CIVIL LITIGATION

1. **In what language(s) may court proceedings be conducted? What arrangements can be made for translation/interpreter services?**

According to the Constitution of the Republic of South Africa, court proceedings may be conducted in any of the eleven official languages recognised in South Africa.

The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

The Rules of Court provide that where evidence in proceedings is given in any language with which the court, the party to the legal process or his representative is not sufficiently conversant, such evidence shall be interpreted by a competent interpreter.

2. **What types of pre-action measures are available and what are their limitations? Must you send a warning letter before issuing any proceedings?**

South African Law does not compel any pre-action measures which require the parties in a dispute to attempt to settle or negotiate a case before proceeding with the matter to court.

There are, however, certain statutes which provide for compulsory pre-litigation measures, in certain instances, which include the following:

2.1 The National Credit Act[1], which provides that before a creditor can institute legal proceedings against a debtor where the debt is governed by the Act, the creditor must deliver a (Section 129) notice to the debtor proposing debt counselling or the referral of the dispute to alternative dispute resolution proceedings, in order to agree on a payment plan to bring the payments up to date.

2.2 The Children's Act[2], which provides that parties may not approach the court as a first resort for the resolution of their disputes. They must first attend mediation through a family advocate, social worker, social service professional or other suitably qualified person.

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[1] No 34 of 2005

2.3 Institution of Legal Proceedings against Organs of State Act [3]provides that as a precursor to the institution of legal proceedings against the government, provincial administration or other local body, 6 months' notice must be given to the relevant department before such legal proceedings are instituted.

In terms of warning letters, legal proceedings are usually preceded by a letter of demand to the defaulting party. This is however not peremptory. There are however circumstances in which a demand is necessary before proceedings can commence and which include:

2.4 Where the parties have agreed that no right of action shall accrue until a demand is made. In this case a demand is a condition precedent to the cause of action; or

2.5 Where it is necessary to place the debtor in *mora* before proceedings can be instituted. The debtor is considered to be in *mora* from the date of receipt of a letter of demand.

3. **What are the costs of civil and commercial proceedings? Who bears the costs?**

"Legal costs" in broad terms means the costs payable in respect of the fees of a legal practitioner who has acted on behalf of a party, and includes any other expenses incurred in respect of the matter. Such costs are payable by a client to the attorney in terms of an agreement between the attorney and the client.

In a civil matter, the parties usually claim an order for the recovery of costs from the other party. The court is requested on the granting of judgment, to make an order in respect of the costs to be awarded. The court has a discretion with regard to such order of costs.

Generally where a party has been substantially successful in the action, that party is entitled to a costs order in its favour against the unsuccessful party. The unsuccessful party will have to pay the costs incurred by the successful party on one of the following scales:

3.1 "Party and party" costs. These are determined according to the tariff set out in the Rules of Court. They do not include all costs, but only such costs as were necessary and were properly incurred, and are fixed on a scale according to the applicable tariff.

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[2]No 38 of 2005

3.2 "Attorney – Client" costs. These entitle the successful party to recover costs in excess of party and party costs. They include the costs and disbursements which the client cannot ordinarily recover from the other party. An award is made because the losing party agreed to pay such costs in an agreement prior to litigation or because the court may wish to penalize the losing party in cases where the court believes that party acted inappropriately.

3.3 "Attorney - own client" costs. These are the costs that an attorney is entitled to, based on the agreement or mandate with his client. The attorney may recover such costs according to the agreed predetermined rate. An Attorney-own client order of costs therefore entitles the successful party in whose favour it is made to recover an even greater amount than an attorney and client costs award.

Party and party costs amount to approximately thirty to forty percent of attorney – own client costs.

The client is responsible to the attorney for payment of monies disbursed by the attorney on behalf of the client, irrespective of the outcome of the case.

[3]No 40 of 2002

4. **What are the basic rules of disclosure of documents in civil and commercial proceedings? Which documents do not require disclosure? Is electronic disclosure of documents normal?**

It is a fundamental and critical aspect that a party to action proceedings is entitled to be informed of all relevant documentary evidence (in whatever format such documentation may be recorded) which the opposing party intends to use at the trial. This procedure is referred to as "discovery" and occurs after the close of pleadings. The overriding purpose of discovery procedure is to enable all of the parties to prepare properly and sufficiently for trial. The discovery procedure is regulated by the Rules of Court.

All documents which are to be used at trial by a party must be identified in a discovery affidavit, which is then served on the opposing party. In the discovery affidavit, different categories of documents are identified including privileged documents and non - privileged documents. The non - privileged documents are made available to the other party.

Failure to discover documents according to the Court Rules will prevent a party from using the documents as evidence in the trial action.

The rules of discovery require that all relevant documents and tape recordings in a party's possession be discovered. Documents are made available in hard copy and not in electronic format. The critical determining factor when deciding whether a document shall be discovered or not is whether the document is relevant to an issue in dispute.

Documents which are considered to be privileged must be identified in the discovery affidavit. However these documents are not made available to the opposing party. Examples of privileged documents include:

4.1 Statements of witnesses taken for purposes of the proceedings;

4.2 Communications between the attorney and his client; and

4.3 Communications between the attorney and advocate.

5. **What is the process for witness evidence (namely, is it deposition based in advance, or witness statement or examination or cross examination)? Can a witness be compelled to attend to give evidence?**

Evidence in a court of law is given orally. A witness gives oral evidence under oath or affirmation. There is no provision to give evidence by way of deposition.

Oral examination of a witness is conducted in three stages, namely:

5.1 Examination in chief;

5.2 Cross examination of the witness by the opposing party; and

5.3 Re-examination affords the party who called the witness to rectify or elaborate upon matters arising from the cross examination, but no new testimony is permitted.

When it is impossible to secure the personal attendance of a witness at a trial due to a valid reason, a party may apply to court to have the witness' evidence taken on commission. The witness' evidence is taken down by way of deposition on commission before a court appointed commissioner. This may be done at any stage before or during a trial.

The witness is examined orally under oath before an appointed commissioner. The opposing party is entitled to cross examine and re-examine the witness. A record of the evidence is made available and handed in to the Registrar of the court and subsequently received as evidence at the trial.

In terms of the High Court Rules, it is possible in limited circumstances to admit, by way of affidavit, the evidence of a witness who cannot personally attend a trial. The procedure is limited to formal types of evidence or evidence which is unlikely to be uncontested by the opposing party.

The Rules of court allow a litigant to compel the presence of a witness to testify at a trial. This is done by a subpoena issued through the court and served by the sheriff of the court. The subpoena informs the witness when and where to appear. A witness properly served is compelled to appear, and should he fail to do so, can suffer serious sanction.

6. **How are settlement discussions usually conducted (namely whether oral or written and whether between the parties direct or their representatives)? Is the settlement**

correspondence between the parties/counsel privileged (i.e: may not be disclosed to the court)?

There is no formal method prescribed for the conduct of settlement discussions. Settlement discussions are conducted informally and on a without prejudice basis.

7. **How can foreign judgments be enforced?**

Before a foreign judgement is enforced in a South African court, certain common law requirements must be met.

These are as follows:

7.1 the foreign court must have been 'internationally competent', which means that it must have exercised jurisdiction on grounds that our courts regard as appropriate;

7.2 the foreign judgment must have been final and conclusive;

7.3 the foreign judgment must not have been fraudulently obtained or be contrary to our ideas of natural justice or public policy;

7.4 the foreign judgment must not have lapsed or have been satisfied;

7.5 the foreign judgment must not have been based on a foreign penal, revenue or public law; and

7.6 the foreign judgment must conform to the requirements of the Protection of Businesses Act 99 of 1978.

The judgment may be enforced by ordinary action proceedings, and if it is for a liquidated sum of money, proceedings may be by way of provisional sentence.

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