shall be entered by making a minute of record thereof.