

## CURRENT CASE LAW OF THE BRAZILIAN SUPREME COURT REGARDING ARTICLE 523, § 1, OF THE CPC MAY SHORTEN PROCEEDINGS IN EXECUTION PHASE

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The current understanding of the Superior Court of Appeals (STJ) regarding the best interpretation of the concept of payment contained in Art. 523 of the Code of Civil Procedure (CPC) and regarding the effectiveness of the judicial deposit of the amount executed as a way to eliminate the fine, the fees of Art. 523, § 1, of the CPC, and the other late charges may increase the efficiency of the execution phase of the proceeding. By creating economic incentives for debtors to spontaneously comply with their obligation, the understanding in case law that has been crystallizing in the Supreme Court seeks to induce debtors to evaluate the cost/benefit of challenging the execution of judgment. The objective is to try to limit discussions at this stage to cases where debtors believe they have a good enough claim to justify taking the financial risks associated with his resistance to complying with the judgment.

Art. 523, head paragraph and § 1, of the CPC sets the period of 15 days for voluntary payment by debtors of the amount established by a creditor in the petition initiating the execution of judgment, under penalty of a fine of 10% and attorneys' fees for loss of suit to the same percentage of 10% over the value of the principal obligation. After this period, with or without attachment and regardless of new summons, a new time period of 15 days begins for the presentation of a challenge to execution of judgment, pursuant to Art. 525 of the CPC.

Thus, the timeline established by the legal text provides that debtors, before challenging the execution of judgment, must effectively make payment of the debt within the time limits stipulated by the creditor or risk seeing their debt automatically increased by 20%, due to the application of a fine and attorneys' fees. This is because, according to the current case law of the Supreme Court, the judicial deposit for the purpose of guaranteeing the judgment does not avoid the application of the fine of Art. 523, § 1, of the CPC, while the existence or the value of the debt for definitive execution of judgment is under discussion.

Justice Nancy Andrighi found, when deciding Special Appeal No. 1.834.337/SP, that there "are two criteria to be said of the application of the fine provided for in Article 523, § 1, of the CPC: the summons for payment or resistance manifested in the suit for execution of judgment. These two criteria are linked to the technical requirements of the procedural rule, since they deny or the period of 15 business days set out in head paragraph or voluntary action of payment". In other parts, it attests that "the fine referred to in Art. 523 of the CPC shall be excluded only if the judgment debtor voluntarily deposits the amount due in court, **without conditioning its withdrawal on any discussion**" and that "there needs to be effective resistance by the debtor through the filing of an objection to then authorize the application of the fine of § 1 of Art. 523".

Analogous reasoning is applied by the understanding established by the STJ, which, in Precedent 517, established that "attorneys' fees are due in the execution of judgment, whether or not there is an objection, after the deadline for voluntary payment, which begins after the summons of the lawyer of the judgment debtor".

That is, unless the debtor voluntarily pays the debt – without contesting it – the legal fine of 10% will be levied, in addition to fees for loss of suit, also stipulated at 10% over the amount of the debt. The resistance of the debtor who does not spontaneously comply with the judgment may generate more work for the creditor's lawyer, either to litigate the issues brought in the objection or to locate assets that can be executed to pay off the debt.

Added to this is the fact that, recently, the Supreme Court has also been reviewing the case law until then predominant in relation to the effect of the judicial deposit of the amount executed, to suppress the legal burden of the arrears.

In 2014, the STJ had set, in judgment of the special appeal representing controversy No. 1.348.640/RJ<sup>[1]</sup> topic 677, to the effect that "in the execution phase, **judicial deposit of the amount (in whole or in part) of the judgment extinguishes the debtor's obligation**, within the limits of the amount deposited." At the time, the plea adopted by the Supreme Court and crystallized in Topic 677 was that, after the deposit of the amounts, the responsibility for the remuneration of the amount would be transferred from the debtor to the depository financial institution. Thus, the creditor who potentially wanted to compensate himself for the difference between the amount of the judicial deposit – adjusted for inflation by the saving account rate – and what would be paid to him, under the enforcement order, should make an application against the bank that maintained the judicial deposit, in the case in which the amounts were deposited.<sup>[2]</sup>

However, recently, a question of order was received under Special Appeal No. 1.820.963/SP<sup>[3]</sup> in the Third Panel of the STJ, to establish a review procedure for Topic 677, aiming to define: "if, in the execution, the judicial

deposit of the amount of the obligation, with the consequent application of interest and adjustment for inflation borne by the depository financial institution, exempts the debtor from the payment of the charges arising from the default, provided for in the judicial or extrajudicial enforcement order, regardless of the release of the amount to the creditor."

Despite the controversy surrounding the previous understanding of the STJ – which assigned to the depository institution the burden arising from a legal relationship to which it was never a party – it is a fact that the proposal to review the jurisprudential topic 677 – which may be assigned to the debtor who deposited the amount executed the responsibility for payment of the difference between the adjustment rates of the judicial deposit and those contained in the enforcement instrument<sup>[4]</sup> – it may encourage the debtor to make voluntary payment of the debt or, at the very least, not delay the discussion indefinitely in the enforcement of judgment, just because it has secured the enforcement instrument.

By making spontaneous payment of the debt before the expiry of the period of Article 523, § 1, of the CPC, without an objection, the debtor avoids increase of the debt by 20%. If it chooses to file an objection – at the risk of having to pay a fine and fees on the debt – it must do so knowing that it may be held liable for interest and adjustment for inflation, under the terms of the instrument executed, up to the date of the actual payment, even if it has made the deposit in full of the amount stipulated by the creditor.

This configuration does not go outside the objectives of the legislator, since there are other financial incentives in the Code of Civil Procedure for debtors to meet their obligations in a timely manner, to accelerate the recovery of the debt executed. Examples are the mechanisms for discount on attorney's fees - art. 827, § 1, of the CPC<sup>[5]</sup> – and installment of the debt - art. 916 of the CPC - applicable to the execution of extrajudicial security for a sum certain.<sup>[6]</sup>

Nor is it possible to say that the imposition of penalties that increase the value of the debt excessively harms the debtor. The logic of abbreviating the definitive execution of judgment by this route also involves the fact that the debtor's broad defense, more often than not, was ensured in the trial phase – before the formation of the instrument that is now sought to be fulfilled. In addressing the provisional fulfillment of judgment, the legislator took care to establish that judicial deposit of the full amount of the debt removes the application of the fine of Art. 523, § 1, of the CPC (art. 520, § 3, cpc). To access this amount or perform any other act of expropriation, the creditor must provide a suitable security deposit and will be liable for any damages (art. 520, I and IV of the CPC), if the instrument on which the provisional execution of judgment is based is amended in favor of the debtor.

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<sup>[1]</sup> REsp 1348640/RS, opinion drafted by Justice PAULO DE TARSO SANSEVERINO, SPECIAL COURT, decided on July 5, 2014, published in the electronic gazette of the Judiciary on May 21, 2014

<sup>[2]</sup> "This Superior Court of Appeals has a settled understanding that **the responsibility for adjustment for inflation and interest, after the judicial deposit is made, is assigned to the financial institution where the cash was deposited** (Precedent 179 and 271 of the STJ). This position applies even if it is an attachment of money for the guarantee of execution. Thus, the judicial deposit in the amount of the execution ceases, the debtor's liability for such charges ceases" (STJ, AgRg no EDcl no Ag 1298725/SP, opinion drafted by Justice Nancy Andrighi, Third Panel, decided on May 10, 2010). In the same direction: STJ, AgRg no Ag 1228560/RJ, opinion drafted by Justice Aldir Passarinho Junior, Fourth Panel, decided on October 19, 2010; STJ, REsp 1665819/DF, opinion drafted by Justice Herman Benjamin, Second Panel, decided on August 8, 2017.

<sup>[3]</sup> Question of Order raised in REsp 1820963/SP, opinion drafted by Justice NANCY ANDRIGHI, SPECIAL COURT, decided on October 7, 2020, published in the electronic gazette of the Judiciary on October 28, 2020, going on to be processed under the procedure set forth in arts. 256-S and 256-T ristj (Special Repetitive Appeal).

<sup>[4]</sup> It should be noted that the proposal for a revision of Topic 677 stems from the fact that the case law of the Supreme Court on the subject had already been changing in recent years, culminating in the Question of Order that effectively proposed revision of the topic. To this effect are the following judgements: STJ, REsp 1475859/RJ, opinion drafted by Justice João Otávio de Noronha, Third Panel, decided on August 16, 2016; STJ, AgInt no AgInt no REsp 1404012/PR, opinion drafted by Justice Luis Felipe Salomão, Fourth Panel, decided on February 7, 2019; STJ, AgInt no AgInt no AREsp 1687672/SP, opinion drafted by Justice Marco Aurélio Bellizze, Third Panel, decided on December 7, 2020.

<sup>[5]</sup> Art. 827. Upon dismissing the complaint, the judge shall then set the attorney's fees of 10%, to be paid by the judgment debtor.

1 - In the event of full payment within three days, the amount of the attorneys' fees shall be halved.

<sup>[6]</sup> Art. 916. Within the period for a motion for clarification, recognizing the credit of the judgment creditor and proving the deposit of 30% of the amount in execution, plus costs and attorneys' fees, the judgment debtor may request that he be allowed to pay the remainder within up to six monthly installments, plus adjustment for inflation and interest of 1% per month.