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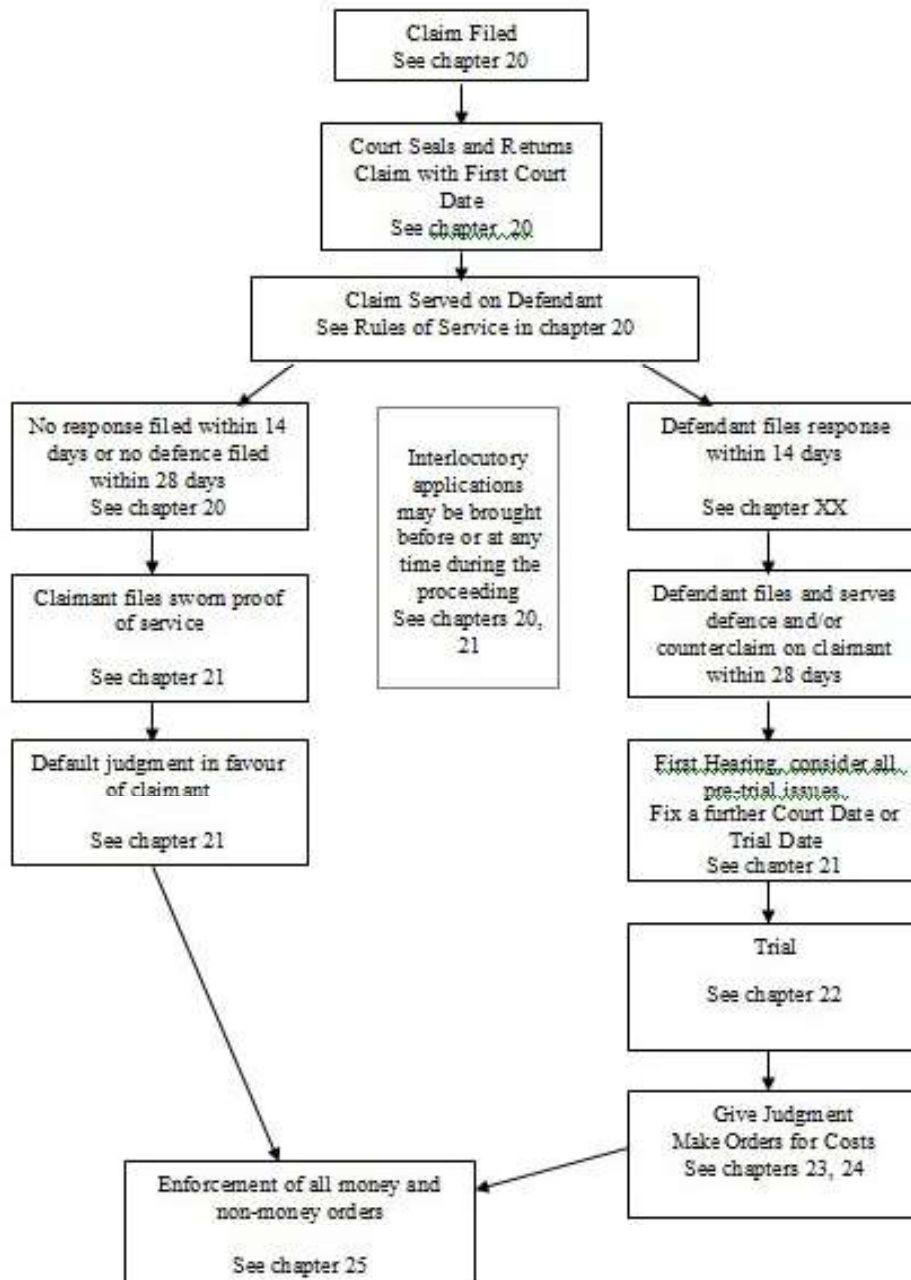
PRE-TRIAL MATTERS

1 The Civil Process

This chapter explains how a case comes before the Magistrate's Court and the steps taken to prepare a case to come to trial.

The diagram over the page shows the general process of a civil case from starting a proceeding to the enforcement of judgments and orders. Each step is explained in detail over the next three chapters.

A Civil Proceeding at a Glance



2 Matters Relating to All Civil Proceedings

2.1 Overriding Objective of *Civil Procedure Rules*

The overriding objective of the Civil Procedure Rules is to deal with cases justly: *Rule 1.2(1) Civil Procedure Rules*.

This includes, as far as practicable:

- ensuring all parties are on an equal footing;
- saving expense;
- dealing with the case in ways that are proportionate to the importance, complexity, amount of money and financial position of each party;
- ensuring the case is dealt with speedily and fairly; and
- allotting an appropriate share of Court resources, while taking into account the needs of other cases: *Rule 1.2(2) Civil Procedure Rules*.

Whenever you are dealing with any matters of civil procedure or interpreting the *Civil Procedure Rules*, you must keep the overriding objective in mind: *Rule 1.3 Civil Procedure Rules*.

2.2 Parties

The four categories of person who can be a party to a civil proceeding are:

- claimant;
- defendant;
- a person who becomes a party; or
- a person ordered by the Court to take part in the proceeding: *Rule 3.1(1) Civil Procedure Rules*.

There may be more than one claimant and defendant in a proceeding: *Rule 3.1(2) Criminal Procedure Rules*.

2.3 Statements of the Case

The most important part of all civil proceedings is the statement of the case. It forms part of all claims, defences or replies, so it is necessary to keep the requirements of a statement of the case in mind throughout the conduct of a proceeding.

The purpose of a statement of the case is to:

- set out the facts of what happened, as each party sees them;
- show the matters on which the parties agree; and
- show the areas where the parties disagree (the “issues between the parties”): *Rule 4.1(2) Civil Procedure Rules*.

Every statement of the case must:

- be as brief as possible;
- set out all the relevant facts on which the party relies but not the evidence of the facts;
- identify any statute or principle of law on which the party relies but not contain the legal arguments; and
- if the party is relying on custom law, state the custom law: *Rule 4.2(1) Civil Procedure Rules*.

Additionally, if the statement of the case is either a claim or counterclaim it must set out the remedies or orders sought: *Rule 4.2(2) Civil Procedure Rules*.

2.4 Service of Documents

For all documents required to be served, the party who files the document is responsible for ensuring the document is served: *Rule 5.1(1) Civil Procedure Rules*.

The party responsible for service may apply to the Court for an order that the document be served by an enforcement officer or other person. If you are satisfied that the circumstances of the case require service by a person other than the party himself or herself, you may order another person to serve it: *Rules 5.1(2),(3) Civil Procedure Rules*.

Service by an enforcement officer or other person will usually be advisable when service by the party would be highly inconvenient, unsafe, or otherwise impractical. For example, for domestic violence non-molestation orders, it would be highly inadvisable for the victim of the violence to personally serve the documents, as it may put her into danger.

3 How a Case Comes to the Magistrate’s Courts

3.1 Interlocutory Orders Prior to Beginning of Proceedings

Even prior to a claim being brought, a potential litigant may bring an application for an interlocutory order.

This can happen:

- the applicant has a serious question to be tried; and
- the applicant would be seriously disadvantaged if the order is not granted: *Rule 7.5(1) Civil Procedure Rules*.

An application for an interlocutory order prior to proceedings starting must:

- set out the substance of the applicant's claim; and
- give a brief statement of the evidence on which the applicant will rely; and
- set out the reasons why the applicant would be disadvantaged if the order is not made; and
- have a sworn statement in support of the application: *Rule 7.5(2) Civil Procedure Rules*.

You may grant an order if you are satisfied that the applicant:

- has a serious question, and under the evidence provided, it is likely to succeed; and
- would be seriously disadvantaged if the order is not made: *Rule 7.5(3) Civil Procedure Rules*.

When granting the order, you may order that the applicant file a claim to start the proceeding by the time stated in the order: *Rule 7.5(4) Civil Procedure Rules*.

If the interlocutory order sought is one outside your jurisdiction (such as an Order to Protect Property under *Rule 7.8* or *Order to Seize Documents* under *Rule 7.9*), direct the applicant to apply to the Supreme Court for the order.

3.2 The Claim

All civil proceedings in the Magistrate's Court start by a claimant filing a claim in the district where:

- the claimant or defendant lives;
- the actions that give rise to the proceeding happened; or
- the property which is the subject of the claim is located: *Rule 2.2, 2.4 Civil Procedure Rules*.

Content of the Claim

The claim must:

- be in Form 6;
- contain a statement of the case;

- contain the claimant's address for service;
- have with it a Response Form; and
- show the facts that give the Court jurisdiction to decide the claim: *Rule 4.3(1),(2) Civil Procedure Rules.*

If damages are claimed, the claim must also state the nature and amount of the damages, including special and exemplary damages: *Rule 4.10(1) Civil Procedure Rules.*

If general damages are claimed, the claim must state:

- the nature of the loss or damage suffered;
- the exact circumstances in which the loss or damage was suffered;
- the basis on which the amount claimed has been assessed or estimated; and
- any other matter about the assessment of damages that might take the other party by surprise: *Rule 4.10(2),(3) Civil Procedure Rules.*

Once the claim is filed, the Court must write on the form the date of the first hearing: *Rule 4.3(3) Civil Procedure Rules.*

Once the date has been set, three copies of the claim are made; for the Court, the claimant and the defendant.

Service

The claimant is responsible for serving the defendant with his or her copy of the claim: *Rule 5.1(1) Civil Procedure Rules.*

Normally, the defendant must be served with the claim personally. This is done by:

- giving a copy of the claim to the defendant; or
- if the individual does not accept the document, by putting it down in his or her presence and telling the person what it is: *Rule 5.8(1) Civil Procedure Rules.*

If personal service cannot be accomplished, the claimant may apply to the Court for an order of substituted service of the claim: *Rule 5.9(1) Civil Procedure Rules.*

You may order that substituted service be made by:

- serving the claim on a chief or church minister who lives in the area where it is believed the defendant is living;
- putting a notice in a newspaper circulating in the area where the defendant lives;

- arranging for an announcement to be broadcast on the local radio; or
- any other way that you think will ensure the defendant will be aware of the claim and its contents: *Rule 5.9(2) Civil Procedure Rules*.

If substituted service is to be effected by newspaper or radio broadcast, it must:

- be addressed to the defendant;
- give the defendant's name and last known address and the claimant's name and address for service;
- say where a copy of the claim can be picked up; and
- (if appearance is required) say the date, time and place of the Court where the person is to go: *Rule 5.9(3) Civil Procedure Rules*.

A number of rules govern the service of particular parties. For service:

- of children and other persons under a legal incapacity, see *Rule 5.10*;
- relating to the estate of a deceased person, see *Rule 5.11*;
- on a partnership, see *Rule 5.12*.

3.3 Defendant's Response / Defence / Counterclaim

Once served with the claim, the defendant has several options. He or she may:

- file a response;
- file a defence; and/or
- file a counterclaim.

Response

Upon service of the claim, the defendant has 14 days to file a response: *Rule 4.13(1)(a) Civil Procedure Rules*.

The response allows the defendant to:

- admit the claim;
- dispute all of the claim;
- dispute part of the claim;
- make a counterclaim; or
- object to the place of the proceeding.

A response must:

- be in Form 7;
- set out the defendant's address of service;
- be completed and signed: *Rule 4.4(2) Civil Procedure Rules.*

The defendant need not file a response if he or she files and serves a defence within 14 days of service of the claim: *Rule 4.4(3) Civil Procedure Rules.*

Defence

If the defendant intends to contest the claim, he or she must file and serve a defence within 14 days of being served if no response has been filed or within 28 days of being served if a response has been filed: *Rule 4.13(1),(2) Civil Procedure Rules.*

The defence:

- must be in Form 8;
- must contain a statement of the case;
- must not deny the claim generally, but must deal with each fact in the claim by denying the fact and stating what the defendant alleges happened.

By not denying a particular fact, the defendant is taken to agree with that fact.

If the defendant does not know about a particular fact and cannot reasonably find out about it, it must be stated in the defence: *Rule 4.5 Civil Procedure Rules.*

In a defence, the statement of the case must **specifically** mention matters that:

- make the claim not maintainable;
- show a transaction is void or voidable;
- may take the claimant by surprise if not mentioned; or
- raise a question of fact not arising out of the claim: *Rule 4.7 Civil Procedure Rules.*

Counterclaim

When served with a claim, the defendant also has the option of starting a counterclaim against the claimant, rather than bringing the matter in a separate proceeding.

If a defendant wants to make a counterclaim against the defendant, he or she must include it in the details of the defence: *Rule 4.8(1) Civil Procedure Rules.*

The counterclaim must:

- contain a statement of the case;
- be shown within the defence to clearly to be a counterclaim; and
- set out the details of the counterclaim as if it were a claim: *Rule 4.8(2),(3) Civil Procedure Rules.*

Counterclaim against additional party

A defendant may also make a counterclaim against someone other than the claimant if:

- the claimant is also a party to the counterclaim; and
- the defendant alleges the other party is liable with the claimant or the relief the defendant claims against the other person is related to or connected with the original subject matter of the proceeding: *Rule 4.9(1) Civil Procedure Rules.*

The defendant must file and serve a counterclaim against the additional party within 14 days of being served if no response has been filed or within 28 days of being served if a response has been filed: *Rule 4.13(1),(2) Civil Procedure Rules.*

3.4 Reply

Once the defendant has made a defence or counterclaim, the claimant then has the opportunity to make a reply to the defence. If the claimant does not file and serve a reply, he or she is taken to deny all facts alleged by the defendant: *Rule 4.6(1) Civil Procedure Rules.*

The reply:

- must be in Form 9;
- must contain a statement of the case;
- must state what the claimant alleges happened.

If the reply does not deal with a particular fact, the claimant is taken to deny it: *Rule 4.6 Civil Procedure Rules.*

In a reply, the statement of the case must **specifically** mention matters that:

- make the claim not maintainable;
- show a transaction is void or voidable;
- may take the claimant by surprise if not mentioned; or
- raise a question of fact not arising out of the claim: *Rule 4.7 Civil Procedure Rules.*

Reply to Defence Against Counterclaim

As the claimant has a right of reply to a defence, so a defendant also has the right of reply if the claimant has made a defence to a counterclaim: *Rule 4.13(3) Civil Procedure Rules*.

Service

The claimant's reply must be filed and served within 14 days of service of the defence: *Rule 4.13(1)(c) Civil Procedure Rules*.

If the reply is to a counterclaim against a third party, the reply must be filed and served within 28 days of service of the counterclaim: *Rule 4.13(1)(d) Civil Procedure Rules*.

4 Dealing with the Matter

4.1 Personal Interest

The first time a claim comes before you, you must always ask yourself if there is any reason why you should not hear the case. You should excuse yourself if you have or appear to have:

- bias or prejudice in the matter;
- a personal or business relationship with any of the parties, or witnesses; or
- a personal or financial interest in the matter.

For further guidance see Chapter 5, Judicial Conduct.

Ideally, you should be able to determine whether there is some reason you should excuse yourself when you first read the claim. However, as parties, witnesses or documents are added to a proceeding you will have to constantly re-evaluate whether there is some reason you should excuse yourself.

4.2 Transferring the Case

Under *Rule 2.4*, a claim may be filed in any one of a number of districts. Even if a claim has been filed in your district, you may change the district where it is dealt with if you are satisfied that the matter can be more conveniently or fairly dealt with in another district: *Rule 2.5(1) Civil Procedure Rules*.

The balance of convenience on where the matter should be heard will depend on:

- the location of the parties;
- the subject matter of the claim, and

- the location of witnesses and evidence.

Transfer to Supreme Court

It may become apparent as documents are tendered that the matter is beyond your jurisdiction, either due to the subject matter (such as child custody) or because the amount of the claim exceeds your jurisdiction.

In such cases, make an order striking the case from the Magistrates' Courts List and transfer it to the Supreme Court:

4.3 Managing the File

After determining whether the case is one you can hear, you will have to deal with the documents which have been filed. The file may range from a complete set of all documents, including the claim, defence and reply, or may consist of just the claim. The steps you take will depend on which documents are in the file.

If only a claim has been filed:

- look at the date of filing and determine what the applicable date for response / defence is;
- if it is before the applicable date, mark the date in your diary and return to it at that date to see if a response or defence has been filed;
- if the date of filing a response or defence has passed, wait until the claimant asks for default judgment or wait for the date of First Hearing to inquire into the matter.

If a claim and defence and/or counterclaims have been filed:

- read the claim and defence and try to determine the issues in dispute; and
- once you have determined the issues, make any notes on the file so that you will be prepared for the First Hearing.