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Information brochure: Divorce Guide

The Divorce Process in South Africa

The divorce process in South Africa is relatively straightforward, yet the financial and emotional consequences can be profound, especially since most divorces are normally lodged in the High Court. The other harsh reality is that the High Courts in South Africa have overly burdened court rolls, and parties normally have to wait a long time for their divorce matter to go to trial when their divorce is contested. The backlog in cases was somewhat lessened when the Regional Courts Amendment Act came into effect in 2010 to amend the Magistrates' Courts Act, 1944, so as to allow regional divisions of the magistrates' courts to also deal with divorce cases.

A divorce action is instituted by the issuing of a summons. You can divorce in either the Regional Court of the Magistrate Court having jurisdiction in your area or in the High Court. To start the divorce process you need to serve a Summons. A divorce summons is unique in that it must be served personally on the defendant by the sheriff of the court.

A court has jurisdiction in a divorce action if one or both parties are:

- domiciled in the area of jurisdiction of the court on the date on which the action is instituted; or
- ordinarily resident in the area of jurisdiction of the court on the said date and has/have been ordinarily resident in South Africa for a period of not less than one year immediately prior to that date.

There are typically two types of divorces, the contested or opposed divorce and the uncontested or unopposed. The latter type of divorce is the best and most cost effective for all parties concerned. An uncontested divorce can be finalized in as little as 4 weeks. If a divorce is contested it may take between 2 - 3 years, but most contested divorces do settle long before they go on trial.

In South Africa, the marital regime of the parties determines how the assets will be divided upon dissolution of the marriage, the assets being those at the time of the divorce. In South Africa, we have a 'no fault' system of divorce, meaning that a divorce will be granted if one of the parties believes that there has been an 'irretrievable breakdown of the marriage relationship' and that there are no reasonable prospects of restoring it. Therefore, a marriage can be dissolved even if one of the parties does not wish to get divorced.

Civil marriages, civil unions and those religious marriages conducted by registered marriage officers can only be dissolved by order of the court. The spouse wishing to end the marriage must issue a summons against the other spouse, stating that the relationship has broken down, that there is no reasonable prospect of restoring the relationship and which matrimonial property regime governs the marriage. The summons must make provision for the division of the estate, either stating that the parties have entered into a prior agreement or asking the court to divide the joint estate or enforce the provisions of the ANC. Parties must also set out what the arrangements are with regards to any children born or adopted during the marriage.

Uncontested Divorces

The best option, if you can make it happen, is to do your divorce in an uncontested manner. An uncontested divorce is one in which you and your spouse work together to agree on the terms of your divorce. You will both consult with the same attorney, who will be unbiased and impartial. There is no formal trial, and only the plaintiff appears in court. In an uncontested divorce, the parties agree prior to the divorce on how to divide their assets and, if there are children involved, which parent will become the parent of primary residence and which will be the parent of alternate residence. A settlement agreement is then drafted with the help of the attorney, entered into (signed) by both parties, and made an order of the court. An uncontested divorce is without a doubt the least expensive type of divorce.

Default divorces

A default divorce is a form of uncontested divorce. A court will grant a divorce by default if you serve a divorce summons on your spouse and he/she does not respond. In a default divorce, the plaintiff prepares a summons setting out his/her claims with or without the help of an attorney. A court issues the summons and a sheriff serves the summons on the defendant. The summons specifies the number of days in which the defendant has to file a notice of intention to defend, i.e. contest the divorce (10 days when the parties live within the jurisdiction of the court or 20 days if they live in different provinces).

If the defendant does not answer by way of a notice of defense within the allotted time, the plaintiff may approach the court to enroll the divorce on the court roll and conclude the divorce on the defendant's default. In such a case, only the plaintiff appears in court.

Some courts do request that a notice of set down (a document stating where and when the divorce will be heard) be served on the defendant personally or by registered post. It may be a good idea to contact your spouse to find out why he/she has not defended. Although you can technically seek a default divorce when the time limit in the summons lapses without the defendant's response, your spouse could also come back and try to get the divorce set aside by claiming that the delivery was not proper and that there was a good excuse for missing the deadline. It is therefore better to give your spouse every opportunity to respond. You and your spouse may also decide to divorce by default.

Do-it-yourself divorces

DIY divorces are concluded without the help of an attorney, and are thus a far cheaper option. Divorcing without an attorney can be achieved in two ways:

- Your local magistrate's court can provide you with the necessary forms and give you guidance on how to conclude your own divorce without legal representation.
- If you don't want to wait in a queue, you can use an on-line divorce service such as www.idivorce.co.za to draft your divorce papers and conclude your divorce. All you will need to do is fill out a questionnaire and pay the fees.

Doing your own divorce might be an option when:

- your divorce is uncontested;
- your divorce is not complicated;
- you have been married for a short period of time;
- you don't have substantial assets to divide;
- there are no disputes regarding any children; and/or
- you are prepared to do all the admin yourself.

Usually where children are involved or where there are substantial assets, retirement annuities or pension funds, it is advisable to seek the assistance of an attorney with family law experience or to involve a qualified third-party mediator, so that a comprehensive settlement agreement and parenting plan can be drafted and implemented.

Going back to court after a divorce was granted to rectify mistakes made by you or an inexperienced legal practitioner in a settlement agreement can be rather costly.

Regional and family courts do provide free assistance through the clerk of the court to enable members of the public to conclude their divorces without legal representation, but this is a time-consuming process, which amounts to long delays, and so may not always be advisable.

An uncontested divorce can be finalized in four to six weeks depending on the court roll. It is not necessary for both parties to appear together in court, therefore, only the plaintiff will give evidence and conclude the divorce before a magistrate or judge, depending on the court in which the divorce was instituted.

The process of an uncontested divorce is relatively simple. As already mentioned, the parties usually enter into a settlement agreement and parenting plan (when children are involved) prior to the divorce. Once the settlement agreement and parenting plan are signed by both parties and witnesses, the divorce process can commence. Usually, the settlement agreement and parenting plan will be attached to a summons and a particulars-of-claim document. The plaintiff then issues the summons and annexures at court.

The court registrar will open a file, stamp the documents and allocate a case number. The documents will then be handed back to the plaintiff and the plaintiff will deliver two sets of these documents to the sheriff in the area where the defendant resides or work. The sheriff will then serve the documents personally on the defendant and issue a return of service proving that the documents were served.

After a period of 10 days, if the plaintiff and defendant live in the same jurisdiction of the court, or 20 days, if they live in different jurisdictions, the plaintiff may enrol the divorce on the court roll. When there are children involved, the parenting plan must be endorsed by the Office of the Family Advocate prior to the divorce being heard in court. The court will not conclude a divorce without this endorsement. The registrar will then allocate a date and the divorce will be set down on the court roll. The plaintiff must then file a notice of set down for the date and time set by the registrar. The plaintiff will appear personally in court before a judge or magistrate to conclude the divorce on the date set down.

Mediation

In mediation, an independent third party will work with both sides to try to reach a settlement agreement, and will advise the parties on the various scenarios they could face if the matter goes to court.

A mediator acts as a neutral third party, and they usually have a legal and/or psychology background. A mediator does not decide the case and has no authority to make any decision or force any order onto the parties. The decision-making power remains with both spouses and the mediation process is without prejudice. The mediator will guide the parties in making reasonable decisions with regards to such things as the division of the joint estate and the maintenance of minor children.

Once a settlement agreement has been drafted with the help of the mediator, the parties can request their respective attorneys to review it. If there are any aspects pertaining to children in the agreement, the Office of the Family Advocate should also peruse it and provide the court with an opinion on whether the arrangements contained in the agreement are in the best interests of the children. The agreement is then attached to the summons and served on the party that chooses to be the defendant. After expiry of the time period mentioned in the summons, the plaintiff will enrol the case on the court roll and finalise the divorce, incorporating the settlement agreement in the final divorce order.

Mediation will work for you if:

- you and your partner agree that you can negotiate in a fair and equitable manner;
- children are involved and you would like to draft a parenting plan;
- you wish to save money in terms of a contested divorce; and/or
- you want your differences to be resolved as soon as possible.

Mediation is a well-established form of dispute resolution and is frequently chosen by couples to resolve as many if not all of their disputes prior to obtaining their divorce. It is effective in terms of both time and money, and allows parties to be directly involved in reaching a settlement that is specifically tailored to their needs. However, mediation requires that both parties want to resolve their differences without resorting to litigation. Mediation can be entered into regardless of whether or not there are children involved. Every aspect of a divorce can be mediated, from the division of assets to the question of maintenance. Parties can agree to mediation before or after legal action has been instituted.

Before entering into mediation, it is advisable for a couple to obtain legal advice so that they know their rights not only in terms of the antenuptial agreement, but also in terms of current legislation such as the Children’s Act. It is difficult to anticipate how many sessions will be required before mediation can be terminated, because it depends on the complexity of the divorce and the couple’s readiness to negotiate. Mediation is currently a voluntary option, but legislation to introduce compulsory mediation is in the pipeline.

The role of the mediator is to manage the negotiations in an impartial manner. A couple may choose to appoint two co-mediators, such as a legal practitioner and a mental-health practitioner, who can each bring their own specific expertise to the mediation. Mediators do not offer advice, whether legal or psychological, and do not represent either party in any way. The mediator should also not have had any previous dealings with either party, whether professional or social. A neutral and skilled mediator aims to provide an environment where emotions frequently experienced by divorcing couples, such as anger, hurt, desperation and fear, can be contained by focusing on what needs to be resolved rather than exploring the reasons for the break-up of the marriage. It is sometimes appropriate for a couple contemplating divorce or separation to seek psychological or therapeutic assistance to deal with the psychological aspects of divorce or separation while at the same time entering into mediation.

There are some instances where mediation is unlikely to be effective, such as where there is a significant power imbalance between the parties, where there are serious allegations of substance abuse or where mental health is being called into question. In the event that mediation fails, information provided to the mediator during mediation may not be disclosed later at a trial. Because mediation is a voluntary process, it can be terminated at any stage by either party or by the mediator if they are of the opinion that the process is no longer productive or serving their needs.

Mediation is currently an unregulated profession. Organizations such as the Family Mediators' Association in the Cape (FAMAC) in Cape Town, the South African Association of Mediators (SAAM) in Gauteng and the KZN Association of Family Mediators (KAFam) in KwaZulu Natal train and accredit mediators. Their websites provide names of accredited mediators as well as useful information regarding mediation. The National Accreditation Board for Family Mediators (NABFAM) has recently been established. One of its chief functions is the standardisation of training and accreditation of mediators in South Africa.

Round-table meetings

A round table settlement is usually accomplished soon after the summons is served in a contested divorce. Both parties' legal representatives informally exchange their clients' financial information and then meet on a convenient date with the parties present to settle the divorce. A settlement agreement is then drafted, and only the plaintiff appears in court to get the settlement agreement made an order of court.

Both you and your partner are entitled to obtain legal representation. At any stage, including before any legal action is instituted and even until a trial has commenced, you and your partner can, together with your respective legal representatives, meet and enter into negotiations. These negotiations are often referred to as roundtable settlement negotiations, and the details of these negotiations may not be disclosed at the trial if it should go ahead.

If you and your partner manage to reach an agreement at any stage, you can also agree whether to have the agreement made an order of court and which party will approach the court to do so. If children are involved, the Office of the Family Advocate will have to peruse your agreement to provide the High Court with an opinion of whether they believe the arrangements you and your partner have agreed to are in the best interests of the children.

Contested Divorces

The contested divorce process consists of various stages:

- pleadings
- application for and set down of trial date
- discovery of documents
- further discovery and particulars
- pre-trial conference
- trial
- judgment

Pleadings

The formal documents in a divorce are referred to as pleadings. Typically, the pleadings in a divorce will consist of the following documents:

- summons, particulars of claim and notice of defence
- plea
- counterclaim
- plea to counterclaim and further pleadings

Only those facts that are necessary to support a cause of action or to disclose a proper defence should be pleaded in the pleadings. One often finds unnecessary detail and/or facts in the pleadings.

The pleadings narrow the disputes and provide guidance to the court on the evidence that is to be led. Pleadings must conform to the following criteria:

- Each pleading must be signed by the party or his/her legal practitioner.
- Pleadings must be divided into paragraphs that are consecutively numbered and contain distinct averments (affirmations or allegations).
- Every pleading must contain a statement of all the material facts relied upon with sufficient particularity to enable the other party to respond thereto.
- Every pleading in which a party claims patrimonial relief other than that which the party would ordinarily be entitled to as a natural consequence of the divorce, must contain details of the grounds on which such relief is claimed.

Summons

A divorce is usually started by way of a summons. The divorce action is deemed to have been instituted on the date the summons was issued. Unless there is a settlement between the parties, the summons culminates in a trial and the delivery of a judgment. The trial involves the leading of evidence by both the plaintiff and the defendant.

The summons informs the defendant that if he/she disputes the plaintiff's claim and wishes to defend the action, he/she must serve a notice of appearance to defend the claim on the plaintiff or his/her attorney within 10 days (where the parties live in the same jurisdiction) or 21 days (where the parties live in different provinces) after the date of service of the summons upon him/her. The summons also warns the defendant of the consequences if he/she fails to do so, i.e. it may be possible to obtain judgment by default against him/her.

A summons must comply with certain formalities and must state:

- the sex, occupation (if known) and address of the defendant;
- the sex, occupation and postal and residential addresses of the plaintiff; and
- the full address where the plaintiff will accept service of documents.

Before the summons can be issued, it must be endorsed with the following particulars of claim:

- The grounds on which it is stated that the court has jurisdiction in terms of the Divorce Act 70 of 1979.
- If a marriage subsists between the plaintiff and the defendant;
- the place and date of the marriage, as well as the matrimonial property system;
- the names, ages and sex of any minor children of the marriage;

- the name and address of the person in whose care the minor children are; and
- the nature and grounds of each claim and alternative claim.

The summons must be signed by the plaintiff or his/her legal practitioner and must state the address of the person who has so signed. A summons and other pleadings may be amended at any time before judgment. The divorce summons is served personally on the defendant by the sheriff of the court. A return of service must be produced by the sheriff stating:

- that the service has been duly effected and provide the date thereof; or
- that he/she has been unable to effect service and provide the reason for such inability.

In a divorce by default, i.e. where the defendant does not defend, a court must be satisfied that the summons was served personally.

Once the summons is served on the defendant, the defendant may, within the period stated in the summons, defend the action (i.e. contest the divorce) by delivering to the registrar and serving upon the plaintiff, at the address nominated by the plaintiff in the summons, a notice in writing that he/she intends to defend. The notice must be signed by the defendant or his/her attorney and must state the full address where the defendant will accept service of further pleadings and notices in the action. If a divorce summons is not served within 12 months of the date of its issue or, having been served, the plaintiff has not, within 12 months after the date of such service, taken further steps to proceed, the summons will lapse.

Plea

After serving a notice of defence, the defendant must, within 20 court days, deliver a plea. The plea must be dated and signed by the defendant or his/her legal representative. In the plea, the defendant must either admit/deny/confess/avoid all the material facts alleged in the particulars of claim, and must clearly state the nature and the grounds of his/her defence, including any exception that he/she may have to the summons.

The defendant should deliver his/her plea timeously. Essentially, the plea contains the basis of the defendant’s defence, and the defendant may admit, deny, confess or avoid the allegations made in the summons and particulars of claim.

When a defendant fails to deliver a plea, the plaintiff may deliver a notice in writing calling upon the defendant to deliver a plea within 5 court days of the service of the notice (referred to as a ‘notice of bar’) and warning the defendant that his/her failure to do so will result in the case being set down without further notice. Furthermore, judgment may be given against the defendant in his/her absence.

Counterclaim

The defendant may deliver a counterclaim or claim in reconvention, setting out any counterclaim that he/she may have.

Plea to counterclaim and further pleadings

If the plaintiff intends to defend the claim in reconvention, he/she must deliver a plea to the counterclaim within 10 court days of delivery of the counterclaim. Once that is done, the pleadings are closed.

Application for and set down of trial date

The plaintiff then makes an application for a trial date, which the registrar will set down (allocate). If the plaintiff does not apply for a trial date within the prescribed number of days after the pleadings have been closed, the defendant may do so.

Usually, if a divorce is instituted in the High Court, the duration from start to finish can be up to three years. In the regional magistrate's court, the duration from start to finish will be shorter as the lower courts do not have the same trial backlog as the High Court.

Discovery of documents

In the period between close of pleadings and waiting for a trial date, there is a process called discovery, during which each party demands to see the documentation and other material like tape recordings the other party intends to use at trial. Our law does not allow documents to be brought to trial without the judge or magistrate's consent. Each and every document that a party will use at trial must be 'discovered', i.e. the other party must be given an opportunity to read the document before the trial commences. The documentation may include bank statements, shareholdings in companies, credit card statements, bond accounts and tax returns. It is usually during the discovery process that most of the hidden documents are found, as there are processes that can require specific documents to be brought forward.

An attorney may issue subpoenas to relevant financial institutions to deliver documents the other party failed to deliver. It often happens that at the commencement of the divorce, all the relevant documents disappear out of the house and the difficult task of following the paper trail begins. Often an attorney will advise a client to immediately make copies of all the relevant documentation that will be used later as evidence to prove the value of their spouse's estate.

During this process, the following must be complied with:

- After the close of pleadings either party may deliver a notice to the other calling on him/her to deliver a schedule (list) specifying the books and documents in his/her possession or under his/her control that relate to the action (case) and that he/she intends to use in the action or that tend to prove or disprove either party's case. The schedule, verified by affidavit, must be delivered by the party required to do so within a specified period of time stated in the court rules.
- If privilege is claimed for any of the books or documents scheduled (i.e. if the party believes that he/she cannot be forced to disclose something), such books or documents must be separately listed in the schedule and the grounds on which privilege is claimed in respect of each must be set out.
- Each party must allow the other party to inspect and make copies of all books and documents disclosed or specified in a schedule delivered to them.
- A book or document not so disclosed may not be used for any purpose at the trial by the party in whose possession or under whose control it is, without the leave of the court on such terms as to adjournment and costs as may be just. This means that if the other side needs time to read through and study the documents that were not disclosed before the trial, the court may adjourn the proceedings at the cost of the party that did not disclose the documents and rule that said party pay the wasted costs for the day. The other party may then call for and use such book or document in the cross-examination of a witness.

Further discovery and particulars

Further discovery is possible if a party believes that, in addition to the documents, books or tape recordings disclosed, other relevant documents or recordings may be in the other party's possession. If the whereabouts of such items are known, the party requesting them must state this in his/her notice for further discovery to the court.

Further and better discovery is a mighty weapon in a divorce proceeding to obtain additional information regarding a spouse's financial status. A major advantage is the fact that the party who receives the notice must reply under oath. Any false statements can lead to prosecution for perjury.

In terms of the court rules, a party may deliver a notice requesting such further particulars as are strictly necessary to enable him/her to prepare for trial, not less than 20 days before the trial. If a party does not adhere to such a request or fails to do so timeously and sufficiently, the other party may request for the case to be dismissed.

Pre-trial conference

The court may at any stage after close of pleadings, or at the request in writing of either party, direct that an informal conference be conducted in the presence of the judicial officer in chambers, in order to consider a settlement of disputes.

Trial

Trial proceedings commence with both parties or their legal representatives being given an opportunity to deliver an opening address, in which the court is informed of the issues that are in agreement and those that are in dispute between the parties.

If, on the pleadings, the burden of proof is on the plaintiff, he/she must give evidence first. Where the burden of proof is on the defendant, the defendant will be first.

A witness who is not a party to the action may be ordered by the court to leave the court until his/her evidence is required or after his/her evidence has been given; or to remain in court after his/her evidence has been given, until the trial is terminated or adjourned.

Any witness may be examined by the court as well as by the parties, and the court may decide to call a witness not called by either party if it thinks his/her evidence necessary in order to discover the truth or answer the question before it.

After both parties have given evidence, whoever went first may again address the court. The other party then has a chance and the party who went first may reply.

Judgment

A divorce trial must culminate in the granting of judgment. The court may grant any of the following orders:

- judgment for a party in respect of his/her claim in so far as he/she has proved the same;
- judgment for a party in respect of his/her defence in so far as he/she has proved the same; or
- absolution from the instance if it appears to the court that the evidence does not justify giving judgment for either party.

Costs

In giving judgment or in making any order including adjournment or amendment, the court may award such costs as may be just. These costs may also be subject to taxation. While costs are generally awarded to the successful party, this is not an immutable rule. A court may decide not to award costs at all, or may apportion the costs of the proceedings between the parties.