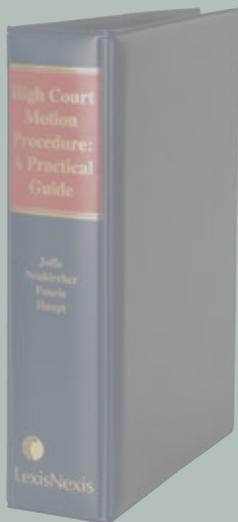


High Court Motion Procedure

By MM Joffe, B Neukircher SC, HR Fourie and LC Haupt, LexisNexis (2008). Looseleaf R456 including VAT



'Practice in the Motion Court,' says Judge Joffe in the preface to this book, 'is not for the faint-hearted.' Few advocates would disagree with that sentiment. Like the unexplored territories on the fringes of early cartographers' maps, the motion court deserves to bear a legend warning travellers that 'here be dragons.' *High Court Motion Procedure* is intended to assist practitioners who draft papers for, and appear in, the land of the dragons.

High Court Motion Procedure is, according to the preface, 'no more than what it is designed to be, namely, a practical guide to the Motion Court' (v). Measured against this yardstick, the book is an unqualified success. It provides practical (as opposed to theoretical or academic) guidance regarding how to draft and move applications in the High Court. The book deals thematically with a series of applications that advocates are likely to encounter in their everyday practice (edictal citation, Rule 43, sequestrations, liquidations and so on). In relation to each of these applications, the treatment commences with a summary of the critical averments that must be made in order to obtain relief. This is followed by notes dealing with the procedure to be followed in the case of each particular application, including references to case law. Then comes the part to which the eyes of most practitioners will be enthusiastically drawn: a precedent for the notice of motion and the founding affidavit. Each section concludes with a block headed 'practitioner's checklist,' containing a series of bullet points to be borne in mind when drafting and moving the relevant application.

When I did pupillage many years ago, my first traumatic exposure to the unopposed motion court left me wishing that there was a practitioner's guide to the bewildering array of applications that were moved according to a script that everyone (except me)

seemed to know. In the absence of such a book, I was compelled to engage in the arduous task of compiling notes and precedents myself, drawing heavily on the handed-down wisdom of generations of pupils who had suffered through the same process before me. The result was the production of a dog-eared file of precedents and notes that I still retain, culled from a motley variety of sources and bearing marginal notes that would have made the Glossators proud. I suspect that most of my colleagues have a similar file lurking somewhere in the recesses of their chambers.

High Court Motion Procedure is a much more sophisticated product than my own frayed and yellowed file. It is the sort of book that junior advocates will consult immediately after reading the brief and just before panic sets in. It is, if you like, an 'Amler on Motion Procedure,' providing precedents for applications in the same way that *Amler* provides precedents for pleadings. The comparison is not inexact because *High Court Motion Procedure* is useful in the same way that *Amler* is useful: it does not provide the last word on each topic, but it does provide an extremely valuable starting point for practitioners confronting a blank page and a looming deadline.

The authors of *High Court Motion Procedure* are a judge in the Witwatersrand Local Division and three advocates at the Pretoria Bar. The book represents the accumulated wisdom of their collective years of practice. They have produced a work that is clearly written, thoughtfully presented and immensely valuable. It is essential reading for anyone sufficiently brave (or insufficiently faint-hearted) to venture into the hazardous terrain of the motion court. The book has the same virtue as the maps of old: you may not be able to avoid the dragons, but at least you will know that they are out there waiting for you.

Alfred Cockrell, Johannesburg Bar



Advocacy Manual

By George Hampel AM QC, Elizabeth Brimer and Randall Kune, Australian Institute for Advocacy (2008). Hard cover AUS \$180 plus postage*

Professor George Hampel AM QC who is well known to all those involved in advocacy training, is perhaps considered the leading light in the quest to improve the advocacy skills of advocates worldwide. Hampel, together with Elizabeth Brimer, who is a barrister practising at the Victorian Bar, and Randall Kune, also a barrister at the Victorian Bar as well as a lecturer at the College of Law, Victoria, have with the assistance of various others involved in advocacy training, compiled this manual. They describe its pur-

pose as 'to provide a practical guide to the philosophy, practice and teaching of advocacy.' Those involved in advocacy training will have learned over the years that what we try and impart to members of the profession is that advocacy is not a science; it involves the art of persuasion and it can be taught. Advocacy embraces fundamental principals which are 'generic and which underlie the practise of all good Advocacy.'

The authors use two case studies as illus-

trations and for practical examples. The main case study is *DPP v Daniel Jones* (which is well known in SA advocacy circles as *S v Jones*) A second case study of *DPP v Lucia Gonzales* is used to illustrate pleas in mitigation.

The manual, interestingly, begins with a chapter on the ethics and etiquette of advocacy. The importance which the authors assign to the ethics involved in advocacy demonstrates what we endeavour to impart to our young practitioners - that above the skills and

knowledge involved in our profession, paramount is the importance of demonstrating ethical conduct.

The manual then takes one through each and every stage of the process in conducting a trial. It deals extensively with preparation and analysis of the case materials as well as the relevant law, evidence and procedure. It then deals with the preparation for the performance that one will undertake after the preparation of the facts and law have been completed.

The authors also deal comprehensively with the use of evidence and provide a useful and relevant summary on the questions of law involved in the presentation of evidence, relevance, hearsay, expert evidence and the admissibility of evidence. As well as dealing with the legal questions surrounding evidence, the authors deal with the relationship between evidence and advocacy.

The authors then take us through the

stages of a trial. A chapter is devoted to each stage. Firstly they deal in detail with how to prepare and present and opening the address, the skills involved in the mastery of the evidence in preparing for examination in chief and the ways in which to structure and perform such examination in chief.

The same detail goes into the chapters on cross-examination and closing argument. In this regard they deal again both with the preparation of such argument and the performance related thereto.

Having dealt with the skills involved in the preparation and conduct of a trial, the later chapters of the manual present the skills involved in written advocacy, oral advocacy, mediation and communication. The final chapters are dedicated to advocacy workshops and instructor training as well as the assessment of advocacy skills.

To those involved in advocacy training this manual is an essential and concise, though

comprehensive, guide to the practice and teaching of advocacy. This book is the first of its kind in this field. As the authors concede, it is a difficult task to compile a manual which, in essence, is required to deal with the practical aspects of advocacy. The well known ethos of advocacy training is that advocacy skills are best taught by the workshop method of instruction, demonstration performance and review. However the manual manages to overcome this difficulty. It is easy to follow and an exceptionally useful tool for teachers and practitioners to use both as a teaching guide and as a practical guide to the improvement and advancement of advocacy skills.

Sharise Weiner SC, Johannesburg Bar (convenor of the GCB's Advocacy Training Committee)

*This manual is now being distributed in Australia, the UK, Hong Kong, USA, Singapore and South Africa. Copies can be purchased via the AAI website (www.advocacy.com.au), alternatively through the General Council of the Bar of SA. 

Abuse of pleadings: Those were the days!

'FORASMUCH as it now appeared to this Court, by a report made by the now Lord Keeper, (being then Master of the Rolls), upon consideration had of the plaintiff's replication, according to an order of the 7th of May anno 37th Reginæ, that the said replication doth amount to six score sheets of paper, and yet all the matter thereof which is pertinent might have been well contrived in sixteen sheets of paper, wherefore the plaintiff was appointed to be examined to find out who drew the same replication, and by whose advice it was done, to the end that the offender might, for example sake, not only be punished, but also be fined to Her Majesty for that offence; and that the defendant might have his charges sustained thereby; the execution of which order was, by a later order made by the late Lord Keeper the 26th of June, Anno 37th Reginæ, suspended, without any express cause shewed thereof in that order, and was never since called upon until the matter came to be heard, on Tuesday lost, before the now Lord Keeper; at which time some mention was again made of the same replication; and for that it now appeared to his Lordship, by the confession of Richard Mylward, alias Alexander, the plaintiff's son, that he the said Richard himself, did both draw, devise, and engross the same replication; and because his Lordship is of opinion that such an abuse is not in any sort to be tolerated, proceeding of a malicious purpose to increase

the defendant's charge, and being fraught with much impertinent matter not fit for this Court; it is therefore ordered, that the Warden of the Fleet shall take the said Richard Mylward, alias Alexander, into his custody, and shall bring him into Westminster Hall, on Saturday next, about ten of the clock in the forenoon,

and then and there shall cut a hole in the myddest of the same engrossed replication (which is delivered unto him for that purpose), and put the said Richard's head through the same hole, and so let the same replication hang about his shoulders, with the written side outward; and then, the same so hanging, shall lead the same Richard, bare headed and bare faced, round about Westminster Hall, whilst the Courts are sitting, and shall shew him at the bar of every of the three Courts within the Hall, and shall then take him back again to the Fleet,

and keep him prisoner, until he shall have paid 10l. to Her Majesty for a fine, and 20 nobles to the defendant, for his costs in respect of the aforesaid abuse, which fine and costs are now adjudged and imposed upon him by this Court, for the abuse aforesaid.'

From BAILII Citation Number: *Mylward v Weldon* [1595] EWHC Ch 1 21 ER 136, (1596) Tothill 102, Reg Lib-A 1596, fol.672 (1596).



In the High Court, the person who is bringing the case, that is, the person who is suing, is known as the plaintiff. The person who is being sued is known as the defendant. To commence proceedings, that is, to start a legal action, the plaintiff's barrister prepares an originating summons. Like summary proceedings, this is a fast-track procedure where the judge decides the case by reading affidavits submitted by both sides. There is more information on originating summons on the Courts Service website. Content of an originating summons. All originating summonses must contain the following information In High Court procedure there also exists an application procedure on notice of motion, supported by, in the event of an opposed motion, the respective parties' affidavits (i.e. founding, answering and replying affidavits). Judges in South Africa do not have the power to search for the truth on their own motion, but is constrained to base their findings on the evidence presented to them by the parties. It follows that South African judges can hardly aspire to find the objective truth. They must necessarily contend themselves with the formal truth or, at best, a combination of the objectiv Pursuant to Section 274 of the 1999 Constitution of the Federal Republic of Nigeria and Section 89 (1) of the High Court Law of Lagos State CAP H5 Order 59(2) of the New Rules stipulates that a suit will be automatically qualified (without any application) for fast track procedure where the action is commenced by a writ of summons and is for a liquidated monetary relief of One Hundred Million Naira (â,100,000,000). An action commenced by a writ of summons that involves a mortgage transaction, charge or security will also be automatically qualified.