

Setting Aside Judgment in the Magistrates Court



University of
South Australia

Legal Advice
Clinic



Welcome to the University of South Australia Legal Advice Clinic

The Legal Advice Clinic at the University of South Australia provides confidential, free legal advice.

The Clinic is staffed by law students who offer legal advice to clients under the supervision of a managing solicitor. Students are trained in professional conduct and all enquiries are treated as confidential.

The Clinic is based on the University of South Australia City West campus, offering an appointment service from Monday to Thursday. On Fridays it offers a drop-in service at the Port Adelaide Magistrates Court.

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Setting Aside Judgment

This booklet outlines the procedure and other relevant information regarding how to go about setting aside judgment in the Magistrates' Court.

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Always try to get legal advice before responding to a judgment to ensure you are aware of your legal position and options.



What is judgment and how did it get to this?

A judgment is a court's decision in legal proceedings. If the proceedings involve a claim for money, judgment against you means the court has decided that you owe money to someone and you must pay it.

Judgment can be made against you because:

- you have lost your case;
- a claim has been made and you have not lodged a defence;
- or you did not attend a court hearing.

If you have lost your case in the Magistrates Court, you may be able to appeal. Of course, in this situation you should immediately get legal advice, as there are

time limits involved. Please refer to page 9 for a list of free legal services that may be able to assist you.

Alternatively, you could contact the Law Society of South Australia on 8229 0222 and ask for a referral to a legal practitioner.

You can apply to have your judgment set aside if a judgment has been made against you because you did not lodge a defence or did not attend a court hearing.

I want to try to set aside (stop) judgment and get permission to lodge a defence. How do I do this?

To lodge an application with the Magistrates Court to try to stop the judgment, you will need a Form 21 and a Form 35. You can obtain these forms from the court registry.



You should always seek legal advice before agreeing with a claim made against you.

Examples of Form 21 and Form 35 are included in this brochure at pages 7 and 8.

Form 21 is the application to have judgment against you set aside.

Form 35 is an affidavit where you will need to explain to the court why you want judgment set aside. The court needs to know the reasons why you have not lodged your defence or why you failed to attend your hearing. You also need to state that you have a defence to the claim and explain what it is.

I do not have a defence. Should I make an application to set aside judgment?

You should always seek legal advice before agreeing with a claim made against you. You may still have a defence you are unaware of.

In cases where it is confirmed that you do not have a defence, it may not be advisable

to lodge an application to set aside judgment as you will likely face additional costs to the judgment debt.

Generally, when you have no defence, you will need to make payment of the debt to the creditor. If you refuse to accept the judgment and do not pay the sum of money to the creditor, the court may impose a period of imprisonment and you will still be required to pay the debt on your release. The creditor can also take action to sell your property.

I cannot afford to make payment to the creditor.

If you cannot afford to make payment to the creditor, you should immediately seek help from a financial counsellor, who may be able to assist you. It is always a good idea to seek financial advice before making any decision, in particular, a payment agreement with a creditor.

A financial counsellor can help you with your budget and may also contact the creditor to discuss a payment plan in relation to the debt.

To make an appointment with a financial counsellor, contact The South Australia Financial Counsellors' Association on 1800 007 007.

I have lodged my application to set aside judgment – what do I need to do now?

Once you have lodged your application to set aside judgment at the court registry, you will receive the date for your next court hearing. If the registry is unable to give you a date immediately, one will be mailed out to you.

It is important that you are well prepared before attending court. This includes knowing your court date, attending court on time and, having a copy of your application and supporting affidavit.

I have been successful in my application to set aside judgment. What is my next step?

If you are successful in your application to set aside judgment, the next step is to lodge your defence. Be sure to take a record of

what the Magistrate says in court and when you must lodge your defence.

A defence form can be obtained online at www.courts.sa.gov.au or at the court registry. Of course you should lodge the defence form within the timeframe specified by the court – usually this is 14 days from the date of judgment being set aside (stopped).

Your defence form needs to outline why you believe you do not owe some or all of the money claimed by the creditor. You should attempt to get legal help with completing your defence.

After you lodge your defence form you will receive a notice informing you of a Directions Hearing time. You must attend this hearing at the appointed time.

At this hearing, the Magistrate will listen to both sides and encourage the parties to come to an agreement.

Again, seeking legal assistance will allow you to better understand your legal position, the court process and your expected behaviour when appearing in court.

Free legal services in South Australia are listed at page 9.

What happens if I am unsuccessful in my application to set aside judgment?

If you are unsuccessful in your application to set aside judgment, you may be able to have the decision appealed. You have 21 days from the date of the decision to apply for an appeal. Of course in this situation you should immediately seek legal advice.

For an appeal, you will need to lodge a notice identifying the grounds on which the appeal is sought. For example, you will need to point to an error in the decision to refuse your application to set aside judgment.

The court that hears your appeal might set aside the judgment so that your case can be heard in the Magistrates Court. It will depend on the particular circumstances.

Guides to Forms 21 and 35

Guides to Forms 21 and 35 are located on pages 7 and 8 of this brochure. Instructions for what is required are printed in red. It is important you fill out a new form with no visible red text. You can get these forms at a court registry or on the Courts Administration Authority website at www.courts.sa.gov.au.

These guides may assist you in completing the forms yourself if you are unable to obtain legal help from the free legal services on page 9.

You should attempt to obtain legal advice with regard to your matter. Self-completion of these forms is a last resort.



A Magistrate must be convinced that you have a defence to the claim that has been made against you.

Form 21

Form 35

MAGISTRATES' COURT [CIVIL DIVISION] SOUTH AUSTRALIA
APPLICATION
TRIAL COURT

ACTION No of

*The court you are in
Example: Port Adelaide Magistrates Court*

The action number is found at the top of your summons or ask at the court registry

Address: Phone No.

*This is the court's address and phone number
The details for Port Adelaide Magistrates Court are:
Address: 260 St Vincent Street
Port Adelaide South Australia 5015
Telephone: 61 8 8204 2444*

PLAINTIFF *The name of the person claiming money from you. This can be found on the summons.*

DEFENDANT *Write your full name.*

* Have you made a previous Application for this Order? Yes/No

*Cross out yes if this is the first time you are making this application to have judgment set aside OR
Cross out no if you have tried to have judgment set aside before.*

An APPLICATION by the REGISTRAR/PLAINTIFF/DEFENDANT
(delete/other - specify)

(Cross out Registrar and Plaintiff, as you are the Defendant in this application)

will be heard on the day of 20 at am/pm (delete) at the TRIAL COURT for an order as follows :- (specify order sought)

This is where you write the orders you would like the court to make.

When the dispute is about debt and you want an opportunity to defend the claim, you should write:

- "1. The judgment against the defendant be set aside and the defendant be given leave to enter a defence.*
- 2. Any other order this Honourable Court deems fit."*

If you fail to attend within 15 minutes of the appointed time the action may be determined in your absence.

You must attend court at the time you were given, if you don't the likely result is that you will lose your application. If you cannot make the time given to you, you must tell the court as soon as possible.

All parties have the right to attend and to be heard.

YOU MUST FILE AND SERVE AN AFFIDAVIT EXPLAINING WHY YOU ARE SEEKING THESE ORDERS.

You must fill out Form 35 which is the affidavit explaining why you want the judgment against you to be set aside

Signed by applicant..... *You must sign here.*

DATED..... *You must date here at the time of signing.*

ORDER OF THE COURT

MAGISTRATES' COURT (CIVIL DIVISION) SOUTH AUSTRALIA

AFFIDAVIT

TRIAL COURT

ACTION No of

*The court you are in
Example: Port Adelaide Magistrates Court*

The action number is found at the top of your summons

BETWEEN *The person claiming money from you
(this can be found on the summons)*

PLAINTIFF

and

Your full name

DEFENDANT

I.....*Your full name, current address and occupation*

Example: I, John Smith of 12 First Street, Citizenville, SA, Painter

** make oath and say/affirm:

- 1. I am the defendant in these proceedings and refer to my application to set aside judgment.*
- 2. I did not file a defence to the plaintiff's claim within 21 days because: (list why you did not file a defence)/ I did not attend the court hearing because:.*

Some possible reasons may be:

- You did not receive the summons/court documents advising you of your hearing
- You did not know how to fill in a defence or where to get help.
- Health Issues. If relying on this defence, you will need demonstrate that these issues had a serious impact on your health (example: a written note from your doctor), or required a time of hospitalisation,.

4. I do not owe (or owe some of the money claimed) by the plaintiff because:

You need to explain what your defence – some possible reasons may be:

- The plaintiff contributed to his/her loss by failing to
- The plaintiff breached our agreement by
- The plaintiff has failed to reduce his/her loss because....

SWORN (or AFFIRMED) by the

Above named

Your full name

at *Time*

Your Signature

this *date* day of *Month* 20 *Year*

.....

(Signature, name and title of person who is a witness to this affidavit)

Free Legal Services

The following is a list of free legal services available in South Australia:

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South Australian Council of Community Legal Centres

t +61 8 8342 1800

f +61 8 8342 0899

www.saccls.org.au

Legal Services Commission of South Australian

Telephone Advice:

Monday to Friday 9am-4.30pm

t +61 8 8463 3555

www.lsc.sa.gov.au

Child Support Help Line:

t +61 8 8463 3576

Legal Help Line (Country callers):

t +1300 366 424

Duty Solicitor

Duty solicitors can be found at each of the metropolitan magistrates courts in South Australia and offer a drop-in service.

To speak to a financial counsellor contact:

The South Australia Financial Counsellors Association

t +1800 007 007

financialcounselling@safca.info

Disclaimer

This material contains general information only. It does not contain legal advice and you should not rely on the general information for advice about any specific legal problem. You should see a lawyer for specific advice about your legal problem.

Care has been taken to ensure that the information contained in this material is correct at the time of publication, but no responsibility will be accepted for any errors or omissions.

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