



Volume 1: Issue 1

April 2016

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STEP-BY-STEP GUIDE TO  
**COMMERCIAL LITIGATION**

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## 1. WHAT LIES AHEAD - AN INTRODUCTION

This guide provides an outline of the different stages in court proceedings in South Africa, and sets out some of the options available to those involved in litigation. It focuses on commercial disputes in the high court.

As the illustration opposite shows, litigation is a process. The guide aims to take the reader through each stage, broadly in the order that it happens.

Achieving a successful outcome in litigation, however, requires a great deal more than knowledge of the process. It usually depends on hard work, a strong team, careful preparation and a willingness to review and flex the approach as a case proceeds.

There are a number of important steps and rules in civil proceedings that are not covered by this guide. For example special rules apply to certain types of cases, such as family proceedings and mortgage bond proceedings. There are also different rules in the lower courts. Every case will differ.

This guide is based on the high court rules and of course, these rules may change from time to time. Different divisions of the high court also have different practise rules. It should not therefore be relied on by anyone contemplating bringing a claim, or who faces the prospect of defending a claim - it serves only as a general guide.

Should you or your company become involved in a dispute, we recommend you seek immediate legal advice.

### STAGES IN LITIGATION

|   |   |                          |
|---|---|--------------------------|
| Investigation                                 | ↓ | Before litigation starts |
| Alternative dispute resolution?               | ↓ |                          |
| Pre-action steps (including letter of demand) | ↓ |                          |
| Summons and particulars of claim              | ↓ | Exchange of pleadings    |
| Plea (and any counterclaim)                   | ↓ |                          |
| Replication (and any defence to counterclaim) | ↓ |                          |
| Case management                               | ↓ | Pre-trial preparation    |
| Discovery of documents                        | ↓ |                          |
| Request for trial particulars                 | ↓ |                          |
| Witness statements                            | ↓ |                          |
| Expert reports and meeting of experts         | ↓ |                          |
| Pre trial conference                          | ↓ | Trial and Enforcement    |
| Trial preparation                             | ↓ |                          |
| Trial   | ↓ |                          |
| Appeals, if any                               | ↓ |                          |
| Enforcement                                   | ↓ |                          |

## 2. BEFORE LITIGATION STARTS

The courts take the view that litigation should be a last resort. This will involve, among other things, the early exchange of information and documents.

You are expected to make serious attempts to resolve your dispute without recourse to the courts. In all disputes, the courts expect you to behave reasonably to try to avoid litigation. This will normally mean that the plaintiff should write a letter of demand to the defendant setting out the basis of the claim and giving the defendant a reasonable time to respond to the claim. The parties should if possible conduct genuine and reasonable negotiations with a view to settling the claim.

The parties should also consider alternative dispute resolution (see below) and make every effort to contain costs.

If a party is found not to have acted reasonably in attempting to settle the dispute before proceedings are started, then the courts can take this into account at a later stage when deciding which party should pay costs, and the level of those costs.

### ALTERNATIVE DISPUTE RESOLUTION

Parties to a dispute are encouraged to consider whether some form of alternative dispute resolution (or ADR) would be more suitable than litigation. Whilst the parties can choose whatever form of ADR they consider to be appropriate, the more conventional options include:

- Arbitration - a confidential form of dispute resolution pursuant to which one or more arbitrators decide a case rather than a court appointed judge.
- Mediation - this is a facilitated negotiation assisted by an independent third party mediator appointed by the parties.
- Early neutral evaluation by an independent third party, who advises on the merits of each party's position.
- Expert determination - in which an independent expert is appointed to resolve the matter by producing a legally binding decision.
- Other forms of discussion and negotiation.

It might be that one or more of the above procedures are provided for in an agreement which forms the basis of the dispute. If the agreement does provide for some sort of ADR then the parties are bound, save in exceptional circumstances, to follow the procedure provided for.

Consideration should also be given to other ways of settling a dispute - for example, by referring a complaint to an ombudsman.

Whilst it might be possible to settle the case before proceedings start, if this is not possible you can still agree a settlement with the other parties at any time during the court proceedings - even after the trial. However, most cases do settle before trial - usually on the day the trial commences.

### COSTS

Litigation is expensive and time consuming. You should therefore seek advice on how much court proceedings might cost. Be aware that litigation is often unpredictable, so it can be impossible to estimate costs accurately. Generally, lawyers charge for their work on an hourly basis.

The general rule in litigation is that the losing party pays the winning party's reasonable costs - although it is rare that all the costs will be recovered. A losing party therefore usually has to

pay not only his own costs but also those of his opponent. As a rule of thumb, the winning party can recover up to 60% of the actual costs incurred.

It might be possible for you to enter into a conditional fee agreement (under which you would pay no, or a reduced, fee if the case is unsuccessful, but generally a higher than normal fee if the case is successful). You will not be able to claim the success amount from your opponent.

There are other ways in which litigation might be funded (in other words, not directly by the plaintiff or defendant). It might be possible to find a third party funder, who would agree to finance your legal costs, normally in return for a share in the proceeds if the case is successful. These types of arrangement will be allowed by the courts if they have no additional features that make them contrary to public policy. The third party funder could be liable for the costs of the opposing party if the claim is unsuccessful.

## **WHICH COURT?**

Large commercial cases are most likely to be brought in the high court. Claims with a value of more than R400 000 can generally be issued in the high court. Claims below R400 000 must usually be issued in a magistrates court. There are many magistrates courts around the country.

## **OTHER CONSIDERATIONS BEFORE STARTING LITIGATION**

### **Preservation of documents**

Once litigation is reasonably in contemplation, the parties are under obligation to preserve all documents (papers and electronic, including recordings of telephone calls). Automatic document destruction policies should be suspended.

### **Pre-action disclosure**

In certain circumstances, it might be appropriate to apply to the court for copies of documents from an intended defendant before proceedings have started.

### **Preservation of privilege**

You do not have to provide legally privileged documents to other parties as part of the disclosure process. Care should therefore be taken to ensure that harmful, non privileged documents are not created. See section 3 for an explanation of privilege.

### **The defendant's ability to pay**

Does the defendant have any assets? If you are bringing a claim, it is important to find out if the defendant has any assets or whether the claim is covered by insurance. Otherwise, there is a danger that a successful claim is unenforceable (see enforcement).

### **Interim measures**

If urgent assistance is needed from the courts, such as an order stopping something - for example, is there a risk of the defendant moving its assets out of the jurisdiction to avoid meeting a judgment in your favour? If this is a possibility, you will need to act urgently to protect your position.

### **Limitation periods**

Are there any 'limitation periods' you should be aware of? In short, a claim must be brought within a certain period of time - normally within three years of a dispute arising - although this is a complex area of the law and the time periods can vary depending on the facts and the type of claim.

## 3. PREPARING YOUR CASE

### BRINGING AND DEFENDING A CLAIM

A claim is started by a plaintiff issuing a summons issued by the registrar of the high court. Particulars of claim, which set out the alleged facts on which the claim is based, must be included. The summons and particulars of claim also set out what relief you are seeking from the court - e.g. damages, an interdict or a declaration. The summons and particulars of claim must then be served (that is, formally delivered to) by the sheriff of the high court on the defendant within a year of the date of issue of the summons.

The defendant then has 10 days to file a notice to defend and 20 days to file a plea. This deadline may be extended by agreement between the parties or on application to the court. In practice, an extension is often requested and usually granted.

If you are served with summons, it is very important that you take urgent legal advice so that you do not miss the deadlines. The courts require strict compliance with deadlines and the court rules generally. If a defendant fails to file a notice to defend, or to file a plea within the relevant time period, the plaintiff can normally obtain 'judgement in default', which is a judgment in the plaintiff's favour obtained without a hearing or further notice to the defendant.

It is open to a defendant to bring a counterclaim against the plaintiff, if he has grounds to make his own claim against the plaintiff, or to bring in a third party as another defendant to the proceedings (for example, if he says that another party is responsible for the plaintiff's loss). Counterclaims are sometimes brought purely for tactical reasons - to put pressure on the plaintiff to settle.

In certain circumstances, the plaintiff must serve a replication, responding to points raised in the plea.

After the filing of the plea, or replication, where required, pleadings are considered closed and the plaintiff files a rule 37 questionnaire, which gives the court information about the case, such as the number and identity of witnesses that they intend to call. The court then appoints a case management judge (there is an approximate 12 month waiting period) who holds a hearing called a "case management conference", to decide the future conduct of the case, including matters such as disclosure of documents, called "discovery", exchange of expert reports and when all issues have been attended to, the case management judge will certify the matter trial ready whereafter the registrar will fix the trial date. The trial date is usually within 30 months of the start of the litigation. More complex cases can take longer - between three to five years - to reach a final judgment i.e. after all appeals have been exhausted.

It may be possible to obtain a quicker judgment if you have grounds to ask the court for 'summary judgment' on either the whole of the claim or defence, or on a particular issue. The court will give summary judgment, which means that the case does not need to go all the way to a full trial, if it considers that there is not a real prospect of a party succeeding in its defence.

The court also has power to 'strike out' a party's claim/defence, either in whole or in part, if it is satisfied that it discloses no reasonable grounds for bringing or defending the claim, it is an abuse of the court process or a party has failed to comply with the rules or court order. This process is called "exception proceedings" and can take up to a year to be finalised.

### COSTS

The successful party is usually awarded costs of bringing the claim or defending it. The costs are in accordance with a prescribed tariff. In practise, a litigant should be able to recover around 60% of its actual spend, from the losing party.

## DISCOVERY

Each party must file and serve an affidavit with a list setting out a brief description of the documents that exist and are relevant to the proceedings. Discovery is a very important part of litigation. It gives each party the chance to test the opponent's case at an early stage with reference to the documentary evidence. A case will often turn on the documents that are disclosed. Discovery can however be an expensive process.

Discovery means that each party must carry out a reasonable search for documents on which it relies, documents which adversely affect its own or another party's case and documents which support another party's case. It must then give disclosure of those documents, which involves listing them and making them available for "inspection" and copying. Each party must set out the extent of the search it has carried out and certify that, to the best of its knowledge, it has complied with its duty to disclose all relevant documents. Generally, you cannot avoid disclosing a document or information merely because it is confidential.

You are not entitled to inspect another party's documents if they are privileged. You will need to take specific advice on whether documents are privileged. In general terms, a document is subject to 'legal advice privilege' if it is a communication between a lawyer and his client for the purpose of giving or obtaining legal advice. Only communications between a lawyer and the client are protected by this privilege. The privilege extends to advice on both what should sensibly be done in the relevant legal context and party's strict legal rights and obligations. A document might also be subject to 'privilege' where it is prepared for purposes of settling the dispute between the parties. Privilege may be waived, so careful consideration must be given to this class of documents to avoid inadvertently waiving privilege.

Where a party believes that there are more documents relevant to the dispute, but not disclosed such party may bring an application to court for an order to compel its discovery.

## EXPERTS

For many cases, there will be specialist or technical issues on which the court will require the assistance of independent experts, or a single expert. For example, in a medical negligence case, the parties might instruct medical experts to opine on the question of whether or not a doctor's actions were negligent.

Experts are appointed by the parties.

The role of the expert is to provide an opinion to the party (or parties) instructing him. In so doing, he owes his instructing party a duty to exercise reasonable skill and care. However, when instructed to give or prepare evidence for court proceedings, the expert has a duty to help the court on matters within his/her expertise, and this duty overrides any duty to the instructing party.

There is an exchange of expert reports. The experts may be required to meet to seek common ground where possible. The experts are then called to give oral evidence, and are cross-examined, at trial. It is best to choose an expert witness who has some experience in testifying in court.

An expert's instructing party pay his fees. However, these will form part of the costs of the action that a party may recover from the opposing party, provided that the court has approved these costs by qualifying the witness as a necessary expert witness.

## PRE TRIAL CONFERENCES

A pre-trial conference is a meeting between the parties' legal teams aimed at summarising the ambit of the dispute, recording admission and formally considering settlement possibilities. As in discovery, this is a very important part of the litigation process. Cases can be won or lost at the pre-trial conference.

## 4. TRIAL AND ENFORCEMENT

### THE TRIAL

The length of the trial will depend on matters such as the complexity of the case and the number of witnesses giving evidence.

There is one judge, who listens to all the evidence. It is for the parties to present the evidence. The judge does not investigate the case, but listens to the evidence that is put up and may ask questions.

The case is usually presented orally at trial by an advocate (also referred to as “counsel”) (although some attorneys have the right to present cases in the high court). In larger and more complex cases, one or more advocates are likely to be instructed at the beginning of a case, and will be fully involved in drafting the pleadings and preparation of the case for trial.

The plaintiff's advocate usually starts by presenting the plaintiff's case. The defendant's advocate then presents the defendant's case. This is called ‘opening submissions’.

There is no jury. The general rules are that, at trial, witnesses of fact give oral evidence and are cross-examined. Expert witnesses are also cross-examined. The parties then summarise their cases (called ‘closing submissions’).

### JUDGMENT

Following the trial, the judge usually takes a period of time to write his judgment. It is then typically delivered (known as being ‘handed down’) in court, sometimes read out by the judge and, more often, copies are made available to the parties by the judge's registrar. Once handed down, the judgment is public. Only in very exceptional circumstances do parts of or even whole judgments remain confidential (at the request of the parties and where the court agrees to this).

### APPEALS

An unsuccessful party (‘the appellant’) can appeal from the high court (one judge) to a full bench of the high court (three judges) or from the high court to the supreme court of appeal, subject to permission from the trial judge. The court only grants leave to appeal if it considers that the appeal has a real prospect of success or there is some other compelling reason for the appeal to be heard.

It is possible to appeal in relation to findings of both law and fact. However, the appeal courts are generally reluctant to overturn a trial judge's findings of fact, particularly where these depend on the judge's view of the credibility of the witnesses.

The appellant must file an “application for leave to appeal” (a request for permission to appeal made to the appeal court) within 21 days of the date of decision appealed against.

### ENFORCEMENT

If a plaintiff wins, he will get judgment in his favour. If the defendant does not pay, the plaintiff can take steps to enforce the judgment, also called execution of the judgment. The main enforcement means that:

- The high court can give a sheriff authority to seize and sell the debtor's (defendant's) property by way of issuing a warrant of execution.
- Third party debt orders, which redirect to the creditor (i.e. the plaintiff) funds owed to the debtor by a third party - for example, funds in the debtor's (defendant's) bank account by issuing a garnishee order.



- Insolvency proceedings - i.e. steps taken to put a non-paying defendant company into liquidation, or bankruptcy in the case of individuals. A creditor will be paid a dividend in the event of sufficient assets being found to cover costs.

## 5. MANAGING LITIGATION - SOME PRACTICAL CONSIDERATIONS

Success in litigation doesn't just require a strong case. It involves hard work, commitment, careful preparation and well-conceived strategy and sufficient funds to see it through to the end.

### Get a head start

If possible spend some time and effort investigating a claim before issuing proceedings. This should include locating relevant documents, allowing your attorney(s) to speak to relevant witnesses, take a statement from each witness and establishing whether or not your opponent has sufficient assets to pay a successful claim and/or costs. That way, you will be better prepared for litigation, have fewer surprises when proceedings start, and gain a clearer idea of your chances of success.

### Seek early advice

There might be limitation periods that are about to run out; urgent court applications that should be made such as an application to freeze your opponent's assets; or court deadlines looming. Any delay may affect the urgency of the relief you may be entitled to.

### Consider the alternatives

Consider whether there are other options available for resolving your dispute - the courts will expect you to do so and you might be able to do a good deal that avoids the time and expense of litigation.

### Take care with documents

Take advice on matters such as privilege and disclosure at an early stage - it is important, for example, not to create documents that could damage your case, or to destroy documents that should be disclosed.

### Prepare for disclosure

Remember that disclosure is a very important part of litigation. You are obliged to disclose all relevant (non privileged) documents, even if they are unhelpful, confidential or embarrassing. On the other hand, you might receive documents from your opponent that really assist your case.

### Make time

Be prepared for the amount of time involved in litigation. A lot of management time might be involved in preparing a case - particularly if employees are required to give evidence. In our experience the more involvement in a case a client has, the better his prospects of success.

### Count the cost

Bear in mind that litigation can be very expensive, particularly in large and complex cases that last a number of years. It is, generally speaking, impossible to give any accurate estimation of costs. From time to time, we will be able to give you a "ball park figure" which is subject to change.

### Review your approach regularly

Litigation can be a very complex process, requiring a careful and regular review of your chosen litigation strategy and tactics.

## 6. COMMON TERMS

### A

**ADR:** Alternative dispute resolution - a description of the different possible methods used to resolve disputes other than through the normal court process, e.g. mediation.

**Arbitration:** A confidential form of dispute resolution pursuant to which one or more arbitrators decide a case rather than a court-appointed judge, and which uses different procedural rules from those adopted by the courts.

### C

**Case management conference (or CMC):** A court hearing to decide the future conduct of a case, including certain procedural matters such as the exchange of evidence.

**Counterclaim:** A claim brought by a defendant, against the plaintiff, in response to the claim brought by the plaintiff.

**Cross-examination:** The questioning of a witness at trial by the opponent's advocate (see also: evidence in chief).

### D

**Damages:** Money awarded by the court to the plaintiff, payable by the defendant, by way of compensation.

**Discovery:** The process pursuant to which the parties to litigation identify to the other parties, normally by the provision of a list, those documents which they are obligated to disclose (see also: inspection).

### E

**Execution:** A method of enforcing a court judgment by way of the sheriff of the high court attaching property and selling it at auction.

**Evidence in chief:** The evidence given by a witness for the party who called him to be a witness.

**Expert witness:** An individual, appointed by a party (or the parties jointly), to provide technical or specialist assistance to the parties and the court.

**Inspection:** The process of allowing the other parties to inspect disclosed documents (or the provision of copies of disclosed documents to the other parties).

**Interdict:** An order of court prohibiting somebody from doing something.

### J

**Judgment in default:** A court judgment in a plaintiff's favour which can be obtained by a plaintiff if a defendant fails to respond to a claim.

### L

**Limitation period:** Also known as Prescription. The period of time within which a claim must be started. For commercial claims, this is normally six years from the date on which the cause of action arises.

### M

**Mediation:** Another form of ADR - a facilitated negotiation assisted by an independent third party mediator appointed by the parties.

### P

**Particulars of claim:** The document in which a plaintiff sets out the details of his claim against the defendant.

**Plea:** The document in which a defendant sets out the grounds on which he is defending a claim.

**Privilege:** The right of a party to refuse to give inspection of a document on the basis that the document is confidential and is either a communication between a lawyer and his client for the purpose of giving or obtaining legal advice, or is a communication between a lawyer and his client, or between either of them and a third party, created for the dominant purpose of giving or receiving legal advice in connection with litigation.

## R

**Rule 37 questionnaire:** A form filed by the plaintiff before a case management conference, giving the court information about the case.

**Return of service:** A form filed by the sheriff confirming delivery of a document commencing proceedings.

## S

**Statement of case:** Document in which a party sets out its case e.g. particulars of claim and defence.

**Strike out:** A strike out order is an order of the court that identified written material which cannot be relied on by a party.

**Summary judgment:** The court will give summary judgment, if it considers that there is not a real prospect of a party succeeding in its claim or defence and there is no other compelling reason why the case or issue should be disposed of at trial. As a result, the case will not go all the way to a full trial.

**Summons:** The document which a plaintiff uses to start a claim.

## T

**Third party debt order:** Also known as Garnishee Order. Third party debt orders redirected to a creditor in respect of funds owed to a debtor by a third party - for example, funds in the debtor's bank account.

## W

**Witness statements:** Written statements containing the evidence of the parties' witnesses.

**Without prejudice:** Negotiations between parties to a dispute with a view to settling the dispute are usually conducted on a 'without prejudice' basis, which means that, save in certain circumstances, the content of the negotiations cannot be revealed to the court.

## 7. WHY CHOOSE SHEPSTONE & WYLIE?

**Our award winning litigation practice has a market leading reputation and is highly respected by clients and peers alike.**

**We handle all types of litigation and arbitration, including aviation and shipping, construction and engineering, energy, financial and banking disputes, fraud and asset tracing, information technology, insolvency, intellectual property, professional indemnity, property disputes, regulatory investigations, shipping and trust litigation.**

**Shepstone & Wylie have acted in many of RSA's top litigation matters in recent years.**

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