

CIVIL PROCEDURE AND THE HIGH COURT RULES IN BOTSWANA - (John Carr-Hartley, Partner)

There are a number of factors in the Botswana civil procedure which are significantly different from other jurisdictions, and particularly the South African civil procedure, and which you need to be aware of in the event that you may become involved in litigation in Botswana, whether as Plaintiff or Defendant.

Botswana has implemented a Case Management System where litigation is driven by the Judge and not the parties themselves.

In terms of our High Court Rules, when Summons is issued, it is accompanied by a very brief Particulars of Claim. The only allegations that are made in the Summons and Particulars of Claim are the citation of the Plaintiff and Defendant, the basis on which the Court has jurisdiction, the basis on which the Plaintiff claims *locus standi* (the legal standing to sue), a concise statement setting out the Plaintiff's cause of action and the relief claimed.

In the event that an Appearance to Defend is entered by the Defendant following delivery of the Summons, the Defendant's grounds of defence must be set out in the Appearance to Defend.

Thereafter, within 14 Court days calculated from the receipt of the Appearance to Defend, the Plaintiff must file Plaintiff's Declaration. The Plaintiff's Declaration is a full and detailed Statement of Claim, setting out all the facts and grounds on which the Plaintiff relies for the relief sought.

In terms of the Rules, Plaintiff's Declaration must be accompanied by:

- An Affidavit of Facts, being an Affidavit deposed to by a person who has knowledge of the matter and who can swear positively to the facts giving rise to the claim. The Affidavit of Facts must detail all the facts which are pertinent to the matter and which give rise to the claim.
- Copies of any and all documentary exhibits and documents on which the Plaintiff intends to rely at the trial of the matter.

Within 14 Court days of service of Plaintiff's Declaration, Defendant must file Defendant's Plea, a Request for Further Particulars or other answer to Plaintiff's claim. In the event that Defendant pleads to the merits of the claim, Defendant must file a Plea which, in terms of the Rules, must be also be accompanied by an Affidavit of Facts and copies of all documents on which Defendant intends to rely for its defence of the claim.

Usually immediately after the Plea has been delivered, the parties and their representatives are then required to hold an Initial Case Management Meeting. At the Initial Case Management Meeting the parties are required to discuss and agree on various issues including, but not limited to: joinder of parties, amendment of pleadings, close of pleadings, further particulars which may be required, separation of trials, interlocutory motions and applications, admissions of fact, documents and other evidence and the scheduling of Discovery.

The most important reason for the holding of the Initial Case Management Meeting is for the parties to seek, give and receive admissions of fact, documents and other evidence. The purpose of the Initial Case Management Meeting is to reduce, insofar as is possible, disputes of fact.

At the conclusion of the Initial Case Management Meeting, the parties draw an Initial Case Management Report (a Minute of the Initial Case Management Meeting) which is filed at Court and the parties' legal

representatives then attend a Case Management Conference with the Judge at which the Case Management Report is reviewed and if accepted by the Judge, the Case Management Report then becomes an Order of Court.

In addition, at the Initial Case Management Conference the Judge usually gives directions for the completion of all pre-trial procedures and sets dates for the completion of all pre-trial procedures, such as for the exchange of discovery, exchange of expert reports and the like.

There are very harsh penalties for failure to attend Case Management Meetings and Case Management Conferences, including dismissal of an action and/or the granting of Judgment and/or punitive orders for costs.

The Rules also provide for a further conference to be held before trial. The additional conference is called the Final Pre-Trial Conference and is convened by the Judge, but before the Final Pre-Trial Conference is held, the parties and their legal representatives are required to meet and prepare a proposed "Final Pre-Trial Order" identifying, inter alia:

- All issues of fact to be resolved during the trial.
- All issues of law to be resolved during the trial.
- All facts not in dispute;
- The witnesses who will be called by each party, together with a summary of the evidence of that witness, and the documentary exhibits which will be introduced into evidence by each witness.
- Details of all exhibits to be adduced into evidence;

Trial dates are set at the Pre-trial Conference and are usually set three to four months in advance of the trial and are included in the Final Pre-trial Order. As a result, it is very unusual for a trial to be postponed, as trial dates are set well in advance.

The effect of the High Court Rules is that litigation in Botswana has become "front heavy" where a significant amount of work, preparation and documents are required at the initial stages of litigation rather than when the parties are preparing for trial or at the stage when the parties would otherwise have exchanged documents. But the effect of the Case Management System is that the parties know right at the outset the other party's case and the documents which will be relied upon and there are therefore very few surprises.

The Case Management Meetings and Case Management Conferences are not exclusively for proceedings commenced by way of Summons and, at the discretion of the Judge, can be invoked in Application Proceedings.