

Business Litigation Preparedness Guide

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Purpose of This Guide

This guide is designed to help businesses understand the risks associated with litigation and how to prepare for potential legal disputes.

Business disputes can arise unexpectedly and may involve significant financial and operational consequences. By understanding how litigation works and taking proactive steps to manage risk, businesses can place themselves in a stronger legal position if a dispute occurs.

This guide provides a general overview of common business disputes, how litigation typically unfolds in South Africa, and the steps businesses can take to protect their interests.

This document serves as an informational guide only and should not be regarded as a substitute for legal advice tailored to a specific situation.

Common Causes of Business Litigation

Commercial disputes arise for many different reasons. Some of the most common causes of litigation in South Africa include:

Contractual Disputes

Disputes often arise when one party fails to comply with the terms of a contract. This may include failure to deliver goods or services, non-payment, or disagreements regarding contractual obligations.

Partnership and Shareholder Disputes

Disagreements between business partners or shareholders can lead to litigation, particularly where governance, financial management, or strategic direction is contested.

Labour Disputes

Employment-related disputes involving dismissals, workplace conduct, or employment contracts may result in proceedings before labour tribunals or courts.

Debt Recovery

Businesses frequently initiate legal proceedings to recover unpaid debts arising from commercial transactions.

Regulatory and Compliance Issues

Failure to comply with applicable laws and regulations may lead to enforcement action, investigations, or civil litigation.



Pre-Litigation Preparedness (Risk Management)

The most effective way to manage litigation risk is to take proactive steps before a dispute arises.

Comprehensive Documentation

Businesses should maintain organised and accurate records of their operations. This includes:

- Contracts and agreements
- Email communications
- Financial records
- Minutes of meetings
- Internal reports and correspondence

Proper record keeping is essential because courts require parties to disclose relevant documents during litigation.

Clear and Well-Drafted Agreements

Contracts should be clear, unambiguous, and tailored to the specific transaction. Poorly drafted agreements often lead to disputes.

Well-drafted contracts should also include provisions dealing with dispute resolution, governing law, and enforcement mechanisms.

Compliance Management

Businesses should ensure compliance with applicable regulatory frameworks, including:

- Companies Act 71 of 2008
- Protection of Personal Information Act 4 of 2013 (POPIA)
- Financial Intelligence Centre Act 38 of 2001 (FICA)
- Labour Relations Act 66 of 1995

A structured compliance programme and periodic internal audits can significantly reduce litigation risk.

Alternative Dispute Resolution (ADR)

Litigation is not always the most efficient way to resolve disputes. In many cases, disputes can be resolved through mediation or arbitration, which may be faster and more cost-effective.

South African court rules also encourage parties to consider mediation before proceeding to trial.



Strategic Steps When Litigation Is Likely

When a dispute escalates and litigation becomes likely, it is important to take strategic and organised action.

Assemble Evidence Early

Gather all documents relevant to the dispute as soon as possible. This may include contracts, communications, invoices, and internal records.

Early collection of evidence helps legal representatives assess the strength of the case and prepare an appropriate legal strategy.

Conduct an Internal Investigation

Businesses should identify the relevant facts, key witnesses, and potential legal risks associated with the dispute.

An early internal assessment allows the business to understand both the strengths and weaknesses of its position.

Obtain Legal Advice

Consulting with legal professionals at an early stage allows businesses to assess the merits of their case and determine the most appropriate course of action.

Early legal advice can often prevent disputes from escalating unnecessarily.

Letter of Demand

In many commercial disputes, a letter of demand is sent before legal proceedings are initiated.

A letter of demand formally notifies the opposing party of the claim and provides an opportunity to resolve the dispute before litigation becomes necessary.



Understanding the South African Litigation Process

Understanding how litigation works allows businesses to engage with the process more confidently and make informed strategic decisions.

Court Jurisdiction

Commercial disputes in South Africa are generally heard either in the Magistrates' Court or the High Court.

The appropriate court depends on factors such as:

- The monetary value of the claim
- The complexity of the dispute
- The nature of the legal issues involved

Commencement of Proceedings

Litigation typically begins when legal proceedings are initiated in court.

This may occur through:

- **A summons**, which initiates action proceedings where oral evidence will be presented at trial, or
- **A notice of motion**, which initiates application proceedings where disputes are decided primarily on written affidavits.

Pleadings

After proceedings commence, the parties exchange formal court documents setting out their respective claims and defences. These documents are referred to as pleadings.

The pleadings define the legal and factual issues that the court will ultimately decide.

Discovery

During the discovery phase, both parties are required to disclose all documents relevant to the dispute that are in their possession or control.

This includes documents that support their case as well as those that may be unfavourable.

Pre-Trial Conference

Before trial, the court rules require the parties to hold a **pre-trial conference**. The purpose is to narrow the issues in dispute, explore settlement opportunities, and prepare the matter for trial.

Trial

If the dispute is not resolved earlier, the matter proceeds to trial where witnesses give evidence and the court hears legal argument.

Judgment

After considering the evidence and legal arguments, the court delivers judgment.

The court may grant relief such as payment of damages, enforcement of contractual obligations, or other appropriate remedies.



Key Strategic Considerations in Litigation

Successful litigation requires more than legal knowledge. Businesses must also adopt a strategic and disciplined approach.

Prospects of Success

One of the first considerations when assessing any potential dispute is the prospects of success.

This assessment involves more than determining whether a legal claim appears strong on its merits. It also requires considering whether a successful judgment can realistically be enforced.

For example, even if a claim is legally valid, litigation may not be commercially sensible if the opposing party does not have sufficient assets to satisfy a court judgment.

Before initiating legal proceedings, it is therefore important to consider factors such as:

- Whether the opposing party has assets or income that could satisfy a judgment
- Whether the opposing party is financially distressed or insolvent
- Whether enforcement measures such as attachment of assets or garnishee orders would be possible

A claim with strong legal merits may still present a significant commercial risk if the amount awarded by the court cannot ultimately be recovered.

For this reason, litigation decisions should always be guided by both legal merits and practical recoverability.

Expert Evidence

Some disputes involve specialised technical or financial issues. In such cases, expert witnesses may be required to provide independent opinions to assist the court.

Cost Management

Litigation can involve significant costs. Businesses should carefully consider the potential financial implications of legal proceedings, including the possibility of being ordered to pay the opposing party's legal costs if unsuccessful.

Strategic Decision-Making

Litigation can be stressful and emotionally charged. However, businesses should focus on making rational and commercially sensible decisions rather than allowing frustration or conflict to dictate strategy.



Specialised Areas of Business Risk

Certain situations require specialised legal and financial expertise.

Business Rescue

Where a company is financially distressed, business rescue proceedings may be considered.

Business rescue is a legal process designed to facilitate the rehabilitation of a financially distressed company.

Anti-Money Laundering Compliance (FICA)

Businesses that fall within the scope of the Financial Intelligence Centre Act 38 of 2001 must comply with anti-money laundering regulations.

Failure to comply with these obligations may result in significant penalties and regulatory enforcement action.



Managing Litigation Costs

Legal proceedings can involve significant financial costs. Businesses should therefore consider the financial implications before initiating or defending litigation.

Legal Fees

Legal costs typically include professional fees for attorneys and, where necessary, advocates.

The overall cost will depend on factors such as:

- The complexity of the dispute
- The amount of documentation involved
- The number of court appearances required
- The duration of the litigation

Cost Orders

South African courts generally follow the principle that the unsuccessful party may be ordered to pay a portion of the successful party's legal costs.

However, the amount recovered rarely reflects the full legal costs incurred.

Strategic Cost Management

Businesses should regularly review the cost-benefit balance of litigation. In some circumstances, a negotiated settlement may be commercially preferable to prolonged litigation.



Practical Tips for Businesses Facing Disputes

Businesses can significantly strengthen their position in a dispute by adopting practical and disciplined practices.

Maintain organised records

Proper record keeping can be decisive in litigation.

Avoid informal agreements

Important commercial arrangements should always be recorded in writing.

Act promptly when disputes arise

Delays can weaken legal claims and may result in prescription of claims.

Seek legal advice early

Early legal advice can often prevent disputes from escalating and may lead to faster resolution.

Remain commercially focused

Litigation should always be approached with a clear commercial strategy rather than emotional reactions.

Conclusion

Commercial disputes are an unavoidable part of doing business. However, businesses that understand the legal process and prepare effectively are far better positioned to manage disputes successfully.

By maintaining proper documentation, ensuring regulatory compliance, and obtaining legal advice when necessary, businesses can reduce litigation risk and protect their commercial interests.

Where disputes arise, early legal intervention and strategic decision-making can often lead to more efficient and cost-effective outcomes.

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The Business Litigation Process in South Africa

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Understanding the typical steps in litigation can help businesses anticipate what to expect when a dispute progresses to court.

While every matter differs depending on its complexity, commercial litigation generally follows the stages outlined below.



Dispute Arises

A dispute usually begins when one party alleges that another party has breached a contract, failed to perform an obligation, or caused financial harm.

At this stage, the parties may attempt to resolve the matter through negotiation or informal discussions.



Letter of Demand

A letter of demand is often sent to formally notify the opposing party of the claim and request that the dispute be resolved within a specified time period.

In many cases, disputes are resolved at this stage without formal court proceedings.



Legal Proceedings

Civil procedure, disputes are generally brought before the court in one of two ways:

Action Proceedings (Summons)

Action proceedings begin with the issuing of a summons.

This process is typically used where there are disputes of fact that require witnesses to testify and be cross-examined in court.

The general stages of action proceedings include:

1. Issue and service of summons
2. Delivery of a notice of intention to defend
3. Exchange of pleadings (plea, replication and related documents)
4. Discovery of documents
5. Pre-trial conference
6. Trial, where witnesses give oral evidence
7. Judgment by the court

Because evidence is presented orally at trial, action proceedings are generally longer and more complex.

Application Proceedings (Notice of Motion)

Application proceedings begin with a notice of motion supported by affidavits.

This procedure is typically used where the dispute can be decided primarily on legal issues or undisputed facts.

In application proceedings:

- The applicant sets out the case in a founding affidavit
- The opposing party responds with an answering affidavit
- The applicant may deliver a replying affidavit

The court usually decides the matter based on the written affidavits and legal argument, without hearing oral evidence.

Application proceedings are often faster than action proceedings, but they are not suitable where there are serious disputes of fact.

Choosing the Appropriate Procedure

The choice between action proceedings and application proceedings is an important strategic decision.

Generally:

- **Action proceedings** are appropriate where factual disputes are expected.
- **Application proceedings** are appropriate where the dispute can be resolved primarily on legal issues or common cause facts.

Obtaining legal advice early helps determine the most appropriate procedure for a particular dispute.

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Ten Common Mistakes Businesses Make During Litigation



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Businesses often weaken their legal position by making avoidable mistakes when disputes arise.

Understanding these risks can help businesses approach litigation more strategically.

1. Poor Record Keeping

Incomplete or disorganised records make it difficult to prove contractual obligations or financial transactions.

2. Informal Business Arrangements

Many disputes arise because important agreements were never properly recorded in writing.

3. Delaying Legal Advice

Waiting too long to obtain legal advice can significantly weaken a legal claim or defence.

4. Ignoring Letters of Demand

Failure to respond to a letter of demand can escalate a dispute unnecessarily and may lead to formal legal proceedings.

5. Destroying or Losing Documents

Once litigation becomes likely, businesses should preserve all relevant records. Destroying documents may severely damage a case.

6. Emotional Decision-Making

Litigation can be stressful, but decisions should always be made based on legal and commercial considerations rather than frustration or conflict.

7. Underestimating Litigation Costs

Businesses should carefully consider the financial implications of prolonged litigation.

8. Poor Internal Communication

Key information is sometimes held by employees who are not consulted early in the process.

9. Failing to Explore Settlement Options

Many disputes can be resolved through negotiation or mediation, avoiding lengthy litigation.

10. Not Understanding the Legal Process

Businesses that understand the litigation process are better equipped to make informed strategic decisions.

Final Note

Commercial litigation can present significant risks for businesses, but those risks can often be managed effectively through proper preparation, sound legal advice, and strategic decision-making.

By understanding the litigation process and taking proactive steps to manage disputes, businesses can protect their commercial interests and minimise unnecessary legal exposure.

For advice regarding a specific dispute or legal risk, businesses should seek professional legal assistance tailored to their particular circumstances.

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