

GUIDELINES TO DIVORCE PROCEEDINGS

1. INTRODUCTION

Divorce is the legal process whereby a Decree of Divorce is obtained at Court to dissolve a valid marriage.

2. WHO MAY INSTITUTE DIVORCE PROCEEDINGS?

Any party to a valid marriage may, if he/she feels aggrieved by the continued marriage relationship and feels that the marital relationship has irretrievably broken down, seek to dissolve the marriage by divorce.

3. WHO ARE THE PARTIES TO DIVORCE PROCEEDINGS?

a. Plaintiff

This is the party who initiates the divorce proceedings.

b. Defendant

The party against whom the divorce action is instituted is called the Defendant.

4. WHICH COURT OFFICIALS ARE INVOLVED IN DIVORCE PROCEEDINGS?

a. The Registrar

This is the Court Official entrusted with the duty to issue a Summons and any other documents/pleadings in the proceedings which need to be served at Court, are served through this Office.

b. The Sheriff

This is the Official who is entrusted with the duty to serve the Summons upon the Defendant. In all cases the Summons must be served upon the Defendant personally. The Defendant must respond to the Summons by completing the Notice of Intention to Defend and serving same on the Plaintiff's Attorneys within 10 (ten) days of date of service of Summons.

5. **WHICH RELEVANT COURT STRUCTURES DEAL WITH DIVORCES?**

In principle, there are three Courts which are vested with the capacity to handle divorce matters and these Courts are as follows:

a. The High Court

This is the Court, which was previously known as the Supreme Court of South Africa. It has jurisdiction to hear all divorce and related proceedings such as Applications for custody and maintenance of minor children arising out of divorce proceedings.

b. The Central Divorce Court

The Central Divorce Court is vested with all the powers and capacities that the High Court has with regards to divorce matters.

c. The Regional Court (The Magistrate's Court)

The Regional Court's Amendment Act came into effect in 2010 to amend the Magistrate's Court Act so as to allow Regional Divisions of the Magistrate's Courts to also deal with divorce cases to relieve the burden on the High Court.

6. **HOW DOES DIVORCE PROCEEDINGS WORK?**

- a. Issue of Summons: The Plaintiff's Attorneys must prepare a Summons and issue same through the Registrar of the Regional Court or High Court.
- b. The Summons will contain the full names and identity numbers of the Plaintiff and the Defendant wherein the Defendant is informed that the Plaintiff is instituting action against the Defendant claiming the relief set out in the Particulars of Claim which is annexed to the Summons. The Defendant is also informed at the Summons that if the Defendant wishes to dispute the claim and wishes to defend the action the Defendant must within 10 (ten) days of service of the Summons upon him/her file with the Registrar his/her Notice of Intention to Defend and serve a copy thereof on the Plaintiff's Attorneys of Record and thereafter and within 20 (twenty) days after serving and filing the Notice of Intention to Defend serve upon the Plaintiff's Attorneys and file with the Registrar a Plea, exception, Notice to Strikeout, with or without a counter-claim.
- c. The Defendant is lastly informed that if the Defendant fails to file and serve a Notice of Intention to Defend, a Judgment may be given against him/her without further notice.
- d. The Summons will be signed by the Plaintiff's Attorneys.
- e. The following forms must be attached to the Summons:
 - i. Particulars of Claim;
 - ii. Settlement Agreement, if one has been concluded;
 - iii. In the event of children born of the marriage, Annexure A pertaining to arrangements regarding the dependent and minor children;
 - iv. A Statistics of Divorce form.

- f. Once the Summons has been issued at Court by the Plaintiff's Attorneys, the Registrar will also sign the Summons and put a Court stamp on the Summons.

7. **WHAT INFORMATION IS CONTAINED IN THE PARTICULARS OF CLAIM?**

- a. Full particularity of the parties must be stated.
- b. The date and place of the marriage of the parties are also required as well as the type of marriage, e.g. in community of property, out of community of property or out of community property with the inclusion or exclusion of the accrual system.
- c. In the event of minor children being born of the marriage, their names, sex and dates of birth must be stated. The Summons must also contain the grounds for the divorce. It is important to note that our Law only recognises two grounds for a divorce and they are as follows:
 - i. Irretrievable breakdown of the marriage; and
 - ii. Mental illness or continuous unconsciousness.
- d. It is important to note that our law of divorce is no longer based on the fault principle. This implies that it is not material to prove for instance the party who caused the breakdown of the marriage, as long as it is proved that the ground(s) do exist, the Court will grant a divorce. In the Particulars of Claim one needs only to state the grounds briefly because evidence will be led, where necessary, at the time of the matter being heard in Court.
- e. The last section of the Particulars of Claim is called the Prayer, and it contains the details of the Order, which the Plaintiff requests the Court to make:
 - i. The Prayer will invariably contain a request for a Decree of Divorce;
 - ii. An Order relating to the property of the parties will also be prayed for in appropriate cases, e.g. an Order for the division of the estate if the parties were married in community of property. It is important to note

that in a case where the parties have executed and signed a Deed of Settlement they will request the Court to make the Settlement Agreement an Order of Court. The effect of this is that the settlement becomes enforceable in the same way as a Court Order;

- iii. An Order relating to custody and maintenance of the minor children, where applicable, will also be made. This Order may also include the maintenance for the spouses;
- iv. The Plaintiff may also ask for an Order for Costs or contribution towards costs against the Defendant.

8. WHAT FURTHER PROCEDURAL ASPECTS ARE OF IMPORTANCE?

- a. Upon receipt of the Summons and Particulars of Claim, the Defendant may decide either to defend the Summons or he/she may, where he/she does not oppose it, simply ignore it, and allow the matter to proceed as undefended. It is important to note that if the Defendant ignores the Summons he/she will be deemed to have consented to have judgment granted against him/her on the terms as set out in the Particulars of Claim.
- b. It may also happen that a Defendant upon receipt of the Summons decides that he/she wants to make settlement proposals. The Defendant can then make contact with the Plaintiff's Attorneys who will then normally draft a Settlement Agreement for consideration by the Defendant.
- c. The Defendant shall then make his/her counterproposals and the Plaintiff's Attorneys will facilitate the settlement and finalise the Settlement Agreement. If the Defendant instructs an Attorney the Plaintiff's Attorneys and the Defendant's Attorneys will liaise and reach an agreement upon all the issues between the parties.
- d. In the event that the parties have finally agreed on a settlement, the Plaintiff's Attorneys will draw up a Settlement Agreement and the Settlement Agreement will be made an Order of Court. Once a Settlement Agreement has been signed, and if the matter is defended, the Defendant's Attorneys will

serve a Notice of Withdrawal of Defence on the Plaintiff's Attorneys and will file same at Court. The Plaintiff's Attorneys will thereafter obtain a Court date from the Registrar and the Plaintiff's Attorneys and the Plaintiff will then attend Court on the appointed date in order to obtain a Decree of Divorce. If no Notice of Intention to Defend was delivered, the Plaintiff's Attorneys will merely place the matter on the unopposed roll and attend Court with the Plaintiff to obtain a Decree of Divorce. It is important to note that the Plaintiff has to bring along to Court his/her original marriage certificate and identity document.

- e. At Court the presiding Officer will call your matter and your Attorney or Advocate will ask the Plaintiff a few questions regarding the marriage, for example your full names, whether you are the Plaintiff in the matter, where and when you were married and how you were married and the reasons for the breakdown in the marriage and whether a Settlement Agreement was concluded and same will be shown to the Plaintiff who will confirm same whereafter the divorce will be declared final and the Plaintiff's Attorneys will then be excused.
- f. The Plaintiff's Attorneys will obtain the Decree of Divorce from the Registrar after approximately 14 (fourteen) days who will make it available to the Plaintiff and the Defendant's Attorneys.