

## The Process of a Typical Commercial Case

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### **South Africa**

Litigation Guide

IBA Litigation Committee

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## THE PROCESS OF A TYPICAL COMMERCIAL CASE

### 1. Limitation issues

There is a three year time limit for bringing a commercial claim, such as for the non-payment for delivery of goods sold and delivered with an agreed price equivalent to US\$100,000.

Parties can agree to different time limits, or to the suspension of the running of prescription (limitation).

### 2. Pre-litigation requirements

There are no pre-litigation requirements or actions the parties must perform before presenting their claim to the courts.

### 3. Starting proceedings

Once a decision has been made to embark on litigation, it is necessary to choose between trial (action) and motion (application) proceedings.

**Action** is commenced by the issue of summons. The parties are required to file formal pleadings setting out the facts and legal basis upon which they rely for their claim or defence. The summons is the first such document. An action culminates in a hearing before a Judge at which witnesses are called to give oral evidence. In actions, the parties are referred to as "the plaintiff" and "the defendant".

**Motion proceedings** differ from actions in that generally no oral evidence is heard by the court (although there are circumstances in which matters may be referred for the hearing of oral evidence). The evidence is placed before the Court in the form of affidavits sworn by the witness. Motion proceedings (which are often referred to as application proceedings) are commenced by way of a notice of motion accompanied by a founding affidavit setting out the facts on which the claim is based, with all the supporting documentation being annexed to the affidavits. In motion proceedings, the parties are referred to as "the applicant" and "the respondent".

The disadvantage of motion proceedings is that the evidence set out in the affidavits cannot be tested by cross-examination, and therefore it is often difficult for a court to decide between conflicting versions. It is for this reason that motion proceedings are appropriate when the issue to be resolved is purely a dispute of law and there is no material dispute of fact.

The advantage of motion proceedings is that they are generally speedier than actions. However, one cannot proceed by way of motion where there is a material dispute of fact. Where an interdict is sought, or temporary relief is sought pending the outcome of an action, it is necessary to proceed by way of motion.

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There are no formal pre-action protocols or procedures which are required to be followed before the institution of court proceedings. Generally, however, the institution of court proceedings is preceded by a formal written demand. No court fees are paid on commencing action or motion proceedings.

### **4. Timetable and Case management**

In motion proceedings, a notice of motion, accompanied by a founding affidavit is served. The respondent then has an opportunity to serve an answering affidavit and the applicant has an opportunity to serve a replying affidavit. The matter is then set down for hearing.

In actions, proceedings are commenced by the issue and service of summons, usually accompanied by detailed particulars of claim. The defendant has an opportunity to deliver a plea to the particulars of claim and the plaintiff may deliver a replication to the plea. Generally, the pleadings are then closed and the matter is enrolled for the allocation of a trial date. Discovery is made by the parties and interlocutory applications to compel further or better discovery are heard. An important step in the stage between the close of pleadings and the trial is the pre-trial conference which is required to be held prior to the commencement of the trial. The purpose of the pre-trial conference is to promote the effective disposal of the litigation by expediting the trial and limiting the issues before the court. Attorneys and counsel representing the parties attend the pre-trial conference. A formal minute of the pre-trial conference is prepared and is required to be handed to the presiding judge prior to the commencement of the trial. One of the issues which is required to be raised at the pre-trial conference is the attitude of parties towards settlement, and it is a requirement that the minutes of the pre-trial conference should reflect that every party claiming relief has requested his opponent to make a settlement proposal and that such opponent has reacted thereto. This formal requirement often leads to the commencement of settlement negotiations.

The period of delay between the close of pleadings, when a matter is enrolled for the allocation of a trial date, and the trial itself varies considerably in different divisions of the High Court, and may be anything between three months and fifteen months.

### **5. Disclosure of Evidence**

After the close of pleadings, there are extensive discovery procedures. Discovery is the procedure whereby the parties disclose to each other all relevant documents and tape recordings that they or their agents have in their possession or under their control. A party may validly object to the production of any document that is privileged. The most important category of privilege is legal professional privilege. A party who is not satisfied with the discovery made by his opponent may apply to court to compel further and better discovery. A party may also request the inspection of documents that have been discovered and is entitled to make copies of such documents.

# IBA GUIDE : Litigation Committee

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### 6. Administration of Evidence

In motion proceedings evidence is given on affidavit.

In trial proceedings, the evidence of witnesses is given orally at the trial. The evidence of the witness is led, in chief. The witness is then cross-examined by opposing counsel and re-examined on issues arising from the cross-examination.

Parties are required to deliver summaries of any expert evidence on which they intend to rely not less than ten court days before the trial. Generally, witness statements from non-expert witnesses are not required.

### 7. Remedies

Generally, the remedies available at trial or in motion proceedings include the following-

- An order for payment of a liquidated amount in money.
- Specific performance.
- Damages.
- A declaratory order.
- An order for the delivery of specified movables.

A litigant who sues in contract sues to have his bargain or its equivalent in money or in money and kind. The litigant who sues in delict (tort) sues to recover the loss which he has sustained because of the wrongful conduct of another. In other words, the litigant claims the amount by which his patrimony has been diminished by such conduct.

Punitive damages are not awarded by South African courts.

### 8. Enforcement

The rules of the High Court deal extensively with execution against property, whether movable or immovable in satisfaction of a judgment. The underlying principle is that execution does not issue against immovable property until the movable property has been excused. The rules provide for the attachment and sale in execution of property in satisfaction of the judgment debt.

Foreign judgments are enforced in South Africa by way of provisional sentence proceedings. The foreign judgment is not directly enforceable, but constitutes a cause of action and will be enforced by the courts provided that, inter alia, the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by South African law with reference to the jurisdiction of foreign courts.

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### 9. Appeal

There is no automatic right of appeal against a decision of any provincial or local division of the High Court. In all instances the party wishing to appeal must first apply for leave to do so. The court granting leave to appeal may direct that the appeal be heard by the Supreme Court of Appeal or by a full court of the appropriate division. If the questions of law and fact and the other considerations involved in the appeal are of such a nature that the appeal does not require the attention of the Supreme Court of Appeal, the court granting leave to appeal may direct that the appeal be heard by a full court of the appropriate division, consisting of a bench of three judges. When an appeal against the decision handed down by a single judge in a provincial or local division is heard by a full court, a further appeal to the Supreme Court of Appeal lies against the judgment of the full court only with the special leave of the Supreme Court of Appeal. In all cases, applications for leave to appeal must be made to the court against whose judgment or order the appeal is directed. If leave to appeal is refused by the court, the appeal may be brought only with the leave of the Supreme Court of Appeal.

A direct appeal to the Constitutional Court lies against the decisions of the Supreme Court of Appeal or the High Court, provided that the matter appealed is a Constitutional matter. The appellant must obtain leave to appeal from the Constitutional Court. The test applied by the Constitutional Court in determining whether leave to appeal should be granted is whether it is in the interests of justice for the prospective appellant to be granted leave to appeal to the Constitutional Court.

### 10. Costs

The general rule is that costs are awarded to the party who is substantially successful. The successful party is required to draw up a bill of costs which is taxed by a High Court official, known as a Taxing Master.

The successful litigant only recovers a portion of his costs. Costs are normally recovered on a scale as between party and party, although special awards may be made by the court in certain cases.

A litigant may, under certain circumstances, be entitled to call upon the other party to furnish security for costs.

The court will order the furnishing of security for costs when –

- The party of whom security is requested is neither resident nor domiciled within South Africa, and does not own immovable property within South Africa.
- A party institutes proceedings which the court considers to be vexatious.
- The party who instituted the proceedings is litigating in a nominal capacity and is found by the court to be a "man of straw" behind whom the real plaintiff is sheltering.

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- A company or other body corporate is the plaintiff or applicant in legal proceedings, if it appears that there is reason to believe that the company or body corporate will be unable to pay the costs of the defendant or respondent if he is successful in his defence.