

KANOKANGA & PARTNERS

ATTORNEYS | LEGAL PRACTITIONERS | NOTARIES & CONVEYANCERS

We thank you once again for choosing Kanokanga & Partners as your legal practitioners. We at the firm strongly believe in efficiency, openness and communication. We have thus put together this brochure to guide you through the litigation process in either the Magistrates Court or the High Court of Zimbabwe. You can refer to this guide to know where you matter stands.

Please note that this short guide is for information purposes as is designed for Civil Litigation. Should you wish to know more about our other services and guides please feel free to contact us.

1. Instructing the Lawyer

This is a process of appointing a lawyer also known as an attorney or legal practitioner to represent you and to act on your behalf in instituting legal proceedings. When instructing the lawyer the “Client” provides the lawyer handling the matter with all relevant information which the client may have at his/her disposal such as e-mails, letters, documents, or the relevant contents of verbal agreements etc.

2. Computation of Time

It should be noted that time periods for the delivery of documents are calculated using “*court days*” which exclude weekends and public holidays.

3. Letter of Demand

This is generally the first step in the legal process. It is usual practice to issue a final letter of demand to the other party before the issuance of Summons. As the title suggests it is a formal letter that states what the other party should do or not do. It generally sets out the cause of the action on which the demand is based. This letter gives deadlines and highlights consequences of failure to perform.

Should the other party comply with the letter of demand, then that matter does not proceed further as it would have been settled. This is beneficial in that it saves costs. It is quite common that “*out of court settlements*” or negotiations are commenced after the issuance of a letter of demand. However should the other party fail to comply with the letter, this then leads to litigation.



4. Jurisdiction

This refers to the competence or the authority of the particular court to hear a matter and grant relief in that matter. It is necessary to avoid unnecessary costs and delays to first determine whether a matter is to be heard in a lower court, that is the Small Claims Court or Magistrates Court) or the High Court. What determines which court will hear the matter are such things as the type of claim, value or quantum of the claim. There are certain claims which can only be heard by the High Court regardless of the quantum of the claim. As a general rule, a court will exercise jurisdiction on the basis that the defendant is resident or domiciled in the area of the court or if the case arose in that area.

5. Action or Motion Proceedings

In an action procedure the court is approached by means of a Summons and there is a clear distinction between the pleadings and trial stage. At the trial stage the parties by means of witnesses give evidence orally. In an action procedure the party who files or brings the action to court is known as the Plaintiff and the other party is known as the Defendant.

In an application procedure the court is approached by means of a Notice of Motion. In an application procedure the party who files or brings the action to court is known as the Applicant and the other party is known as the Respondent. Legislation may prescribe application (motion) proceedings, but the procedure may also be used where there is no real dispute over any fundamental question of fact.

6. Summons

This is a legal document issued out of Court and is served on the Defendant by either the Messenger of Court (Magistrate) or the Sheriff (High Court). The issuance of Summons is the first legal step in informing the Defendant of the claim, the Plaintiff's cause of action and the claim made and relief sought. The Summons indicates the name of the Court, the names and the addresses of the parties to the matter. The Defendant is informed that he has a certain number of days, for example in the Magistrates Court (7) seven days and the High Court (10) days in which to reply or respond to the claim issued by the Plaintiff. Failure to respond to the claim within the prescribed time will enable the Plaintiff to proceed and apply for a Default Judgment.



As a general rule the nature or complexity of the Plaintiff's claim will determine the type of Summons to be used. In the High Court there are two types of Summons, the "*Simple*" summons and the "*Combined*" summons. The Simple summons is used when the cause of action is based on a debt or liquidated demand and the Combined summons is used when the Plaintiff's claim is not founded on a debt or liquidated demand.

6.1. Provisional Sentence Summons & Judgment

This is an extraordinary procedure in terms of which a Plaintiff in possession of a document showing an indebtedness for a liquidated sum of money, for example cheques, negotiable instruments and any other form of document, including an acknowledgement of debt, may obtain provisional judgment for the amount payable on the face of the document prior to the trial date. The rationale is that the Court will grant a provisional judgment in favour of the Plaintiff that in issuing the document in question the Defendant has acknowledged its indebtedness.

7. Appearance to Defend

This is the procedure whereby the Defendant files a Notice of Intention to defend the claim being made by the Plaintiff. An appearance to Defend must be made within the prescribed time. Where the Defendant does not wish to defend the matter, they can consent to Judgment, in terms of which they can consent to pay into the Court or Undertake to perform etc, depending on what is being claimed in the Summons.

8. Plea & Counter Claim

A Plea is the Defendant's reply or response to the Plaintiff's claim. A Plea must be issued within the prescribed or stipulated time frame and should address the issues raised by the Plaintiff. The Defendant can either admit or deny liability. The law however provides relief in the form of defenses, such as Prescription of Debts, or a matter/claim that has already been dealt with by the Courts, Summons which is vague and embarrassing, or that the Court lacks jurisdiction to hear the matter, or that the matter is pending before a Superior Court.



9. Replication

A replication is the Plaintiff's reply or response to the Defendant's Plea and is necessary only when the Plaintiff wishes to place new facts before the Court or clarify the issues raised in the claim.

10. Default Judgment

The Court grants a default judgment to a party to the proceedings where the other party is in default, that is to say where that party – has not entered an appearance to defend the matter and did not admit or consent to the claim within the prescribed time frame or has not filed a Plea within the prescribed time, has refused, failed or neglected to attend any court hearing as advised.

11. Pre – Trial Conference (PTC)

Once all the pleadings have been filed, then the pleadings are deemed to have been closed. There is need to apply to the Court for a PTC Date which date is given by the Registrar or the Clerk of Court as the case may be. A formal minute of the PTC is prepared and is required to be handed to the Presiding Officer prior to the trial. It should be noted that the PTC is a meeting which is convened by the Court with the rationale that the parties explore the possibilities of settling the matter without having to resort to lengthy, expensive and usually stressful trial. The idea is to find common ground between the parties vis-à-vis the claim and agree on critical issues for determination, known as issues.

Discovery is one of the most important steps in PTC preparation and is based on the principle that a party is entitled to be notified prior to the hearing of the matter of all the documentary evidence, including such things as letters, emails, tape recordings, videos that they or their agents have in their possession. Discovery is made by way of Affidavit to which a list is annexed listing all the documents. There are however certain exceptions to the need to disclose relevant documents. These include witness statements taken for the purpose of the trial, communications between attorney and client, pleadings, notices and affidavits in the action. There are certain other documents which are considered to be privileged, and which likewise need not be discovered. These include, inter alia, communication made in a bona fide attempt to negotiate settlement and documents which fall within professional legal privilege. This is done in the form of a notice requesting the delivery of the discovery affidavit within 24 days of receipt of the notice.



Accordingly where matters would not have resolved through the negotiation of “*out of court settlements*”, the matter proceeds to Trial.

12. Trial

The focus of any action is the trial itself. The trial is the hearing by the court of evidence relevant to the dispute. A single judge will be allocated to hear the matter. Generally the party making the claim bears the onus of proving its claim. As such the Plaintiff usually starts with the evidence. Any claim must be proved on a balance of probabilities. The attorney for the Plaintiff will usually give an opening address to the Presiding Officer; this is to give an overview of the case. Judgment in less complex matters may be handed down immediately after completion of oral argument. However judgment is generally reserved and handed down once the Court has had an opportunity to consider the matter.

13. Judgment

A Court Judgment is the finding and ruling of the Court relating to the facts and law relating to the dispute. This process marks the formal end of proceedings before the Court. A Judgment Debt is the claim etc that the court adjudges or decides to be owing to the Plaintiff and it so directs that the Plaintiff is entitled thereto. The Judgment Debtor & Creditor respectively are the parties to the court judgment who hitherto were the Defendant and the Plaintiff respectively. That is to say, a judgment having been passed and the judgment debt determined, the Defendant (formerly the debtor) becomes the Judgment Debtor and the same is true for the Plaintiff who hitherto was the Creditor, and now becomes the Judgment Creditor.

14. Costs

At the end of the trial or application, the Court will hand down judgment and will make an order as to who must pay the costs of the trial or application. This is at the Court’s discretion. Costs will generally be awarded in favour of the successful party. There are two basic cost orders, these are:

- i. Party & Party Scale
 - Which are the necessary and proper costs which have been incurred by the successful party.



- ii. Attorney/Legal Practitioner & Client Scale
 - Which allows for the recovery of more costs than party and party costs and is usually a punitive award. Attorney and client costs are costs payable by a client to his/her attorney in terms of the contract between them.

In order to determine the costs due to the successful litigant, a Bill of Costs must be drawn up and this Bill will depend on the cost order and set out all the costs incurred by the litigant from the inception of the matter to its finality. This includes attorneys' fees and disbursements as well as advocates fees. The bill is drawn in accordance with a tariff that is issued by the Law Society of Zimbabwe. Once a bill has been drawn up it is sent to the opposing party. The opposing party will then decide whether it wants the bill to be taxed before the Taxing Master or whether it wants to settle the claim for costs, either in full or by negotiation. If a bill is opposed then a notice of taxation is sent to the opposing party indicating the date and time at which the Taxing Master will tax the bill. At the taxation the Taxing Master will go through each item, with reference to the Tariff, and decide what should be allowed, disallowed or reduced.

15. Appeals & Review

Once judgment is delivered, a litigant that is dissatisfied with the judgment granted may, in certain circumstances, apply to have the judgment set aside by instituting either appeal or review proceedings.

15.1. Appeal

Where a dissatisfied litigant is of the view that the judgment ought to be set aside because the court reached the wrong conclusion on the facts or law, the appropriate remedy is an appeal. Since an appeal involves a re-evaluation of the court's decision, it will be based on the record of proceedings. Appeal proceedings are instituted by filing a Notice of Appeal with the grounds of Appeal. An application for Leave to Appeal may be required first before filing the Notice of Appeal. Leave to Appeal is not granted automatically. The party bringing the application must first apply for leave to appeal to the court that handed down the decision. Leave to appeal must be sought within the prescribed time limit. As a general rule, leave to appeal will be granted where there is a reasonable prospect of another court coming to a different decision. The application for leave to appeal will then be set down and heard by the same judge who presided over the proceedings in question.



15.2. Review

A decision of a court may be taken on review where the procedural correctness or fairness is questioned. It is the process in terms of which the proceedings of a lower court are brought before a higher court as a result of certain irregularities. The proceedings of a lower court may be brought under review on the basis of: absence of jurisdiction on the part of the court; or interest in the cause, bias, malice or corruption on the part of the judicial officer, or gross irregularity in the proceedings; and / or the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence. A notice of motion and founding affidavit must be delivered which sets out the grounds, facts and circumstances upon which the review is alleged.

16. Warrant | Writ of Execution

This authorizes and empowers the Messenger of Court or Sherriff to attach, remove and sell by public action, the assets, property (which can be movable or immovable) of the Judgment Debtor for the purposes of recovering the Judgment Debt. This is enforced at the instruction of the Judgment Creditor pursuant to a Court Order. However, execution will only take place first against the movables and thereafter against any immovable property. The Messenger of Court or Sheriff prepare an inventory listing items which have been attached. This list will be given to the attorney who may, at that stage or thereafter, instruct the Sheriff to take the items listed in the inventory into his custody and sell them. After selling the attached and removed property the Messenger of Court or Sheriff pays to the Judgment Creditor what is due to him/her in terms of the Court Order and should there be a surplus after a deduction of the costs incurred, it is handed over to the Judgment Debtor.

Where an appeal is pending this suspends the execution of the judgment until finalization of the matter.

17. Garnishee

A garnishee order is another means by which the Judgment Creditor may enforce a judgment. A garnishee order allows a judgment creditor to recover a judgment debt by attaching a money debt owed to the judgment debtor by a third party (the garnishee). This Order is directed to the employer or any source of all judgment debtors' income or revenue, to deduct in instalments or full, for purposes of satisfying the judgment debt.



18. Civil Imprisonment

Where a judgment debtor does not own valuable assets but has the means to pay or the ability to earn the amount due and his failure or refusal to pay is willful, imprisonment on the basis of the judgment debt will force such debtor to pay or find the means to do so. Upon application by the judgment creditor, the Court issues an order for the arrest of the judgment debtor by the Messenger of Court or the Sheriff. The rationale is to induce payment or make the judgment debtor pay as opposed to punishing him/her. It is the judgment creditor who meets the costs incurred by the judgment debtor during the stay in prison, usually ranging from 30days to 90days depending on the circumstances. However, the judgment debtor cannot be imprisoned forever as the court may discharge him/her in the event of total failure to pay notwithstanding the imprisonment.

