

**CHAPTER 04:02 - HIGH COURT: SUBSIDIARY LEGISLATION  
INDEX TO SUBSIDIARY LEGISLATION**

Rules of the High Court

**RULES OF THE HIGH COURT**

*(section 28)*

*(19th May, 2008)*

ARRANGEMENT OF ORDER OF RULES

ORDER

1. Application and interpretation
2. General forms of process, fees, etc
3. Duties of Registrar
4. Advocates and Attorneys: warrants to sue and defend
5. Effect of non-compliance
6. Originating Process
7. Disability
8. Service of summons, writs, notices and other documents
9. Entry of appearance to summons
10. Edictal citation
11. Renewal of originating process
12. Petitions and applications
13. Affidavits and depositions
14. Provisional sentence
15. Arrest of defendant
16. Joinder of parties and consolidation of actions
17. Third party procedure
18. Proceedings by or against partnerships and associations
19. Change of parties
20. Pleading generally
21. Close of pleadings
22. Entry for trial
23. Dismissal for want of prosecution
24. Declaration
25. Plea and claim in reconvention
26. Replication to plea in reconvention
27. Deleted
28. Application for directions
29. Judgment by consent
30. Judgment in default of appearance
31. Deleted
32. Amendment of pleadings
33. Irregular proceedings
34. Summary judgment
35. Special cases and adjudication on point of law
36. Assessment of damages
37. Inquiries and accounts
38. Payment into court
39. Discovery, inspection and production of documents
40. Admissions
41. Inspection, examinations and expert testimony
42. Case management: allocation of cases and case management conferences
43. Set down of defended actions, motions and petitions
44. Procuring evidence for trial
45. Civil trials
46. Poor litigants

47. Withdrawal, settlement, postponement and abandonment
48. Variation and rescission of orders
49. Matrimonial causes
50. Entering judgment in default
51. Drawing up of judgments and orders
52. Execution
53. Imprisonment for debt
54. Discovery in aid of execution
55. Garnishee proceedings
56. Contempt of court
57. Security for costs
58. Review of taxation
59. Civil appeals from magistrates' court and other bodies or persons
60. Appeals in criminal cases from subordinate courts to the High Court
61. Reviews
62. Criminal proceedings: circuit court
63. *De Lunatico Inquirendo*, appointment of curators in respect of persons under disability and release from curatorship
64. Interpleader
65. Sworn translators
66. Interpretation of evidence
67. Inspection of records
68. Criminal trials
69. Superannuation
70. Enforcement of protective provisions under section 18 of the Constitution
71. Computation of time
72. Tariff of Deputy-Sheriff fees
73. Advocates' fees in civil matters
74. Taxation and tariff of fees of attorneys
75. Allowances payable to assessors
76. Tariff of allowances payable to witnesses in civil proceedings in the High Court
77. Law terms and vacations
78. Trade Unions and Employers' Organizations Rules
79. Paper and printing

First Schedule  
 Second Schedule  
 Third Schedule  
 Fourth Schedule

S.I. 115, 1969,  
 S.I. 117, 1969,  
 S.I. 98, 1970,  
 S.I. 65, 1971,  
 S.I. 80, 1971,  
 S.I. 123, 1971,  
 S.I. 82, 1972,  
 S.I. 79, 1975,  
 S.I. 21, 1982,  
 S.I. 66, 1982,  
 S.I. 121, 1982,  
 S.I. 61, 1985,  
 S.I. 16, 1986,  
 S.I. 89, 1986,

S.I. 58, 1989,  
S.I. 65, 1989,  
S.I. 7, 1991,  
S.I. 116, 2004,  
S.I. 41, 2005,  
S.I. 73, 2006,  
S.I. 40, 2008,  
S.I. 24, 2009.

## **ORDER 1 APPLICATION AND INTERPRETATION**

1. These Orders and Rules may be cited as the Rules of the High Court.
2. Application of these Rules shall be directed towards the achievement of a just, efficient and speedy dispensation of justice.
3. In these Rules, unless the context leads to a repugnant result—
  - "action"** means a civil proceeding commenced in such manner as may be prescribed, but does not include a criminal proceeding by the State;
  - "advocate"** means an advocate duly admitted and still enrolled on the Roll of Legal Practitioners under section 13 of the Legal Practitioners Act and a foreign advocate admitted to practise under section 7 of the Legal Practitioners Act;
  - "attorney"** means an attorney duly admitted and still enrolled on the Roll of Legal Practitioners under section 13 of the Legal Practitioners Act;
  - "cause"** includes any action, suit or other original proceeding and any criminal proceeding;
  - "counsel"** means an advocate or an attorney;
  - "court"** means a judge sitting in open court;
  - "court day"** means any day other than a Saturday, Sunday or any day which is a public holiday under the Public Holidays Act;
  - "defendant"** includes a defendant to a counterclaim;
  - "deliver"** means file the original with the Registrar and serve copies bearing the Registrar's date stamp on all parties;
  - "Form"** means a form set out in the First Schedule to these Rules;
  - "judge"** means the judge to whom a cause has been allocated under Order 42, sitting in open court or in chambers;
  - "judgment"** includes decree;
  - "judicial division"** means a division of the High Court of Botswana as may be prescribed as such from time to time;
  - "magistrate"** means a person appointed as such under section 104 of the Constitution;
  - "Master"** means the Master of the High Court appointed under section 4 of the Administration of Estates Act;
  - "matrimonial cause"** means any action for divorce, nullity of marriage or judicial separation;
  - "motion day"** means at least one day in every week, other than during vacation, on which a judge shall sit to hear and consider any matter required under these Rules to be heard on a motion day or any other matter directed by the judge to be so heard. The Registrar shall publish the dates of each judge's motion days at least three weeks in advance of the earliest such date;
  - "party"** or any reference to a plaintiff, defendant or other litigant includes his counsel;
  - "plaintiff"** includes a plaintiff in a counterclaim;
  - "Principal Registry"** means the Office of the Registrar at the seat of the judicial division in which a cause was first registered;

**"Registrar"** means the Registrar of the High Court and includes a Deputy Registrar, an Assistant Registrar and any person performing the duties of a Registrar under the authority of section 17 of the Act;

**"Registry"** includes the Registry at the High Court at Lobatse and Francistown and at any seat of the High Court that may be gazetted as such;

**"Sheriff "** includes a Deputy-Sheriff and any person acting under the general or special directions of the Sheriff;

**"trial"** includes the substantive hearing of application or petition proceedings, where applicable.

## **ORDER 2**

### **GENERAL FORMS OF PROCESS, FEES, ETC.**

1. The Registrar or other officer empowered to do so shall sign and date stamp every writ or other process.

2. The forms in the First Schedule, or forms as near as may be, may be used in all matters, causes and proceedings to which they are applicable, with such variations as circumstances may require.

3. In proceedings for which forms are not provided in the First Schedule or prescribed by any enactment, the Registrar may, subject to the approval of the Chief Justice, from time to time, frame such forms as may be appropriate in the circumstances.

4. (1) The fees specified in the Second Schedule shall be paid by the party at whose instance they are incurred, and may afterwards be recovered as costs of cause, unless a judge so orders.

(2) A judge may, on account of the poverty of any party, although such party may not have been formally admitted to sue or defend as a pauper, or for other sufficient reasons, dispense, if he sees fit, with the payment of any fees.

(3) An application under subrule (2) shall be made informally to the Registrar by a party at any time before or after the commencement of the proceedings stating the grounds on which he claims the payment of fees should be dispensed with.

(4) The Registrar shall put the application before a judge, as soon as possible, who, after considering the application and hearing the applicant (if he considers that necessary), shall make an order allowing or refusing the application.

(5) Before making an order under subrule (4), the judge may direct the Registrar or the District Officer of the place where the applicant resides to make any enquiries or investigations regarding the circumstances of the party and the grounds stated in the application.

(6) The judge may order that the dispensation shall extend to the whole or any part of the fees payable in the action.

5. Unless otherwise expressly provided therein, the fees specified in the second column of the Second Schedule shall be paid in respect of the items set out in the first column thereof by means of, either—

- (a) postage stamps issued by the Government or with the authority of the Government; or
- (b) in cash paid to the proper officer of the court, who shall forthwith issue an official receipt for the cash.

6. No document in respect of which a fee is payable shall be accepted unless payment has been made under rule 5.

7. Upon receipt of any such document, the proper officer of the Registry shall forthwith cancel such stamps by means of impressing with indelible ink partly upon each and every such stamp or endorsement and partly upon the document to which they are affixed, the stamp of the Registry or district registry concerned with the true date of such impression in such a manner that the stamps or endorsement are clearly defaced.

8. No receipt shall be issued by the court or any officer thereof in respect of stamps required to be affixed hereunder.

9. The proper officer of the court whose duty it is to receive any document required to be stamped hereunder shall ensure that each and every such document is sufficiently and properly stamped before accepting the same.

10. (1) The officer receiving any writ, document or other process for filing shall forthwith impress on the document the date stamp provided for that purpose indicating the date and time of receipt and shall then append his signature below the date and time.

(2) The officer shall then, if satisfied that the prescribed fees have been paid, file the same in the case file, and an entry of the filing thereof and the date of the filing shall be made in the Civil Record Book forthwith.

(3) No writ of summons, document or other process which is required to be filed shall be filed unless the prescribed fees (if any) have been paid and the document duly date-stamped as provided in this rule and any other rule.

11. All writs, documents or other process or document prepared by an attorney shall be backed with the name and place of business of the attorney stating the capacity in which he acts.

12. Except as otherwise provided, costs shall be allowed to parties and taxed in accordance with the scale of costs set forth in the Second Schedule.

### **ORDER 3 DUTIES OF REGISTRAR**

1. In addition to the duties referred to in any other Order or enactment, the Registrar shall carry out the duties specified in this Order.

2. The Registrar at each Registry shall keep a register to be called the Civil Record Book in which the following particulars shall be recorded—

- (a) the serial number of the cause;
- (b) the names of the parties and their attorneys (if any);
- (c) the plaint or cause of action;
- (d) the date each document was filed and the party filing it;
- (e) the date and place of hearing the cause;
- (f) the names of counsel (if any);
- (g) the name of the judge and any other judge hearing any aspect of the cause;
- (h) the judge's reference;
- (i) the judgment;
- (j) the date the judgment was delivered; and
- (k) any subsequent proceedings and remarks.

3. (1) As soon as a writ of summons is issued, the Registrar shall prepare a cover in which all pleadings, applications, affidavits and other processes or proceedings relevant to the case shall be filed.

(2) Separate covers shall similarly be kept and endorsed for all petitions, originating motions or other originating matters to be presented to court.

(3) The writ of summons and all other documents in any cause shall be numbered by the Registrar before issue with a consecutive number for the year and the cause shall, at the time of issue, be entered by him in the Civil Record Book under that number.

(4) Every document afterwards served, delivered or filed in such cause shall be marked with such number, and the judge's reference by the party delivering it and shall not be received by the Registrar until so marked.

4. The Registrar shall not accept and file any document or issue any writ of summons, subpoena or other process or order of court unless the prescribed fee has been paid except where the party has been granted leave to proceed under Order 46 or an order dispensing with the payment of fees has been made under Order 2.

5. The Registrar shall have the authority to limit the hours during which process may be filed provided that in doing so he shall ensure that process may be filed for at least five hours on

any court day.

#### **ORDER 4**

##### **ADVOCATES AND ATTORNEYS: WARRANTS TO SUE AND DEFEND**

1. Except as is hereinafter provided, no writ of summons, petition, motion or other originating document in a cause and no order of arrest under Order 15 shall be issued by the Registrar at the instance of an attorney on behalf of a plaintiff, petitioner or applicant, nor shall the Registrar cause appearance to be entered at the instance of an attorney on behalf of a defendant or respondent unless there has been filed with him a power of attorney to sue or defend, as the case may be:

Provided that no power of attorney need be filed by the Attorney-General, Director of Public Prosecutions or any counsel to the Attorney-General or Director of Public Prosecutions in any matter in which the Attorney-General or Director of Public Prosecutions is acting in his capacity as such for or on behalf of the Government of Botswana or for a Government Department.

2. On good cause shown to the Registrar, an attorney may, without filing a power of attorney, enter appearance on behalf of a client to defend proceedings, on the condition that the power of attorney is filed as soon as possible and in any event before any further step is taken by such attorney.

3. On good cause shown to the Registrar, an attorney may, without filing a power of attorney, institute proceedings of an urgent nature, on the condition that the power of attorney is filed as soon as possible and in any event before the proceedings are heard unless the judge excuses such filing for proper reason.

4. No public company may institute, defend or oppose any cause or appear before the court otherwise than by counsel.

5. If any action taken under rules 2 and 3 is repudiated by the alleged principal and is found by the judge to have been unjustified, the judge may order the attorney personally to pay the costs thereby occasioned.

6. The Registrar shall not set down any civil appeal at the instance of an attorney on behalf of an appellant unless—

- (a) such attorney files with the Registrar a power of attorney authorising him to prosecute the appeal; or
- (b) it is shown to the Registrar that the power of attorney filed in the proceedings in the court *a quo* confers such authority.

7. Every attorney appearing or instructing an advocate to appear on behalf of the respondent at the hearing of a civil appeal shall before the hearing thereof file with the Registrar a power of attorney authorising him to act for the respondent, unless it is shown to the Registrar that the power of attorney filed in the proceedings in the court *a quo* confers such authority.

8. Powers of attorney shall be duly signed by the client and dated and shall be in Form 1 in the First Schedule with such variations as circumstances may require.

9. A party suing or defending by an attorney shall be at liberty to change his attorney in any cause upon not less than five court days' written notice of such change being filed with the Registrar and served on all other parties, together with a power of attorney and notice of substitution from his new counsel, or a notice that he will thenceforth represent himself, in which case he shall notify a physical and postal address for service within the jurisdiction.

10. An attorney may at any time renounce his agency by giving not less than five court days' written notice to his client, any other parties and to the Registrar, but until the client furnishes the Registrar with, and notifies the opposite party of, a new address for service, any process served on the retiring attorney at the address for service shall be considered good service and the retiring attorney shall notify his former client of the service of any such process by letter addressed to the client's last known address.

11. Notwithstanding rule 9, once a cause is set down for hearing, no attorney shall be

permitted to renounce his agency during the 10 court days immediately preceding the trial date except with the leave of the judge upon good cause shown, which shall not include only the failure of a client to pay fees.

#### **ORDER 5 EFFECT OF NON-COMPLIANCE**

1. Subject to rule 2, non-compliance with any of these Rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the judge so directs, but the proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with, in such manner and on such terms as the judge may think fit.

2. (1) No proceedings shall be void or be rendered void or wholly set aside under rule 1, or otherwise by reason only of the fact that the proceedings were begun by means other than those required in the case of the proceedings in question by any provision of these Rules.

(2) Where proceedings are begun as mentioned in subrule (1) then, subject to the provisions of that subrule, the judge may make any order which he has power to make under rule 1, and subrule (1) shall not be taken as prejudicing the power of the judge to make any order he may think fit with respect to the costs of these proceedings.

3. (1) An application to set aside any proceedings for irregularity shall be brought under the provisions of rule 1 of Order 33.

(2) An application under this rule may be made on motion and the grounds of objection must be stated in the notice of motion.

#### **ORDER 6 ORIGINATING PROCESS**

1. (1) Every action, other than process for the arrest of the defendant, shall, where service is to be effected within the jurisdiction, be commenced by a writ of summons, petition or notice of motion (in this rule collectively referred to as "originating process") signed by the Registrar and date-stamped with the stamp of the court.

(2) An originating process shall be issued by the Registrar or other officer of the court empowered to issue an originating process.

2. An originating process shall be issued out of the Registry for the division of the court in which the cause is to be heard.

3. (1) The originating process shall, where service is to be effected within the jurisdiction, command the defendant that he cause an appearance to be entered within the period prescribed in the writ to answer the plaintiff's claim.

(2) The originating process shall require the person serving it to serve on the defendant at the same time a copy of the process and immediately thereafter to return to the High Court the original process duly endorsed with what he has done concerning it.

4. Before issue, every originating process shall contain the following particulars—

- (a) the full name of the defendant and—
  - (i) where the defendant is an individual,
    - (aa) his residence or place of business, and, where known, his occupation, and, if he is sued in a representative capacity, the capacity in which he is so sued,
    - (bb) the defendant's gender and marital status and whether a married defendant is married in or out of community of property;
  - (ii) where the defendant is an incorporated or unincorporated entity, the name of the defendant, whether or not the defendant is incorporated and, if so under what law and the defendant's registered office or principal place of business;
- (b) where the defendant's full name is unknown to the plaintiff and cannot be ascertained, that fact should be stated and such particulars as can be ascertained, including the defendant's name and where possible such initials as are known, should be given;
- (c) the full name, occupation and residence or place of business of the plaintiff, and if he is suing in a representative capacity, the capacity in which he sues;

- (d) where the plaintiff is an individual, the plaintiff's gender, marital status and whether a married plaintiff is married in or out of community of property;
- (e) where the plaintiff is an incorporated or unincorporated entity, the name of the plaintiff, whether or not the plaintiff is incorporated and, if so under what law and the plaintiff's registered office or principal place of business;
- (f) a statement of the nature of the claim made and of the relief or remedy sought in the action; and
- (g) the date of issue of the writ.

**5.** A writ of summons shall be in Form 2 in the First Schedule with such variation as circumstances require.

**6.** (1) The plaintiff or his attorney or agent shall present at the Registry the original originating process, and three copies thereof, or if there is more than one defendant, one extra copy for each additional defendant.

(2) Upon payment of the prescribed fee the Registrar shall sign and date-stamp the original and all the copies.

(3) The plaintiff or his attorney or agent shall then file the originating process at the Registry.

(4) The officer in the Registry to whom an originating process or other process is presented for filing shall impress the date stamp provided for that purpose on the original originating process and every copy presented and shall also append his signature below the date and time impressed by the date stamp.

(5) The officer shall then retain the original and a copy and return the other copies duly impressed with the date stamp and signed to the person presenting the same.

(6) The officer in the Registry to whom pleadings, petitions, applications, affidavits and all other process, proceedings or other document relevant to the case are presented for filing shall impress the date stamp provided for that purpose on each original document and every copy presented, and shall also append his signature below the date and time impressed by the date stamp.

(7) The officer shall then retain the original and one copy and return the other copies duly impressed with the date stamp and signed as aforesaid to the person presenting the same.

(8) For the purposes of compliance with subrules (6) and (7) the party or his attorney shall present to the officer in the Registry the original and one copy of the document for retention by the officer, and one copy for the party or his attorney, and as many other copies as are required for service.

**7.** In every action the writ shall be endorsed with the particulars of the claim, signed by the plaintiff or his attorney, which particulars shall state truly and concisely the nature, and the grounds of the cause of action and the relief sought.

**8.** (1) Subject to the provisions of this Order, an originating process may, before service, be amended by the plaintiff as he thinks fit.

(2) Any alteration or amendment of an originating process, whether before or after issue, shall, before service thereof, be initialled by the Registrar, and until so initialled such alterations and amendments shall have no effect.

**9.** (1) Before an originating process is issued it must be endorsed—

- (a) where the plaintiff sues by an attorney, with the plaintiff's address and the attorney's name or firm and a business address of his within the jurisdiction, and also (if the attorney is the agent of another) the name or firm and business address of his principal;
- (b) where the plaintiff sues in person, with—
  - (i) the address of his place of residence and, if his place of residence is not within the jurisdiction, or if he has no place of residence, the address of a place within the jurisdiction at or to which documents for him may be delivered or sent, and

(ii) his occupation.

(2) The address for service of a plaintiff shall be—

- (a) where he sues by an attorney, the business address of the attorney endorsed on the summons or, where there are two such addresses so endorsed, the business address of the attorney who is acting as agent for the other;
- (b) where he sues in person, the address within the jurisdiction endorsed on the writ.

**10.** In all cases where proceedings are commenced other than by writ of summons, rule 12 shall apply to the documents by which such proceedings are originated as if they were a writ of summons.

**11.** A writ of summons shall be prepared by the plaintiff or an attorney and shall be written or printed or partly written or partly printed on A4 paper of good quality.

**12.** The time within which a defendant shall be required to enter appearance to defend shall be reckoned as follows—

- (a) in the case of writs of summons and other originating processes issued at the High Court Registry at Lobatse where the defendant's dwelling house or other place of residence or place of business or employment within jurisdiction, or in the case of a company or corporation, its registered office or principal place of business within jurisdiction is within a radius of 100 kilometers from the High Court Registry at Lobatse, the time limited for entering appearance shall be 14 court days after service of the writ of summons or other process (including the day of service);
- (b) in the case of writs of summons and other originating processes issued at the High Court Registry at Francistown where the defendant's dwelling house or other place of residence or place of business or employment within jurisdiction or, in the case of a company or corporation, its registered office or principal place of business within jurisdiction, is within a radius of 100 kilometres from the High Court Registry at Francistown, the time limited for entering appearance shall be 14 court days after service of the writ of summons or other process (including the day of service);
- (c) in all other cases, whether the writ of summons or other originating process is issued at the High Court Registry at Lobatse or at the High Court Registry at Francistown where the defendant's dwelling house or other place of residence or place of business or employment within jurisdiction, or in the case of a company or corporation its registered office or principal place of business within jurisdiction is outside the areas mentioned in paragraphs (a) and (b) the time limited for entering appearance shall be 21 court days after service of the writ of summons or other process (including the day of service).

**13.** (1) Where a writ of summons or other originating process is issued out of the High Court Registry at Lobatse, the appropriate office for entering an appearance shall in all cases be the High Court Registry at Lobatse.

(2) Where a writ of summons or other originating process is issued out of the High Court Registry at Francistown, the appropriate office for entering an appearance shall in all cases be the High Court Registry at Francistown.

(3) Where a writ of summons or other originating process is issued out of a Registry, the appropriate office for entering an appearance shall in all cases be the High Court Registry for the district concerned.

**14.** (1) Every writ of summons shall be made returnable to the High Court at the place at which appearance is required to be entered and the writ shall be endorsed and returned thereto by the person who served the writ after service thereof has been effected.

(2) The endorsement of service shall be made on the writ within three court days of the service thereof and the writ so endorsed returned to the High Court as soon as possible thereafter.

**ORDER 7  
DISABILITY**

1. In this Order—

**"patient"** means a person who, by reason of age, infirmity, disability or mental disorder, is incapable of managing and administering his property and affairs;

**"person under disability"** means a person who is under the age of 21 years or a patient;

**"guardian"** shall include guardian *ad litem*, curator and tutor, as the context requires.

2. (1) A person under disability may not bring, or make a claim in, any proceedings except by his guardian, and may not defend, make a counterclaim or intervene in any proceedings, or appear in any proceedings under a judgment or order, notice of which has been served on him except by his guardian *ad litem*.

(2) Subject to the provisions of these Rules, anything which in the ordinary conduct of any proceedings is required or authorised by a provision of these Rules to be done by a party to the proceedings shall or may, as the case may be, if the party is a person under disability, be done by his guardian or guardian *ad litem*.

(3) A guardian or guardian *ad litem* of a person under disability must act by an attorney.

3. (1) Except as otherwise provided in any written law, a guardian *ad litem* must be appointed by the judge.

(2) Except where the guardian or guardian *ad litem*, as the case may be, of a person under disability has been appointed by the judge—

(a) the name of any person shall not be used in a cause as guardian of a person under disability;

(b) an appearance shall not be entered in a cause for a person under disability; and

(c) a person under disability shall not be entitled to appear by his guardian *ad litem* on the hearing of a petition, action, summons or motion which, or notice of which, has been served on him,

unless the documents listed in rule 4 have been filed.

4. The documents referred to in rule 3 (2) are the following—

(a) a written consent to be guardian or guardian *ad litem*, as the case may be, of the person under disability in the cause in question given by the person proposing to be such guardian or guardian *ad litem*;

(b) except where the person proposing to be such guardian or guardian *ad litem* of the person under disability, being a patient, is authorised under any written law relating to mental health to conduct the proceedings in the cause in the name of the patient or on his behalf, a certificate made by the attorney for the person under disability certifying—

(i) that he knows or believes, as the case may be, that the person to whom the certificate relates is a person under disability giving (in the case of a patient) the grounds of his knowledge or belief,

(ii) where the person under disability is a patient, that there is no person authorised as aforesaid, and

(iii) that the person so named has no interest in the cause in question adverse to that of the person under disability.

5. (1) Where—

(a) in an action against a person under disability begun by writ of summons to which an appearance is required to be entered, no appearance is entered in the action for that person; or

(b) the defendant to an action serves a plea and counterclaim on a person under disability who is not already a party to the action, and no appearance is entered for that person, an application for the appointment by the judge of a guardian *ad litem* of that person must be made by the plaintiff or defendant, as the case may be, after the time limited (as respects that person) for appearing and before proceeding further with the action or counterclaim.

(2) Where a party to an action has served on a person under disability who is not already a party to the action, a third party notice, and no appearance is entered for that person to the notice, an application for the appointment by the judge of a guardian *ad litem* of that person must be made by that party after the time limited (as respects that person) for appearing and before proceeding further with the third party proceedings.

(3) Where in any proceedings against a person under disability begun by petition or motion, or by writ of summons, to which no appearance has been entered, that person does not appear by a guardian *ad litem* at the hearing of the petition, motion, action or summons, as the case may be, the judge hearing it may appoint a guardian *ad litem* of that person in the proceedings, or direct that an application be made by the petitioner or applicant, as the case may be, for the appointment of such a guardian.

(4) An application under subrule (1) or (2) must be supported by evidence proving—

- (a) that the person to whom the application relates is a person under disability;
- (b) that the person proposed as guardian *ad litem* is willing and a proper person to act as such and has no interest in the proceedings adverse to that of the person under disability;
- (c) that the writ of summons, plea and counter claim or third party notice, as the case may be, was duly served on the person under disability;
- (d) subject to subrule (5), that notice of the application was, after the expiration of the time limited for appearing, and at least seven court days before the day named in the notice for hearing of the application, so served on him.

(5) If the judge so directs, notice of an application under subrule (1) or (2) need not be served on a person under disability.

**6.** Notwithstanding anything to the contrary contained in any rule, a person under disability shall not be taken to admit the truth of any allegation of fact made in the pleading of the opposite party by reason only that he has not traversed it in headings.

**7.** Order 39 shall apply to a person under disability and to his guardian or guardian *ad litem*.

**8.** (1) A special case stated in a cause to which a person under disability is a party shall not be entered for argument without the leave of the judge.

(2) An application for an order under this rule must be supported by sufficient evidence that the statements of fact made in the special case, so far as they affect the interest of the person under disability, are true.

(3) A special case to which this rule applies shall not be entered for argument by the Registrar unless, at the time when the application is delivered to him, there is produced to him a copy of the order required under this rule.

**9.** Where in any proceedings (other than a matrimonial cause) money is claimed by or on behalf of a person under disability, no statement, compromise or payment, and no acceptance of money paid into court, whenever entered into or made, shall, so far as it relates to that person's claim, be valid without the approval of the judge.

**10.** (1) Where before proceedings in which a claim for money is made by or on behalf of a person under disability (whether alone or in conjunction with any other person) are begun, an agreement is reached for the settlement of the claim, and it is desired to obtain the judge's approval to the settlement, an application to the judge may be made for—

- (a) the approval of the judge to the settlement and such orders or directions as may be necessary to give effect to it; or
- (b) alternatively, directions as to the further prosecution of the claim.

(2) Subject to any special provisions in these Rules, the documents must be served—

- (a) in the case of a minor who is not a patient, on his guardian, or, if he has no guardian, on the person with whom he resides or in whose care he is;
- (b) in the case of a patient, on the person (if any) who is authorised under any written law

to conduct in the name of the patient or on his behalf the proceedings in connection with which the document is to be served, or, if there is no person so authorised, on the person with whom he resides or in whose care he is, and must be served in the manner required by these Rules with respect to the document in question.

(3) Notwithstanding anything in subrule (2), the judge may order that a document which has been, or is to be, served on the person under disability, or on a person other than a person mentioned in that subrule, shall be deemed to be duly served on the person under disability.

(4) A judgment or order requiring a person to do, or refrain from doing, any act, or a notice of motion or writ of summons for the attachment or committal of any person must, if that person is a person under disability, be served personally on him unless the judge otherwise orders. This subrule shall not apply to an order for interrogatories or for discovery or inspection of documents.

## **ORDER 8**

### **SERVICE OF SUMMONS, WRITS, NOTICES AND OTHER DOCUMENTS**

1. (1) Service upon a person of a petition, notice, summons, order, pleading or other document of which service is required, may be made by any adult person who has no interest in the cause and is able to explain its nature and contents.

(2) Except in the case of arrest, writs of summons, petitions, notices, summonses, orders, pleadings and other documents shall not be served on a Sunday or between 7 p.m. and 7 a.m. and no such service shall be valid.

2. (1) Where the application to the judge is for an order affecting the liberty or status of the respondent, the application, petition, summons or writ shall be served by delivery of a copy thereof to the respondent personally, unless the judge for good cause shown gives leave for such application, petition, summons or writ to be served in some other specified manner.

(2) Service of any process on the person to be served, shall be effected in one or other of the following manner—

(a) by delivering a copy thereof to the said person personally:

Provided that:

- (i) where such person is a minor or a person under legal disability service shall be effected upon the guardian, tutor, curator, or the like of such minor or person under disability; and
- (ii) where such person refuses to accept delivery, service shall be effected by leaving the copy in full view of such person.

(b) by leaving a copy thereof at the place of residence or business of the said person, guardian, tutor, curator or the like with the person apparently in charge of the premises at the time of delivery, being a person apparently not less than 16 years of age;

(c) for the purposes of paragraph (b), when a building other than a hotel, boarding house, hostel or similar residential building is occupied by more than one person or family, "residence" or "place of business" means that portion of the building occupied by the person upon whom service is to be effected;

(d) by delivering a copy thereof at the place of employment of the said person, guardian, tutor, curator or the like to some person apparently not less than 16 years of age and apparently in authority over him;

(e) if the persons so to be served have chosen a *domicilium citandi*, by delivering a copy thereof at the *domicilium* so chosen by either handing to the defendant personally or to any responsible person apparently not less than 16 years old found thereat and only if there is no one to accept service then by affixing a copy at the outer door of the premises or at any such prominent place as may be found;

(f) in the case of a corporation or company, by delivering a copy to a responsible employee at its registered office or its principal place of business within jurisdiction, or,

- if there is no such employee willing to accept service, by affixing a copy to the main door of such office or place of business, or in any manner prescribed by law;
- (g) by delivering a copy thereof to any agent who is duly authorised in writing to accept service on behalf of the person upon whom service is to be effected;
  - (h) where any partnership, firm or voluntary association is to be served, service shall be effected upon a partner, the proprietor, or on the chairman or secretary of the committee, or other managing body of such association as the case may be, in one of the manners set forth in this rule;
  - (i) where a local authority or statutory body is to be served, service shall be effected by delivering a copy to the council secretary, assistant council secretary, town clerk or assistant town clerk, chairman or mayor of such local authority, or to the secretary or member of the board or committee of such body, or in any manner provided by law;
  - (j) if two or more persons are sued in their joint capacity as trustees, liquidators, executors, administrators, curators or guardians, or in any other joint representative capacity, service shall be effected upon each of them in any manner set out in this rule; or
  - (k) where a person to be served keeps his residence or place of business closed, and thus prevents the Deputy-Sheriff or any other person effecting service from serving the process, it shall be sufficient to affix a copy thereof to the out or principal door of such residence or place of business.

(3) It shall be the duty of the Sheriff or the person serving a process or document to explain the nature and contents thereof to the person upon whom service is being effected, and to state in his return that he has done so.

**3.** (1) If the plaintiff (or a defendant in the case of proceedings involving a third party) experiences difficulty in effecting personal service on a defendant or other party to the proceedings, he may apply to the judge for leave to effect substituted service of the process on such defendant.

(2) Such an application shall be supported by an affidavit deposing as to the efforts that have been made to effect personal service of the process and stating the last known residence or place of business of the defendant or other party within jurisdiction.

(3) Upon hearing such application the judge may order that substituted service be effected on the defendant or other party by sending the process by pre-paid registered post to the last known place of residence or place of business of the defendant or other party within jurisdiction or by advertisement in a local newspaper circulating in the area where the defendant or other party had his last place of residence or place of business.

(4) If the plaintiff (or defendant in the case of proceedings involving a third party) experiences difficulty in effecting service on a corporation or company under rule 2 (2) (f), he may apply under subrule (3) for leave to effect substituted service.

**4.** Service of any process or of any document in a foreign country shall be effected by any person authorised under the law of that country to serve therein.

**5.** Service shall be proved in one of the following manners—

- (a) where service has been effected by the Sheriff, by the return of service of such Sheriff;
- (b) where service has not been effected by the Sheriff, by an affidavit of the person who effected service, or in the case of service on an attorney or a member of his staff, the Government of Botswana, on any Minister, or any other officer of such Government in his capacity as such, by the production of a signed receipt therefore.

**6.** Service of any process or document in a foreign country shall be proved by a certificate of the person effecting service in which he identifies himself, states that he is authorised under the law of the country to serve process or document therein, and that the process or document in question has been served as required by the law of that country, and sets forth the manner and the date of such service.

7. Whenever the judge, or the Registrar when acting under Order 30, is not satisfied as to the effectiveness of the service, he may order such steps to be taken as to him seems meet.

8. Any summons, writ, warrant, rule or notice, or other process, document or communication which by law, rule of court, or agreement of the parties is required or directed to be served or executed upon any person or left at the house or place of abode or a place of business or employment of any person in order that such person may be affected thereby may be transmitted by telegraph or telefacsimile and a telegraphic or telefacsimile copy served or executed upon such person or left at his house or place of abode or business or employment shall be of the same force and effect as if the original had been shown to or a copy thereof served upon such person, or left as aforesaid, as the case may be.

9. Service of any such process on the offices of an attorney by facsimile transmission shall be effective provided that it is proved that a legible copy was so served.

#### **ORDER 9**

#### **ENTRY OF APPEARANCE TO SUMMONS**

1. (1) Subject to subrule (2) and to Order 7, a defendant to an action begun by writ of summons (whether or not he is sued as a trustee or personal representative or in any other representative capacity) may enter an appearance in the action and defend it by an attorney or in person.

(2) A public company may not enter an appearance in the action or defend it otherwise than by counsel.

(3) An appearance is entered by properly completing and delivering a memorandum of appearance.

(4) Delivery to the plaintiff of a memorandum of appearance may be effected by sending by post to the plaintiff, if the plaintiff sues in person, but otherwise to the plaintiff's attorney, at the plaintiff's address for service, a copy of the memorandum of appearance on the day it is date-stamped by the Registrar.

(5) If two or more defendants to an action enter an appearance by the same attorney and at the same time, only one memorandum need be completed and delivered for those defendants.

2. (1) A memorandum of appearance is a request to the Registrar to enter an appearance for the defendant or defendants specified in the memorandum.

(2) A memorandum of appearance must be signed by the attorney by whom the defendant appears, or, if the defendant appears in person, by the defendant.

(3) A memorandum of appearance must specify—

(a) an address within the jurisdiction;

(b) in the case of a defendant appearing by an attorney, a business address of the attorney within the jurisdiction, and where the defendant enters an appearance in person, the address specified under paragraph (a) shall be his address for service, but otherwise his attorney's address shall be his address for service;

(c) concisely the nature and the grounds of the defence and the relief or remedy required.

(4) Where the defendant enters an appearance by an attorney who is acting as agent for another attorney, having a place of business within the jurisdiction, the memorandum of appearance must state that the first-named attorney so acts, and must also state the name and address of that other attorney.

(5) Immediately on entry of defence, the Registrar shall deliver the file to the judge.

(6) If on application by the plaintiff the judge is satisfied that any address specified in the memorandum of appearance is not genuine, the judge may set aside the appearance.

3. (1) A defendant may not enter an appearance to an action after judgment has been entered therein except with the leave of the judge and after such judgment has been set aside.

(2) Except as provided in subrule (1), nothing in these Rules or any writ of summons or order thereunder shall be construed as precluding the defendant from entering an appearance

in an action after the time limited for appearing but before application has been made for judgment by default.

**4.** (1) A defendant to an action may with the leave of the judge enter a conditional appearance in the action.

(2) A conditional appearance, except by a person sued as a partner of a firm in the name of that firm and served as a partner, is to be treated for all purposes as an unconditional appearance unless the judge otherwise orders or the defendant applies to the judge within the time limited for the purpose for an order under rule 5 and the judge makes an order thereunder.

**5.** A defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within 14 court days after entering the appearance apply to the judge for an order setting aside the writ of summons or the service thereof on him, or declaring that the writ of summons has not been duly served on him, or discharging any order giving leave to serve the writ of summons on him out of jurisdiction.

#### **ORDER 10 EDICTAL CITATION**

**1.** Except by leave of the judge, no process or document whereby proceedings are instituted shall be served outside the Republic.

**2.** (1) Any person desiring to obtain such leave shall make application to the judge setting forth concisely the nature and extent of his claim, the grounds upon which it is based and upon which the judge has jurisdiction to entertain the claim, and also the manner of service which the judge is asked to authorise.

(2) If such manner be other than personal service, the application shall further set forth the last known whereabouts of the person to be served and the enquiries made to ascertain his whereabouts.

(3) Upon such application the judge may make such order as to the manner of service as to him seems meet and shall further order the time within which notice of intention to defend is to be given or any other steps to be taken by the person to be served.

(4) Where service by publication is ordered, it may be in a form as near as may be in accordance with Form 3 in the First Schedule, approved and signed by the Registrar.

**3.** Any person desiring to obtain leave to effect service outside Botswana of any document other than one whereby proceedings are instituted may either make application for such leave in terms of rule 2 or request such leave at any hearing at which the judge is dealing with the matter, in which latter event no papers need be filed in support of such request and the judge may act upon such information as may be given from the Bar, or given in such manner as he may require, and may make such order as to him seems meet.

#### **ORDER 11 RENEWAL OF ORIGINATING PROCESS**

**1.** (1) No originating process shall be in force for more than six months from the date of issue thereof, including the day of such date; but if any defendant named therein has not been served therewith the plaintiff may, before the expiration of the six months, apply to the Registrar in writing for leave to renew the originating process.

(2) Where the Registrar is satisfied that reasonable efforts have been made to serve such defendant, or for other good reasons, he may renew the original or concurrent originating process for three months from the date of such renewal inclusive, and so from time to time during the currency of the renewed originating process.

(3) The originating process shall in such case be renewed by being marked with the stamp of the court and shall bear the date of such renewal; such stamp to be impressed upon the originating process by the proper officer, upon delivery to him by the plaintiff or his attorney of a memorandum in Form 28 in the First Schedule with such variations as circumstances may require.

(4) An originating process so renewed shall remain in force and be available to prevent

the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the originating process of summons.

2. The production of an originating process purporting to be marked with the stamp of the court, showing the same to have been renewed in the manner aforesaid, shall be sufficient evidence of its having been so renewed, and of the commencement of the action as of the date of first issue of such renewed originating process for all purposes.

## **ORDER 12 PETITIONS AND APPLICATIONS**

1. Except where proceedings by way of petition are prescribed by law, every application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief, and the notice of motion shall be in Form 4 in the First Schedule with such variations as circumstances require, and shall state the rule under which the application is brought.

2. When relief is claimed against any person, or where it is necessary or proper to give any person notice of such application, the notice of motion shall be addressed to both the Registrar and such person, otherwise it shall be addressed to the Registrar only.

3. (1) Every petition shall conclude with the form or order prayed and be verified upon oath by or on behalf of the petitioner.

(2) With every application the applicant shall file with the Registrar a draft of the order which he seeks.

4. (1) Every application brought *ex parte* (whether by way of petition or upon notice to the Registrar supported by an affidavit as aforesaid) shall be filed with the Registrar and set down not less than two days before the day fixed for hearing.

(2) If the application is brought upon notice to the Registrar, such notice shall set forth the form of the order sought, specify the affidavit filed in support thereof, request him to place the matter on the roll for hearing on a motion day, and be as near as may be in accordance with Form 5 in the First Schedule as appropriate.

(3) Any person having an interest which may be affected by a decision on an application being brought *ex parte* may deliver notice of an application by him for leave to oppose, supported by an affidavit setting forth the nature of such interest and the ground upon which he desires to be heard, whereupon the Registrar may set such application down for hearing at the same time as the first-mentioned application.

(4) At the hearing the judge may grant or dismiss either or both such applications, as the case may require, or may adjourn the same upon such terms as to the filing of further affidavits by either applicant as to him seems meet.

5. (1) Every application other than one brought *ex parte* shall be brought on notice of motion as near as may be in accordance with Form 5 in the First Schedule, and true copies of the notice and all annexures thereto shall be served upon every party to whom notice thereof has to be given.

(2) In such notice the applicant shall appoint an address within Botswana at which he will accept notice and service of all documents in such proceedings, and shall set forth a day not less than five court days after service thereof on the respondent, on or before which such respondent is required to notify the applicant in writing whether he intends to oppose such application and shall further state that if no such notification is given the application will be set down for hearing on a stated motion day not being less than seven court days after service on the said respondent of the said notice.

(3) If the respondent does not on or before the day mentioned for that purpose in such notice notify the applicant of his intention to oppose, the applicant may place the matter on the roll for hearing by giving the Registrar notice to set down before noon on the court day but one preceding the day upon which the same is to be heard.

- (4) Any person opposing the grant of an order sought in the notice of motion shall—
- (a) within the time stated in the said notice, give the applicant notice in writing that he intends to oppose the application and in such notice appoint an address within Botswana at which he will accept notice and service of all documents;
  - (b) within 14 court days of the service on him of the notice of motion, deliver his answering affidavit, if any, together with any relevant documents;
  - (c) if he intends to raise a question of law only, deliver notice of his intention to do so within the time stated in the preceding paragraph, setting forth such question.

(5) Within seven court days of the service upon him of the affidavit and documents referred to in paragraph (b) or (c) of subrule (4), the applicant may deliver a replying affidavit; and the judge may, in his discretion, permit the filing of further affidavits.

(6) Where no answering affidavit or notice in terms of paragraph (b) or (c) of subrule (4) is delivered within the stipulated period referred to, the applicant may set the application down for hearing on a motion day.

(7) Where an answering affidavit or notice is delivered, the judge shall determine the date of hearing at the pre-trial conference.

(8) Notice of hearing in writing of the date determined by the judge shall forthwith be given by the applicant to the Registrar and to all parties in accordance with Form 29 in the First Schedule.

(9) Where an application cannot properly be decided upon affidavit, the judge may dismiss the application or the judge at the pre-trial conference may make such order as to him seems meet with a view to ensuring a just and expeditious decision; and in particular, but without affecting the generality of the foregoing, he may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness, or he may refer the matter to trial with appropriate directions as to pleadings or definition of issues or otherwise.

6. The judge, after hearing an application, whether brought *ex parte* or otherwise, may make no order thereon (except as to costs, if any), but grant leave to the applicant to renew the application on the same papers supplemented by such further affidavits as the case may require.

7. (1) Any party to any application proceedings may bring a counter application, or may join any party to the same extent as would be competent if the party wishing to bring such counter application or join such party were a defendant in an action and the other parties to the application were parties to such action; in the latter event, Order 16 shall apply *mutatis mutandis*.

(2) The periods prescribed with regard to applications shall apply *mutatis mutandis* to counter applications.

8. Any person against whom an interim order is granted *ex parte* may anticipate the return day upon delivery of not less than 24 hours' notice.

9. A copy of every application to a judge in connection with the estate of any person deceased, or alleged to be a prodigal, or under any legal disability, mental or otherwise, shall, before such application is filed with the Registrar, be submitted to the Master for consideration and report; and if any person is to be suggested to the judge for appointment as curator to property, such a suggestion shall likewise be submitted to the Master for report.

10. The provisions of rule 9 shall further apply to all applications for the appointment of administrators and trustees under deeds or contracts relating to trust funds or to the administration of trusts set up by testamentary disposition.

11. Notwithstanding the foregoing rules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the Registrar or as directed by a judge.

**12.** (1) In urgent applications the judge may dispense with the forms and service provided for in these Rules and may dispose of such matter at such time and place and in such manner, and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as to him seems meet.

(2) In every affidavit filed in support of any application under subrule (1), the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.

**13.** In any application against any Minister or other officer or servant of the State in his capacity as such, the respective periods referred to in subrule (2) of rule 6, or for the return of a *rule nisi*, shall be not less than 14 court days after the service of the notice of motion, or the *rule nisi*, as the case may be, unless the judge specially authorises a shorter period.

**14.** (1) The judge may, on application, order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client.

(2) The judge shall not grant the application unless he is satisfied that the applicant will be prejudiced in his case if it is not granted.

**15.** (1) If when an opposed application or petition is called, the applicant or petitioner appears and the respondent does not appear, the applicant or petitioner may address the judge to justify the relief sought, and the judge may make such order as he sees fit.

(2) If when an opposed application or petition is called, the respondent appears but the applicant or petitioner does not appear, the respondent may apply for the dismissal of the application or petition, and the judge may thereupon dismiss the application or petition, or make such other order as he sees fit.

(3) If when an opposed application or petition is called, neither party appears, the judge shall strike the matter from the roll, where after it may only be restored upon application with good cause shown.

### **ORDER 13 AFFIDAVITS AND DEPOSITIONS**

**1.** Upon any motion, petition or other application, evidence shall be given by affidavit, but the judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit, and whereafter such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence unless by the special leave of the judge.

**2.** Every affidavit shall be entitled in the cause in which it is sworn.

**3.** (1) Every affidavit shall contain only statements of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true stating the sources and grounds thereof.

(2) An affidavit shall not contain extraneous matters by way of objection, prayer, legal argument or conclusion.

**4.** Affidavits sworn in Botswana shall be sworn before a commissioner of oaths or other officer empowered to administer oaths under the Commissioners of Oaths Act.

**5.** Every commissioner who administers an oath shall express the time and date when and the place where he takes an affidavit, or the acknowledgement of any deed or recognizance; otherwise the same shall not be held authentic, nor be admitted to be filed or enrolled without the leave of the judge; and every such commissioner shall express the time when, and the place where, he does any other act incidental to his office.

**6.** Every affidavit shall be drawn up in the first person, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be, shall be confined to a distinct portion of the subject; and the affidavit shall be written or printed.

**7.** Every affidavit shall state the description, the place of abode and the occupation of the

deponent.

**8.** In every affidavit made by two or more deponents the names of the several persons making the affidavit shall be inserted in the *jurat*, except that if the affidavit of all the deponents is taken at one time by the same officer it shall be sufficient to state that it was sworn by both (or all) of the "above-mentioned" deponents.

**9.** (1) Every affidavit to be used in any cause in the Principal Registry or in a Registry shall be filed in the Principal Registry or in the Registry, as the case may be.

(2) There shall be endorsed on every affidavit a note showing on whose behalf it is filed, and no affidavit shall be used without such note, unless the judge otherwise directs.

**10.** The judge may order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant.

**11.** No affidavit having in the *jurat* or body thereof any interlineations, alterations, or erasure shall, without leave of the judge, be read or made use of in any matter pending before the judge unless the interlineations or alterations (other than by erasure) are authenticated by the initials of the deponent and the officer taking the affidavit, nor in the case of an erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure are rewritten and signed or initialled in the margin of the affidavit by the deponent and the officer taking it.

**12.** (1) Where an affidavit is sworn by any person who appears to the officer taking the affidavit to be illiterate or blind, the officer shall certify in the *jurat* that the affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his signature or mark in the presence of the officer.

(2) No such affidavit shall be used in evidence in the absence of this certificate, unless the judge is otherwise satisfied that the affidavit was read over to and appeared to be perfectly understood by the deponent.

**13.** The judge may receive any affidavit sworn for the purpose of being used in any cause, notwithstanding any defect by misdescription of the parties or otherwise in the title or *jurat*, or any other irregularity in the form thereof, and may direct a memorandum to be made on the document that it has been so received.

**14.** (1) No affidavit shall be sufficient if sworn before the attorney acting for the party on whose behalf the affidavit is to be used, or before any agent or correspondent of such attorney, or before the party himself.

(2) Any affidavit which would be insufficient if sworn before the attorney himself shall be insufficient if sworn before his partner or an attorney practising in the same firm.

**15.** Where a special time is limited for filing affidavits, no affidavit filed after that time shall be used, unless by leave of the judge.

**16.** Every exhibit or annexure referred to in an affidavit shall be initialled by the deponent and the commissioner or officer before whom the affidavit is sworn on the date it is sworn to.

#### **ORDER 14 PROVISIONAL SENTENCE**

**1.** Where by law any person may be summoned to answer a claim made for provisional sentence, proceedings shall be instituted by way of a summons as near as may be in accordance with Form 6 in the First Schedule, calling upon such person to pay the amount claimed or, failing such payment, to appear personally or by counsel upon a motion day named in such summons, not being less than seven court days after service upon him of such summons, to admit or to deny his liability.

**2.** Such summons shall be issued by the Registrar and the provisions of rules 4 and 10 of Order 6 shall *mutatis mutandis* apply.

**3.** Copies of all documents upon which the claim is founded shall be annexed to the summons and served with it.

**4.** The plaintiff shall set down the case for hearing before noon on the court day but one

preceding the day upon which it is to be heard.

5. Upon the day named in the summons, the defendant may appear personally or by counsel to admit or deny his liability and may, not later than noon of the court day but one preceding the day upon which he is called upon to appear in court, deliver an affidavit setting forth the grounds upon which he disputes liability. In such event, the plaintiff shall be afforded a reasonable opportunity of replying thereto.

6. If at the hearing the defendant fails to appear, or admits his liability, or if he has previously filed with the Registrar an admission of liability signed by himself and witnessed by counsel acting for him and not acting for the opposite party, or, if not so witnessed, verified by affidavit, the judge may give final judgment against him.

7. The judge may hear oral evidence as to the authenticity of the defendant's signature or that of his agent, to the documents upon which the claim for provisional sentence is founded.

8. Should the judge refuse provisional sentence, he may order the defendant to file a plea within a stated time and may make such order as to costs of the proceedings as to him may seem just; and thereafter, the provisions of these Rules as to pleading and the further conduct of trial actions shall *mutatis mutandis* apply.

9. Should the judge grant provisional sentence, the plaintiff shall on demand furnish the defendant with security *de restituendo* to the satisfaction of the Registrar against payment of the amount due under the judgment.

10. Any person against whom provisional sentence has been granted may enter into the principal case only if he has satisfied the amount of the judgment for provisional sentence and taxed costs, or if the plaintiff on demand fails to furnish due security in terms of rule 9.

11. A defendant entitled and wishing to enter into the principal case shall, within one month of the grant of provisional sentence, deliver notice of his intention to do so, in which event the summons shall be deemed to be a summons with declaration annexed thereto and he shall deliver a plea simultaneously; failing such notice and plea, the provisional sentence shall *ipso facto* become a final judgment and the security given by the plaintiff shall lapse.

#### **ORDER 15 ARREST OF DEFENDANT**

1. (1) Where a plaintiff proves to the satisfaction of the Registrar that he has a good cause of action against a defendant to the amount of P40,000 or more, and that there is good ground for believing that the defendant is about to leave Botswana and that the absence of the defendant from Botswana will materially prejudice the plaintiff in the prosecution of his claim, the Registrar may issue a writ of arrest directing the defendant to be arrested and held to bail to answer the plaintiff's claim.

(2) Prior to the issue of any such writ, the plaintiff shall lodge with the Registrar an affidavit sworn to by the plaintiff, or his agent, or his servant, in which shall be set forth all facts which would justify the Registrar in issuing, or refusing to issue, the said writ, and in particular the following—

- (a) the sum alleged to be due to the plaintiff by the defendant, when it became due and the cause thereof;
- (b) whether or not the plaintiff holds any security for the alleged debt and, if he does, the nature and value thereof;
- (c) that the deponent believes that the defendant is about to remove from Botswana and the grounds of such belief; and
- (d) the steps, if any, which the plaintiff has already taken to enforce his claim.

2. A writ of arrest shall be in Form 7 in the First Schedule and shall, before delivery to the Sheriff or his deputy, be endorsed with the plaintiff's address for service as required by rule 9 of Order 6.

3. A writ of arrest may be executed on any day and at any hour and at any place except in regard to members and officers of Parliament during such period as may be prescribed under

the National Assembly (Powers and Privileges) Act.

**4.** The Registrar may before issuing a writ of arrest require the plaintiff to give security for any damages which may be caused by such writ of arrest and may require such additional evidence as he may think fit.

**5.** (1) The sum of money or other thing demanded shall be set out in the writ of arrest and the cost and charges of issuing the writ shall be endorsed thereon by the Registrar.

(2) The Sheriff or his deputy shall, upon any arrest made by virtue of any such writ, give to the defendant, at his request and at his charge, a true copy thereof and of all documents on which the claim is founded.

**6.** (1) If on his arrest the defendant or anyone on his behalf gives to the Sheriff or his deputy reasonable security by bond or obligation of the said defendant, and of another person residing and having sufficient means within Botswana, that the defendant shall appear according to the exigency of the said writ and shall stand to abide, and perform the judgment of the judge thereon, or shall surrender himself to prison in execution of the same, or if the said defendant pays or delivers to the Sheriff or his deputy the sum of money or thing mentioned in the said writ, together with the costs and charges endorsed thereon, and the further costs of the execution of the writ, the Sheriff or his deputy shall permit the defendant to go at large and free of the said writ of arrest.

(2) The bond or obligation to be given to the Sheriff or his deputy under subrule (1) shall be as near as may be in Form 8 in the First Schedule.

**7.** If the defendant at any time after his arrest satisfies the claim contained in the writ, including the costs and charges endorsed thereon and the costs of the arrest, or if he gives a bond or obligation in terms of rule 6, he shall be entitled to immediate discharge from such arrest.

**8.** If a bond or obligation has been given by the defendant or by anyone on his behalf interms of rule 6, the plaintiff shall proceed with his action precisely as if there had been no arrest and the writ of arrest shall in that case stand as a writ of summons in the action.

**9.** Unless otherwise ordered, the costs of and incidental to a writ of arrest shall be costs in the cause.

**10.** Any person arrested shall be entitled to anticipate the day of appearance and to apply to the judge in term time or vacation for the discharge of the said arrest, upon giving 24 hours' notice to the attorney for the plaintiff, or to the plaintiff if he is not represented by an attorney.

**11.** If the Sheriff or his deputy takes from the party arrested any money or thing for the plaintiff or any bond or obligation by virtue of any writ of attachment, then the Sheriff or his deputy shall, as soon as practicable, and being thereunto required by the plaintiff or his attorney, deliver over to the plaintiff or his attorney any such money or thing or assign to the plaintiff such bond or obligation by an endorsement thereon to be made by the Sheriff or his deputy under his hand, which endorsement shall be as near as may be in Form 9 in the First Schedule.

**12.** If the defendant on the return day or on the day of the anticipation of the same as aforesaid admits the claim contained in the process, final judgment shall be given against him and he shall be discharged from such arrest.

**13.** If the defendant has not satisfied or admitted the claim contained in the writ and has not given security as aforesaid, the plaintiff shall on the return day, or on the day of the anticipation of the same as aforesaid, apply for confirmation of arrest, when the judge, unless sufficient cause to the contrary is shown, shall confirm such arrest and order the return of the defendant to prison, but shall make such further order as to it or him seems meet so as to provide for the speedy termination of the proceedings between the parties, the writ standing as writ of summons in the case.

**ORDER 16**

## **JOINDER OF PARTIES AND CONSOLIDATION OF ACTIONS**

1. All persons may be joined in one action as plaintiffs in whom any right of relief (in respect of or arising out of the same transaction or series of transactions) is alleged to exist, whether jointly, severally or in the alternative where if such persons brought separate actions any common question of law or fact would arise:

Provided that if, upon the application of any defendant, it appears that such joinder may embarrass or delay the trial of the action, the judge may order separate trials, or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment, but the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief, unless the judge in disposing of the costs otherwise directs.

2. Where any action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful if it has been commenced in the name of the right plaintiff, the judge may, if satisfied that it has been so commenced through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff subject to his consent in writing and upon such terms as may be just.

3. Where in any action any person has been improperly or unnecessarily joined as a co-plaintiff, and a defendant has set up a counterclaim or set-off, he may obtain the benefit thereof by establishing his set-off or counterclaim as against the parties other than the co-plaintiff so joined, notwithstanding the misjoinder of such plaintiff or any proceeding consequent thereon.

4. All persons may be joined as defendants against whom the right to relief is alleged to exist, whether jointly, severally or in the alternative, and judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment.

5. It shall not be necessary that every defendant be interested as to all the reliefs prayed for, or as to every cause of action included in any proceeding against him; but the judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest.

6. Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as hereinafter mentioned, or as may be prescribed by any special order, join two or more defendants to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties.

7. Trustees, curators, executors and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees, curators or representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the judge may, at any state of the proceedings, order any of such persons to be made parties either in addition to or in lieu of the previously existing parties.

8. Where there are numerous persons having the same interest in one cause, one or more of such persons may sue or be sued, or may be authorised by the judge to defend such cause on behalf of or for the benefit of all persons so interested, provided that he or they are duly authorised to represent all such persons.

9. (1) No cause shall be defeated by reason of the misjoinder or non-joinder of parties, and the judge may in every cause deal with the matter in controversy so far as regards the rights and interests of the parties actually before him.

(2) The judge may at any stage of the proceedings, either upon or without the application of either party, or upon the application of any party who claims to be interested, and on such terms as may appear to the judge to be just, order that the names of any parties improperly

joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the judge may be necessary in order to enable the judge effectually and completely to adjudicate upon and settle all the questions involved in the cause, be added.

(3) No person shall be added as a plaintiff without his own consent in writing thereto.

(4) Every party whose name is so added as defendant shall be served with a writ of summons, petition or notice of motion in the manner hereinafter mentioned, or in such manner as may be prescribed by a special order, and the proceedings as against such party shall be deemed to have begun only on the service of such writ of summons, petition or notice of motion.

**10.** Any application to add to or strike out or substitute a plaintiff or defendant may be made to the judge at any time before trial by motion, or at the trial of the action in a summary manner and may be granted on such terms as the judge deems fit.

**11.** Where a defendant is added or substituted, the writ of summons, petition or motion shall be amended accordingly, and the plaintiff shall, unless otherwise ordered by the judge, file a copy of the writ of summons, petition or motion as amended and serve the new defendant with such amended writ of summons, petition or motion in the same manner as original defendants are served, and the proceedings shall be continued as if the new defendant had originally been made a defendant.

**12.** (1) Subject to the provisions of the Abolition of Marital Power Act, a married person can sue or be sued without the assistance of his or her spouse.

(2) A plaintiff or defendant who is married in community of property shall, if so required by section 13 of the Abolition of Marital Power Act, file with his or her originating process or defence the written consent of his or her spouse to the institution or defence of proceedings.

**13.** Where separate actions have been instituted, and it appears to the judges of each such action in consultation, convenient to do so, the judge of the action first registered may upon the application of any party thereto, and after notice to all interested parties, make an order consolidating such actions, whereupon—

- (a) the said actions shall proceed as one action;
- (b) the provisions of this Order shall *mutatis mutandis* apply with regard to the action so consolidated; and
- (c) the judge making such order may make any additional order which to him seems meet with regard to the further procedure, and may give one judgment disposing of all matters in dispute in the said actions, defence of the proceedings.

#### **ORDER 17**

#### **THIRD PARTY PROCEDURE**

**1.** Where a party in any action claims—

- (a) as against any other person not a party to the action (in this rule called a "third party"), that such party is entitled in respect of any relief claimed against him, to a contribution or indemnification from such third party; or
- (b) that any question or issue in the action is substantially the same as a question or issue which has arisen or will arise between such party and the third party and should properly be determined not only as between any parties to the action but also as between such parties and the third party or between any of them,

such party may issue a notice hereinafter referred to as a third party notice, as near as may be in accordance with Form 10 in the First Schedule, which notice shall be served by the Sheriff.

**2.** Such notice shall state the nature and grounds of the claim of the party issuing the same, the question or issue to be determined, and any relief or remedy claimed; and in so far as the statement of the claim and the question or issue are concerned, the rules with regard to pleadings and to summonses shall *mutatis mutandis* apply.

**3.** The third party notice shall be served before or concurrently with the delivery of the first pleading delivered by the party issuing it in the action in connection with which it is issued

and shall be accompanied by a copy of all pleadings filed in the action up to the date of service.

4. (1) If the third party intends to contest the claim set out in the third party notice, he shall deliver notice of intention to defend as if to a writ of summons.

(2) Immediately upon receipt of such notice the party who issued the third party notice shall inform all other parties accordingly.

5. The third party shall, after service upon him of a third party notice, be a party to the action and, if he delivers notice of intention to defend, shall be served with all documents and given notice of all matters as a party.

6. The third party may plead or except to the third party notice as if he were a defendant to the action; he may also, by filing a plea, or other proper pleading, contest the liability of the party issuing the notice on any ground notwithstanding that such ground has not been raised in the action by such latter party:

Provided, however, that the third party shall not be entitled to claim in reconvention against any person other than the party issuing the notice, except to the extent that he would be entitled to do so in terms of Order 25.

7. The rules with regard to the filing of further pleadings shall apply to third parties as follows—

- (a) insofar as the third party's plea relates to the claim of the party issuing the notice, the said party shall be regarded as the plaintiff and the third party as the defendant;
- (b) insofar as the third party's plea relates to the plaintiff's claim, the third party shall be regarded as a defendant, and the plaintiff shall file pleadings as provided by the said rules.

8. Where a party to an action has against any other party (whether either such party became a party by virtue of any counterclaim by any person, or by virtue of a third party notice, or by any other means), a claim referred to in rule 1, he may issue and serve on such other party a third party notice in accordance with the provisions of this rule; except that no further notice of intention to defend shall be necessary, the same procedure shall apply as between the parties to such notice and they shall be subject to the same rights and duties as if such other party had been served with the third party notice in terms of rule 1.

9. Any party who has been joined as such by virtue of a third party notice may at any time make application to the judge for the separation of the trial of all or any of the issues arising by virtue of such third party notice, and the judge may upon such application make such order as to him seems meet, including an order for the separate hearing and determination of any issue, on condition that his decisions on any other issue arising in the action, either as between the plaintiff and the defendant, or as between any other parties, shall be binding upon the applicant.

## **ORDER 18**

### **PROCEEDINGS BY OR AGAINST PARTNERSHIPS AND ASSOCIATIONS**

1. In this rule—

**"association"** means any unincorporated body of persons capable of owning a beneficial interest in property not being a partnership and shall include a trust;

**"plaintiff and defendant"** include applicant and respondent;

**"sue"** and **"sued"** are used in relation to actions and applications.

2. A partnership or an association may sue or be sued in its name.

3. A plaintiff suing a partnership need not allege the names of the partners; if it does, any error of omission or inclusion shall not afford a defence to the partnership.

4. (1) A plaintiff suing a partnership may include in any writ of summons a notice calling for particulars of the full name and residential address of each partner as at the relevant date.

(2) The defendant shall within seven court days deliver a written statement containing such information.

(3) Concurrently with the said statement, the defendant shall serve upon the persons

referred to in subrule (2) a notice as near as may be in accordance with Form 11 in the First Schedule and deliver proof by affidavit of such service.

(4) A plaintiff suing a partnership and alleging in the writ of summons or notice of motion that any person was at the relevant date a partner, shall notify such partner accordingly by delivering a notice as near as may be in accordance with Form 11 in the First Schedule.

(5) Any person served with a notice in terms of subrule (3) or (4) shall be deemed to be a party to the proceedings with the rights and duties of a defendant.

(6) Any party to such proceedings may aver in the pleadings or affidavit that such person was at the relevant date a partner or that he is estopped from denying such status.

(7) If any party to such proceedings disputes such status, the judge may at any time decide that issue *in limine*.

(8) Execution in respect of a judgment against a partnership shall first be levied against the assets thereof, and, after such execution, against the private assets of any person held to be, or held to be estopped from denying his status as a partner, as if judgment had been entered against him.

5. The preceding rule shall apply *mutatis mutandis* to a defendant sued by a partnership.

6. If a partnership is sued and it appears that since the relevant date it has been dissolved, the proceedings shall nevertheless continue against the persons alleged by the plaintiff or stated by the partnership to be partners, as if sued individually.

7. (1) A plaintiff suing an association may include in any writ of summons a notice calling for a certified copy of its current constitution and a list of the names and addresses of the office bearers and their respective officers at the relevant date.

(2) Such notice shall be complied with within seven court days.

(3) Subrules (1) and (2) shall apply *mutatis mutandis* to a defendant sued by an association.

8. Subrules (4) to (8) inclusive of rule 4 shall apply *mutatis mutandis* when—

- (a) a plaintiff alleges that any member, servant or agent of the defendant association is liable in law for its alleged debt;
- (b) a defendant alleges that any member, servant or agent of the plaintiff association will be responsible in law for the payment of any costs which may be awarded against the association.

9. Rule 6 shall apply *mutatis mutandis* in regard to the continuance of proceedings against any member, servant or agent referred to in paragraph (a) of rule 8.

10. If the party requested to furnish any particulars as aforesaid fails to deliver them timeously or sufficiently, the party requesting the same may apply to the judge for an order for their delivery or for the dismissal of the action or the striking out of the defence, whereupon the judge may make such order as to him seems meet.

#### **ORDER 19 CHANGE OF PARTIES**

1. No proceedings shall terminate solely by reason of the death, marriage or other change of status of any party thereto unless the cause of such proceedings is thereby extinguished.

2. Whenever by reason of an event referred to in rule 1 it becomes necessary or proper to introduce a further person as a party in such proceedings, (whether in addition to or in substitution for the party to whom such proceedings relate) any party thereto may forthwith by notice to such further person, to every other party, and to the Registrar, add or substitute such further person as a party thereto, and subject to any order made under rule 4 hereof, such proceedings shall thereupon continue in respect of the person thus added or substituted as if he had been a party from the commencement thereof and all steps validly taken before such addition or substitution shall continue to be of full force and effect:

Provided that except with the leave of the judge granted on such terms (as to

adjournment or otherwise) as to him may seem meet, no such notice shall be given after the commencement of the hearing of any opposed matter; and provided further that the copy of the notice served on any person joined thereby as a party to the proceedings shall (unless such party is represented by an attorney who is already in possession thereof ), be accompanied in application proceedings by copies of all notices, affidavits and material documents previously delivered, and in trial matters by copies of all pleadings and like documents already filed of record.

**3.** Whenever a party to any proceedings dies or ceases to be capable of acting as such, his executor, curator, trustee or similar representative may by notice to all other parties, and to the Registrar, intimate that he desires in his capacity as such thereby to be substituted for such party, and, unless the judge otherwise orders, he shall thereafter for all purposes be deemed to have been so substituted.

**4.** The judge may upon notice of application delivered by any party within 21 court days of service of notice in terms of rule 2 or 3 set aside or vary any addition or substitution of a party thus effected, or may dismiss such application or confirm such addition or substitution on such terms, if any, as to the delivery of any affidavits or pleadings, or as to postponement or adjournment, or as to costs or otherwise, as to him may seem meet.

## **ORDER 20 PLEADING GENERALLY**

**1.** Every pleading shall state the title of the action and the description of the pleading and on the last sheet of it there shall be endorsed the name and address of the attorney filing the same, or the name and address of the party if he does not act by an attorney.

**2.** Every pleading shall be filed with the Registrar and, except in the cases provided for by these Rules, a copy of it shall be delivered by the party to the other party or parties to the action on the same day as it is filed, or as soon thereafter as is practicable.

**3.** (1) Every pleading shall be legibly written or typed on A4 paper, and shall, when necessary, be divided into paragraphs numbered consecutively, each paragraph containing as nearly as may be a separate allegation.

(2) The year, day of the month, sums and numbers shall be expressed in figures and not in words.

(3) Where pleadings have been settled by counsel, they shall be signed by him, or on his behalf, and if not so settled they shall be signed by the party if he intends to appear in person.

**4.** (1) Every allegation in a declaration or claim in reconvention shall be dealt with by the opposite party specifically.

(2) He must admit or deny every allegation or state that he has no knowledge concerning it, or confess and avoid it.

(3) Every allegation not so dealt with shall be taken to be admitted.

(4) Every pleading and every annexure or documentary exhibit shall be in the English language, provided that where the original or best copy is in another language, it shall be accompanied by an English translation certified as accurate by a sworn translator or by an officer of the court (including a legal practitioner) who is fluent in the language in question and in English.

(5) The same rule stated in the preceding provisions of this rule shall apply to any allegation in subsequent pleadings, except where a joinder of issue is justified.

**5.** (1) When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but must answer the point of substance; thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else state how much he received.

(2) When a fact is alleged with diverse circumstances, it shall not be sufficient to deny it along with these circumstances, but a fair and substantial answer must be given.

**6.** In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all other cases in which particulars may be necessary, particulars (with dates and items if necessary) shall be stated in the pleading.

**7.** Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be; with a specific averment as to whether or not it was fulfilled.

**8.** The defendant or plaintiff, as the case may be, must raise by his pleading all matters which show the action or claim in reconviction not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply (as the case may be) as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, *res adjudicata*, *lis pendens*, fraud, prescription, release, payment, performance or acts showing illegality either by statute or common law.

**9.** No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

**10.** Wherever it is material to allege notice to any person of any fact or thing, it shall be sufficient to allege such notice as a fact, unless the form or precise terms of such notice, or the circumstances from which such notice is to be inferred, are material.

**11.** Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied (for instance, consideration for a bill of exchange, where the plaintiff sues only on the bill and not for the consideration as a substantive ground of claim).

**12.** (1) A party who in his pleadings relies upon a contract shall state whether the contract is written or oral, and when, where and by whom it was concluded and, if the contract is written, a true copy thereof or of the part relied on shall be annexed to the pleading.

(2) When a contract, promise or agreement is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial of fact of the express contract, promise or agreement alleged, or of the matters of fact from which the same may be implied by law, and not as a denial of the legality or sufficiency in law of such contract, promise or agreement.

**13.** Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document, or any part thereof, are material.

**14.** Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred:

Provided that the judge may direct that particulars of such circumstances be given to the opposite party.

**15.** A plaintiff suing for damages shall set them out in such manner as will enable a defendant reasonably to assess the quantum thereof:

Provided that a plaintiff suing for damages for personal injury shall specify his date of birth, the nature and extent of the injuries and the nature, effects and duration of the disability alleged to give rise to such damages, and shall, as far as practicable, state separately what amount, if any, is claimed for —

- (a) medical, hospital and other similar expenses and how these costs and expenses are made up;
- (b) pain and suffering, stating whether temporary or permanent and which injuries caused it;
- (c) disability in respect of:
  - (i) the earning of income (stating earnings lost to date and how the amount is made

- up, and the estimated future loss, and the nature of the work the plaintiff will in future be able to do);
- (ii) the enjoyment of amenities of life (giving particulars) and stating whether the disability concerned is temporary or permanent; and
  - (iii) disfigurement with a full description thereof, and stating whether it is temporary or permanent.

**16.** A joinder of issue shall operate as a denial of every material allegation of fact in the pleading upon which issue is joined, but it shall except any facts which the party may be willing to admit and shall then operate as a denial of the facts not so admitted.

**17.** (1) Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the time period allowed for filing any subsequent pleading, and before filing any other pleading, deliver an exception thereto and, subject to subrule (2), then the party delivering the exception may make application for directions under Order 28.

(2) Before applying at any case management conference for the hearing of an exception, the excipient shall, by his notice of exception, accord to his opponent the opportunity of removing his cause of complaint within 10 court days, failing which removal the application may be made.

- (3) Upon hearing an exception, the judge may—
- (a) dismiss the exception, in which event the subsequent pleading shall be filed and delivered within 10 court days of such dismissal; or
  - (b) uphold the exception, and
    - (i) dismiss the action or defence, as the case may be, or
    - (ii) allow such amendment as may be necessary to remove the cause of complaint, in which event the subsequent pleading shall be filed and delivered in terms of paragraph (a) above; or
  - (c) make such other order as he deems just to ensure the expeditious disposal of the case.

**18.** (1) Where any pleading contains averments which are scandalous, vexatious or irrelevant, the opposing party may, within the period allowed for filing any subsequent pleading, and before filing any further pleading, file and deliver a notice of application to strike out such averments, and by such notice shall accord his opponent an opportunity of removing the cause of complaint within 10 court days, failing which removal the party delivering the application may make application for directions under Order 28.

- (2) On hearing an application to strike out, the judge may—
- (a) dismiss the application, in which event the subsequent pleading shall be filed and delivered within 10 court days thereafter; or
  - (b) order to be struck out the offending averments or any part thereof; or
  - (c) make such other order as to amendment or otherwise as he deems just to ensure the expeditious disposal of the cause.

**19.** (1) Where a party, in order to plead requires a further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in a pleading, that party shall, within the period allowed for filing the subsequent pleading, and before filing any other pleading, deliver a notice of application for such better statement or further particulars, and by such notice shall allow the other party 10 court days within which to deliver such better statement or further particulars.

(2) Upon failure of the other party to deliver the said statement or particulars within the time allowed, the party requiring the better statement or further particulars may make application for directions under Order 28.

(3) On hearing the application to deliver the better statement or particulars, the judge may—

- (a) dismiss the application; or
  - (b) order the delivery of the better statement or further particulars within a stated period.
- (4) If the better statement or further particulars are still not delivered within the stated period, the requesting party may make application for directions under Order 28.
- (5) On hearing the application the judge may—
- (a) dismiss the action or defence, as the case may be; or
  - (b) strike out the averments in respect of which further particulars were sought; or
  - (c) make such other order as he deems just so as to ensure the expeditious disposal of the cause.
- (6) After delivery of the better statement or further particulars, the requesting party shall deliver his plea or replication or other answer within 10 court days of such delivery.
- 20.** Any party wishing to raise a special plea in bar or in abatement shall at the same time plead over to the substantive claim.
- 21.** No technical objection shall be raised to any pleading on the ground of any alleged want of form.
- 22.** Where in these Rules a copy of any pleading is ordered to be delivered by a party to another party, and one or other of the parties, or any of them, are represented by attorneys, it shall be delivered by or to the attorney of the party at the address for service.
- 23.** If in any pleading a party fails to comply with any of the provisions of this Order, such pleading shall be deemed to be an irregular step, and the other party or parties or any of them shall be entitled to act in accordance with Order 33.

#### **ORDER 21 CLOSE OF PLEADINGS**

**1.** Except where otherwise ruled or ordered by the judge, where a pleading subsequent to replication is not ordered, then, at the expiration of 14 court days from the service of the plea or replication (if a replication has been filed) or, where a pleading subsequent to replication is ordered, and the party who has been ordered or given leave to file the same fails to do so within the period limited for that purpose, then, at the expiration of the period so limited, the pleadings shall be deemed to be closed and material statements of fact in the pleading last served shall be deemed to have been denied and put in issue:

Provided that this rule shall not apply to a plea in reconvention and that unless the plaintiff files a plea in reconvention the statements of facts contained in such claim in reconvention shall, at the expiration of 14 court days from the service thereof or of such time (if any) as may by order be allowed for filing of a plea thereto, be deemed to be admitted, but the judge may at any subsequent time give leave to the plaintiff to file a plea in reconvention.

#### **ORDER 22 ENTRY FOR TRIAL**

**1.** The judge shall determine the date of any hearing. In doing so the judge shall, save where exceptional circumstances require otherwise, determine dates so as to ensure that actions are heard in the order in which pleadings are closed.

#### **ORDER 23 DISMISSAL FOR WANT OF PROSECUTION**

**1.** Where in any action no step has been taken by either party for six months or more, a party may apply for the dismissal of the action or, failing such application by a party, the Registrar shall list it before the judge on a motion day for dismissal for want of prosecution on that date and serve notice thereof on all parties thereto.

**2.** On the action being called the judge shall dismiss the action with costs unless sufficient reason is shown to the contrary.

**3.** If the judge decides not to dismiss the case, he shall impose conditions for the future conduct of the proceedings and give directions for the expeditious disposal of the case.

#### **ORDER 24**

## **DECLARATION**

1. The full statement of the plaintiff's claim shall be called his declaration, and it shall state truly and concisely the name and description of the party suing and his place of residence or place of business, and, if he sues in a representative capacity, the capacity in which he sues; the name of the defendant and his place of residence or place of business and, if he is sued in a representative capacity, the capacity in which he is sued; the nature, extent and grounds of the cause of action, complaint or demand.

2. Every declaration shall—

- (a) state specifically the relief which the plaintiff claims, either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the judge may think just to the same extent as if it had been asked for; and the same rules shall apply to any claim in reconvention made, or relief claimed by the defendant in his claim in reconvention.
- (b) be accompanied by—
  - (i) an affidavit or affidavits by persons having direct knowledge thereof setting out the facts relied upon;
  - (ii) copies of the documentary exhibits to be relied upon or, in the case of a running account, a statement of account from inception stating with descriptions thereof all debits and credits and the outstanding balance;
  - (iii) a short legal motivation of the relief sought.

3. Where the plaintiff seeks relief in respect of several distinct claims, or causes of action, founded upon separate and distinct grounds, they shall be stated, as far as may be, separately and distinctly; and the same rule shall apply where the defendant relies upon several distinct grounds of defence, set-off or claim in reconvention, founded upon separate and distinct facts.

4. A declaration shall be filed within 30 court days of entry of appearance, save where an application for summary judgment is made in which event it shall be filed within 30 court days after refusal of summary judgment.

5. A copy of the declaration shall be delivered by the plaintiff to the defendant on the same day as it is filed with the Registrar, or as soon thereafter as is practicable.

6. In his declaration a plaintiff may alter, modify or extend his claim or claims as stated in the writ, and the writ shall thereupon be deemed to be amended in accordance with the claim or claims made in the declaration:

Provided that where the defendant shows that he is prejudiced by such amendment the judge may make such order as to costs or otherwise as the justice of the case demands.

7. This Order shall not apply to declarations to be delivered in matrimonial causes, which declarations shall meet the requirements of the rules promulgated under Cap. 29:06 the Matrimonial Causes Act.

## **ORDER 25 PLEA AND CLAIM IN RECONVENTION**

1. (1) The defendant's answer to the plaintiff's declaration shall be called his plea, and it shall set forth concisely the nature of his defence and deal with the allegations in the declaration as provided by rule 4 of Order 20.

(2) The plea shall be accompanied by—

- (a) an affidavit or affidavits by persons having direct knowledge thereof setting out the facts relied upon;
- (b) copies of all the documentary exhibits to be relied upon in the defence;
- (c) a short legal motivation of the relief sought.

2. Where the judge is of opinion that any allegation of fact denied or not admitted by the defendant ought to have been admitted, the judge may make such order as shall be just with

respect to any extra costs occasioned by it having been denied or not admitted.

**3.** Subject to subrule (2), a defendant who enters an appearance and intends to defend an action must, unless the judge gives leave to the contrary, file and deliver his plea, exception or special plea at the Registry on or before the date stipulated by the judge.

**4.** The defendant shall on the same day that he files his plea or exception, or soon thereafter as is practicable, deliver a copy of it to the plaintiff.

**5.** The defendant in an action may set up by way of claim in reconvention any right or claim he may have against the plaintiff, and such claim in reconvention shall have the same effect as an action, so as to enable the judge to pronounce a final judgment in the same action both on the original claim and on the claim in reconvention.

**6.** Where legally entitled to do so, the defendant may set off his claim in reconvention against the plaintiff's claims.

**7.** A claim in reconvention shall be so described and shall set forth in paragraphs, separate and distinct from the plea, the nature, the extent and grounds of the cause of action as required for a declaration under rule 1 of Order 24 and shall be accompanied by the items listed in rule 2 of Order 24.

**8.** A claim in reconvention shall be filed with the defendant's plea, and a copy thereof delivered to the plaintiff.

**9.** Facts and allegations already set forth in the plea or in the declaration and admitted in the plea may be incorporated in the claim in reconvention by reference to the relevant paragraphs of the plea or declaration, as the case may be.

**10.** In any action in which the defendant sets up a claim in reconvention and the action of the plaintiff is stayed, discontinued or dismissed, the claim in reconvention may nevertheless be proceeded with.

**11.** Where in any action the set-off or claim in reconvention is established as a defence against the plaintiff's claim, the judge may, if the balance is in favour of the defendant, give judgment for the defendant in such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case.

**12.** The judge may for good cause shown order the plaintiff's claim and the claim in reconvention to be tried separately.

**13.** The preceding provisions of this Order shall be subject to any ruling or order as the judge may deem meet to make.

## **ORDER 26**

### **REPLICATION TO PLEA IN RECONVENTION**

**1.** Within 14 court days of the service upon him of a plea complying with rule 1 (2) of Order 25, and subject to rule 2 hereof, the plaintiff shall where necessary deliver a replication to the plea and a plea to any claim in reconvention.

**2.** No replication or subsequent pleading which would be a mere joinder of issue or further denial of allegations in the previous pleading shall be necessary, and issue shall be deemed to be joined and pleadings closed in terms of rule 1 of Order 21.

**3.** Where a replication or subsequent pleading is necessary, a party may therein join issue on the allegations in the previous pleading; to such extent as he has not dealt specifically with the allegations in the plea or such other pleading, such joinder of issue shall operate as a denial of every material allegation of fact in the pleading upon which issue is joined.

**4.** A plaintiff in reconvention shall, subject to the provisions of rule 2 hereof, within 14 court days from the delivery of the plea in reconvention deliver a replication in reconvention.

**5.** (1) Further pleadings may, subject to the provisions of rule 2, be filed and delivered by the respective parties within 14 court days of the previous pleading delivered by the opposite party.

(2) Such pleadings shall be termed rejoinder, surrejoinder, rebutter and surrebutter, as the case may be.

6. The preceding provisions of this Order shall be subject to any ruling or order as the judge may deem meet to make.

**ORDER 27**  
**PROCEDURE FOR BARRING**  
**(Deleted)**

1 to 6 (deleted)

**ORDER 28**  
**APPLICATION FOR DIRECTIONS**

1. (1) In any action, any party may make application for directions in respect of any interlocutory matter on which a decision may be required. Except where the judge, on notice of motion, otherwise allows in exceptional circumstances, such application shall be heard at a case management conference.

(2) Four court days' notice of the application shall be given to the opposite party.

2. The party applying for directions shall, in his notice, set out the matters in respect of which he intends to ask for directions, and such matters may, so far as is necessary and practicable, include generally the proceedings to be taken in the action and the costs of the application, and more particularly the following, namely pleadings, amendment to pleadings, particulars, admissions, removal of trial, the hearing of arguments on points of law, the trial of one or more questions (whether of law or of fact), inspection of movable and immovable property, commissions, examination of witnesses, place and date of trial.

3. (1) The party to whom the application is addressed shall also, as far as practicable, apply at the hearing of the application for any directions which he may desire in respect of matters specified in rule 2.

(2) Such party shall before the hearing give notice to the other party or parties to the action of the matters in respect of which he intends to ask for directions.

4. Upon the hearing of the application, the judge shall, as far as practicable, make such order as may be just as to the matters in respect of which directions are asked.

5. No affidavit shall be used on the hearing of an application for directions except by leave of the judge.

6. Any application subsequent to the original application and before judgment for any directions as to any interlocutory matter or thing by any party shall be made by two clear days' notice to the other party stating the grounds of the application.

7. The costs of any application subsequent to the original application shall be borne by the party applying unless the judge is of the opinion that such application could not properly have been made at the hearing of the original application.

8. (1) On the hearing of an application under this Order, the judge may—

(a) make an order—

(i) that evidence of any particular fact to be specified in this Order shall be given at the trial by affidavit, or

(ii) by consent of parties dispensing with any of the technical rules of evidence for the avoidance of expenses and delay; and

(b) in addition, in commercial causes, make such order or orders as he thinks fit for the speedy determination of the questions really in controversy between the parties, and particularly he may make orders dispensing with formal pleadings and settling the issues to be tried between the parties.

(2) Commercial causes shall include causes arising out of ordinary transactions of merchants and traders, amongst others, those relating to the construction of mercantile documents, export or import of merchandise, freightment, insurance, banking and mercantile agency and mercantile usages.

9. (1) Where in—

(a) any proceedings on motion or by petition;

- (b) applications for provisional sentence;
- (c) applications for the arrest of persons or of goods,

there is a conflict of evidence and the matter cannot be decided without the hearing of oral evidence, the judge in his discretion may order that such oral evidence as the parties may desire to produce be heard forthwith or on such date as the judge may fix.

(2) The judge may also give directions as to dispensing with all pleadings or any particular pleading or as to dispensing with the oral evidence of any person who has given or may give evidence upon affidavit and may give such other directions as to him may seem most conducive to the speedy and inexpensive determination of the matters at issue.

(3) The judge may on the application of either party order the attendance for cross-examination of any person who has made an affidavit in such proceedings.

#### **ORDER 29**

#### **JUDGMENT BY CONSENT**

1. (1) At any time after service of the writ of summons, a defendant may consent to judgment without appearing in court.

(2) This rule does not apply to actions for divorce, judicial separation or nullity of marriage.

2. (1) Such consent shall be in writing and signed either by the defendant personally or by an attorney who has entered appearance on his behalf.

(2) The defendant's signature shall be verified by an affidavit made by someone other than himself, or by the signature of an attorney acting for him and not for the opposite party.

3. Upon filing such consent at the registry, the plaintiff may without notice to the defendant set down the cause for judgment and thereupon judgment may be given or order made in accordance with such consent.

#### **ORDER 30**

#### **JUDGMENT IN DEFAULT OF APPEARANCE**

1. Where the writ of summons is endorsed for a debt or liquidated demand only and the defendant fails, or all the defendants fail, if more than one, to enter appearance thereto, the Registrar may, on application by the plaintiff, enter final judgment against that defendant (including judgment declaring immovable property secured by a mortgage bond specially executable) for any sum not exceeding the sum endorsed on the writ, together with interest at the rate specified, if any, and if no rate is specified at the rate of 10 per cent per annum to the date of payment, and costs and proceed with the action against the other defendants, if any.

2. Subject to rule 4 of Order 36 where the writ is endorsed with a claim against a defendant for unliquidated damages and that defendant fails to enter appearance, the plaintiff may apply to the Registrar for judgment against that defendant for such damages as the Registrar may assess under Order 36 and costs, and proceed with the action against the other defendants, if any.

3. Where the writ is endorsed with a claim against a defendant relating to the detention of goods only, then if that defendant fails to enter appearance thereto, the plaintiff may at his option enter either—

- (a) judgment against that defendant for the return of the goods and costs; or
- (b) judgment for the value of the goods to be assessed under Order 36 and costs,

and proceed with the action against the other defendants, if any.

4. (1) Where the writ is endorsed with a claim against a defendant for the recovery of land only then if that defendant—

- (a) fails to enter appearance; or
- (b) enters an appearance but includes in his notice of appearance a statement that he is defending the action with respect to a specified part only of the land,

the plaintiff may in respect of that defendant remaining in default or in the case mentioned in paragraph (b), after entry of appearance, apply to the Registrar for judgment for possession of

the land or, as the case may be, the part of the land not specified in the statement aforesaid, as against that defendant and costs, and proceed with the action against the other defendants, if any.

(2) Where the writ is endorsed for a claim against a defendant for the recovery of land and damages then if that defendant—

- (a) fails to enter appearances; or
- (b) enters an appearance but includes in his notice of appearance a statement that he is defending the action with respect to a specified part only of the land or claim for damages,

the plaintiff may in respect of that defendant remaining in default or in the case mentioned in paragraph (b), after entry of appearance, apply to the Registrar for judgment for—

- (i) possession of the land or, as the case may be, the part of the land not specified in the statement aforesaid; and/or
- (ii) the damages or, as the case may be, the part of the damages not specified in the statement aforesaid, with damages sought being assessed under Order 36;

as against that defendant and costs, and proceed with the action against the other defendants, if any.

(3) Where there is more than one defendant, judgment entered under this rule shall not be enforced against any defendant unless and until judgment for possession of the land has been entered against all the defendants.

**5.** Where the writ issued against any defendant is endorsed with two or more of the claims mentioned in the foregoing rules, and no other claim, then, if the defendant remains in default, the plaintiff may enter against that defendant such judgment in respect of any such claim as he would be entitled to under those rules if that were the only claim endorsed on the writ, and proceed with the action against the other defendants, if any.

**6.** (1) In a matrimonial cause, service shall, except with the leave of the judge, be personal, and if the defendant fails to enter appearance, the plaintiff may after the expiry of the period provided for in the writ of summons set down the case for hearing on any motion day and shall deliver to the defendant personally, unless the judge shall otherwise direct, a copy of the notice of set down, which notice shall be delivered or dispatched not less than 10 court days before the date of trial.

(2) On the date on which the case is set down for trial or on any subsequent date fixed by the judge, the judge after hearing evidence may enter judgment against the defendant and for the plaintiff or make such order as upon the declaration it considers the plaintiff entitled to.

(3) If the case is not heard on the date on which it is set down for trial and the defendant is not present, notice of any subsequent date fixed for trial shall be sent by the plaintiff by registered post to the defendant to his last known place of residence or last business address.

**7.** (1) Where a writ is endorsed with a claim of a description not mentioned in rules 1 to 4, and 6 the plaintiff may set the action down *ex parte* for hearing on a motion day and on hearing the action the judge may enter judgment in default, with or without hearing evidence, as he may decide.

(2) Where a writ issued against a defendant is endorsed as aforesaid, but by reason of the defendant satisfying the claim or complying with the demands thereof or for any other like reason it has become unnecessary for the plaintiff to proceed with the action, then, if the defendant fails to enter an appearance, and remains in default, the plaintiff may, after the time limited for appearance, enter judgment with the leave of the judge against that defendant for costs.

(3) An application for leave to enter judgment under subrule (2) shall be by motion which must, unless the judge otherwise orders, be served on the defendant against whom it is sought to enter judgment.

**8.** (1) Judgment shall not be entered against a defendant under this Order unless a

return of service or an affidavit of service, as the case may be, is filed, by or on behalf of the plaintiff, proving due service of the writ or notice of the writ on the defendant, as the case may be.

(2) In cases where the return of service shows that the writ has not been served personally on the defendant, the plaintiff shall file at the Registry an affidavit sworn by himself or by any other person who can swear positively to the facts, verifying the cause of action, and the amount claimed, (if any) and stating that in his belief there is no defence to the action.

(3) Where, in an action begun by writ, an application is made to the judge for an order affecting a party who has failed to enter an appearance, the judge hearing the application may require to be satisfied in such manner as he thinks fit that the party is in default of appearance.

9. If the plaintiff's claim is for a debt or liquidated demand, or for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, or for any of such matters, or for the recovery of land, and the defendant files a plea which purports to offer an answer to part only of the plaintiff's alleged cause of action, the judge may enter judgment, final or interlocutory, as the case may be, for the part unanswered:

Provided that the unanswered part consists of a separate cause of action, or is severable from the rest, as in the case of a part of a debt or liquidated demand.

10. In any cause in which issues arise in an action other than between plaintiff and defendant, if any party to any such issue makes default in delivering any pleading, the opposite party may apply to the judge for such judgment, if any, to which upon the pleadings he may appear entitled; and the judge may order judgment to be entered accordingly, or make such other order as may be necessary to do complete justice between the parties.

11. (1) In all cases where judgment has been given by consent or in default under Order 30, such judgment may be set aside by the judge and leave given to the defendant to defend or to the plaintiff to prosecute his action.

(2) Such leave shall only be given on good and sufficient cause and upon such terms as to costs and otherwise as the judge deems just.

**ORDER 31  
DEFAULT OF PLEADING  
(Deleted)**

1 to 13 (deleted)

**ORDER 32  
AMENDMENT OF PLEADINGS**

1. Failing consent by all parties the judge may, at any stage of the proceedings, on application allow either party to alter or amend his pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.

2. If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited, then within 14 court days from the date of the order, such order to amend shall on the expiration of such limited time as aforesaid, or of such 14 court days (as the case may be), lapse unless the time is extended by the judge.

3. Pleadings may be amended by minor written alterations in all copies, unless the amendments are so numerous or of such a nature that the making of them in writing would render the document difficult or inconvenient to read, in either of which cases the amendment must be made by retyping and delivering a copy of the document as amended.

4. Whenever any pleading is amended, the same, when amended, shall be marked with the date of the order, if any, under which the same is so amended, and of the day on which such amendment is made in the following manner, namely: "Amended this ..... day of ..... pursuant to Order ..... of ..... dated ..... day of ....."

5. Whenever any pleading is amended, such amended document shall be delivered to

the opposite party within the time allowed for amending the same.

6. Clerical or arithmetic mistakes by the judge, or the Registrar acting under Order 30, in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the judge on motion without an appeal.

7. The judge may at any time, and on such terms as to costs or otherwise, as the judge may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the pleadings.

8. The costs of and occasioned by any amendment made pursuant to this Order shall be borne by the party making the same, unless the judge otherwise orders.

### **ORDER 33 IRREGULAR PROCEEDINGS**

1. Any party to any cause in which an irregular or improper step or proceeding has been taken by any party may within 14 court days of the taking of such step or proceeding apply to the judge to set it aside:

Provided that no party who has taken any further step in the cause with knowledge of the irregularity or impropriety shall be entitled to make such application.

2. Application in terms of rule 1 shall be on notice to all parties *mutatis mutandis* as provided for in rule 18 (1) of Order 20.

3. If at the hearing of such application the judge is of the opinion that the proceeding or step is irregular or improper, he may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to him seems meet.

4. Until a party has complied with any order of the judge made against him, he shall not take any further step in the cause, except to apply for an extension of time within which to comply with such order.

5. Where a party fails to comply timeously with a request made or notice given pursuant to these Rules, the party making the request or giving the notice may notify the defaulting party that he intends, after the lapse of seven court days, applying for an order that such notice or request be complied with, or that the claim or defence be struck out; failing compliance within the seven court days, application may be made to court and the judge may make such order thereon as to him seems meet.

### **ORDER 34 SUMMARY JUDGMENT**

1. The plaintiff may apply to court for summary judgment on each of such claims in the summons as is only—

- (a) based on a liquid document;
- (b) for a liquidated amount in money;
- (c) for delivery of specified movable property; or
- (d) for ejection,

together with any claim for interest and costs.

2. (1) The plaintiff shall simultaneously with his writ of summons, deliver notice of such application, accompanied by an affidavit made by himself, or by any other person who can swear positively to the facts verifying the cause of action and the facts on which it is founded and the amount, if any, claimed, and stating that in his opinion there is no *bona fide* defence to the action and that entry of appearance to defend, if delivered, will have been delivered solely for the purpose of delay.

(2) If the claim is founded on a liquid document, a copy of the document shall be annexed to such affidavit.

(3) Such notice of application shall state that the application will be set down for hearing on a stated day not being less than seven court days from the date of delivery thereof.

3. Upon the hearing of and application summary judgment, the defendant may—
- (a) give security to the plaintiff to the satisfaction of the Registrar for any judgment including costs which may be given; or
  - (b) satisfy the judge by affidavit, which shall be delivered simultaneously with his appearance to defend, of himself or of any other person who can swear positively to the fact that he has a *bona fide* defence to the action, such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefore; or
  - (c) with the leave of the judge on the hearing of the application, satisfy the judge by oral evidence that he has a *bona fide* defence to the action.

4. No evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in rule 2, nor may either party cross-examine any person who gives evidence on affidavit or *viva voce* evidence but the judge may put to any person who gives oral evidence such questions as he considers may elucidate the matter.

5. If the defendant does not find security or satisfy the judge as provided in paragraph (b) of rule 3, the judge may enter summary judgment for the plaintiff.

6. If, on the hearing of an application made under this rule, it appears—

- (a) that any defendant is entitled to defend, and any other defendant is not so entitled; or
- (b) that the defendant is entitled to defend as to part of the claim, the judge shall—
  - (i) give leave to defend to a defendant so entitled thereto and give judgment against the defendant not so entitled;
  - (ii) give leave to defend to the defendant as to part of the claim and enter judgment against him as to the balance of the claim, unless he has paid such balance to the plaintiff or into court in terms of Order 38, or
  - (iii) make both orders mentioned in subparagraphs (i) and (ii).

7. If the defendant finds security or satisfies the judge as provided in rule 3, the judge shall give leave to defend and the action shall proceed as if no application for summary judgment had been made.

8. Leave to defend may be given unconditionally or subject to such terms as to security for costs, time for delivery of pleadings, or time or mode of trial or otherwise, as the judge deems fit.

9. The judge may at the hearing of such application make such order as to costs as to him may seem just:

Provided that if—

- (i) the plaintiff makes an application under this Order where the case is not within the terms of rule 1, or where the plaintiff, in the opinion of the judge, knew that the defendant relied on a contention which would entitle him to leave to defend, the judge may order that the action be stayed until the plaintiff has paid the defendant's costs; and may further order that such costs be taxed as between attorney and client; and
- (ii) in any case in which summary judgment was refused and in which the judge, after trial, gives judgment for the plaintiff substantially as prayed, and the judge finds that summary judgment should have been granted had the defendant not raised a defence which in its opinion was unreasonable, the judge may order the plaintiff's costs of the action to be taxed as between attorney and client.

#### **ORDER 35**

#### **SPECIAL CASES AND ADJUDICATION ON POINT OF LAW**

1. (1) The parties to any civil action may, after a writ of summons or notice of motion has been issued, concur in stating the questions of law arising therein in the form of a special case for the opinion of the judge.

(2) Every such special case shall be divided into paragraphs numbered consecutively

and shall concisely state such facts and documents as may be necessary to enable the judge to decide the questions raised thereby.

(3) Upon the argument of such case, the judge and the parties shall be at liberty to refer to the whole contents of such documents and the judge shall be at liberty to draw from the facts and documents stated in any such special case any inference, whether of fact or law, which might have been drawn therefrom if proved at the trial.

2. If it appears to the judge that there is in any case or matter a question of law which it would be convenient to have decided before any evidence is given, or any question or issue of fact is tried, the judge may make an order accordingly, and may direct such question of law to be raised for the opinion of the judge, either by special case or in such other manner as the judge may deem expedient, and such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed.

3. (1) Every special case shall be typewritten or printed by the plaintiff and signed by the several parties and their counsel and shall be filed by the plaintiff.

(2) If the Registrar so requests, one or more copies of the special case shall be filed for the use of the judges.

4. No special case in any cause to which a minor or person of unsound mind is a party shall be set down for argument without leave of the judge, the application for which must be supported by sufficient evidence that the statements contained in such special case, so far as the same affect the interest of such minor or person of unsound mind, are true.

5. The parties to a special case may, if they think fit, enter into an agreement which shall be embodied or referred to in the special case that, on the judgment of the judge being given in the affirmative or negative on the questions of law raised by the special case, a sum of money fixed by the parties, or to be ascertained by the judge, or in such manner as the judge may direct, shall be paid by one of the parties to the other of them either with or without costs; and the judgment of the judge may be entered for the sum so agreed or ascertained, with or without costs (as the case may be), and execution may issue upon such judgment forthwith, unless otherwise agreed, or unless stayed on appeal.

#### **ORDER 36 ASSESSMENT OF DAMAGES**

1. Where judgment is given for damages, the damages shall be assessed by the judge or, if so ordered by the judge, by the Registrar.

2. Where judgment in default of appearance is sought under rule 2 or rule 3 of Order 30 for unliquidated damages or for the value of goods, the application may be made *ex parte* and shall be accompanied by evidence on affidavit establishing and justifying the damages or value, as the case may be, for which judgment is sought.

3. In considering an application under rule 2, the Registrar may—

- (a) grant judgment for such damages or value as he considers proved on affidavit; or
- (b) call for additional evidence, either oral or on further affidavit prior to granting judgment.

4. When judgment is granted by the Registrar under rule 2—

- (a) the plaintiff may, within 14 court days, apply *ex parte* to the judge for reassessment of the damages assessed by the Registrar; or
- (b) the defendant may, within 14 court days of becoming aware of the judgment, apply on motion to the judge for reassessment of the damages assessed by the Registrar;

failing either of which, the judgment granted by the Registrar shall become final.

5. The attendance of witnesses and the production of documents before the judge or Registrar may be compelled by subpoena and the provisions of Order 45 as to proceedings at a trial shall, with any necessary adaptations, apply.

6. Where any judgment as is mentioned in rule 2 is given in default of appearance or in default of defence, and the action proceeds against other defendants, the damages under the judgment shall be assessed at the trial unless the judge otherwise orders.

7. The preceding provisions of this Order shall apply in relation to a judgment for the value of goods to be assessed, with or without damages to be assessed, and references in those provisions to the assessment of damages shall be construed accordingly.

8. Where damages are to be assessed (whether under this Order or otherwise) in respect of any continuing cause of action, they shall be assessed down to the time of the assessment.

### **ORDER 37 INQUIRIES AND ACCOUNTS**

1. In any civil cause in which all parties interested who are under no disability consent thereto, and also, without such consent, in any civil cause requiring any prolonged examination of documents or accounts or any scientific or local examination which cannot, in the opinion of the judge, conveniently be made by the judge in the usual manner, the judge may, at any time, on such terms as he may think proper, order any question or issue of fact, or any question of account arising therein, to be investigated or tried before a referee to be agreed on between the parties or appointed by the judge.

2. (1) The plaintiff may at any time after the defendant has entered an appearance or after the time limited for appearing, apply for an order under rule 1.

(2) An application under this rule shall be made by notice of motion and be supported by affidavit.

3. (1) Where an order has been made under rule 1, the judge shall furnish the referee with such part of the proceedings and such information and detailed instructions as may appear necessary for his guidance, and shall direct the parties, if necessary, to attend upon the referee during the inquiry.

(2) The instructions shall specify whether the referee is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his investigation.

4. The judge may, at any stage of the proceedings, direct any necessary inquiries or accounts described in rule 1 to be made or taken, notwithstanding that it may appear that there is some special or further relief sought or some special issue to be tried, as to which it may be proper that the cause should proceed in the ordinary manner.

5. (1) The referee may, subject to the order of the judge, hold the inquiry at or adjourn it to any place which he may deem most convenient, and have any inspection or view which he may deem expedient for the disposal of the controversy before him.

(2) He shall, so far as practicable, proceed with the inquiry *de die in diem*.

6. Subject to any order to be made by the judge ordering the inquiry, evidence shall be taken at any inquiry before a referee and the attendance of witnesses may be enforced by subpoena; and every such inquiry shall be conducted in the same manner, as nearly as circumstances will admit, as trials before a judge, but not so as to make the tribunal of the referee a public court of justice.

7. Subject to any order as mentioned in rule 6, the referee shall have the same authority in the conduct of any inquiry as a judge when presiding at any trial.

8. Nothing contained in these Rules shall authorise any referee to commit any person to prison or to enforce any order by attachment or otherwise; but the judge may, in respect of matters before a referee, make any order of attachment or commitment he may consider necessary.

9. The referee may, before the conclusion of an inquiry before him, or by his report under the reference, submit any question arising therein for the decision of the judge, or state any facts specially.

10. If it appears to the judge, on the representation of the Registrar or a party, that there is any undue delay in the prosecution of any accounts or inquiries, or in any other proceedings under any judgment or order, the judge may require the party having conduct of the

proceedings, or any other party, to explain the delay, and may thereafter make such order with regard to expediting the proceedings or conduct thereof or the stay thereof and as to the costs of the proceedings, as the circumstances of the case may require.

**11.** The proceedings and report in writing of the referee shall be received in evidence in the case, unless the judge has reason to be dissatisfied with them, and the judge shall have power to draw such inferences from the proceedings or report as shall be just.

**12.** The judge shall have power to require any explanations or reasons from the referee, and to remit the cause, or any part thereof, for further inquiry or consideration to the same or any other referee, as often as may be necessary, and shall pass such ultimate judgment or order as may appear to be right and proper in the circumstances of the case.

### **ORDER 38 PAYMENT INTO COURT**

**1.** (1) In any action for payment of a sum of money, the defendant may at any time pay unconditionally into court the sum so claimed or any part thereof, and the Registrar shall, upon the application of the plaintiff, cause to be paid such sum to the plaintiff's attorney (or to the plaintiff where he sues in person).

(2) In making such payment, the defendant shall state whether he acknowledges or disavows liability for the payment of the plaintiff's costs in whole or in part.

(3) If the defendant, in making such payment into court in terms of subrule (1), acknowledges liability, in terms of subrule (2), for payment of the costs in whole or in part, and fails to pay in full such costs, as taxed, within seven court days after demand, the plaintiff may apply in writing through the Registrar to a judge for judgment for the same.

(4) If the defendant in making payment into court in terms of subrule (1) disavows liability, in terms of subrule (2), for any portion of the plaintiff's costs, he shall state in the notice accompanying the payment into court the grounds upon which he so disavows, and the action may be set down for hearing on the question of costs only.

**2.** In any action in which a sum of money is claimed, either alone or with any other relief, the defendant may, at any time without prejudice, pay an amount into court by way of an offer of settlement of the plaintiff's claim.

**3.** Where the plaintiff claims the performance of some act by the defendant, the defendant may at any time tender either unconditionally or without prejudice to perform such act; unless such act must be performed by the defendant personally, *pari passu* with such a tender there shall be filed with the Registrar an irrevocable power of attorney to perform such act on behalf of the person making the tender.

**4.** Any party to an action who stands to be held liable to any other party to contribute towards or to be held liable with such party for the payment of any amount which may be recovered by any other party, may either unconditionally or without prejudice by way of an offer of settlement—

(a) make a written offer to that other party to contribute either a specific sum or in a specific proportion towards the amount to which the plaintiff may be held entitled in the action; or

(b) pay into court a sum in respect of the share of the amount to which the plaintiff may be held to be entitled and for which share he may be adjudged liable.

**5.** One of several defendants, whether sued jointly, jointly and severally, separately or in the alternative, may either unconditionally or without prejudice by way of an offer of settlement pay into court a sum of money in respect of the plaintiff's claim, or tender in terms of these Rules, to do any act or acts, the performance of which is claimed by the plaintiff.

**6.** Notice of any payment, tender or offer in terms of this rule shall be given to all parties to the action and shall state—

(a) whether the same is unconditional or without prejudice as an offer of settlement;

(b) whether it is accompanied by a tender to pay the plaintiff's costs in whole or in part;

- and  
(c) whether the amount paid is offered in settlement of both claim and costs or of the claim only.

7. A plaintiff may within 10 court days of the receipt of the notice referred to in rule 6, or thereafter with the consent of the defendant or a judge, accept any payment, tender to perform an act, or written offer in settlement of his claim and shall notify all other parties to the action accordingly, and the Registrar, upon being satisfied that the requirements of this rule have been complied with, shall cause to be paid out to the plaintiff's attorney (or to the plaintiff where he sues in person) the money paid into court or give effect to, or deliver to the plaintiff's attorney (or to the plaintiff where he sues in person) the power of attorney referred to in rule 3.

8. If a tender or payment in terms of rule 2, 3, 4 or 5 is not stated to be in satisfaction of a plaintiff's claim and costs, the plaintiff may, on notice to the defendant, apply for judgment for costs.

9. (1) No payment into court, tender or offer, made without prejudice in terms of this rule, by way of an offer of settlement, shall be disclosed at any time to the judge before judgment has been given.

(2) No reference to the fact of such payment, tender or offer shall appear on any file in the office of the Registrar containing the papers in the said case.

(3) The fact of a payment, tender or offer referred to in subrule (1) may be brought to the notice of the judge after judgment has been given as being relevant to the question of costs.

(4) If the judge has given judgment on the question of costs in ignorance of any such payment, tender or offer, and such is brought to the notice of the judge within 48 hours, the question of costs shall be considered afresh in the light thereof:

Provided that nothing contained in this rule shall affect the judge's discretion as to an award of costs.

(5) Any party to an action who, contrary to this rule, by himself or his counsel, mentions or discloses to the judge such payment, tender or offer shall, even if successful in the action, be liable to have costs given against him.

10. Money paid into court in terms of this Order shall be paid into a deposit account with the Government in such manner as the Accountant-General may from time to time direct.

### **ORDER 39**

#### **DISCOVERY, INSPECTION AND PRODUCTION OF DOCUMENTS**

1. Any party to any cause may, without filing any affidavit, apply to the judge for an order directing any other party to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein, and the judge may make thereon such order as he thinks fit.

2. The affidavit to be made by a party against whom such order as is mentioned in rule 1 has been made, shall specify which, if any, of the documents therein mentioned he objects to produce and the reasons for such objections and shall be in Form 12 in the First Schedule with such variations as circumstances may require.

3. (1) Any party to any cause may at any time during which such cause is pending or during the hearing thereof apply to the judge for an order for the production by any other party of any documents in his possession or power, relating to any matter in question in the cause.

(2) Such application shall, unless the judge otherwise orders, be made on notice of motion to the party from whom production is sought.

4. The judge may, on an application made in terms of rule 3, make such order as seems right and may deal with the documents, production whereof may be ordered, in such manner as seems just:

Provided that production of any document shall not be ordered if the judge is satisfied that the production is not necessary, at that stage of the cause or at all, either for disposing fairly of the cause or for saving costs.

**5.** Every party to an action or other proceeding shall be entitled, at any time, to give notice in writing to any other party in whose pleading or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his attorney, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such cause, unless he satisfies the judge that such document relates only to his own title, he being a defendant to the cause, or that he had some other cause or excuse which the judge deems sufficient for not complying with such notice, in which case the judge may allow the same to be put in evidence on such terms as to costs and otherwise as the judge may think fit.

**6.** (1) Notice to any party to produce any documents referred to in his pleading or affidavit shall be in Form 13 in the First Schedule with such variation as the circumstances may require.

(2) An affidavit of the attorney or his clerk of the service of any notice to produce, shall in all cases be evidence of the service of the notice and of the time when it was served.

**7.** (1) The party to whom such notice is given shall, within seven court days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three court days from the delivery thereof, at which the documents, or such of them as he does not object to produce, may be inspected at the office of his attorney, or, in the case of banker's books or other books of account, or books in constant use for the purpose of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce and on what ground.

(2) Such notice shall be in Form 14 in the First Schedule with such variations as the circumstances may require.

**8.** (1) If the party served with notice under rule 5 omits to give such notice of a time for inspection, or objects to give inspection, or offers inspection elsewhere than at the office of his attorney, or at the usual place of custody of the documents (as the case may be), the judge may, on the application of the party desiring it, make an order for inspection in such place and in such manner as he may think fit:

Provided that the order shall not be made when, and so far as the judge is of opinion that, it is not necessary either for disposing fairly of the cause, or for saving costs.

(2) Any application to inspect documents, except such as are referred to in the pleadings, particulars or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them and that they are in the possession or power of the other party.

(3) The judge shall not make such order for inspection of such documents when and so far as the judge is of the opinion that it is not necessary either for disposing fairly of the cause or for saving costs.

**9.** (1) Where inspection of any business books is applied for, the judge may, if he thinks fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations or alterations:

Provided that notwithstanding that such copy has been supplied the judge may order inspection of the book from which the copy was made.

(2) Where on an application for an order for inspection, privilege is claimed for any document, it shall be lawful for the judge to inspect the document for the purpose of deciding as to the validity of the claim of privilege.

(3) The judge may, on the application of any party to any cause at any time, and whether an affidavit of documents has or has not already been ordered or made, make an order requiring any other party to state by affidavit whether any particular document or documents or

any class or classes of documents specified or indicated in the application is or are or has or have at any time been in his possession, custody or power; and, if not, then in his possession, custody or power, when he parted with the same and what has become thereof.

(4) Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time, had in his possession, custody or power the particular document or the class or classes of documents specified or indicated in the application, and that they relate to the matters in question in the cause, or to some of them.

**10.** (1) If any party wilfully fails to comply with any order for discovery or inspection of documents, he shall be liable to attachment.

(2) He shall also, if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not entered a defence.

**11.** Service of an order for discovery or inspection made against any party on his attorney shall be sufficient service to found an application for an attachment for non-compliance with the order; but the party against whom the application for an attachment is made may show in answer to the application that he had no notice or knowledge of the order.

**12.** Counsel upon whom an order against any party for discovery or inspection is served under the last preceding rule who neglects, without reasonable excuse, to give notice thereof to his client, shall be liable to attachment.

**13.** This Order shall apply to plaintiffs and defendants who are minors, and to their curators *ad litem*.

**14.** (1) Where a registered company as defined in any motor vehicle insurance law is a party to any action by virtue of the provisions of the said law, any party thereto may obtain discovery against the driver or owner of the vehicle insured by the said company.

(2) The provisions of subrule (1) shall apply *mutatis mutandis* to the driver of a vehicle owned by a person, State, Government or body of persons.

(3) Where a plaintiff sues as cessionary, the defendant shall *mutatis mutandis* have the same rights under this Order against the cedent.

**15.** (1) Any party to an action may, after the close of pleadings, give notice to any other party to specify in writing particulars of dates and parties of or to any document intended to be used at the trial of the action on behalf of the party to whom notice is given.

(2) The party receiving such notice shall, not less than 21 court days before the date of trial, give a notice—

- (a) specifying the dates and parties of or to, and the general nature of, any such document which is in his possession;
- (b) specifying such particulars as he may have to identify any such document not in his possession, at the same time furnishing the name and address of the person in whose possession such document is.

(3) In making any such specification, the party so specifying may give the particulars of such documents as may be in his possession by reference to any discovery affidavit insofar as such particulars in the discovery affidavit are sufficient.

**16.** The preceding provisions of this Order shall be subject to any ruling or order as the judge may deem meet to make.

#### **ORDER 40 ADMISSIONS**

**1.** Any party to a cause may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the cause of any other party.

**2.** Either party may call upon the other party to admit any document, except all just exceptions, and, in case of refusal or neglect to admit after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the

cause may be, unless at the trial or hearing the judge certifies that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense.

3. A notice to admit documents shall be in Form 15 in the First Schedule with such variations as the circumstances may require.

4. Any party may, by notice in writing, at any time not later than nine court days before the day for which the notice of trial has been given, call on any other party to admit, for the purpose of the cause, matter or issue only, any specific fact or facts mentioned in such notice.

5. In case of refusal or neglect to admit the same within six court days after service of such notice, or within such further time as may be allowed by the judge, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the cause, matter or issue may be, unless at the trial or hearing the judge certifies that the refusal to admit was reasonable, or unless the judge at any time otherwise orders or directs.

6. Any admission made in pursuance of such notice is to be deemed to be made only for the purpose of the particular cause, matter or issue, and not as an admission to be used against the party on any other occasion, or in favour of any person other than the party giving notice.

7. The judge may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

8. A notice to admit facts shall be in Form 16 in the First Schedule and admissions of facts shall be in Form 17 in the First Schedule with such variations as circumstances may require.

#### **ORDER 41**

#### **INSPECTION, EXAMINATIONS AND EXPERT TESTIMONY**

1. Subject to the provisions of this rule and any ruling or order by the judge, any party to proceedings in which damages or compensation in respect of alleged bodily injury is claimed shall have the right to require any party claiming such damage or compensation, whose state of health is relevant for the determination thereof, to submit to a medical examination.

2. (1) Any party requiring another party to submit to such examination shall deliver a notice specifying the nature of the examination required, the person or persons by whom, the place where and the date (being not less than 14 court days from the date of such notice) and time when it is desired that such examination shall take place, and requiring such other party to submit himself for examination then and there.

(2) Such notice shall state that such other party may have his own medical advisor present at such examination, and shall be accompanied by a remittance in respect of the reasonable expense to be incurred by such other party in attending such examination.

(3) Such expense shall be tendered on the scale as if such person were a witness in a civil suit before the judge:

Provided, however that—

- (i) if such other party is immobile, the amount to be paid to him shall include the cost of his travelling by motor vehicle and, where required the reasonable cost of a person attending upon him;
- (ii) where such other party will actually lose his salary, wage or other remuneration during the period of his absence from work, he shall, in addition to his expenses on the basis of a witness in a civil case, be entitled to receive a reasonable amount in respect of the salary, wage or other remuneration which he will actually lose; and
- (iii) any amount paid by a party as aforesaid shall be costs in the cause unless the judge otherwise directs.

3. (1) The person receiving such notice shall within seven court days of the service thereof notify the person delivering it, in writing, of the nature and grounds of any objection which he may have in relation to—

- (a) the nature of the proposed examination;
- (b) the person or persons by whom the examination is to be conducted;
- (c) the place, date or time of the examination;
- (d) the amount of the expenses tendered to him,

and shall further—

- (i) in the case of his objection being to the place, date or time of the examination, furnish an alternative date, time and place, as the case may be;
- (ii) in the case of the objection being to the amount of the expenses tendered, furnish particulars of such increased amount as may be required.

(2) If the person receiving the notice fails to deliver such objection within the said period of seven court days, he shall be deemed to have agreed to the examination upon the terms set forth by the person giving the notice.

(3) If the person giving the notice regards the objection raised by the person receiving it as invalid in whole or in part he may, on notice, make application to a judge to determine the conditions upon which the examination, if any, is to be conducted.

4. Any party to such an action may at any time by notice in writing require any person claiming such damages to make available, insofar as he is able to do so, to such party within 10 court days, any medical reports, hospital records, X-ray photographs, or other documentary information of a like nature relevant to the assessment of such damages.

5. If it appears from any medical examination carried out either by agreement between the parties or pursuant to any notice in terms of this rule, or by order of a judge, that any further medical examination by any other person is necessary or desirable for the purpose of giving full information on matters relevant to the assessment of such damages, any party may require a second and final medical examination in accordance with the provisions of this rule.

6. If it appears that the state or condition of any thing of any nature whatsoever whether movable or immovable, may be relevant with regard to the decision on any matter at issue in any action, any party thereto may at any stage thereof, not later than 14 court days before the hearing, give notice requiring the party relying upon the existence of such state or condition of such thing, or having such thing in his possession, or under his control, to make it available for inspection or examination in terms of this rule, and may in such notice require him to submit the thing or a fair sample thereof for inspection or examination within a period of not more than 10 court days from the date of the receipt of the notice.

7. (1) The party called upon to submit such thing for examination may require the party requesting it to specify the nature of the examination to which it is to be submitted, and shall not be bound to submit such thing thereto if this would materially prejudice such party by reason of the effect thereof upon such thing.

(2) In the event of any dispute whether the thing should be submitted for examination, such dispute shall be referred to a judge on notice delivered by either party stating that the examination is required and that objection is taken in terms of this rule.

(3) In considering any such dispute the judge may make an order as to him seems meet.

8. Any party causing an examination to be made in terms of rules 1 and 6 shall—

- (a) cause the person making the examination to give a full report in writing of the results of his examination and the opinions that he formed as a result thereof on any relevant matter;
- (b) after receipt of such report, and upon request, furnish any other party with a complete copy thereof;
- (c) bear the expense of carrying out any such examination:

Provided that such expense shall form part of such party's costs.

9. No person shall, except with the leave of the judge, or the consent of all the parties to the suit, be entitled to call as a witness any person to give evidence as an expert upon any matter upon which the evidence of expert witnesses may be received unless he has—

- (a) not less than 14 court days before the hearing, delivered notice of his intention to do so; and
- (b) not less than 10 court days before the trial, delivered a summary of such expert's opinions and his reasons therefore.

10. (1) No person shall, except with the leave of the judge, or the consent of all the parties, be entitled to tender in evidence any plan, diagram, model or photograph unless he has not less than 10 court days before the hearing delivered a notice stating his intention to do so, offering inspection thereof and requiring the party receiving notice to admit the same within seven court days of his receipt of the notice.

(2) If the party receiving the notice fails within the said period so to admit, the said plan, diagram, model or photograph shall be received in evidence upon its mere production and without further proof thereof.

(3) If such party states that he does not admit them, the said plan, diagram, model or photograph may be proved at the hearing and the party receiving the notice may be ordered to pay the cost of such proof.

#### **ORDER 42**

#### **CASE MANAGEMENT: ALLOCATION OF CASES AND CASE MANAGEMENT CONFERENCES**

1. The Registrar shall—

- (a) on the commencement of these Rules, allocate each existing cause; and
  - (b) allocate any cause registered after the commencement of these Rules
- to a judge who, from the time of such allocation, shall manage the cause as provided in this Order.

2. (1) In the event of any judge becoming unable for any reason to manage or continue to manage a cause under this Order, the Registrar shall immediately upon that inability being known allocate the cause to another judge and advise all parties in writing of such allocation; the judge then allocated shall be bound by all decisions and rulings given by the previous judge.

(2) As soon as practical after the entry of appearance to defend in an action or the giving of notice of opposition in an application or petition, but in any event in respect of causes referred to in subrule 1(a) by not later than 31st December, 2008, the judge shall, subject to rule 12, on notice to the parties schedule an initial case management conference with the parties and their counsel, except that the judge may in his discretion dispense with the need for attendance by the parties or any of them. The conference shall be held at a time set by order of the judge and shall allow sufficient time for compliance with subrule (3).

(3) At least 21 days before the initial case management conference, the parties shall confer about the nature and basis of their claims and defences, the possibilities for a prompt settlement or resolution of the action, and each of the issues to be addressed at the initial case management conference as set forth in subrule (4) below. The parties jointly shall prepare a case management report concerning their discussion and shall submit the report to the judge at least 14 days before the initial case management conference. The plaintiff or applicant, as the case may be, shall initiate communications with the defendant and shall prepare a first draft of the report. The case management report shall set forth the parties' proposals with respect to the issues identified in subrule (4) below. If the parties agree on proposals with respect to some or all of the issues, they shall set forth a joint proposal with respect to those issues. If the parties do not agree on proposals with respect to some or all of the issues, they shall set forth their separate proposals with respect to those issues.

(4) The following issues shall be addressed at the initial case management conference—

- (a) the need for joining other parties and the dates for such joinder;
- (b) the filing of any pleadings, the need for amendments to pleadings or filing of better statements or further particulars, and the dates for such amendments, statements or particulars;

- (c) the need for interlocutory motions and the dates for such motions;
- (d) a deadline for the close of pleadings under Order 21;
- (e) the admission of facts and other evidence by consent of the parties;
- (f) the control and scheduling of discovery, including but not limited to inspection and production of documents under Order 39; admissions under Order 40; inspection, examination, and expert testimony under Order 41; and examination of witnesses under Order 44;
- (g) narrowing the field of dispute between expert witnesses, by their participation at pre-trial conferences or in any other manner;
- (h) hearing and determination of objections on point of law;
- (i) any matter that might be raised in an application for directions under Order 28;
- (j) giving orders or directions for the separate hearing of a trial or plea in bar, a claim, counterclaim, set-off, or third party claim or of any particular issue in the action, including the assessment of damages under Order 36;
- (k) settlement of issues, inquiries and accounts under Order 37;
- (l) securing statement of special case of law or facts under Order 35;
- (m) the date for additional case management conferences, if necessary, and for the final pre-trial conference;
- (n) the possibilities of settlement talks or possible mediation of the dispute;
- (o) such other issues as may facilitate the just and speedy disposal of the action, which may include where issues are straightforward and a final pre-trial conference may be dispensed with the agreement of admissions, facts and legal issues in dispute, witnesses to be called and the setting of trial dates.

**3.** The initial case management conference shall, except in exceptional circumstances, be completed in a single conference and shall not be adjourned.

**4.** Immediately after completion of the initial case management conference, but in no event more than 14 days after completion of the conference, the judge shall issue a case management order in Form 1 in the Fourth Schedule. The case management order shall address the issues set forth in rule 2 (4) that are relevant to the action and shall establish a schedule for all relevant events. The case management order shall govern the subsequent course of the proceedings, and shall be modified by the judge only for good cause.

**5.** The judge may from time to time schedule, or the parties may from time to time request, additional case management conferences. These additional conferences shall be held to facilitate the continuing judicial control of the action and may address any of the issues set forth in rule 2 (4) or any other issues relevant to management or resolution of the action.

**6.** Prior to the trial of any matter, the judge shall, subject to subrule (4) (o) of rule 2 hold a final pre-trial conference. The conference shall occur at a time set by the judge and shall be attended by the parties and legal practitioners who will participate in the trial. The final pre-trial conference shall address the issues set forth in rule 2 (4), the parties' proposed final pre-trial order, and any other issues related to a fair and efficient trial.

**7.** At least 14 days before the final pre-trial conference, the parties jointly shall submit to the judge a proposed final pre-trial order. The plaintiff shall initiate communications with the defendant and shall prepare a first draft of the proposed final pre-trial order. The proposed final pre-trial order shall identify the following—

- (a) all issues of fact to be resolved during the trial;
- (b) all issues of law to be resolved during the trial;
- (c) all relevant facts not in dispute;
- (d) all witnesses who may be called to testify during the trial, identified by the party that intends to call the witness, with a brief summary of the substance of each witness' anticipated testimony;
- (e) all exhibits to be introduced into evidence during the trial, identified by the party that

- intends to introduce the exhibit;
- (f) all objections to identified witnesses and exhibits;
- (g) the anticipated length of the trial;
- (h) the date for the trial;
- (i) any proposals for expediting the trial;
- (j) prospects for settlement of the action and whether the parties have participated in mediation or other settlement efforts.

**8.** Immediately after completion of the final pre-trial conference, but in no event more than 14 days after completion of the conference, the judge shall issue a final pre-trial order in Form 2 in the Fourth Schedule, which the Registrar shall deliver to the parties simultaneously with the notice of assignment of dates under rule 2 of Order 43. The final pre-trial order shall be based on the parties' proposed final pre-trial order, as modified by the judge, shall specify the issues set forth in rule 7, and shall set a firm date for the trial.

**9.** Issues, evidence, and objections not set forth in the final pre-trial order shall not be available to the parties at trial. Once issued by the judge, the final pre-trial order shall be modified only to prevent manifest injustice.

**10.** The final pre-trial conference shall, except in exceptional circumstances, be completed in a single conference and shall not be adjourned.

**11.** If a party or his counsel fails without lawful excuse to attend an initial case management conference, additional case management conference, or final pre-trial conference, fails to participate in the creation of a case management report or proposed final pre-trial order, fails to obey a case management order or final pre-trial order, or fails to participate in the case management or final pre-trial processes in good faith, the judge may enter such orders as are just, including but not limited to the following—

- (a) an order refusing to allow the non-compliant party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated issues in evidence;
- (b) an order striking out pleadings or parts thereof;
- (c) an order dismissing a claim or entering final judgment;
- (d) an order requiring the non-compliant party or his counsel to pay the opposing party's costs caused by the non-compliance.

**12.** In the case of opposed applications, where the issues are straightforward, and no evidence is to be led, the judge may dispense with any case management conference, and assign a date for hearing in terms of Order 43, giving such other directions for the conducts of the hearing as he deems fit.

### **ORDER 43**

#### **SET DOWN OF DEFENDED ACTIONS, MOTIONS AND PETITIONS**

**1.** The judge shall assign the date or dates of hearing of a trial or (subject to the provisions of Order 12) an opposed motion or petition.

**2.** The Registrar shall not later than 10 court days after the assignment of the day or days of hearing by the judge, give no less than 14 court days' notice to all parties to the proceedings of the dates so assigned.

**3.** When a matter has been set down for hearing any party may apply to the judge no less than five court days before the date of hearing to have the set down changed or set aside for good cause.

**4.** Notwithstanding the provisions of this Order, any party to contested proceedings may for good cause apply on notice to all the parties to the judge for a special date or dates for hearing and the judge may on such application fix a special date or dates of hearing during any term of court or during any vacation with the consent of all the parties and having regard to the convenience of the judge.

### **ORDER 44**

## **PROCURING EVIDENCE FOR TRIAL**

1. (1) Any party desiring the attendance of any person to give evidence at a trial may, as of right sue out from the office of the Registrar one or more subpoenas for that purpose, each of which subpoenas shall contain the names of not more than four persons, and the service thereof upon any person therein named shall be effected by the Sheriff in the manner prescribed by Order 8, and the process for subpoenaing such witnesses shall be, as nearly as may be, in accordance with Form 18 in the First Schedule.

(2) If any witness has in his possession or control any deed, instrument, writing or thing which the party requiring his attendance desires to be produced in evidence, the subpoena shall specify such document or thing and require him to produce it to the judge at the trial.

2. The witnesses at the trial of any action shall be examined *viva voce* but a judge may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit, or that the affidavit of any witness be read at the hearing on such terms and conditions as to him may seem meet:

Provided that where it appears to the judge that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.

3. A judge may on application on notice in any matter where it appears convenient, or necessary for the purpose of justice, make an order for taking the evidence of a witness before or during the trial by a commissioner of the judge and permit any party to any such matter to use such deposition in evidence on such terms, if any, as to him seems meet, and in particular may order that such evidence shall be taken only after the close of pleadings or only after the giving of discovery or the furnishing of any particulars in the action.

4. Where the evidence of any person is to be taken on commission by any commissioner within Botswana, such person may be subpoenaed to appear before such commissioner to give evidence as if at the trial.

5. Unless the judge ordering the commission directs such examination to be by interrogatories and cross-interrogatories, the evidence of any witness to be examined before a commissioner in terms of an order granted under rule 3 shall be adduced upon oral examination in the presence of the parties, their counsel, and the witness concerned shall be subject to cross-examination and re-examination.

6. A commissioner shall not decide upon the admissibility of evidence tendered but shall note any objections made and such objections shall be decided by the judge hearing the matter.

7. Evidence taken on commission shall be recorded in such manner as evidence is recorded when taken before a judge and the transcript of any shorthand record, or record taken by mechanical or electronic means, duly certified by the person transcribing the same and by the commissioner shall constitute the record of the examination:

Provided that the evidence before the commissioner may be taken down in narrative form.

8. The record of the evidence shall be returned by the commissioner to the Registrar with his certificate to the effect that it is the record of the evidence given before him and shall thereupon become part of the record in the action.

9. The preceding provisions of this Order shall be subject to any ruling or order as the judge may deem meet to make.

## **ORDER 45 CIVIL TRIALS**

1. If, when a trial is called, the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim so far as the burden of proof lies upon him and judgment shall be given accordingly insofar as he has discharged such burden:

Provided that where the claim is for a debt or liquidated demand no evidence shall be necessary unless the judge otherwise orders.

**2.** If, when a trial is called, the defendant appears and the plaintiff does not appear, the defendant shall be entitled to an order granting absolution from the instance with costs but may lead evidence with a view to satisfying the judge that final judgment should be granted in his favour, and the judge, if so satisfied, may grant such judgment.

**3.** The provisions of rule 1 shall apply to any person making any claim (whether by way of claim in reconvention or third party notice or by any other means) as if he were the plaintiff and the provisions of rule 2 shall apply to any person against whom such a claim is made as if he were a defendant.

**4.** (1) If, when a trial is called, neither party appears, the judge shall, unless he sees good reason to the contrary, strike the cause out of the roll.

(2) Any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the judge, upon such terms as the judge may seem fit.

(3) Any cause struck out may, by leave of the judge, be replaced on the roll, on such terms as to the judge may seem fit.

**5.** Where the burden of proof is on the plaintiff, he, or one counsel for the plaintiff, may briefly outline the facts intended to be proved and the plaintiff may then proceed to the proof thereof.

**6.** (1) At the close of the case of the plaintiff, the defendant may apply for absolution from the instance, in which event the defendant or one counsel on his behalf may address the judge and the plaintiff or one counsel on his behalf may reply.

(2) The defendant or his counsel may thereupon reply on any matter arising out of the address of the plaintiff or his counsel.

**7.** If absolution from the instance is not applied for or has been refused and the defendant has not closed his case, the defendant or one counsel on his behalf may briefly outline the facts intended to be proved, and the defendant may then proceed to the proof thereof.

**8.** Each witness shall, where a party is represented, be examined, cross-examined, or re-examined, as the case may be, by only one (though not necessarily the same) counsel for such party.

**9.** If the burden of proof is on the defendant, he or his counsel shall have the same rights as those accorded to the plaintiff or his counsel by rule 5.

**10.** Upon the cases on both sides being closed, the plaintiff or one or more of his counsel on his behalf may address the judge, and the defendant or one or more counsel on his behalf may do so, after which the plaintiff or one counsel only on his behalf may reply on any matter arising out of the address of the defendant or his counsel.

**11.** Either party may apply at the opening of the trial for a ruling by the judge upon the onus of adducing evidence, and the judge, after hearing argument, may give a ruling as to the party upon whom such onus lies:

Provided that such ruling may thereafter be altered to prevent injustice.

**12.** (1) If there is one or more third parties, or if there are defendants to a claim in reconvention who are not plaintiffs in the action, any such party shall be entitled to address the judge in opening his case, and shall lead his evidence after the evidence of the plaintiff and of the defendant has been concluded and before any address at the conclusion of such evidence.

(2) Except insofar as the judge otherwise directs, the defendants to any counterclaim who are not plaintiffs shall first lead their evidence and thereafter any third parties shall lead their evidence in the order in which they became third parties.

(3) If the onus of adducing evidence is on the claimant against the third party, or on the defendant to any claim in reconvention, the judge shall make such order as may seem convenient with regard to the order in which the parties shall conduct their cases and address the judge, and in regard to their respective rights of reply.

(4) The provisions of rule 11 shall *mutatis mutandis* apply with regard to any dispute as

to the onus of adducing evidence.

**13.** (1) Where the onus of adducing evidence on one or more of the issues is on the plaintiff, and that of adducing evidence on any other issue is on the defendant, the plaintiff shall first call his evidence on any issue in respect of which the onus is upon him, and may then close his case.

(2) The defendant, if absolution from instance is not granted, shall, if he does not close his case, thereupon call his evidence on all issues in respect of which such onus is upon him.

**14.** After the defendant has called his evidence, the plaintiff shall have the right to call rebutting evidence on any issues in respect of which the onus was on the defendant:

Provided that if the plaintiff has called evidence on any such issues before closing his case, he shall not have the right to call any further evidence thereon.

**15.** (1) Nothing contained in rule 13 or 14 shall prevent the defendant from cross-examining any witness called at any stage by the plaintiff on any issue in dispute, and the plaintiff shall be entitled to re-examine such witness consequent upon such cross-examination without affecting the right given to him by rule 14 to call evidence at a later stage on the issue on which such witness has been cross-examined.

(2) The plaintiff may further call the witness so cross-examined and give evidence on any such issue at a later stage.

**16.** A record shall comprise—

- (a) any judgment or ruling given by the judge;
- (b) any evidence given in court;
- (c) any objection made to any evidence received or tendered;
- (d) the proceedings of the court generally including any inspection in loco and any matter demonstrated by any witness in court; and
- (e) any other portion of the proceedings which the judge may specially order to be recorded.

**17.** Such record shall be kept by such means as to the judge seems appropriate and may in particular be taken down in longhand, shorthand or mechanically or electronically recorded.

**18.** (1) The longhand or shorthand notes so taken or any mechanically or electronically recorded record shall be certified by the person taking the same to be correct and shall be filed with the Registrar.

(2) It shall not be necessary to transcribe the longhand or shorthand notes or print out the mechanically or electronically recorded record unless the judge so directs or a party appealing so requires.

(3) If and when transcribed, the transcript of such notes or record shall be certified as correct by the person transcribing them and the transcript, the longhand or shorthand notes and the mechanically or electronically recorded record shall be filed with the Registrar.

(4) The transcript of the longhand notes, the shorthand notes, or the mechanically or electronically recorded record certified as correct shall be deemed to be correct unless the judge otherwise orders.

**19.** (1) Any party to any matter in which a record has been made in longhand or shorthand or mechanically or electronically may apply in writing through the Registrar to the judge to have the record transcribed if an order to that effect has not already been made.

(2) Such party shall be entitled to a copy of any transcript ordered to be made upon payment of the prescribed fees.

**20.** If it appears convenient to do so, the judge may at any time make any order with regard to the conduct of the trial as to him seems meet and thereby vary any procedure laid down by this Order.

**21.** Every stenographer employed to take down a record of any proceeding shall be deemed to be an officer of the court and shall, before entering on his duties, take the following

oath:

"I, ..... do swear that I shall faithfully and to the best of my ability record in shorthand or cause to be recorded by mechanical or electronic means as directed by the judge the proceedings in any case in which I may be employed as an official of the court, and that I shall similarly, when required to do so, transcribe the same or as far as I am able, any shorthand notes or mechanical or electronic record made by any other stenographer."

**22.** By consent, the parties to a trial shall be entitled at any time before trial, on written application to a judge through the Registrar, to have the cause transferred to a magistrate's court:

Provided that the matter is one within the jurisdiction of the latter court whether by way of consent or otherwise.

**23.** The judge may, at the conclusion of the evidence in trial actions, confer with counsel in his chambers to the form and duration of the addresses to be submitted in court.

**24.** Where the judge considers that the proceedings have been unduly prolonged by the successful party by the calling of unnecessary witnesses, or by excessive examination or cross-examination, or by over-elaboration in argument, it may penalise such parties in the matter of costs.

**25.** Notwithstanding the preceding provisions of this Order, the judge may give any ruling or order as he deems meet.

#### **ORDER 46 POOR LITIGANTS**

**1.** If any poor person applies in writing to the Registrar for leave to sue or defend as a pauper and alleges that he is unable to pay the fees of the action, the Registrar shall enquire into the means of the applicant and for that purpose may require the applicant to give evidence on oath, either in person or by affidavit.

**2.** The decision of the Registrar shall be final as to whether the applicant has sufficient means to finance his action or not. If the Registrar is satisfied as to the applicant's lack of means, he shall refer the case to a legal practitioner for consideration.

**3.** If the legal practitioner certifies that he has considered the case and that he believes the applicant has a reasonable probability of success—

- (a) the Registrar shall grant the applicant leave to sue or defend without payment of fees under Order 2;
- (b) the Registrar shall thereupon assign the certifying legal practitioner to the applicant;
- (c) such legal practitioner shall not take a fee from the applicant for anything done in the conduct of the action;
- (d) if the applicant succeeds in the prosecution or defence of the action and such success results in an order for payment to him of any sum of money or delivery to him of any property from any other party, whether by way of damages, costs or otherwise, the judge may order that the fees under Order 2 shall be a first charge on any value recovered under such order and, from the balance of such value recovered, the legal practitioner for the applicant shall be entitled to such costs as may be allowed on taxation.

#### **ORDER 47**

##### **WITHDRAWAL, SETTLEMENT, POSTPONEMENT AND ABANDONMENT**

**1.** (1) A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the judge, withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; and the taxing master shall tax such costs on the request of the other party.

(2) If no such consent to pay costs is embodied in the notice of withdrawal, or such taxed costs are not paid within 14 days of demand, the other party may apply to the judge on notice

for an order for costs.

2. Any party in whose favour any decision or judgment has been given may abandon such decision or judgment either in whole or in part by delivering notice thereof, and such judgment or decision abandoned in part shall have effect subject to such abandonment.

3. If in any proceedings a settlement or an agreement to postpone or withdraw is reached, it shall be the duty of the attorney for a plaintiff or applicant immediately to inform the Registrar accordingly.

4. Unless such proceedings have been withdrawn, any party to a written settlement shall, if the same has not been carried out, be entitled to apply for judgment in terms thereof on at least four days' notice to all interested parties.

#### **ORDER 48**

#### **VARIATION AND RESCISSION OF ORDERS**

1. The judge may in addition to any other powers he may have meromotu, or upon the application of any party affected, rescind or vary—

- (a) an order or judgment erroneously sought or erroneously granted without notice to any party affected thereby;
- (b) an order or judgment in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission;
- (c) an order or judgment granted as the result of a mistake common to all parties.

2. Any party desiring any relief under this rule shall make application therefore upon notice to all parties whose interests may be affected by any rescission or variation sought.

3. The judge shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.

#### **ORDER 49**

#### **MATRIMONIAL CAUSES**

1. In any matrimonial matter, the judge may, if the parties agree, interview them privately in his chambers in the presence of their legal advisers for the purpose of discussing with them a settlement of the matter or any other matter affecting the future conduct of the proceedings.

2. In any case affecting the custody of children, the judge may, if he thinks fit, interview such children privately in his chambers.

#### **ORDER 50**

#### **ENTERING JUDGMENT IN DEFAULT**

1. (1) Every judgment in default of appearance or of defence shall be drawn up and presented to the Registrar for signing by the attorney for the party in whose favour the judgment is being entered.

(2) If the party is not represented by an attorney the judgment shall be drawn-up by the Registrar.

(3) Forms 31 to 35 in the First Schedule shall be used, with such variations as circumstances may require.

2. The Registrar shall sign the judgment if he is satisfied that the party against whom it is proposed to enter judgment is in default and that all the relevant rules have been complied with.

3. The entry of judgment shall be dated as of the day on which it was signed by the Registrar, and the judgment shall take effect from that date.

4. After the judgment has been signed by the Registrar it shall be filed by the party or his attorney and the prescribed fees paid.

5. Every judgment shall be entered by the proper officer in the book to be kept for that purpose.

6. No judgment shall be enforceable unless it has been duly signed, and filed and the prescribed fees paid.

#### **ORDER 51**

## **DRAWING UP OF JUDGMENTS AND ORDERS**

1. (1) All judgments and orders in civil proceedings, other than orders specified under rule 2, shall be drawn up and presented for filing within seven court days by the attorney for the party in whose favour the judgment or order has been made:

Provided that where draft orders have been filed in terms of subrule 3 (2) of Order 12, they shall be typed and confirmed by the court stenographer and presented to the Registrar in terms of rule 6 below.

2. (1) Where an order has been made neither embodying any special terms nor including any special directions, but simply enlarging time for taking any proceedings or doing any act or giving leave—

- (a) for the issue of any writ of execution when such leave is required;
- (b) for the amendment of any pleadings;
- (c) for the filing of any document; or
- (d) for any act to be done by any officer of the court other than an attorney,

it shall not be necessary to draw up such order unless a judge otherwise directs.

(2) A direction that the costs of such order shall be costs in any cause shall not be deemed a special direction within the meaning of this rule.

3. Every judgment or order, if and when it is drawn up, shall be dated with the day of the week, the month and the year on which it was made and shall take effect accordingly.

4. In the event that an attorney fails to comply with rule 1 within the time specified any person affected by the judgment or order made may give notice to the Registrar of such failure.

5. The Registrar shall sign, stamp and file any judgment or order presented to him under rule 1 provided that he is satisfied that it has been drawn up correctly and that the provisions of Order 79 have been observed in regard thereto.

6. On receipt of a notice under rule 4 or in any case where the party in whose favour the judgment or order has been made is not represented, the Registrar shall draw up, sign and stamp the judgment or order as the case may be.

7. The omission to draw up a judgment or order shall not relieve any party to the proceedings from the obligation to obey the same unless it is of such a kind that personal service is necessary, but no action may be dismissed, or pleadings struck out for failure to comply with an order which has not been drawn up and served upon the party in default and no taxation of costs may proceed and no writ of execution or attachment may be issued in the absence of a judgment or order drawn up and filed in accordance with this Order.

8. Clerical mistakes in judgments or orders or errors arising therein from any accidents, slips or omission may at any time be corrected by the judge on motion.

## **ORDER 52 EXECUTION**

1. The party in whose favour any judgment has been pronounced may, at his own risk, sue out of the office of the Registrar one or more writs for execution thereof as near as may be in accordance with Form 19 in the First Schedule:

Provided that, except where by judgment immovable property has been specially declared executable, no such process shall issue against the immovable property of any person until a return has been made of any process which may have been issued against his movable property, or the Registrar perceives from any return that the said person has no sufficient movable property to satisfy the writ.

2. No process of execution shall issue for the levying and raising of any costs awarded to any party until they have been taxed by the taxing master or agreed to in writing by the party concerned in a fixed sum:

Provided that it shall be competent to include in a writ of execution a claim for satisfying costs already awarded to the judgment creditor but not then taxed, subject to due taxation thereafter:

Provided further that if such costs have not been taxed and the original bill of costs, duly allocated not lodged with the Deputy-Sheriff before the day of the sale, such costs shall be excluded from his account and plans of distribution.

**3.** (1) Whenever by any process of the court the Deputy-Sheriff is commanded to levy and raise any sum of money upon the goods of any person, he shall forthwith himself or by his assistant proceed to the dwelling house or place of employment or business of such person (unless the judgment creditor gives different instructions regarding the situation of the assets to be attached) and there—

- (a) demand satisfaction of the writ, and, failing satisfaction;
- (b) demand that so much movable and disposable property be pointed out as he may deem sufficient to satisfy the said writ, and, failing such pointing out;
- (c) search for such property.

(2) Any such property shall be immediately inventoried with sufficient detail, including serial and other identifying numbers as to enable their subsequent identification and, unless the execution creditor otherwise directs, and subject to the provisions of rule 5, shall be taken into custody of the Deputy-Sheriff:

Provided that if there is any claim made by any other person to any such property seized or about to be seized by the Deputy-Sheriff then, if the plaintiff gives the Deputy-Sheriff an indemnity to his satisfaction to save him harmless from any loss or damage by reason of the seizure thereof,

- (i) the Deputy-Sheriff shall retain or shall seize, as the case may be, make an inventory of and keep the said property, and
- (ii) the Deputy-Sheriff shall give to the judgment debtor written notice of the attachment and a copy of the inventory made by him, unless he is excused by the Registrar from so doing for proper reason.

**4.** The Deputy-Sheriff shall forthwith file with the Registrar a return of any attachment made or other action taken on a process of execution, together with the inventory and shall furnish a copy of such return and inventory to the party who caused such process to be issued and to the judgment debtor.

**5.** Where any movable property has been attached by the Deputy-Sheriff, the person whose property has been so attached may, together with some person of sufficient means as surety to the satisfaction of the Deputy-Sheriff, undertake in writing as near as may be in accordance with Form 20 in the First Schedule that such property shall be produced on the day appointed for the sale thereof, whereupon the Deputy-Sheriff shall leave the said property attached and inventoried on the premises where it was found.

**6.** If the judgment debtor does not, together with a surety, give an undertaking as aforesaid, then, unless the execution creditor otherwise directs, the Deputy-Sheriff shall remove the said goods to some convenient place of security, or keep possession thereof on the premises where they were seized, the expense whereof shall be recoverable from the judgment debtor and defrayed out of the levy.

**7.** (1) Where any movable property is attached as aforesaid, the Deputy-Sheriff shall where practicable and subject to Order 64 sell it by public auction, for cash and without reserve, to the highest bidder after due advertisement by him in one or more newspapers and after the expiration of not less than 14 court days from the time of seizure thereof.

(2) Where perishables are attached as aforesaid, they may with the consent of the execution debtor, or upon the execution creditor indemnifying the Deputy-Sheriff against any claim for damages which may arise from such sale, be sold immediately by the Deputy-Sheriff concerned in such manner as to him seems expedient.

**8.** If incorporeal property, whether movable or immovable, is available for attachment, it may be attached without the necessity of a prior application to the judge in the manner hereinafter provided—

- (a) where the property or right to be attached is a lease or a bill of exchange, promissory note, bond or other security for the payment of money, the attachment shall be complete only when—
  - (i) notice has been given by the Deputy-Sheriff to the lessor and lessee, mortgagor and mortgagee or lessee, or person liable on the bill of exchange or promissory note or security, as the case may be, and
  - (ii) the Deputy-Sheriff has taken possession of the writing (if any), evidencing the lease, or the bill of exchange or promissory note, bond or other security, as the case may be, and
  - (iii) in the case of a registered lease or any registered right, notice has been given to the Registrar of Deeds;
- (b) where movable property sought to be attached is the interest of the execution debtor in property pledged, leased or sold under a suspensive condition to or by a third person, the attachment shall be complete only when the Deputy-Sheriff has served on the execution debtor and on the third person notice of the attachment with a copy of the warrant of execution; the Deputy-Sheriff may, upon exhibiting the original of such warrant of execution to the pledgee, lessor, lessee, purchaser or seller, enter upon the premises where such property is and make an inventory and valuation of the said interest;
- (c) in the case of the attachment of all other incorporeal property or incorporeal rights in property as aforesaid—
  - (i) the attachment shall only be complete when notice of the attachment has been given in writing by the Deputy-Sheriff to all interested parties, and where the asset consists of incorporeal immovable property or an incorporeal right in immovable property, notice shall also have been given to the Registrar of Deeds; and the Deputy-Sheriff shall have taken possession of the writing or document evidencing the ownership of such property or right, or shall have certified that he has been unable, despite diligent search to obtain possession of the writing or documents,
  - (ii) the Deputy-Sheriff may upon exhibiting the original of the warrant of execution to the person having possession of property in which incorporeal rights exist, enter upon the premises where such property is and make an inventory and valuation of the right attached;
- (d) in the case of the attachment of stocks, shares or interest in close companies, attachment shall be effected by taking possession of the certificates evidencing ownership of such stocks, shares or interest and notice of the attachment shall be given to the Registrar of Companies, the company secretary or principal officer or other regulating authority.

**9.** Attachment of property subject to a lien shall be effected *mutatis mutandis* in accordance with the provisions of paragraph (b) of rule 8.

**10.** Where property subject to a real right of any third person is sold in execution, such sale shall be subject to the rights of such third person unless he otherwise agrees.

**11.** (1) Subject to any hypothec existing prior to the attachment, all writs of execution lodged with the Deputy-Sheriff before the day of the sale in execution shall rank *pro rata* in the distribution of the proceeds of the goods sold, in the order of preference referred to in rule 12 (21).

(2) Where more than one asset has been attached, in conducting a sale in terms of rule 7 (1), the Deputy-Sheriff shall halt the sale when a sufficient sum has been realised to satisfy the judgment debts and costs and shall pay over to the judgment debtor any surplus remaining after the sale of the final asset sold to reach the said total.

(3) If there should remain any surplus, the Deputy-Sheriff shall pay it over to the judgment debtor, and the Deputy-Sheriff shall make out and deliver to him an exact account in

writing, of his costs and charges of the execution and sale, which shall be liable to taxation upon application by the judgment debtor, and, if upon taxation any sum is disallowed, the Deputy-Sheriff shall refund such sum to the judgment debtor.

(4) Within seven court days of the sale the Deputy-Sheriff shall compile and deliver to the Registrar, the judgment creditor and the judgment debtor a vendue roll recording each asset sold, the price realised therefore, and the name and address of the purchaser, together with an account of the disposal of all funds realised from the sale and a record of any assets not sold and their disposition.

(5) Where an insufficient sum is realised from a sale, the Deputy-Sheriff may make a further attachment or attachments on the same writ, provided that a second or subsequent sale shall not be conducted before the vendue roll of the previous sale or sales has been prepared and delivered in terms of subrule (4).

**12.** (1) A writ of execution against immovable property shall contain a full description of the nature and situation (including the address) of the immovable property to enable it to be traced and identified by the Deputy-Sheriff; and shall be accompanied by sufficient information to enable him to give effect to subrule (3) hereof.

(2) An attachment shall be made by a Deputy-Sheriff upon a writ as near as may be in accordance with Form 21 in the First Schedule.

(3) The mode of attachment of immovable property shall be by notice in writing by the Deputy-Sheriff served upon the owner thereof, and upon the Registrar of Deeds, and, if the property is in the occupation of some person other than the owner, also upon such occupier; any such notice as aforesaid shall be served by means of a registered letter, duly prepaid and posted, addressed to the person intended to be served.

(4) After attachment, any sale in execution shall take place in the district in which the attached property is situate and be conducted by the Deputy-Sheriff of such district:

Provided that the Sheriff in the first instance, and subject to the provisions of subrule (13) may on good cause shown, authorise such sale to be conducted elsewhere and by another Deputy-Sheriff; upon receipt of written instructions from the execution creditor to proceed with such sale, the Deputy-Sheriff shall ascertain and record what bonds, leases or other encumbrances are registered against the property together with the names and addresses of the person in whose favour such bonds, leases and encumbrances are so registered and shall thereupon notify the execution creditor accordingly.

(5) No immovable property which is subject to any claim preferent to that of the execution creditor shall be sold in execution unless—

- (a) the execution order has caused notice in writing of the intended sale to be served by registered post upon the preferent creditor if his address is known and, if the property is rateable, upon the local authority concerned, calling upon them to stipulate within 10 court days of a date to be stated a reasonable reserve price, or to agree in writing to a sale without reserve; and has provided proof to the Deputy-Sheriff that the preferent creditor has so stipulated or agreed; or
- (b) the Deputy-Sheriff is satisfied that it is impossible to notify any preferent creditor, in terms of this subrule, of the proposed sale, or such creditor having been notified has failed or neglected to stipulate a reserve price or to agree in writing to a sale without reserve as provided for in paragraph (a) within the time stated in such notice.

(6) The Deputy-Sheriff may by notice served upon any person require him to deliver up to him forthwith all documents in his possession or control relating to the debtor's title to the said property.

(7) The Deputy-Sheriff shall appoint a day and place for the sale of such property, such day being, except by special leave of the Sheriff, not less than one month after service of the notice of attachment.

(8) The execution creditor shall, after consultation with the Deputy-Sheriff, prepare a

notice of sale containing a short description of the property and improvements thereon, its situation and street number (if any), the time and place for the holding of the sale and the fact that the conditions may be inspected at the office of the Deputy-Sheriff with as many copies of the notice as the latter may require.

(9) The Deputy-Sheriff shall indicate two suitable newspapers circulating in the district in which the property is situate and require the execution creditor to publish the said notice once in each of the said newspapers and in the *Government Gazette* not later than 14 court days before the date appointed for the sale and to furnish him not later than the day prior to the date of the sale with a copy of each of the said newspapers and with the number of the *Gazette* in which the notice appeared.

(10) Not later than 10 court days prior to the date of the sale, the Deputy-Sheriff shall forward by registered post, a copy of the notice of sale referred to in subrule (8) to every other judgment creditor who has caused the said immovable property to be attached and to every mortgagee or lessee thereof whose address is known.

(11) Not less than 10 court days prior to the date of sale, the Deputy-Sheriff shall affix one copy of the notice on the notice board of the District Commissioner of the administrative district in which the property is situate and one copy at or as near as may be to the place where the said sale is actually to take place.

(12) The conditions of sale shall, not less than 28 court days prior to the date of the sale, be prepared by the execution creditor as near as may be in accordance with Form 22 in the First Schedule and the said conditions shall be submitted to the Deputy-Sheriff to settle them; the execution creditor shall thereafter supply the Deputy-Sheriff with two copies of the conditions of sale, one of which shall lie for inspection by interested parties at his office.

(13) Any interested party may, not less than seven court days prior to the date of the sale, upon 24 hours' notice to the execution creditor, and the bond or lease holders, apply to the Sheriff for any modification of the conditions of sale, and the Sheriff may make such modification thereon as to him may seem meet.

(14) The execution creditor may appoint an attorney to attend to the transfer of the property when sold in execution.

(15) Immovable property attached in execution shall be sold by the Deputy-Sheriff or by an auctioneer appointed by him at the direction of the judgment creditor by public auction:

Provided that should an auctioneer be appointed the fees and commissions recovered by the Deputy-Sheriff and the auctioneer from the proceeds of the sale shall not in aggregate exceed those provided for in Order 72.

(16) If the purchaser fails to carry out any of his obligations under the conditions of sale, the sale may be cancelled by a judge summarily on the report of the Deputy-Sheriff after due notice to the purchaser, and the property may again be put up for sale by public auction, and the purchaser shall be responsible for any loss sustained by reason of his default, which loss may, on the application of any aggrieved creditor whose name appears on the Deputy-Sheriff's distribution account, be recovered from him under judgment of the judge, pronounced summarily on a written report by the Deputy-Sheriff after such purchaser has received notice in writing that such report will be laid before the judge for such purpose; and if he is already in possession of the property the Deputy-Sheriff may, on seven court days' notice, apply to a judge for an order ejecting him or any person claiming to hold under him therefrom.

(17) Subject to the provisions of subrule (5), the sale shall be without reserve and upon the conditions stipulated under subrules (12) and (13) and the property shall be sold to the highest bidder.

(18) The Deputy-Sheriff shall give transfer to the purchaser against payment of the purchase money and upon performance of the conditions of sale and may for that purpose do anything necessary to effect registration of transfer, and anything so done by him shall be as valid and effectual as if he were the owner of the property.

(19) The Deputy-Sheriff shall not pay out to the creditor the purchase money until transfer has been given to the purchaser, but upon receipt thereof he shall forthwith pay the Sheriff all moneys received in respect of the purchase price.

(20) The Deputy-Sheriff shall, as soon as possible after the sale and in any event within 14 court days thereafter, prepare in order of preference as hereinafter provided a plan of distribution of the proceeds and shall forward a copy of such plan to the Registrar; and immediately thereafter the Deputy-Sheriff shall give notice by registered post to all parties who have lodged writs and to the execution debtor that the plan will lie for inspection for 14 court days from the date mentioned at his office and at the office of the Registrar and unless such parties signify in writing their agreement to the plan, such plan shall so lie for inspection.

(21) After deductions from the proceeds of the costs and charges of execution the following shall be the order of preference—

- (a) the claims of preferent creditors ranking in priority in their legal order of preference and thereafter;
- (b) the claims of other creditors whose writs have been lodged with the Sheriff in the order of preference laid down in the Insolvency Act.

(22) Any interested person objecting to such plan shall, within four court days of the expiry of the period referred to in subrule (20), give notice in writing to the Deputy-Sheriff and all other interested persons of the particulars of his objection and shall bring such objection before a judge for review on 10 court days' notice to the Deputy-Sheriff and the said persons.

(23) The judge on review shall hear and determine the matter in dispute and may amend or confirm the plan of distribution or may make such order, including an order as to costs, as to him seems meet.

(24) If—

- (a) no objection is lodged to such plan;
- (b) the interested parties signify their concurrence therein; or
- (c) the plan is confirmed or amended on review,

the Sheriff shall on production of a certificate from the conveyancer that transfer has been given to the purchaser and on the request of the Deputy-Sheriff pay out in accordance with the plan of distribution; if the address of a payee is not known, the amount due to him shall be paid into the Guardian's Fund established under the Administration of Estates Act.

**13.** In this Order the Sheriff may perform any function of a Deputy-Sheriff.

### **ORDER 53 IMPRISONMENT FOR DEBT**

**1.** (1) Where the Sheriff or his deputy has made a return of *nulla bona* or not sufficient goods on a writ of execution, the judgment creditor may cause to be issued a summons commanding the judgment debtor to pay the amount of the judgment, and, unless he does so, to show cause at a time and place stated why an order for personal attachment should not be decreed against him.

(2) The summons shall be in Form 23 in the First Schedule with such variations as circumstances may require.

**2.** A copy of the writ of execution as endorsed by the Sheriff or his deputy and a copy of the judgment shall be served on the judgment debtor together with the summons.

**3.** Where the judgment debtor has not paid the amount due, the judgment creditor shall on the return day of the summons, or on any adjournment thereof, produce to the judge the original judgment and the original writ of execution with the return thereon or annexed thereto, and may thereafter move for judgment in terms of the summons; and thereafter the judgment debtor may show cause why a writ of personal attachment shall not issue and may be examined, cross-examined and re-examined.

**4.** The judge may adjourn the hearing for further evidence or refuse or grant an order for the personal attachment and imprisonment of the judgment debtor, or grant an order and

suspend its execution on such terms as he deems fit, and may his order limit the term of the imprisonment and make such order as to costs as the justice of the case requires.

5. Where an order has been made for personal attachment of a judgment debtor, and its execution suspended, so long as certain installments are paid, the Registrar may, before issuing a writ, require the party applying therefore to satisfy him by affidavit that the debtor has failed in due payment of any such installment.

6. Where there are two or more orders of personal attachment and imprisonment against the same debtor, such orders shall be cumulative with effect according to priority of issue of the respective writs of personal attachment, unless otherwise directed by the judge.

7. A writ of personal attachment of a judgment debtor shall be signed by the Registrar and addressed to the Sheriff or his lawful deputy and to the keeper of a specified prison and shall be in Form 24 in the First Schedule.

8. Except where immunity is conferred by any law, a writ for the personal attachment of a judgment debtor may be executed at any hour on any day except on a Sunday, and at any place.

9. The Registrar may order the release of a judgment debtor from prison whenever it is shown to his satisfaction that the judgment debtor has paid the judgment debt and all costs which he has been ordered to pay, or where the judgment creditor has failed to pay for the judgment debtor's maintenance, or where the judgment creditor consents to his release, or where a provisional or final order of sequestration is made in respect of the estate of the judgment debtor.

10. The judge may grant the release of a judgment debtor for good cause shown by him after notice of motion to the judgment creditor.

#### **ORDER 54**

#### **DISCOVERY IN AID OF EXECUTION**

1. When a judgment or order is for the recovery or payment of money, the party entitled to enforce it may apply in accordance with Form 35 in the First Schedule to the judge for an order that the debtor liable under such judgment or order, or, in the case of a corporation, that any officer thereof, be orally examined, as to whether any and what debts are owing to the debtor, or whether the debtor has any and what other property or means of satisfying the judgment or order, before the judge; and the judge may make an order in accordance with Form 36 in the First Schedule for the attendance and the examination of such debtor, or of any other person, and for the production of any books or documents.

2. Upon the examination, the judge shall record or cause to be recorded as nearly as may be the statements of the debtor, and then read it or cause it to be read to him and cause him to sign the same.

3. In case of any judgment or order other than for the recovery or payment of money, if any difficulty arises in or about the execution or enforcement thereof, any party interested may apply to the judge, and the judge may make such order thereon for the attendance and examination of any party or otherwise as may be just.

#### **ORDER 55**

#### **GARNISHEE PROCEEDINGS**

1. (1) The judge may, upon the *ex parte* application in accordance with Form 37 in the First Schedule of any person who has obtained a judgment or order for the recovery or payment of money, either before or after any oral examination of the debtor liable under such judgment or order, and upon affidavit by himself or his attorney stating that judgment has been recovered, or the order made, and that it is still unsatisfied, and to what amount, and that any other person is indebted to such debtor, and is within the jurisdiction, order that all debts owing or accruing from such third person (hereinafter called "the garnishee") to such debtor shall be attached to answer the judgment or order, together with the costs of the garnishee proceedings; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the judge to

show cause why he should not pay to the person who has obtained such judgment or order the debt due from him to such debtor, or so much thereof as may be sufficient to satisfy the judgment or order, together with the costs aforesaid.

(2) At least seven court days before the day of hearing, the order *nisi* shall be served on the garnishee and, unless otherwise ordered, on the judgment debtor.

(3) The order *nisi* must be served personally on the garnishee.

2. Service of an order that debts, due or accruing to a debtor liable under a judgment or order, shall be attached, or notice thereof to the garnishee, in such manner as the judge shall direct, shall bind such debts in his hands.

3. If the garnishee does not dispute the debt due or claimed to be due from him to such debtor, or if he does not appear upon the motion, then the judge may order execution to issue, and it may issue accordingly, without any previous writ or process, to levy the amount due from such garnishee, or so much thereof as may be sufficient to satisfy the judgment or order, together with the costs of the garnishee proceedings.

4. If the garnishee disputes his liability, the judge, instead of making an order that execution shall issue, may order that any issue or question necessary for determining his liability be tried or determined in any manner in which any issue or question in an action may be tried or determined.

5. Whenever in any proceedings to obtain an attachment of debts it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the judge may order such third person to appear, and state the nature and particulars of his claim upon such debt.

6. After hearing the allegation of any third person under such order, as mentioned in rule 5, or any other person who by the same or any subsequent order the judge may order to appear, or in the case of such third person not appearing when ordered, the judge may order execution to issue to levy the amount due from such garnishee, together with the costs of the garnishee proceedings or any issue or question to be tried or determined according to the preceding rules of this Order, and may bar the claim of such third person, or make such other order as such judge thinks fit, upon such terms, in all cases, with respect to the lien or charge (if any) of such third person, and to costs, as the judge thinks just and reasonable.

7. Payment made by or execution levied upon the garnishee under any such proceedings shall be a valid discharge to him as against the debtor, liable under a judgment or order, to the amount paid or levied, although such proceeding may be set aside, or the judgment or order reserved.

8. The costs of any application for an attachment of debts and of any proceedings arising from or incidental to such application of the judgment creditor shall, unless otherwise directed, be retained out of the money recovered by him under the garnishee order, and in priority to the amount of the judgment debt.

#### **ORDER 56 CONTEMPT OF COURT**

1. The institution by a party of proceedings for contempt of court shall be made by notice of motion to the person against whom the contempt of court is alleged.

2. (1) Such notice of motion shall set forth distinctly the grounds of complaint and shall be supported by an affidavit of the facts.

(2) Where the proceedings are instituted at the instance of the judge *mero motu*, the notice shall be issued by the Registrar and no affidavit of the facts shall be necessary.

3. Nothing in the preceding rules shall affect the power of the judge to deal summarily with a contempt of court committed in his presence without any written charge or notice to the offender.

4. (1) Where a judge has imposed a fine for contempt of court the Registrar shall furnish the Sheriff or his deputy with the particulars of such fine and deliver to him a writ in Form 25 in

the First Schedule with such variations as the circumstances of the case require.

(2) Immediately on the delivery of such writ, the Sheriff or his deputy shall execute the same in terms thereof.

5. (1) Where a judge orders a person to be committed to prison or imposes a sentence of imprisonment for contempt of court, the Registrar shall furnish the Sheriff or his deputy or a police officer with a writ of personal attachment and committal to prison in Form 26 in the First Schedule with such variations as the circumstances may require.

(2) Immediately on delivery of such writ, a Sheriff or his deputy, or the police officer to whom it is delivered, shall execute the same.

#### **ORDER 57 SECURITY FOR COSTS**

1. A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of the proceedings, deliver a notice setting forth the grounds upon which security is claimed and the amount demanded.

2. If the amount of security only is contested, the Registrar shall determine the amount to be given and his decision shall be final.

3. If the party from whom security is demanded contests his liability to give security, or if he fails or refuses to furnish security in the amount demanded, or the amount fixed by the Registrar, within 10 court days of the demand or the Registrar's decision, the other party may apply to the judge on notice for an order that such security be given and that the proceedings be stayed until such order is complied with.

4. The judge may, if security is not given within a reasonable time, dismiss any proceedings instituted or strike out any pleadings filed by the party in default, or make such other order as to him may seem meet.

5. Any security for costs shall, unless the judge otherwise directs, or the parties otherwise agree, be given in the form, amount and manner directed by the Registrar.

6. The Registrar may, upon the application of the party in whose favour security is to be provided, and on notice to interested parties, increase the amount thereof if he is satisfied that the amount originally furnished is no longer sufficient and his decision shall be final.

#### **ORDER 58 REVIEW OF TAXATION**

1. Any party dissatisfied with the ruling of the taxing master as to any item or part of an item which was objected to may within 14 court days of the *allocatur* require the taxing master to state a case for the decision of a judge, which case shall set out each item or part of an item together with the grounds of objection advanced at the taxation, and shall embody any relevant findings of fact by the taxing master:

Provided that, except with the consent of the taxing master, no case shall be stated where the amount or the total of the amounts which the taxing master has disallowed or allowed, as the case may be, and which the party dissatisfied seeks to have allowed or disallowed respectively, is less than P10,000.

2. (1) The taxing master shall supply a copy of the case to each of the parties, who may, within 10 court days of the receipt of the copy, submit contentions in writing thereon, including grounds of objection not advanced at the taxation, in respect of any item or part of an item which was objected to before the taxing master.

(2) Thereafter, the taxing master shall frame his report and shall lay the case together with the contentions of the parties and his report before a judge, who may then decide the matter upon the case and contentions so submitted, together with any further information which he may require from the taxing master, or may decide it after hearing, if he deems fit, the parties or their counsel.

(3) A copy of the report of the taxing master, and of any further information supplied by him to the judge, shall be supplied by him to the parties.

3. The judge may make such order as to the costs of the case as he may deem fit, including an order that the unsuccessful party shall pay to the opposing party a sum fixed by the judge as and for costs.

4. For the purposes of these Rules the terms "taxing master" and "taxing officer" mean the Registrar or any public officer authorised by the Registrar under section 17 of the Act.

#### **ORDER 59**

#### **CIVIL APPEALS FROM MAGISTRATES' COURT AND OTHER BODIES OR PERSONS**

1. (1) An appeal to the judge against a decision of a magistrate's court in a civil matter shall be prosecuted within six months after the noting of such appeal, and unless so prosecuted it shall be deemed to have lapsed.

(2) A lapsed appeal may be revived for good cause shown upon application to the judge, which application shall be made no later than 60 court days after the lapsing of the appeal. In granting such an application, the judge shall direct the manner of prosecution of the appeal.

(3) By prosecution of an appeal it is meant applying in writing to the Registrar on notice to the other parties for a date of hearing.

2. The prosecution of an appeal shall *ipso facto* operate as the prosecution of any cross-appeal which has been duly noted.

3. If a cross-appeal has been noted, and the appeal lapses, the cross-appeal shall also lapse unless application for a date of hearing for such cross-appeal is made to the Registrar within three weeks of the date of the lapse of such appeal.

4. (1) Upon receipt of an application for a date of hearing for an appeal or cross-appeal, the Registrar shall forthwith consult with the judge and thereafter assign a date of hearing thereto.

(2) The Registrar shall forthwith give the applicant for such date written notice of the date so assigned, whereupon the applicant shall without delay deliver a notice of set down and notify the clerk of the magistrate's court in writing accordingly.

5. A notice of set down of a pending appeal shall *ipso facto* operate as a set down of any cross-appeal and vice versa unless the appeal has lapsed.

6. (1) Upon receipt of a notice of appeal the court or tribunal *a quo* shall prepare and lodge with the Registrar, not less than four months from the date of receipt of the notice of appeal, a copy of the record.

(2) Such copy shall be clearly typed on A4 paper in 1.5 line spacing and the pages thereof shall be consecutively numbered; in addition, every tenth line on each page shall be numbered.

(3) The record shall contain a correct and complete copy of the pleadings, evidence and all other documents necessary for the hearing of the appeal and the copy lodged with the Registrar shall be certified by the clerk of the court or certifying officer of the tribunal lodging the same.

(4) The Registrar shall forthwith furnish the appellant and each of the other parties with a copy of the record duly certified.

7. (1) Except insofar as these affect the merits of an appeal, subpoenas, notices of trial, consents to postponements, schedules of documents, notices to produce or inspect, and other documents of a formal nature, shall be omitted from the copies of the record prepared in terms of the foregoing rule; a list thereof shall be included in the record.

(2) By consent of parties exhibits having no bearing on a point at issue in an appeal, and immaterial portions of lengthy documents may likewise be omitted from such copies, in which event a written consent, setting forth what documents or portions thereof, as the case may be, have been omitted, and signed by or on behalf of the parties, shall be filed with the Registrar when such copies are lodged:

Provided that the judge hearing the appeal may at all times refer to the original record and take cognizance of all matters appearing therein.

8. These Rules shall apply *mutatis mutandis* to an appeal against any decision of any body or person where such right of appeal is given by law and is not otherwise governed by these Rules.

#### **ORDER 60**

#### **APPEALS IN CRIMINAL CASES FROM SUBORDINATE COURTS TO THE HIGH COURT**

1. (1) An accused person wishing to appeal against any conviction, sentence or order in a criminal case shall note his appeal within 14 court days after such conviction, sentence or order by lodging with the clerk of the court at the place of conviction, sentence or order, a notice of appeal in Form H1 in the Third Schedule setting out clearly and specifically the grounds on which the appeal is based, or a written statement setting out clearly and specifically the grounds on which the appeal is based.

(2) Every notice of appeal or written statement shall be signed by the person giving it or by the legal practitioner representing him.

(3) If the accused person is unable, owing to illiteracy or to any physical defect to complete the notice of appeal or to write out the statement, the clerk of the court shall, upon request, do so, and the accused person shall affix his mark thereto in the presence of a witness.

2. (1) Upon an appeal being noted the judicial officer who tried the case shall within 10 court days deliver to the clerk of the court a statement in writing showing—

- (a) the facts he found to be proved;
- (b) the grounds upon which he arrived at any finding of fact specified in the appellant's notice of appeal or statement as appealed against; and
- (c) his reasons for any ruling of law or as to the admission or rejection of evidence so specified as appealed against:

Provided that if the judicial officer is of the opinion that the written judgment delivered by him in terms of section 290 of the Criminal Procedure and Evidence Act contains the information required by this rule, he shall so advise the clerk of the court in writing, which shall be deemed to be a sufficient compliance with this rule.

(2) The statement referred to in rule 2 (c) of this Order shall become part of the record.

3. (1) The appellant may, within the time limited for the noting of an appeal, by notice to the clerk of the court amend his grounds of appeal, and the judicial officer concerned may in his discretion, within 10 court days thereafter, deliver to the clerk of the court a further statement of reasons for judgment.

(2) The appellant may at any time after the time limited for the noting of an appeal, amend his grounds of appeal with the leave of the judge.

4. (1) The clerk of the court shall immediately upon receipt of the notice of appeal or statement impress the date stamp provided for that purpose on the notice of appeal or statement and shall append his signature below the date impressed by the date stamp, and shall also enter particulars of the notice of appeal or statement in a register provided for that purpose.

(2) The clerk of the court shall within 10 court days of the noting of an appeal forward the original notice of appeal or statement together with two certified or photocopies thereof to the Registrar. The clerk of court shall retain two certified or photocopies of the notice of appeal or statement.

(3) The clerk of the court shall within 20 court days after receiving the judicial officer's statement or further statement, transmit the same, together with the record of the case, to the Registrar. He shall at the same time forward four copies of the record and the judicial officer's statement or further statement for the use of the judge.

(4) If for any reason the clerk of court finds it impracticable to comply with subrule (2) within the prescribed time, he shall inform the Registrar, who may in his discretion grant him extension of time within which to comply with the subrule. Such extension of time shall be stated in writing specifying the period of extension, and shall be communicated to the clerk of court,

and a copy filed in the relevant appeal case file.

5. Within 10 court days after the receipt of the record of appeal the Registrar shall deliver the appellant or his counsel and the respondent a copy thereof.

6. An appeal against a conviction, sentence or order made by a subordinate court in any criminal matter shall be set down by the Registrar on notice to all parties on a date to be determined by the Registrar in consultation with the judge.

7. The ultimate responsibility for ensuring that copies of the complete record of appeal and all other relevant documents and materials are in all respects properly before the judge shall rest on the Registrar.

8. These Rules shall apply *mutatis mutandis* to an appeal by the Director of Public Prosecutions against dismissal of a summons or charge or other decision of a subordinate court, and to appeals from a court martial and the customary court of appeal.

### **ORDER 61 REVIEWS**

1. Except where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any magistrate's court and of any tribunal, board or officer performing judicial, quasi-judicial, or administrative functions, shall be by way of notice of motion directed and delivered by the parties seeking to review such decision or proceedings to the judicial officer, or chairman of the court, tribunal or board, or to the officer, as the case may be, and to all other parties affected—

- (a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside; and
- (b) calling upon the judicial officer, chairman or officer, as the case may be, to despatch within 14 court days of the receipt of the notice of motion, to the Registrar, either:
  - (i) the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or he desires to give or make; or
  - (ii) where no record of the proceedings was kept or is available, a written explanation for the lack of the record, together with such reasons as he is by law required or he desires to give or make;

and to notify the applicant that he has done so.

2. The notice of motion shall set out the decision or proceedings sought to be reviewed and shall be supported by affidavit setting out the grounds and the facts and circumstances upon which the applicant relies to have the decision or proceedings set aside or corrected.

3. (1) The Registrar shall make available to the applicant the record despatched to him as aforesaid upon such terms as the Registrar thinks appropriate to ensure its safety, and the applicant shall thereupon cause copies of such portions of the record as may be necessary for the purposes of the review to be made and shall furnish the Registrar with one copy, and each of the other parties with one copy thereof, in each case certified by the applicant as true copies.

(2) The cost of transcription, if any, shall be borne by the applicant and shall be costs in the cause.

4. The applicant may within seven court days after the Registrar has made the record available to him, by notice and accompanying affidavit, amend, add to or vary the terms of his notice of motion and supplement the supporting affidavit and shall deliver the said notice and affidavit.

5. If the judicial officer, chairman or officer, as the case may be, or any party affected desire to oppose the granting of the order prayed in the notice of motion, he shall—

- (a) within 14 court days of the receipt by him of the notice of motion or any amendment thereof deliver notice to the applicant that he intends so to oppose and shall in such notice appoint an address within eight kilometres of the office of the Registrar at which he will accept notice and service of all processes in such proceedings; and
- (b) within 21 court days of the expiry of the time referred to in rule 4 hereof, deliver any

affidavits he may desire in answer to the allegations made by the applicant.

6. The applicant shall have the rights and obligations in regard to replying affidavits set out in Order 12.

7. The provisions of Order 12 as to set down of applications shall *mutatis mutandis* apply to the set down of review proceedings.

8. Except with the leave of the judge on good cause shown, no application for review shall be brought later than four months after the handing down of the decision or conclusion of the proceedings complained of.

#### REVIEW IN CRIMINAL CASES

9. Whenever the record of any proceedings in a criminal case comes before the High Court in pursuance of the provisions of section 62 of the Magistrates' Courts Act or of the court's own motion or otherwise than on appeal, a judge, after reviewing such record, may—

- (a) confirm, amend or set aside any judgment, decision or order of any subordinate court contained therein;
- (b) order a new trial of any case heard or decided in any subordinate court or direct that such new trial shall be heard in the High Court;
- (c) receive further evidence or remit the case to the court of first instance for further hearing, with such instructions as to further proceedings as the High Court may deem necessary; or
- (d) impose such punishment, whether more or less severe than or of a different nature from the punishment imposed by the court of first instance, as in the opinion of the High Court ought to have been imposed by that court:

Provided that a more severe punishment may not be imposed without the accused having been given an opportunity of being heard, or represented by counsel, in open court.

10. Notwithstanding that the High Court is of the opinion that any point raised on the review might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings unless it appears to the High Court that a failure of justice has in fact resulted therefrom.

11. If in any case on review a judge desires to have any question of law or fact in such case argued at the bar, he may direct the same to be argued by the Director of Public Prosecutions and by such other counsel as the judge may appoint, which counsel shall be reimbursed at the rates then payable to *pro deo* counsel in criminal trials.

12. When a judge has reviewed any proceedings coming before him and has dealt with such proceedings, either in chambers or in open court, he shall endorse his certificate stating his opinion upon the record thereof and the said record shall then be returned to the court from which the same was transmitted or received, and the judge may, in addition, embody his opinion in the form of a judgment, if he so desires.

#### ORDER 62

#### CRIMINAL PROCEEDINGS: CIRCUIT COURT

1. In this Order, the term "circuit court" means the High Court sitting as a circuit court for one or more magisterial districts, as directed or authorised by the Chief Justice.

2. (1) The process of a circuit court for any district for summoning any person, either as an accused or as a witness in any criminal case before such court, may be sued out at any time, whether the date for holding such court has been appointed or not.

(2) It may be issued by the Registrar of the court or of the circuit court:

Provided that the process for summoning any person required by the Director of Public Prosecutions or his deputy as a witness in a criminal case in such court need not be endorsed or formally sued out by or on behalf of the Director of Public Prosecutions.

3. The process of the circuit court for any district for arresting and holding to bail any person in order to compel his appearance before such court shall be issued by the magistrate of

such district or by a judge.

4. All process of the circuit court shall be dated on the day on which it is issued, shall be signed by the officer issuing it, shall be endorsed by the person suing out the same and shall be directed to the Deputy-Sheriff.

5. The Registrar of every circuit court shall, on the closing of the same, cause to be transmitted to the Sheriff a list of all warrants of execution in criminal cases which have been issued by him.

6. In all cases where any process is required for the execution of any sentence, judgment or order of any circuit court in a criminal case, after the records thereof have been deposited in the office of the Registrar of the High Court, the process of the High Court for the execution of any such sentence, judgment or order may be issued to the party requiring the execution of the same.

7. When a circuit court imposes upon any party whatsoever a fine for contempt of court, for default of appearance or otherwise, and such fine is not duly paid, the Registrar of the circuit court shall furnish to the Deputy-Sheriff the particulars of such fine and deliver to him a warrant in respect thereof.

8. The Registrar of every circuit court shall immediately upon the closing of the court in that circuit town make out and transmit to the Registrar of the High Court a return showing all fines which have, during the sitting of the court in that town, been imposed by the said court, specifying therein the names of the parties, the amount of the fine, the date when imposed, the date when a warrant was delivered to the Deputy-Sheriff for its levy, the extent, if any, to which the fine was remitted, and whether it was paid without issue of a warrant.

9. The Registrar of the circuit court shall be a magistrate nominated by the Registrar of the High Court.

#### **ORDER 63**

#### ***DE LUNATICO INQUIRENDO, APPOINTMENT OF CURATORS IN RESPECT OF PERSONS UNDER DISABILITY AND RELEASE FROM CURATORSHIP***

1. Any person desirous of making application to the judge for an order declaring any person (hereinafter referred to as "the patient") to be of unsound mind and as such incapable of managing his affairs, and appointing a curator to the person or property of such patient shall in the first instance apply to the judge for the appointment of a curator *ad litem* to such patient.

2. Such application shall be brought *ex parte* and shall set forth fully—

- (a) the grounds upon which the applicant claims *locus standi* to make such application;
- (b) the grounds upon which the judge is alleged to have jurisdiction;
- (c) the patient's age and gender, full particulars of his means, and information as to his general state of physical health;
- (d) the relationship, if any, between the patient and the applicant, and the duration and intimacy of their association, if any;
- (e) the facts and circumstances relied on to show that the patient is of unsound mind and incapable of managing his affairs;
- (f) the name, occupation and address of the respective persons suggested for appointment by the judge as curator *ad litem* and, subsequently, as curator to the patient's person or property, and a statement that these persons have been approached and have intimated that, if appointed, they would be able and willing to act in these respective capacities.

3. The application shall, as far as possible, be supported by—

- (a) an affidavit by at least one person to whom the patient is well-known and containing such facts and information as are within the deponent's own knowledge concerning the patient's mental condition; if such person is related to the patient, or has any personal interest in the terms of any order sought, full details of such relationship or interest, as the case may be, shall be set forth in his affidavit; and

(b) affidavits by at least two medical practitioners, one of whom shall, where practicable, be an alienist, who have conducted recent examinations of the patient with a view to ascertaining and reporting upon his mental condition and stating all such facts as were observed by them at such examinations in regard to such condition, the opinions formed by them in regard to the nature, extent and probable duration of any mental disorder or defect observed and their reasons for the same, and whether the patient is in their opinion incapable of managing his affairs; such medical practitioners shall, as far as possible, be persons unrelated to the patient, and without personal interest in the terms of any order sought.

4. Upon the hearing of the application referred to in rule 1, the judge may appoint the persons suggested or any other suitable person as curator *ad litem*, or may dismiss the application, or make such further or other order thereon as to him may seem meet and, in particular, on cause shown, and by reason of urgency, special circumstances or otherwise, dispense with any of the requirements of this Order.

5. (1) Upon his appointment, the curator *ad litem* (who shall if practicable be an advocate or an attorney) shall without delay interview the patient, and shall also inform him of the purpose and the nature of the application unless, after consulting a medical practitioner referred to in paragraph (b) of rule 3, he is satisfied that this would be detrimental to the patient's health.

(2) He shall further make such enquiries as the case appears to require, and thereafter prepare and file with the Registrar his report on the matter to the judge, at the same time furnishing the applicant with a copy thereof.

(3) In his report the curator *ad litem* shall set forth such further facts, if any, as he has ascertained in regard to the patient's mental condition, means and circumstances and he shall draw attention to any consideration which, in his view, might influence the judge in regard to the terms of any order sought.

6. Upon receipt of the said report, the applicant shall submit the same, together with copies of the documents referred to in rules 2 and 3 to the Master of the High Court for consideration and report to the judge.

7. (1) In his report the Master shall, as far as he is able, comment upon the patient's means and general circumstances, and the suitability or otherwise of the persons suggested for appointment as curator to the person or property of the patient, and he shall further make such recommendations as to the furnishing of security and rendering of accounts by, and the powers to be conferred on, such curator as the facts of the case appear to him to require.

(2) The curator *ad litem* shall be furnished with a copy of the said report.

8. After receipt of the report of the Master, the applicant may, on notice to the curator *ad litem* (who shall if he thinks fit inform the patient thereof) place the matter on the roll for hearing on the same papers for an order declaring the patient to be of unsound mind and, as such incapable of managing his affairs, and for the appointment of the person suggested as curator to the person or property of the patient or to both.

9. At such hearing the judge may require the attendance of the applicant, the patient, and such other persons as it may think fit to give such evidence *viva voce*, or furnish such information as the judge may require.

10. Upon consideration of the application, the report of the curator *ad litem* and of the Master and such further information or evidence, if any, as has been adduced *viva voce* or otherwise, the judge may direct service of the application on the patient, or may declare the patient to be of unsound mind and incapable of managing his own affairs and appoint a suitable person as curator to his person or property, or both, on such terms as to him may seem meet, or it may dismiss the application or generally make such order (including an order that the costs of such proceedings be defrayed from the assets of the patient) as to him may seem meet.

11. Different persons may, subject to due compliance with the requirements of this Order in regard to each, be suggested and separately appointed as curator to the person and curator

to the property of any person found to be of unsound mind and incapable of managing his own affairs.

**12.** The provisions of rules 1, 2 and 4 to 10 inclusive shall, insofar as the same are applicable thereto, also apply *mutatis mutandis* to any application for the appointment by the judge of a curator to the property of a person detained as or declared to be a mentally disordered or a defective person under the provision of any other law and who is incapable of managing his affairs.

**13.** Except to the extent as the judge may on application otherwise direct, the provisions of rules 1 to 11 shall *mutatis mutandis* apply to every application for the appointment of a *curator bonis* to any person on the ground that he is, by reason of some disability, mental or physical, incapable of managing his own affairs.

**14.** Every person who has been declared by a judge to be of unsound mind and incapable of managing his affairs, and to whose person or property a curator has been appointed, and who intends applying to a judge for a declaration that he is no longer of unsound mind and incapable of managing his affairs, or for release from such curatorship, as the case may be, shall give 14 court days' notice of such application to such curator and to the Master.

**15.** Upon receipt of such notice and after due consideration of the application, and such information as is available to him, the Master shall without delay report thereon to the judge, at the same time commenting upon any aspect of the matter to which, in his view, its attention should be drawn.

**16.** Upon the hearing of any application referred to in rule 14 hereof, the judge may declare the applicant no longer of unsound mind and as being capable of managing his affairs, order his release from such curatorship or dismiss the application, or, *mero motu*, appoint a curator *ad litem* to make such enquiries as it considers desirable, and postpone a further hearing of the matter to permit the production of such report, affidavit or evidence, as the case may be, or postpone the matter *sine die* and make such order as to costs or otherwise as it may deem meet.

#### **ORDER 64 INTERPLEADER**

**1.** (1) Where any person, in this Order called "the applicant", alleges that he is under any liability in respect of which he is or expects to be sued by two or more parties making adverse claims, (in this Order referred to as "the claimants"), in respect thereto, the applicant may deliver a notice in terms of this Order called an "interpleader notice" to the claimants.

(2) In regard to conflicting claims with respect to property attached in execution, the Sheriff shall have the rights of an applicant and an execution creditor shall have the rights of a claimant.

**2.** (1) Where the claims relate to money, the applicant shall be required, on delivering the notice mentioned in rule 1 hereof, to pay the money to the Registrar who shall hold it until the conflicting claims have been decided.

(2) Where the claim relates to a thing capable of delivery, the applicant shall tender the subject matter to the Registrar when delivering an interpleader notice, or take such steps to secure the availability of the thing in question as the Registrar may direct.

(3) Where the conflicting claim relates to immovable property, the applicant shall place the title deeds thereof, if available to him, in the possession of the Registrar when delivering the interpleader notice and shall, at the same time, hand to the Registrar an undertaking to sign all documents necessary to effect transfer of such immovable property, in accordance with any order which the judge may make or any agreement of the claimants.

**3.** The interpleader notice shall—

- (a) state the nature of the liability, property or claim which is the subject matter of the dispute;
- (b) call upon the claimants within the time stated in the notice, not being less than 14 court

- (c) days from the date of service thereof, to deliver particulars of their claims; and state that upon a further date, not being less than 14 court days from the date specified in the notice for the delivery of claims, the applicant will apply to court for its decision as to his liability or the validity of the respective claims.

4. There shall be delivered together with the interpleader notice an affidavit by the applicant stating that—

- (a) he claims no interest in the subject matter in the dispute other than for charges and costs;
- (b) he does not collude with any of the claimants;
- (c) he is willing to deal with or act in regard to the subject matter of the dispute as the judge may direct.

5. If the claimant to whom an interpleader notice and affidavit have been duly delivered fails to deliver particulars of his claim within the time stated, or, having delivered such particulars, fails to appear in court in support of his claim, the judge may make an order declaring him and all persons claiming under him barred as against the applicant from making any claim on the subject matter of the dispute.

6. If a claimant delivers particulars of his claim and appears before it, the judge may—

- (a) then and there adjudicate upon such claim after hearing such evidence as he deems fit;
- (b) order that any claimant be made a defendant in any action already commenced in respect of the subject matter in dispute in lieu of or in addition to the applicant;
- (c) order that any issue between the claimants be stated by way of a special case or otherwise and tried, and for that purpose order which claimant shall be plaintiff and which shall be defendant;
- (d) if he considers that the matter is not a proper matter for relief by way of interpleader notice, dismiss the application;
- (e) make such order as to costs and the expense, if any, incurred by the applicant under subrule (2) of rule 2 as to him may seem meet.

7. If an interpleader notice is issued by a defendant in an action, proceedings in that action shall be stayed pending a decision upon the interpleader, unless the judge upon application made by any other party to the action otherwise orders.

#### **ORDER 65** **SWORN TRANSLATORS**

1. Any person of full age may be admitted and enrolled by the court as a sworn translator in any language upon satisfying the court as to his competency.

2. No person shall be admitted and enrolled as a sworn translator unless his proficiency in the language which he intends to translate has been duly certified in writing, after examination held not more than six months before the date of his application by a competent sworn translator of not less than five years standing:

Provided that, if there is no sworn translator of sufficient standing within its jurisdiction the judge may appoint as examiner any person whom he considers to be duly qualified to hold such examination.

3. Every sworn translator duly admitted and enrolled shall, to the extent of such admission and enrolment, be deemed to be a sworn translator for all courts, and the Registrar shall notify all magistrates' courts of such admission and enrolment.

4. (1) Any person admitted and enrolled under rule 1 shall, before commencing to exercise the functions of his office, take an oath or make an affirmation which shall be subscribed by him in the following form:

"I, ..... do hereby swear solemnly and sincerely affirm and declare that I will in my capacity as a translator of the High Court and magistrates' courts faithfully and correctly translate, to the best of my knowledge and ability, any document into the English language from any other

language in respect of which I have been admitted and enrolled as a translator."

(2) Any such oath or affirmation shall be taken or made before a judge admitting and enrolling the translator, and the judge concerned shall, at the foot thereof, endorse a statement of the fact that it was taken or made before him and of the date on which it was so taken or made and append his signature thereto.

#### **ORDER 66 INTERPRETATION OF EVIDENCE**

1. Where the evidence of any proceedings is given in any language with which the court or a party or his representative is not sufficiently conversant, such evidence shall be interpreted by a competent interpreter, sworn to interpret faithfully and to the best of his ability in the languages concerned.

2. Before any person is employed as an interpreter the judge may, if in his opinion it is expedient to do so, or if any party on reasonable grounds so desires, satisfy himself as to the competence and integrity of such person after hearing evidence or otherwise.

3. Where the services of an interpreter are employed in any proceedings, the costs, if any, of interpretation shall, unless the judge otherwise orders, be costs in the cause:

Provided that where the interpretation of evidence given in the official language of the court is required by a party for himself or for his witness, such costs shall be at such party's expense.

#### **ORDER 67 INSPECTION OF RECORDS**

1. Any party to a cause, and any person having a personal interest therein, with leave of the Registrar, on good cause shown, may at his office examine and make copies of all documents in any cause pending before the court.

2. Any person may, subject to the payment of the prescribed fee, inspect the record of any cause which has been adjudicated on in court.

#### **ORDER 68 CRIMINAL TRIALS**

1. In this Order the term "magistrate" includes any judicial officer presiding at a preparatory examination.

2. (1) As soon as possible after the conclusion of a preparatory examination, the magistrate shall cause a copy of the record to be made and transmitted to the Registrar for transmission to the Director of Public Prosecutions.

(2) All exhibits which can conveniently be copied shall be copied and attached to the record, but all original exhibits shall be retained by the magistrate and not forwarded with the copy of the record.

3. (1) If it is decided to indict the accused for trial or sentence before the High Court, the Director of Public Prosecutions shall inform the magistrate who shall, as soon as possible and in any event within 15 court days if no preparatory examination has been held, transmit the original record together with three certified copies to the Registrar; which record shall, in the case of a direct committal, include the warrant of committal, the indictment, copies of the witness summaries and any documentary exhibits produced, and the record of appearances and remands to date.

(2) Where a preparatory examination has been held, all original exhibits, securely packed, shall be despatched to the Registrar who shall issue a receipt for such exhibits and ensure that they are available at the trial.

4. (1) Within 21 court days of receipt of any warrant of committal for trial or sentence from a magistrate's court the Registrar shall after consulting the judge—

(a) in the case of a committal for sentence, issue a notice of hearing for a date during the current or impending session of the court, which is reserved for criminal appeals or criminal applications, which shall be no less than 14 court days after the issue of the

- notice, and shall cause such notice, together with a copy of the record, to be served upon the Director of Public Prosecutions and the accused or his counsel;
- (b) in the case of a committal for trial, issue a notice of trial for initial hearing at roll-call before a judge on a date, during the current or impending session of the court, which shall be no less than 14 court days after the issue of the notice, and such notice shall be served together with a copy of the record including the indictment and the witness summaries, on the Director of Public Prosecutions, the accused and his counsel;
  - (c) in the case of a committal for trial, and where the accused is not legally represented due to lack of means, after due inquiry appoint *pro deo* counsel to undertake the case on his behalf.

(2) Where a criminal trial is called at roll-call, the judge shall, after hearing the Director of Public Prosecutions and the accused or his counsel on pleas to be offered, admissions to be made, witnesses required by both sides, and possible duration, set appropriate trial dates, and postpone the trial to such dates, before plea, for hearing.

**5.** (1) Within three court days after the roll-call the Director of Public Prosecutions and the accused or his counsel shall inform the Registrar of witnesses required to be subpoenaed to appear at the trial, and the Registrar shall cause such subpoenas to be issued and served:

Provided that should demands for the issue of subpoenas be made by the accused which the Registrar considers to be unreasonable, the Registrar shall refer such demands to the judge for direction.

(2) The day, date and time for attendance at court shall be clearly endorsed on every subpoena and indictment issued.

(3) One subpoena shall contain the names of not more than four persons to be served.

**6.** The officer serving a subpoena or indictment shall—

- (a) explain the nature and contents thereof to the person upon whom service is being effected and state in his return that he has done so;
- (b) when serving an indictment, put the following questions to an accused—
  - (i) do you desire that witnesses be subpoenaed for your trial? If so, do you desire the witnesses be subpoenaed at the expense of the State?
  - (ii) what are their names, addresses, occupations and present whereabouts?
  - (iii) do you wish to have the assistance of counsel at your trial?
  - (iv) do you intend to arrange for counsel to be appointed, or do you wish the State to appoint counsel for you?
  - (v) if you desire the State to appoint counsel—
    - (aa) what money contribution can you make towards the cost?
    - (bb) what assets do you have?

**7.** If the accused desires that any witnesses be subpoenaed, the Registrar shall take the necessary action:

Provided that the Registrar may require an accused to satisfy him that it is reasonable to subpoena any witness at the expense of the State and, if not so satisfied, the Registrar may refer the question to a judge for direction.

**8.** In all cases where assessors are required, the Registrar shall make the necessary arrangements.

**9.** The Registrar shall keep a book to be called "The Criminal Record Book" in which shall be entered short particulars (including sentence, if any) of every criminal cause.

**10.** For the purposes of this Order "session of the court" means a law term as defined in Order 77 or a special criminal session or circuit ordered by the Chief Justice for the dispatch of criminal trials.

## **ORDER 69 SUPERANNUATION**

- 1.** (1) After the expiration of three years from the day whereon a judgment has been

pronounced, no writ of execution may be issued unless the debtor consents to the issue of the writ or unless the judgment is revived by the judge on notice to the debtor, but in such case no new proof of the debt shall be required.

(2) In the case of judgment for periodic payments, the three years shall run, in respect of any payment, from the due date thereof.

2. Writs of execution of a judgment once issued shall remain in force and may, subject to any law relating to prescription, be executed at any time without being renewed until the judgment has been satisfied in full.

### **ORDER 70 ENFORCEMENT OF PROTECTIVE PROVISIONS UNDER SECTION 18 OF THE CONSTITUTION**

1. An application by any person for redress in terms of subsection (1) of section 18 of the Constitution of Botswana shall be by way of notice of motion calling upon the party or parties, against whom redress is sought, to show cause why an order in terms of a draft (to be attached to the notice of motion) should not be granted by the court.

2. The notice of motion shall be supported by affidavit setting out the circumstances and the grounds upon which the applicant relies.

3. (1) The provisions of Orders 8 and 12 in regard to service of process and applications generally shall apply *mutatis mutandis* to proceedings under this Order.

(2) In all cases where the Attorney-General is not a party to the action, a copy of the notice of motion and all accompanying documents shall be delivered to a responsible person at his chambers.

4. (1) In any reference under subsection (3) of section 18 of the Constitution, the presiding officer shall concisely state such facts and refer to such documents as may be necessary to enable the court to decide the question raised.

(2) The presiding officer shall give every party to the proceedings an opportunity to propose additions, omissions or alterations to such statement and every such proposed addition, omission or alteration shall, unless incorporated in the statement of facts, be recorded and shall, together with the reasons of the presiding officer for rejecting the same, form part of the reference.

### **ORDER 71 COMPUTATION OF TIME**

1. Where it occurs in any judgment, order, direction or other document forming part of any proceedings in the High Court—

- (a) the word "month" means a calendar month unless the context otherwise requires;
- (b) the word "week" means seven consecutive days unless the context otherwise requires.

2. (1) Any period of time fixed by these Rules or by any judgment, order or direction for doing any act shall be reckoned in accordance with the following provisions—

- (a) where the time limited for the doing of a thing expires or falls upon an excluded day, the thing may be done on the day next following, that is not an excluded day;
- (b) where there is a reference to a number of clear days or "at least" a number of days between two events, in calculating the number of days there shall be excluded the days on which the events happen;
- (c) where there is a reference to a number of days, not expressed to be clear days, between two events, in calculating the number of days there shall be excluded the day on which the first event happens and there shall be included the day on which the second event happens;
- (d) where any act or proceeding is directed or allowed to be done or taken on a certain day, then if that day is an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the day next following that is not an excluded day;

- (e) where any act or proceeding is directed or allowed to be done or taken within a number of clear days or "not more than" a number of days not exceeding six clear days, excluded days shall not be reckoned in the computation of such number;
- (f) where a time is expressed to begin or end at, on or with a specified day, or to continue to or until a specified day, the time shall include that day;
- (g) where a time is expressed to begin after or to be from a specified day, the time shall not include that day;
- (h) where anything is to be done within a time after, from or before a specified day, the time shall not include that day;
- (i) where there is a reference to a period of time consisting of a number of months after or before a specified day, the number of months shall be counted from, but not so as to include, the month in which the specified day falls, and the period shall be reckoned as being limited by and including—
  - (i) the day immediately after or before the specified day, according as the period follows or precedes the specified day; and
  - (ii) the day in the last month so counted having the same calendar number as the specified day, but if such last month has no day with the same calendar number, then the last day of the month.

(2) For the purposes of this Order an "excluded day" means a Saturday, a Sunday or a public holiday.

**3.** (1) The judge may, on such terms as he thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules, or by any judgment, order or direction, to do any act in any proceedings.

(2) The judge may extend any such period as is referred to in subrule (1) although the application for extension is not made until after the expiration of that period.

(3) The period within which a person is required by these Rules or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent between the parties (given in writing) and endorsed by the judge.

**4.** Where a year or more has elapsed since the last proceeding in a cause, the party who desires to proceed must give to every other party not less than one month's notice of his intention to proceed.

**5.** Unless with the leave of the judge or with the consent of all the parties to the action, the period of the court vacation commencing on 15th December shall be excluded in reckoning any period prescribed by these Rules or by any order or direction for serving, filing or amending any pleading.

## **ORDER 72 TARIFF OF DEPUTY-SHERIFF FEES**

**1.** The fees and charges contained in the appended tariff shall be chargeable by and allowed to Deputy-Sheriffs, provided that no fees may be charged for the service of process in proceedings brought or defended under Order 46 (but the necessary disbursements for the purpose of such service may be recovered).

**2.** Where there are more ways than one of doing any particular act, the least expensive way shall be adopted unless there is some reasonable objection thereto, or unless the party at whose instance process is executed desires any particular way to be adopted at his expense.

**3.** Where any dispute arises as to the validity or amount of any fees or charges, or where necessary work is done and necessary expenditure incurred for which no provision is made, the matter shall be determined by the taxing master.

### **TARIFF**

**1.** For registration of any document for service or execution, upon receipt thereof .....

2. For service, or attempted service, of—
- (a) summonses, petitions, notices of motion (each) .....
  - (b) notices, orders or other documents (each) .....

Provided that:

- (i) whenever any document to be served with any such process is mentioned in the process or forms and annexure thereto, no additional fee shall be charged for the service of such document, otherwise a fee of P10 may be charged in respect of each separate document served;
- (ii) an attempted service of more than one document on the same person shall be treated as an attempted service of one document only; and
- (iii) no fee for the service of a separate document shall be charged in respect of the service of process in criminal cases.

3. Travelling allowances—

- (a) For the distance actually and necessarily travelled by the Deputy-Sheriff, or his officer, reckoned from the office of the Deputy-Sheriff, both on the forward and the return journey, per kilometre or fraction of a kilometre .....  
The rates applicable to persons employed in the Public Service as authorised in General Orders;
- (b) when two or more summonses or other process, whether at the instance of the same party or of different parties, are capable of being served on one and the same journey, the travelling allowance for performing the round of service shall be fairly and equitably apportioned among the several cases, regard being had to the distance at which the parties against whom such process is directed respectively reside from the office of the Deputy-Sheriff, but the fee for service shall be payable for each service made or attempted to be made;
- (c) this allowance shall be payable only in cases where the duty in question is to be performed beyond a radius of one kilometre from the office of the Deputy-Sheriff:  
Provided that if the office of the Deputy-Sheriff is situate more than five kilometres from the court the allowance shall be payable only where such duty is to be performed beyond a distance of one kilometre from the court.

4. (1) Postage in civil matters, as per postal tariff.

(2) Postage in criminal matters, free.

**NOTE:** *If difficulty is experienced in having envelopes marked "On Botswana Government Service" accepted by the local postal authorities, the Deputy-Sheriff may take the postal matter to the Registrar, or to the magistrate, who shall frank the envelope with his official franking stamp.*

5. For the execution of any writ—

- (a) (i) of personal arrest, including conveying defendant to court, to an attorney's office or to a prison, per person .....
- (ii) for conveying a defendant to court from a place of custody on a day subsequent to the day of arrest and attending at court, P50 per hour with a minimum of P50 but not exceeding .....
- (b) of ejection: P50 per hour, subject to a minimum fee of P50 but not exceeding .....  
(in addition to reasonable expenses necessarily incurred);
- (c) against immovable property—
- (i) for execution, including service of notice of attachment upon

the owner of the immovable property and upon the Registrar of Deeds or other officer charged with the registration of such property and if the property is in occupation of some lessee or person other than the owner, also upon such lessee or occupier .....

- (ii) for notice of attachment to a single lessee or occupier .....  
Identical notices when there are several lessees, occupiers, or owners, for each after the first .....
- (iii) for making valuation or report for purposes of sale .....
- (iv) when a Deputy-Sheriff has been authorised to sell property and the property is not sold by reason of the fact that the attachment is withdrawn or the debtor's estate made insolvent, irrespective of the amount of the writ .....  
The necessary notice for the withdrawal of the attachment, the first .....
- (v) Other identical notices for each after the first .....  
to ascertain and record what bonds, leases or other encumbrances are registered against the property together with the names and addresses of the persons in whose favour such bonds, leases and encumbrances are so registered, including any correspondence in connection therewith .....
- (vi) to notify the execution creditor of such bonds, leases, or other encumbrances and of the names and addresses of the persons in whose favour such bonds, leases or other encumbrances are registered .....
- (vii) for consideration of proof that the preferent creditor has complied with the requirements of paragraph (a) of subrule (5) of rule 12 of Order 52 .....
- (viii) for the notice referred to in subrule (6) of rule 12 of Order 52 .....
- (ix) for consideration of notice of sale prepared by execution creditor in consultation with Deputy-Sheriff .....
- (x) for verifying that notice of sale has been published in the newspapers indicated and in the *Gazette* .....
- (xi) for forwarding a copy of the notice of sale to every judgment creditor who had caused the immovable property to be attached and to every mortgagee or lessee thereof whose address is known, for each copy .....
- (xii) for affixing a copy of the notice of sale on the notice board of the District Commissioner referred to in subrule (11) of rule 12 of Order 52, and at or as near as may be to the place where the sale is actually to take place, an inclusive fee of ..... 10
- (xiii) for considering the conditions of sale ..... 25
- (xiv) on the sale of immovable property by the Deputy-Sheriff as auctioneer, two and one half per cent of the proceeds of the sale which shall be paid by the purchasers, with a minimum of ..... 50

.....  
This includes the cost of paying to the Sheriff all moneys received in respect of the purchase price.

(xv)	for any report referred to in subrule (2) of rule 12 of Order 52 .....	25
(xvi)	for giving transfer to the purchaser .....	20
(xvii)	for preparing a plan of distribution of the proceeds (including the necessary copies and for forwarding a copy to the Registrar) .....	100
(xviii)	for giving notice to all parties who have lodged writs and to the execution debtor that the plan will lie for inspection, for every notice .....	10
(xix)	for request to the Sheriff to pay out in accordance with the plan of distribution .....	10

(d) against movable property—

- (i) when a writ is paid on presentation, one per cent on the amount so paid with a minimum fee of .....
- (ii) for any abortive attempt at attachment, including one hour's search and enquiry .....
- (iii) when a writ is withdrawn or the debtor's estate made insolvent before any property is attached .....
- (iv) for making an attachment, including one hour's search and enquiry .....
- (v) notice of attachment, if necessary, to a single person .....  
Identical notices, when there is more than one person to be given notice, for each after the first .....
- (vi) when an attachment is withdrawn by a judgment creditor or the debtor's estate is made insolvent before sale, three and-one-quarter per cent on the value of the property attached or the amount of the writ whichever is the lesser;
- (vii) when a writ is paid by the debtor to the Deputy-Sheriff after attachment but before sale, three-and-a-quarter per cent on the amount so paid;
- (viii) when monies are taken in execution, one-and-a-half per cent on the amount so taken;
- (ix) for drawing advertisement of sale of goods attached .....
- (x) for selling in execution (whether auctioneer employed or not), including distribution of the proceeds, on the first P2,000 or part thereof, six per cent, and over and above the first P2,000, five per cent;
- (xi) the Deputy-Sheriff himself shall sell movable property in execution but he shall engage the services of an auctioneer if directed thereto in writing by the judgment creditor, provided the judgment creditor bears the additional commission, if any;
- (xii) commission shall not be chargeable, as against a judgment debtor, on the value of movable property attached and subsequently claimed by a person other than the judgment debtor and released in consequence of such claim unless such property has been attached at the express direction of the judgment creditor, in writing, in which event the judgment creditor shall be liable to the Deputy-Sheriff for the commission;

- (xiii) for insuring movable property attached when it is considered necessary and when the Deputy-Sheriff is directed thereto in writing, by the judgment creditor, in addition to the amount of premium paid, an inclusive fee of .....
- (e) For keeping possession of property (money excepted)—
  - (i) for an officer necessarily left in possession, a reasonable inclusive fee per day not exceeding .....
  - For an additional officer, where necessary, limited to one, per day, not exceeding .....

**NOTE:** *"Possession" means the continuous and necessary presence on the premises for the period in respect of which possession is charged of a person employed and paid by the Deputy-Sheriff for the sole purpose of retaining possession —*

- (ii) for removal and storage, the reasonable and necessary expenses for such removal and storage; and if an animal is to be stabled or fed, the reasonable charges for such stabling and feeding;
- (iii) for herding and preserving livestock, the necessary expenses for herding and preserving such stock;
- (iv) when no officer is left in possession and no security bond is taken, but movable property attached remains under the supervision of the Deputy-Sheriff, per day .....

**6.** (1) For making an inventory, including a copy for the person whose goods are being inventoried, per 100 words or part thereof .....

(2) For any additional necessary copy, per 100 words or part thereof .....

(3) For assistance, where necessary, in taking inventory (limited to one officer), a reasonable and inclusive fee per day, not exceeding .....

**7.** (1) For making return of service or execution, including drawing and typing original for court, limited to one person upon each original process .....

(2) Copy thereof for party desiring service or execution .....

**8.** For drawing and completing bail bond, deed of suretyship or indemnity bond .....

**9.** For copies of process and orders necessarily made per folio with a minimum of .....

**10.** For making copies of summonses, orders, subpoenas, writs, etc. received by telegram, 15t per folio of 100 words, with a minimum of ....

**11.** In cases of prisoners sentenced to death—

- (a) where a prisoner is executed: arranging for, etc. and attending capital punishment, an inclusive fee of .....
- (b) where the prisoner is not executed, an inclusive fee of .....

**NOTE:** *This fee in both cases includes identifying the prisoner on arrival, subsequent attendances at the prison at the request of the prisoner or the authorities, taking statements from the prisoner if requested to do so, and transport.*

**12.** For each necessary letter excluding formal letters accompanying process or returns .....

**13.** For each necessary attendance by telephone (in addition to .....

prescribed trunk charges) .....

**ORDER 73  
ADVOCATES' FEES IN CIVIL MATTERS**

1. Except where the judge authorises fees consequent upon the employment of more than one advocate to be included in a party and party bill of costs, only such fees as are consequent upon the employment of one advocate shall be allowed as between party and party.

2. Where fees in respect of more than one advocate are allowed in a party and party bill of costs, the fees to be permitted in respect of any additional advocate shall not exceed one half of those allowed in respect of the first advocate.

3. The appended tariff of maximum fees as between party and party (hereinafter referred to as "the tariff ") shall (except where the judge on application made before or when judgment is delivered otherwise orders) apply in the following matters—

- (a) any claim for a sum not exceeding P200,000 with or without any claim for ancillary relief;
- (b) any claim for delivery of property movable or immovable of a value not exceeding P200,000;
- (c) any claim for ejectment from premises where the value of the right of occupation to the occupier does not exceed P200,000;
- (d) any claim for divorce, judicial separation or other matrimonial relief unless accompanied by a money claim exceeding P200,000 or a proprietary claim exceeding P200,000 in value (excluding a claim for maintenance);
- (e) any appeal and review from magistrates' courts;
- (f) any application for interdicts pendente lite in regard to any matter mentioned in paragraph (a), (b), (c) or (d):

Provided that—

- (i) where the amount of the claim exceeds P200,000 but that of the judgment does not, the tariff shall apply;
- (ii) where the defendant or respondent is awarded costs and the amount or value of the claim against him exceeds P200,000 the tariff shall not apply unless in either case the judge otherwise orders.

4. In applying the provisions of the tariff, the taxing master shall have regard to the scale of fees ordinarily allowed, as between party and party, at the time of coming into operation of this tariff for like services and shall not without substantial reason allow any fee materially in excess thereof.

5. (1) The taxation of advocates' fees as between party and party shall be effected by the taxing master in accordance with this rule and, where applicable, the tariff.

(2) Where the tariff does not apply, he shall allow such fees (not necessarily in excess thereof ) as he considers reasonable.

6. The taxing master shall be entitled at his discretion at any time to depart from the provisions of this tariff in extraordinary or exceptional cases, where strict adherence to such provisions would be inequitable.

**TARIFF OF MAXIMUM FEES FOR ADVOCATES ON PARTY AND PARTY BASIS IN  
CERTAIN CIVIL MATTERS**

	P
1. Written advice and memoranda in the course of litigation .....	25
2. Drawing pleadings and stated cases, settling a statement of claim in a combined summons or third party notice .....	20
3. Advice on evidence .....	30
4. Consultations on trial, to settle affidavits, stated cases, etc. and receive instructions and/or furnish advice, informal inspections with attorney and/or	8

client prior to hearing, etc. (per hour) .....	
5. Settling notice of motion, affidavit, etc. where consultation not held.....	25
6. Appearance in court—	
(a) First day of hearing—	
(i) Opposed applications .....	
(ii) Exceptions or motions to strike out .....	
(iii) Stated cases .....	
(iv) Trials .....	
(v) Appeals from magistrates' courts including review of proceedings thereof .....	30
(b) Subsequent days—	
A refresher (without the necessity of a refresher brief ) in an amount per day to be allowed in the discretion of the taxing master, but not to exceed two-thirds of the fees allowed on taxation in respect of the first day.	
(c) (i) Attending court to note a reserved judgment .....	
(ii) Attending court to note a reserved judgment including argument as to terms of order: whether as to costs or otherwise, and an application for leave to appeal .....	
(d) Attending court on formal unopposed postponement .....	
(e) Fee in lieu of fee for first day's hearing when case settled or withdrawn or postponed at the instance of any party—	
(i) not more than two days prior to the date of hearing.....	
Fee otherwise allowable on taxation for first day's hearing under (i)	
(ii) not less than three days and not more than seven days prior to the date of hearing .....	
Two-thirds of fees under (i)	
(iii) not less than eight days and not more than 21 days prior to the date of hearing.....	
Half the fee under (i)	

7. Circuit matters—

For services necessarily rendered on circuit in respect of a matter already pending in a circuit court, any fee otherwise allowable in terms of the foregoing tariff may be increased in the discretion of the taxing master by an amount not exceeding one-third of such fee.

**ORDER 74**  
**TAXATION AND TARIFF OF FEES OF ATTORNEYS**

1. It shall be competent for the taxing master to tax all bills of costs for services actually rendered by an attorney in his capacity as such, whether in connection with litigation or not; in the latter event, the taxing master shall nevertheless be guided as far as possible by the scales of fees fixed by the appended tariff:

Provided that the taxing master shall not tax costs in instances where some other official is empowered to do so.

2. At the taxing of any bill of costs the taxing master may call for such books, documents, papers or accounts as in his opinion are necessary to enable him properly to determine any matter arising upon such taxing.

3. With a view to affording the party who has been awarded an order for costs a full indemnity for all costs reasonably incurred by him in relation to his claim or defence, and to ensure that all such costs shall be borne by the party against whom such order has been awarded, the taxing master shall, on every taxation, allow all such costs, charges or expenses, as appear to him to have been necessary or proper for the attainment of justice, or for defending the rights of any party, but except as against the party who incurred the same, no costs shall be

allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee to an advocate, or special charges and expenses to witnesses or to other persons or by other unusual expense.

4. The taxing master shall not proceed to the taxation of any bill of costs unless he is satisfied that the party liable to pay the same has received due notice as to the time and place of such taxation and notice that he is entitled to be present thereat:

Provided that such notice shall not be necessary—

- (i) if the party against whom costs have been awarded has not appeared at the hearing either in person or by his legal representative;
- (ii) if the person liable to pay costs has consented in writing to taxation in his absence; and
- (iii) for the taxation of writ and post-writ bills.

5. The taxing master shall be entitled in his discretion at any time to depart from any of the provisions of this tariff in extraordinary or exceptional cases, where strict adherence to such provisions would be inequitable.

6. (1) In order to diminish as much as possible the costs arising from the copying of documents to accompany the briefs of counsel, the taxing master shall not allow the costs of any unnecessary duplication in briefs.

(2) No fees shall be allowed by the taxing master as between party and party for the copying of any document not used at the hearing unless the judge otherwise directs.

7. Fees for copying shall be disallowed to the extent by which such fees could reasonably have been reduced by the use of printed forms in respect of bonds, leases, hire purchase agreements or any documents.

8. Where in the opinion of the taxing master more than one attorney has been necessarily engaged in the performance of any of the services covered by the tariff, each such attorney shall be entitled to be remunerated on the basis set out in the tariff for the work necessarily done by him.

9. (1) In criminal matters an attorney's remuneration shall be specially agreed in advance in a gross sum or on the basis of a reasonable charge.

(2) Where the agreement is for remuneration in a gross sum, the gross sum shall cover all services of the attorney until the issues in the case are determined irrespective of the length of the case or the complexity of the issues.

(3) Where the agreement is for remuneration by way of reasonable charge, the client may demand a detailed bill of charges and expenses and if the client disputes the reasonableness of the charges and expenses he may, by notice of motion (which must state the grounds of objection) apply to a judge in chambers to determine the dispute and the judge may proceed summarily in the matter and may make such order (including an order as to costs of the motion) as he considers just.

(4) Where on the authority of the client an advocate is instructed to conduct the case, the charges of the attorney for work done by him shall, as far as practicable, be in accordance with the tariffs laid down in civil matters; and the attorney shall, on request, provide the client with a bill of charges; such bill shall be taxable by the taxing master as if it were a bill of costs in a civil matter.

10. The taxing master may grant a party wasted costs occasioned by the failure of the taxing party or his or her attorney or both to appear at a taxation or by the withdrawal by the taxing party of his or her bill of costs.

11. A folio shall contain 3000 words or part thereof, four figures are to be counted as a word.

#### ***TARIFF OF FEES OF ATTORNEYS***

In connection with a bill of costs for services rendered by an attorney, such an attorney shall be entitled to charge, in accordance with the hourly rates at section I of this tariff, for time

taken, where there is no fixed rate for such a service.

### **A – TAKING INSTRUCTIONS**

1. To institute or defend any proceeding..... Time taken by attorney
2. For advice on evidence or on commission ..... Time taken by attorney
3. For case on opinion, or for advocate's guidance in preparing pleadings, including exceptions ..... Time taken by attorney
4. For statement of witness..... Time taken by attorney
5. To set down cause, issue subpoena or any other simple instructions ..... Time taken by attorney
6. To draft a petition or affidavit ..... Time taken by attorney
7. To note an appeal..... Time taken by attorney
8. To prosecute or defend an appeal (exclusive of the perusal of the record) ..... Time taken by attorney

### **B – ATTENDANCE AND PERUSAL**

1. (a) Any summons, petition, affidavit, pleading, advocate's advice and drafts, report, and important notice or document, per folio for the first 10 folios ..... P10  
and thereafter per folio ..... P5  
(up to a maximum of P2 for all folios) ..... P5
- (b) Any letter, record, stock sheets in voluntary surrenders, judgments or any other material documents not elsewhere specified, per folio for the first 10 folios ..... P10  
and thereafter per folio ..... P5  
(up to a maximum of P25,000 for all folios)
2. Attending the receipt of and considering any plan or exhibit or other material document in respect of which the basis of remuneration set out in item 1 of this section cannot be applied - per folio for the first 10 folios..... P5  
and thereafter per folio ..... P10  
(up to a maximum of P25,000 for all folios) ..... P5
3. Making searches in offices of record (per half hour or part thereof ) ..... Time taken by attorney
4. Sorting out, arranging and paginating papers for pleading, advice on evidence or brief on trial or appeal (per half hour) ..... Time taken by attorney
5. Attending to give or take discovery (per half hour) ..... Time taken by attorney
6. Attending on client to obtain particulars of his claim and to settle same..... Time taken by attorney
7. Attending on bespeak and thereafter procure transcription of shorthand note, etc ..... Time taken by attorney
8. Other attendances including telephone calls (per half hour)..... Time taken by attorney

### **C – ATTENDANCE (FORMAL)**

1. To serve or deliver any necessary document or letter or despatch any telegram ..... P30
2. To sue out any process or file any document ..... P15
3. To set down causes for trial ..... P15
4. To search for any return..... P15
5. On receipt, perusing and considering of notice of intention to

- defend - per folio .....
- 6. On advocate, e.g. with folio ..... Time taken by attorney
- 7. On signature of powers of attorney to sue or defend P30
- .....
- 8. Other formal attendances, including telephone calls..... Time taken by attorney

**D – DRAFTING AND DRAWING**

- 1. Drafting instructions for case on opinion, for advocates' guidance in preparing pleadings (including further particulars and requests for same) including exceptions ..... Time taken by attorney
- 2. Drafting instructions to advocate for advice on evidence, for brief on trial or on commission..... Time taken by attorney
- 3. Drafting instructions to advocate for argument in respect of all classes of pleading, provided that a fee for drafting instructions on motion, petition, exception or appeal, shall only be allowed at the discretion of the taxing master.... Time taken by attorney
- 4. Drafting statements of witnesses..... Time taken by attorney
- 5. Drawing subpoenas, powers of attorney to sue or defend and formal notices (per folio) ..... P50
- 6. Drafting a petition, affidavit, any notice, except formal notice, summons, further particulars requested and furnished for trial, writs of execution, arrest or attachment and any other important document not otherwise provided for ..... Time taken by attorney
- .....
- 7. Letter or telegram (per folio) ..... P50  
and thereafter per folio..... P50  
Copy to keep per folio ..... P2
- 8. Drawing index to brief ..... P50
- 9. Drawing short brief..... Time taken by attorney
- NOTE 1:** In computing the number of folios of any document referred to in paragraphs 1, 2, 3, 4 and 6 of this section, the taxing master shall deduct, but treat as annexures where relevant, any portions consisting of quotations from other documents and papers.
- NOTE 2:** The charges allowed in this section for drafting and drawing do not, except in the case of items 5, 7, 9, and 10, include making the first fair copy which shall be charged for under Item 1 of section F of this tariff.
- 10. Research, preparation and drafting of heads of argument ..... Time taken by attorney
- .....

**E – APPEARANCE, CONFERENCE AND INSPECTION**

- 1. Attendance by attorney when an advocate is employed in court or before a judge, a commissioner, or referee or at an inspection directed by the judge:  
To note judgment only..... Time taken by attorney  
Otherwise, per hour
- 2. Appearance by attorney without an advocate before a judge on request by the judge, or before a commissioner or referee, per hour..... Time taken by attorney
- 3. (1) Appearance by an attorney as counsel in court, or before As for advocates a judge, an arbitrator, commissioner or referee or at an inspection directed by the judge:  
Maximum fees .....

Provided that an attorney shall not be allowed fees both as an attorney and as counsel in respect of the same service.

- (2) Any conference or consultation with advocate with or without witnesses and on pleadings including exceptions and particulars to pleadings, applications, petitions, affidavits, testimony and on any other matter which the taxing officer may consider necessary:  
Per half hour .....
  - 4. (1) Any conference or consultation with client, witness or opposite party, and any other conference or consultation which the taxing officer may consider necessary:  
Per half hour .....
  - (2) Attending conference in terms of Order 42:  
Per half hour .....
  - 5. Any inspection *in situ* or otherwise per hour.....
- The above rates of remuneration shall not be applicable in respect of time spent in travelling, but the taxing master shall in respect of time necessarily so spent, allow additional remuneration not exceeding P21 *per diem*, and shall also allow the reasonable costs of necessary conveyance.
- 6. Evidence: Such just and reasonable charges and expenses as may, in the opinion of the taxing master, have been properly incurred in procuring the evidence and attendance of witnesses whose fees have been allowed on taxation provided that the qualifying expenses of a witness shall not be allowed without an order of court or the consent of all interested parties.  
Time spent travelling and waiting is to be at the particular attorneys hourly rate, but no travel expenses allowable within Gaborone or to file at the High Court unless a special trip was made.

**F – MISCELLANEOUS**

- 1. Briefing and copying; for making copies for the court, for counsel or for attorney, or for service or for any other necessary purpose, the charge shall be per folio  
..... 10 thebe  
(including the first copy of any document drafted in respect of which a charge is recoverable under Items 2, 3, 4, 5, 7, and 9 of section D of this tariff ) and for further copies up to 200, per folio and for still further copies, per folio  
..... P2
- 2. For making copies of the record in a civil appeal from the magistrates' court the charge shall be per folio of the first copy, and per folio of all other copies..... P2
- 3. Drawing up insolvency schedules, including petition, affidavit and relative attendance *ad jurat* ..... Time taken by attorney
- 4. For giving a verbal or written opinion (as between attorney and client)..... Time taken by attorney
- 5. General: Inclusive fee for consultations and discussions with client or advocate not otherwise provided or specially charged..... Time taken by attorney

**G – BILL OF COSTS**

In connection with a bill of costs for services rendered by an attorney, such attorney shall be entitled to charge:

1. For drawing the bill of costs, making the necessary copies and attending settlement, five per cent of the first P10,000 or a portion thereof, two and a half per cent of the second P10,000 or a portion thereof, and one per cent on the amount in excess of P200,000 of the amount of the attorney's fees, either as charged in the bill if not taxed, or as allowed on taxation.

2. And in addition thereto, if recourse is had to taxation, for arranging and attending taxation and obtaining consents to taxation, five per cent of the first P10,000 or portion thereof, and two and a half per cent of the second P10,000 or portion thereof, and one and a half per cent on the amount in excess of P200,000 of the fees allowed on taxation.

The fee under each item of this section shall be calculated on the same amount.

#### **H – NOTARIAL CHARGES**

1. In an undefended civil cause, an attorney may, without tendering any bill of costs for taxation, recover from the party against whom an order for costs has been made, a sum not exceeding P10,000 as costs in that cause:

Provided that—

- (i) the costs claimed do not exceed P10,000;
- (ii) the said party does not apply to the master to have the bill taxed; or
- (iii) the judge does not otherwise direct.

#### **I – HOURLY RATES (PARTY AND PARTY SCALE)**

Pupil attorney	00 per hour
0 - 2 years experience	00 - P400 per hour
2 - 5 years experience	P400 - P500 per hour
5 - 10 years experience	P500 - P700 per hour
10 - 15 years experience	P700 - P850 per hour
Over 15 years experience	P850 - P1,000 per hour

#### **ORDER 75**

##### **ALLOWANCES PAYABLE TO ASSESSORS**

1. An assessor shall be paid for every day or part thereof necessarily spent away from his normal place of residence for the purpose of attendance at court, a fee of P1,000.

2. An assessor shall also be reimbursed his reasonable transport costs from his normal place of residence to the court.

3. Where in the opinion of the Registrar payment of the allowances prescribed in this Order would cause undue hardship, or there are extraordinary circumstances in any particular instance calling for special allowances to be paid, he may authorise the payment of such additional allowances as he may deem appropriate.

#### **ORDER 76**

##### **TARIFF OF ALLOWANCES PAYABLE TO WITNESSES IN CIVIL PROCEEDINGS IN THE HIGH COURT**

1. A witness attending upon subpoena in any civil proceedings shall be paid an allowance towards subsistence at the same rates as are provided in the tariff for a witness in criminal proceedings.

2. Public servants attending as witnesses shall deal with the allowance received as laid down in departmental regulations or instructions.

#### **ORDER 77**

##### **LAW TERMS AND VACATIONS**

1. (1) For the despatch of civil and criminal business there shall be four terms in every year which shall commence on 1st February, the second Tuesday immediately after Easter Monday, 1st August and 1st November respectively.

(2) Notwithstanding the provisions of subrule (1), if the date of commencement of any term falls on a day which is not a business day, that term shall commence on such day as the

Chief Justice shall, by notice published in the *Gazette*, appoint.

2. (1) There shall be four vacations in every year.

(2) The first vacation shall commence on the Monday immediately before Good Friday and terminate on the Monday immediately after Easter Monday; the second vacation shall commence on 1st July and terminate on 31st July; the third vacation shall commence on 15th October and terminate on 31st October; the fourth vacation shall commence on 15th December and terminate on 31st January.

(3) Notwithstanding the provisions of subrule (2), if the day fixed for the end of a term is not a business day that term shall end on the immediately preceding business day.

3. Any person may make an urgent application in a criminal matter to a judge in chambers at any time in an appropriate case.

4. The court shall not sit during vacation except for the—

- (a) despatch of business certified by counsel as being urgent;
- (b) the management of actions under Order 42;
- (c) or as the Chief Justice may direct or allow.

5. For the despatch of civil and criminal business, the court shall sit at such places other than Lobatse and on such dates as the Chief Justice may, by notice published in the *Gazette*, appoint.

6. Subject to the provisions of section 9 of the High Court Act, any sitting of the court may be held by a judge in chambers.

7. Criminal trials shall be set down by the Registrar in accordance with the procedure prescribed by Order 68.

#### **ORDER 78**

#### **TRADE UNIONS AND EMPLOYERS' ORGANIZATIONS RULES**

1. These Rules may be cited as the Trade Unions and Employers' Organizations Rules.

2. All appeals to the High Court made under section 13 of the Trade Unions and Employers' Organizations Act (in this Order referred to as "the Act"), shall be brought by notice of motion within 60 days (or within such further time as the judge may think fit to allow) of the decision of the Registrar of Trade Unions and Employers' Organizations (hereinafter in this Order referred to as the "Registrar") under section 10 or 12 of the Act.

3. The notice of motion shall be in Form 27 in the First Schedule.

4. A fee of P20 shall be taken in the High Court in the form of stamps affixed to the copy of the notice of motion filed with the Registrar of the High Court.

5. The notice of motion shall be headed with a reference to the Trade Unions and Employers' Organizations Act, and also with a reference to the decision of the Registrar against which the appeal is brought and shall contain, or have scheduled or annexed thereto, a concise statement of the grounds of the appeal, and no grounds other than those comprised in such statement shall (except with the leave of the judge and on such terms, if any, as the judge shall think just) be allowed to be taken by the appellant at the hearing of the motion.

6. Except where the trade union, or alleged trade union, in question are themselves the appellants, such trade union, or alleged trade union, or any person who appeared before the Registrar and in whose favour he decided, shall (unless the judge otherwise orders) be the respondent or one of the respondents to the motion.

7. (1) A copy of the notice of motion shall be served on the respondents in a manner provided in these Rules in relation to service of documents by any responsible person in the employ of the appellant.

(2) The judge may at any stage of the motion direct that the same be served on any persons whom the judge may think proper.

8. At any stage of the motion the judge may, if it appears expedient to do so, cause notice to be given by advertisement or otherwise of the time when the motion will be, or is likely to be, heard and disposed of, or otherwise make provision for enabling any persons interested

in the trade union, or alleged trade union, in question, or in the subject matter of the appeal, to appear and be heard on the motion.

**9.** At any stage of the motion, the judge may, if he thinks fit, give any such special directions for the hearing and disposal of the motion either on affidavit evidence or with witnesses or otherwise, and generally at such time and in such manner as may be just and convenient.

**10.** In all proceedings on any such appeal, the judge shall have all the powers vested by the Act in the Registrar and may make any order which might or ought to have been made by the Registrar.

**11.** In proceedings on any such appeal the costs of, and incidental thereto, including the costs of and incidental to, any proceedings before the Registrar, shall be in the discretion of the judge.

**12.** These Rules (except if and insofar as otherwise provided by this Order) shall apply to all proceedings on any such motion.

### **ORDER 79 PAPER AND PRINTING**

**1.** Unless the nature of the document renders it impracticable every document prepared by a party for use in the High Court shall be clearly and legibly printed or typewritten in permanent black ink on one side only of durable quality A4 paper having a blank margin not less than 4cm wide on the left side of each page.

**2.** (1) Except where these Rules otherwise provide, every document prepared by a party for use in the High Court must be produced by one of the following means, that is to say, printing, writing (which must be clear and legible) and typewriting otherwise than by means of a carbon, and may be produced partly by one of those means and partly by another or others of them.

(2) For the purposes of these Rules a document shall be deemed to be printed if it is produced by digital or photocopying.

(3) Any type used in producing a document for use as aforesaid must be such as to give a clear and legible impression and must not be smaller than 11 point type for printing and have 1.5 line spacing.

**3.** Petitions, affidavits, grounds of appeal and the like shall be divided into concise paragraphs and shall be consecutively numbered.

**4.** The plaintiff, petitioner, appellant or applicant in any case or matter shall, not later than three days prior to the hearing thereof, collate and number consecutively and suitably secure all pages of the documents delivered and shall prepare and deliver a complete index thereof.

**5.** The Registrar may reject any document which does not comply with the requirements of this Order.

### **FIRST SCHEDULE Form 1 POWER OF ATTORNEY TO SUE OR DEFEND**

*(Order 4 rule 8)*

In the High Court of the Republic of Botswana

I,..... do hereby nominate and appoint Attorney (with power of substitution) to be ..... lawful attorney and agent for ..... and in ..... name to institute/defend proceedings of claim and demand against/ instituted by ..... according to law and to proceed to the determination thereof hereby promising to ratify any legal steps ..... may take by virtue of these presents.

Given under..... hand at ..... this day of .....20 .....

Witnesses: .....

**Form 2**  
**SUMMONS**  
(Order 6 rule 5)

In the High Court of the Republic of Botswana

Civil Case No. ....

In the matter between:

..... Plaintiff  
and  
..... Defendant

To: ..... of .....  
name, occupation and sex address  
hereinafter called "the defendant"

You are commanded that within ..... days after the service of this summons on you, inclusive of the day of such service, you do cause an appearance to be entered for you in an action at the suit of:

..... of .....  
name, occupation and sex  
address

hereinafter called "the plaintiff", in which action the plaintiff claims the relief, and on the grounds set out in the particulars in the Annexure hereto.

And take notice that in default of your so doing the plaintiff may proceed therein, and judgment may be given in your absence.

**MEMORANDUM TO BE SUBSCRIBED ON THE SUMMONS**

You are informed that—

- (i) you should within ..... days of the service upon you of this summons enter appearance to defend. An appearance is entered by properly completing and delivering a memorandum of appearance to the Registrar and to the plaintiff. Delivery to the plaintiff may be effected by sending by post to the plaintiff if the plaintiff sues in person, but otherwise to the plaintiff's attorney at the plaintiff's attorney's address for service, a copy of the memorandum of appearance on the day it is delivered to the Registrar;
- (ii) the memorandum of appearance should state an address within the jurisdiction at or to which documents for you may be delivered or sent; and
- (iii) the memorandum of appearance should specify concisely the nature and the grounds of the defence and the relief or remedy required;

FURTHER if you fail to file and serve notice as aforesaid, judgment as claimed may be given against you without further notice to you.

**ANNEXURE**

**PARTICULARS OF PLAINTIFF'S CLAIM**

The plaintiff's claim *locus standi* in judicio for the following reasons:

.....  
.....  
.....

The court has jurisdiction over the defendant for the following reasons:

.....  
.....  
.....

The plaintiff claims:

.....

The cause of plaintiff's action is: .....

Plaintiff/Plaintiff's attorney

This summons was issued by .....

whose address for service is .....

and whose postal address for service is at .....

Attorney for the plaintiff who resides at .....

**ENDORSEMENT TO BE MADE WITHIN THREE DAYS AFTER SERVICE**

This summons was served by me at ..... at ..... a.m./p.m. on the ..... day of ....., 20 .....

ENDORSED the ..... day of ....., 20 .....

Signed: .....

Address:.....

.....

.....

Occupation:.....

**Form 3**  
**EDICTAL CITATION: SHORT FORM OF PROCESS**  
*(Order 10 rule 2(4))*

In the High Court of the Republic of Botswana

In the matter between:

..... Plaintiff  
and

.....Defendant

To:

A ..... B..... (sex) .....

..... (occupation) formerly residing at .....but  
whose present whereabouts are unknown:

TAKE NOTICE that by summons issued out of this court, you have been called upon  
to give notice, within ..... days after publication hereof, to the Registrar and  
to .....

The plaintiff's attorney of your intention to defend (if any) in an action wherein

C ..... D.....claims:

(a) .....

(b) .....

(c) .....

TAKE NOTICE FURTHER that if you fail to give such notice, judgment may be granted  
against you without further reference to you.

DATED at.....this.....day of....., 20 .....

.....  
Registrar of the High Court  
Plaintiff's attorney  
Address for service:

**Form 4**  
**NOTICE OF MOTION**  
*(Order 12 rule 1)*

In the High Court of the Republic of Botswana

..... Applicant  
and

.....Respondent

TAKE NOTICE that ..... (hereinafter called "the applicant")  
intends to make application to this court for an order

(a) .....

(b) .....

(c) .....

(here set forth the form of order prayed) and that the accompanying affidavit of .....  
will be used in support thereof.

TAKE NOTICE FURTHER that the applicant has appointed .....

.....  
(here set forth an address in Botswana at which he will accept notice and service of all process in these proceedings).

TAKE NOTICE FURTHER that if you intend opposing this application you are required—  
(a) to notify the applicant’s attorney in writing on or before the .....; and  
(b) within 14 court days of the service of this notice upon you, to file your answering affidavits, if any;

and further that you are required to appoint in such notification an address within Botswana at which you will accept notice and service of all documents in these proceedings.

If no such notice of intention to oppose is given, the application will be made on the ..... at ..... a.m.

DATED at ..... this ..... day of ....., 20 .....

To:

- (1) C.D.  
(Address)  
Respondent,
- (2) The Registrar of the High Court, Francistown/Lobatse.

**Form 5  
NOTICE OF MOTION**

*(Order 12 rule 4 (2) and 5 (1))*

In the High Court of the Republic of Botswana

In the matter of:

..... Applicant

TAKE NOTICE that application will be made on behalf of the above-named applicant on the ..... day of ..... at 10 a.m. or as soon thereafter as counsel may be heard for an order in the following terms:

- (a) .....
- (b) .....
- (c) .....

and that the affidavit of ..... annexed hereto will be used in support thereof.

Kindly place the matter on the roll for hearing accordingly.

DATED at ..... this ..... day ....., 20 .....

.....  
Applicant’s attorney  
To: The Registrar of the High Court,  
Francistown/Lobatse.

**Form 6  
SUMMONS: PROVISIONAL SENTENCE**

*(Order 14 rule 1)*

In the High Court of the Republic of Botswana

In the matter between:

..... Plaintiff

and

..... Defendant

To the Sheriff or his Deputy:

INFORM ..... (name) ..... (sex) .....  
(occupation), of ..... (residence or place of business)  
(hereinafter called "the defendant"):

(1) that he/she is hereby called upon immediately to pay to .....  
(name) ..... (sex) ..... (occupation) of .....  
(residence or place of business) (hereinafter called "the plaintiff") an amount of .....  
..... together with interest thereon at the rate  
of ..... per cent per annum as from ..... claimed by plaintiff .....

(here set out the cause of action) ..... , and a copy of which document is annexed hereto;

(2) that failing such payment, he/she is hereby called upon to appear before this court personally or by counsel at ..... on ..... the ..... day of ....., 20 ..... at ..... o'clock in the forenoon (or as soon thereafter as the matter can be heard) to admit or deny his liability for the said claim, and to state why the mortgaged property should not be declared executable;

(3) that if he denies liability for the same, he may not later than noon on ..... the ..... day of ....., 20 ....., file an affidavit with the Registrar of this court, and serve a copy thereon on plaintiff's attorney, which affidavit shall set forth the grounds of his defence to the said claim, and in particular state whether he admits or denies his signature to the said ..... or whether he admits or denies the signature or authority of his agent.

AND INFORM the said defendant further that in the event of his not paying the amount and interest above-mentioned to the plaintiff immediately and if he (the said defendant) further fails to file an affidavit as aforesaid, and to appear before this court at the time above stated, provisional sentence may forthwith be granted against him with costs, and the mortgaged property may be declared executable, but that against payment of the said amount, interest and costs, he will be entitled to demand security for the restitution thereof if the said sentence should thereafter be reversed.

AND serve a copy of this summons and of the said ..... on the said defendant and then return this summons to the Registrar with your return of what you have done therein.

DATED at ..... this ..... day of ....., 20 .....

Plaintiff's attorney  
Address for service:

.....  
.....

**Form 7**  
**WRIT OF ARREST**  
(Order 15 rule 2)

In the High Court of the Republic of Botswana  
In the matter between:

..... Plaintiff  
and

..... Defendant

To: The Sheriff or his Deputy, .....

We command that you take ..... of ..... (hereinafter called "the defendant"), if he is found in this country, and safely keep him so that you have him before the above-named High Court at ..... on the ..... day of ..... 20 .., at ..... o'clock in the forenoon, then and there to answer ..... of ..... (hereinafter called "the plaintiff") wherefore he hath not (set out the wrong or injury).

As it is said: and have then and there this writ with whatsoever you have done thereupon.

DATED at ..... this ..... day of ....., 20 .....

.....  
Registrar of the High Court  
The plaintiff's address for service is:  
.....  
.....  
Attorney for the plaintiff

**Form 8**  
**BOND OF SECURITY BY DEFENDANT TO WRIT OF ARREST**  
(Order 15 rule 6 (2))

In the High Court of the Republic of Botswana

Know all men by these presents that we .....  
of..... and ..... of  
..... are held and firmly bound  
to..... the Sheriff of Botswana in the sum of P.....  
(the sum or value of the thing mentioned in the writ) of lawful money to be paid to the said Sheriff  
or his attorneys, administrators or assigns; for which payment we bind ourselves, and each of us  
for himself, in the whole, our and every of our heirs, executors and administrators, firmly by  
these presents.

Now the conditions of this obligation is such that if the above bonded .....  
.....  
do appear in person by his attorney before the High Court of Botswana, at .....on the  
..... day of ....., 20 ....., at ..... o'clock in the  
forenoon, to answer ..... of.....  
wherefore (following the statement in the writ of attachment), and also shall stand to, abide and  
perform the judgment of the court thereon, or render himself to the prison of the said court, in  
execution thereof, then this obligation to be void; otherwise to remain in full force.

DATED at ..... this ..... day of ....., 20 .....

Signed and delivered in the presence of: .....

**Form 9**  
**ENDORSEMENT TO BOND OF SECURITY**  
(Order 15 rule 11)

In the High Court of the Republic of Botswana

I, .....  
the within-named Sheriff (or Deputy-Sheriff) at the request of.....  
the plaintiff within-named, hereby assign to him, the said .....  
the within bail-bond, and all the benefit and advantage arising therefrom.

In witness whereof, I have hereunto set my hand on this ..... day of ....., 20 .....

.....  
(Deputy) Sheriff

**Form 10**  
**NOTICE TO THIRD PARTY**  
(Order 17 rule 1)

In the High Court of the Republic of Botswana

In the matter between:

..... Plaintiff

and

.....Defendant

and

.....Third Party

TO THE ABOVE-NAMED THIRD PARTY:

TAKE NOTICE that the above-named plaintiff has commenced proceedings against the  
above-named defendant for the relief set forth in the summons, a copy of which is herewith  
served upon you.

The above-named defendant claims a contribution or indemnification (or such other  
ground as may be sufficient to justify a third-party notice) on the grounds set forth in the  
annexure hereto.

If you dispute those grounds (or if you dispute the claim of the plaintiff against the  
defendant) you must give notice of your intention to defend, within ..... days. Such  
notice must be in writing and filed with the Registrar and a copy thereof served on the  
above-named defendant at the address set out at the foot of this notice. It must give an  
address (not being a post office box or *poste restante*) within eight kilometres of the court for  
the service upon you of notices and documents in the action. Within 14 days of your giving  
such notice you must file a plea to the plaintiff's claim against the defendant or a plea to the

defendant's claim against you, or both such pleas.

DATED at .....this ..... day of ....., 20 .....

.....  
Defendant's attorney  
(Address)

To: .....  
and plaintiff's attorney  
(Address)

**Form 11**  
**NOTICE TO ALLEGED PARTNER**  
(Order 18 rule 4 (3) and (4))

In the High Court of the Republic of Botswana

Civil Case

No.....

In the matter between:

..... Plaintiff  
and

.....Defendant  
To: .....

TAKE NOTICE that action has been instituted by the above-named plaintiff against the above-named defendant for the sum of ..... and that the plaintiff alleges that the above-named defendant is a partnership of which you were from..... to ..... a partner.

If you dispute that you were a partner or that the above-mentioned period is in any way relevant to your liability as a partner, you must within ..... days of the service of this notice give notice of your intention to defend. Upon your giving such notice a copy of the summons served upon the above-named defendant will be served upon you.

To give such notice you must file with the Registrar and serve a copy thereof upon the plaintiff at the address set out at the foot hereof a notice stating that you intend to defend. Your notice must give an address (not being a post office box or poste restante) within eight kilometres of the court for the service upon you of notices and documents in the action. Unless you do all these things your notice will be invalid.

Thereafter you should file a plea in which you may dispute that you were a partner or that the period alleged above is relevant or that the defendant is liable, or all three of these matters.

If you do not give such notice you will not be at liberty to contest any of the above issues. If the above-named defendant is held liable you will be liable to have execution issued against you, should the defendant's assets be excused in execution and be insufficient.

DATED at ..... this ..... day of ....., 20 .....

Attorney for .....

(Address)

(N.B. In application proceedings this form should be appropriately altered.)

**Form 12**  
**AFFIDAVIT OF DOCUMENTS**  
(Order 39 rule 2)

In the High Court of the Republic of Botswana

In the matter between:

..... Plaintiff  
and

.....Defendant  
I, ..... the above-named defendant, hereby make oath and say:

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the First Schedule hereto.

2. I object to produce the said documents set forth in the second part of the said First Schedule hereto. (State grounds of objection).

3. I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the Second Schedule hereto.

4. The last-mentioned documents were last in my possession or power on (state when, and what has become of them, and in whose possession they now are).

5. According to the best of my knowledge, information and belief, I have not now and never had in my possession, custody or power, or in the possession, custody or power of my attorneys or agents, or in the possession, custody or power of any other persons or person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the said First and Second Schedules hereto.

Sworn before me at ..... this ..... day of ....., 20 .....

.....  
Justice of the Peace, or  
Commissioner of Oaths.

**Form 13**  
**NOTICE TO PRODUCE**  
(Order 39 rule 6 (1))

In the High Court of the Republic of Botswana  
In the matter between:

..... Plaintiff  
and  
.....Defendant

TAKE NOTICE that the plaintiff/defendant requires you to produce for his inspection the following documents referred to in your declaration, or plea or affidavit, dated the ..... day of ....., 20 ....., namely:

.....  
.....

DATED at ..... this ..... day of ....., 20 .....

.....  
Attorney for the plaintiff/defendant

To:

**Form 14**  
**NOTICE TO INSPECT**  
(Order 39 rule 7(2))

In the High Court of the Republic of Botswana  
In the matter between:

..... Plaintiff  
and  
.....Defendant

TAKE NOTICE that you may inspect the documents mentioned in your notice of the .....day of ....., 20 ....., (except those hereunder specified), at my office on the ..... day of ....., 20 ....., between the hours of 10 o'clock a.m. and 4 o'clock p.m

I object to produce the following documents for the reasons stated, namely:

.....  
.....

DATED at ..... this ..... day of ....., 20 .....

.....

Attorney for the plaintiff/defendant.

To:

**Form 15**  
**NOTICE TO ADMIT DOCUMENTS**  
(Order 40 rule 3)

In the High Court of the Republic of Botswana  
In the matter between:

..... Plaintiff  
and

.....Defendant

TAKE NOTICE that the plaintiff/defendant in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant/plaintiff, his attorney or agent, at ..... on the ..... day of ....., 20 .., between the hours of ..... and the defendant/plaintiff is hereby required within 48 hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and such documents as are stated to have been served, sent or delivered, were so served, sent or delivered respectively; saving all just exceptions to the admissibility of all such documents as evidence in this cause.

DATED at ..... this ..... day of ....., 20 .....

To:

Description of Documents.

**Form 16**  
**NOTICE TO ADMIT FACTS**  
(Order 40 rule 8)

In the High Court of the Republic of Botswana  
In the matter between:

..... Plaintiff  
and

.....Defendant

TAKE NOTICE that the plaintiff/defendant in this cause requires the defendant/plaintiff to admit, for the purposes of this cause only, the several facts respectively hereunder specified; and the defendant/plaintiff is hereby required, within six days from the service of this notice, to admit the said several facts, saving all just exceptions to the admissibility of such facts as evidence in this cause.

DATED at ..... this ..... day of ....., 20 .....

.....  
Attorney for the plaintiff/defendant

To:

The facts, the admission of which is required, are:

1. ....
2. ....
3. ....
4. ....

**Form 17**  
**ADMISSION OF FACTS, PURSUANT TO NOTICE**  
(Order 40 rule 8)

In the High Court of the Republic of Botswana  
In the matter between:

..... Plaintiff

and

.....Defendant

TAKE NOTICE that the defendant/plaintiff in this cause for the purpose of this cause only, hereby admits the several facts respectively hereunder specified, subject to the qualifications or limitations, if any, hereunder specified, saving all just exceptions to the admissibility of any such facts, or any of them, as evidence in this cause:

Provided that this admission is made for the purpose of this action only, and is not an admission to be used against the defendant/plaintiff on any other occasion, or by anyone other than the plaintiff/defendant or party requiring the admission.

DATED at ..... this ..... day of ....., 20 .....

.....  
Attorney for the defendant/plaintiff

To:

Facts Admitted

Qualifications or limitations, if any, subject to which they are admitted

- 1.....
- 2.....
- 3.....
- 4.....

- 1.....
- 2.....
- 3.....
- 4.....

**Form 18  
SUBPOENA**

*(Order 44 rule 1 (1))*

In the High Court of the Republic of Botswana

Civil Case No.....

In the matter between:

..... Plaintiff

and

.....Defendant

To the Sheriff or his Deputy:

INFORM:

(1) (State names, sex, occupation and place of business or residence of each witness)

(2)

(3)

(4)

that each of them is hereby required to appear in person before this court at ..... on the ..... day of ....., 20 .., at ..... o'clock in the forenoon and thereafter to remain in attendance until excused by the said court, in order to testify on behalf of the above-named plaintiff/defendant in regard to all matters within his knowledge relating to an action now pending in the said court and wherein the plaintiff claims:

- (1) .....
- (2) .....
- (3) .....

from the defendant.

AND INFORM him that he is further required to bring with him and to produce to the said court (here describe accurately each document, book or other thing to be produced)

AND IN FORM each of the said persons further that he should on no account neglect to comply with the subpoena as he may thereby render himself liable to a fine or to imprisonment.

DATED at ..... this ..... day of ....., 20 ...

Registrar of the High Court

.....  
Plaintiff's/Defendant's attorney

**Form 19**  
**WRIT OF EXECUTION**

*(Order 52 rule 1)*

In the High Court of the Republic of Botswana

Civil Case No.....

In the matter between:

..... Plaintiff  
and  
..... Defendant

To the Deputy-Sheriff for the district of .....

You are hereby directed to attach and take into execution the movable goods of ..... for above-mentioned defendant of ..... (address), and of the same to cause to be realised by public auction the sum of ..... together with interest thereon at the rate of ..... per cent per annum ..... from the ..... day of ..... of the said ....., which he recovered by judgment of this court dated the ..... day of ..... 20 ....., in the above-mentioned case, and also all other costs and charges of the plaintiff in the said case to be hereafter duly taxed according to law, besides all your costs thereby incurred.

Further pay to the said ..... or his attorney the sum or sums due to him with costs as above-mentioned, and for your so doing this shall be your warrant.

And return you this writ with what you have done thereupon.

DATED at ..... this ..... day of ....., 20 .....

.....  
Registrar of the High Court

.....  
Plaintiff's attorney  
(Address)  
.....  
.....

**Form 20**  
**FORM OF SECURITY UNDER ORDER 52**

*(Order 52 rule 5)*

In the High Court of the Republic of Botswana

In the matter between:

..... Plaintiff  
and  
..... Defendant

WHEREAS by virtue of certain writ of the High Court of Botswana dated the ..... day of ....., 20....., issued at the instance of ..... against..... of....., the Deputy-Sheriff seized and laid under attachment the under-mentioned articles, namely:

.....  
Now, therefore, we, the said ..... and ..... of ..... at..... (occupation) as surety for him, bind ourselves severally in solidum, hereby undertaking to said Deputy-Sheriff or his cessionaries, assignors successors in office, that the said goods shall be not be made away with or disposed of, but shall remain in possession of the said ..... under the said attachment, and be produced to the said Deputy-Sheriff (or other person authorised by him to receive the same) on the..... day of....., 20..... (the day appointed for the sale), or on any other day when the same maybe required in order to be sold, unless the said attachment shall legally be removed, failing which I, the said.....

hereby bind myself, my person, goods and effects, to pay and satisfy the sum of.....  
(estimated value of the effects seized) to the said Deputy-Sheriff, his cessionaries, assigns or  
successors in office, for and on account of the said.....

IN WITNESS whereof, we, the said .....and ..... have hereunto set  
our hands on this .....day of ....., 20.....

.....  
Judgment Debtor Surety  
.....  
Deputy-Sheriff

**Form 21**  
**WRIT OF ATTACHMENT-IMMOVABLE PROPERTY**  
(Order 52 rule 12 (2))

In the High Court of the Republic of Botswana

Civil Case No.....

In the matter between:

..... Plaintiff  
and  
.....Defendant

To the Deputy-Sheriff for the district of .....

WHEREAS you were directed to cause to be realised the sum of ..... in  
satisfaction of a judgment debt and costs obtained by ..... against the said  
..... in this court on the ..... day of ....., 20 .....

AND WHEREAS your return stated ..... (here quote the Deputy-Sheriff's  
return on the writ against movables).

NOW, therefore, you are directed to attach and take into execution the immovable  
property of the said ..... being ..... (here again the  
description of the property) to cause to be realised therefrom the sum of .....  
together with the costs hereof and of the prior writ amounting to ..... and  
your charges in and about the same, and thereafter to dispose of the proceeds thereof in

accordance with Order 52, rule 12.  
For which this shall be your warrant.

DATED at..... this ..... day of ....., 20 .....

.....  
Registrar of the High Court  
.....  
Plaintiff's attorney  
(Address)

**Form 22**  
**CONDITIONS OF SALE IN EXECUTION OF IMMOVABLE PROPERTY**  
(Order 52 rule 12 (12))

In the High Court of the Republic of Botswana

In re:

..... Plaintiff  
and

.....Defendant

The property which will be put up to auction on the ..... day of ....., 20 .....,  
consists of .....

The sale shall be subject to the following conditions:

1. The property shall be sold by the Deputy-Sheriff of .....at ..... to the  
highest bidder without reserve/with a reserve price of .....
2. The sale shall be for Pula, and no bid for less than one Pula shall be accepted.
3. If any dispute arises about any bid the property may be again put up to auction.
4. If the auctioneer makes any mistake in selling, such mistake shall not be binding on any

of the parties, but may be rectified. If the auctioneer suspects that a bidder is unable to pay either the deposit referred to in condition 6 or the balance of the purchase price he may refuse to accept the bid of such bidder, or accept it provisionally until the bidder has satisfied him that he is in a position to pay both such amounts. On the refusal of a bid under such circumstances, the property may immediately be again put up to auction.

5. The purchaser shall, as soon as possible after the sale, and immediately on being requested by the ....., sign these conditions and if he has bought *qua qualitate*, state the name of his principal.

6. (1) The purchaser shall pay a deposit of 10 per cent of the purchase price in cash on the day of sale, the balance against transfer to be secured by a bank or building society guarantee, to be approved by the plaintiff's attorney, to be furnished to the Deputy-Sheriff within ..... days after the date of sale.

(2) If transfer of the property is not registered within one month after the sale, the purchaser shall be liable for payment of interest to the plaintiff at the rate of six per cent per annum and to the ..... bondholder at the rate of ..... per cent per annum on the respective amounts of the award to the plaintiff and the bondholder in the plan of distribution as from the expiration of one month after the sale to the date of transfer.

7. If the purchaser fails to carry out any of his obligations under the conditions of sale, the sale may be cancelled by a judge summarily on the report of the Deputy-Sheriff after due notice to the purchaser, and the property may again be put up for sale; and the purchaser shall be responsible for any loss sustained by reason of his default, which loss may, on the application of any aggrieved creditor whose name appears on the Deputy-Sheriff's distribution account, be recovered from him under judgment of the judge pronounced summarily on a written report by the Deputy-Sheriff, after such purchaser has received notice in writing that such report will be laid before the judge for such purpose; and if he is already in possession of the property the Deputy-Sheriff may, on seven days' notice, apply to a judge for an order ejecting him or any person claiming to hold under him therefrom.

8. The purchaser shall pay auctioneer's charges on the day of sale and, in addition, transfer dues, costs of transfer, and arrear of rates, taxes and other charges necessary to effect transfer, upon request by the attorney for the execution creditor.

9. The property may be taken possession of immediately after payment of the initial deposit, and shall after such deposit be at the risk and profit of the purchaser.

10. The purchaser may obtain transfer forthwith if he pays the whole price and complies with condition 8, in which case any claim for interest shall lapse, otherwise transfer shall be passed only after the purchaser has complied with the provisions of conditions 6 and 8 hereof.

11. The Deputy-Sheriff may demand that any buildings standing on the property sold shall be immediately insured by the purchaser for the full value of the same, and the insurance policy handed to him and kept in force as long as the whole price has not been paid: and if he does not do so, the Deputy-Sheriff may effect the insurance at the purchaser's expense.

12. The property is sold as represented by the title deeds and diagram, the Deputy-Sheriff not holding himself liable for any deficiency that may be found to exist and renouncing all excess. The property is also sold subject to all servitudes and conditions specified in the deed of transfer.

13. The execution creditor shall be entitled to appoint an attorney to attend to transfer.

DATED at ..... this ..... day of ....., 20 .....

.....  
Deputy-Sheriff.

I hereby certify that today the ..... in my presence the herein before mentioned property was sold for ..... to .....

I, the undersigned ....., residing at ..... do hereby bind myself as the purchaser of the herein before mentioned property to pay the purchase price and to perform all and singular the conditions mentioned above.

**SUMMONS FOR IMPRISONMENT FOR DEBT**

*(Order 53 rule 1 (2))*

In the High Court of the Republic of Botswana

To: The Sheriff or his Deputy,

Command ..... of .....(hereinafter called "the defendant") that justly and without delay he render and pay to ..... (hereinafter called "the plaintiff") the sum of P ..... of lawful money, with interest thereon at the rate of ..... per cent per annum from the ..... day of ..... , 20 ....., to the day of payment which he owes to the said plaintiff upon and by virtue of a certain sentence of the High Court of Botswana at ..... bearing date the ..... day of ..... , 20 ....., together with the sum of P..... and P..... being the taxed costs incurred by the said plaintiff in obtaining the said sentence and execution thereof, which said sentence has been carried into execution and a return since made thereon that no goods or chattels of the said defendant could be found whereof the exigency of the said writ or any part thereof could be made; as it is said.

And unless he shall do so, then summon the said defendant that he appear before the High Court of Botswana at ..... in the forenoon, or so soon thereafter as counsel can be heard, to show cause why he has not done it; and also to show cause, if any, why a writ of personal attachment shall not forthwith be decreed to issue against the person of the said defendant, to have effect and hold good until he has paid the said plaintiff the sum of P.....

And also summon the said defendant then and there to plead to the claim of the said plaintiff for payment thereof, under security, with costs, and to join issue thereon; and serve on the said defendant a copy of this summons, of the said sentence, writ of execution and return thereon, whereon the said claim is founded; and return you then and there this summons with whatsoever you have done thereupon.

DATED at ..... this ..... day of ....., 20 .....

.....  
Registrar of the High Court  
Plaintiff's attorney

**Form 24**

**WRIT OF EXECUTION-IMPRISONMENT FOR DEBT**

*(Order 53 rule 7)*

In the High Court of the Republic of Botswana

To: The Sheriff or his Deputy,

You are hereby commanded, in pursuance of an order of the High Court of Botswana, bearing date the ..... day of ..... 20 ....., to take ..... of ..... and deliver him to the Officer-in-Charge of the prison at ..... together with a certified copy of this writ, there to be safely kept for a period of or until he has paid to ..... of ..... the sum of P ..... of lawful money, with interest thereon at the rate of ..... per cent per annum from the ..... day of ..... 20 ....., to the day of payment which the said ..... by sentence of the said court bearing date the ..... day of..... 20 ....., recovered against the said ..... together with the sum of P ..... for the taxed costs and charges of the said ..... together with the further sum of P ..... for this writ, by him about this suit in that behalf expended, whereof the said ..... is convicted, as appears of record, or until the said ..... shall be in terms of the said writ or otherwise legally discharged, and for so doing this shall be your warrant.

And return you this writ with what you have done thereon.

DATED at ..... this ..... day of ....., 20 .....

.....  
Registrar of the High Court  
Plaintiff's attorney

**Form 25**  
**WRIT OF EXECUTION FOR CONTEMPT OF COURT BY DEFAULTING WITNESS**  
*(Order 56 rule 4 (1))*

In the High Court of the Republic of Botswana

To: The Sheriff or his Deputy,

WHEREAS at a court holden at ..... on the ..... day of ....., 20 ....., before the Honourable Mr Justice ..... of ..... one of the witnesses summoned to attend before the said court for the purpose of giving evidence at the trial of ..... or in the action between ..... and ..... did not accordingly attend at the said court in obedience to the said summons, but made default therein.

It was therefore ordered and adjudged by the Honourable Mr Justice ..... that the said ..... be fined, and he was fined accordingly the sum of P ..... to be by him forfeited and paid to the use of the State for his default aforesaid.

You are therefore commanded that you cause the said fine to be levied out of the goods or chattels of the said ..... and that you do forthwith pay over the amount so levied to the State, for which this shall be your warrant.

DATED at ..... this ..... day of ....., 20 .....

.....  
Registrar of the High Court

**Form 26**  
**WRIT OF PERSONAL ATTACHMENT AND COMMITTAL TO PRISON**  
*(Order 56 rule 5 (1))*

In the High Court of the Republic of Botswana

To the Sheriff or his Deputy, and to all police officers and other peace officers whom it may concern:

WHEREAS an order was made by the Honourable Mr Justice ..... committing ..... of ..... to prison until he has complied with an order of the High Court of Botswana at ..... dated the ..... day of ....., 20 ....., and that the said ..... is still in contempt in failing to comply therewith, or sentencing ..... of ..... to ..... days' imprisonment for contempt of court.

Now therefore you are commanded to take ..... of ..... if he is found in Botswana and deliver him to the Officer-In-Charge of the prison at ....., together with a copy of this writ, there to be safely kept until the further order of the High Court or for the period of ..... days from the date of his delivery to the Officer-In-Charge of the said prison.

And return you this writ to the High Court at Francistown/Lobatse with whatsoever you have done thereupon.

.....  
Registrar of the High Court

**Form 27**  
**NOTICE OF MOTION**  
*(Order 78, rule 3)*

In the High Court of the Republic of Botswana

In the matter of:

..... Appellant  
and

..... Respondent

TAKE notice that the High Court at Francistown/Lobatse will be moved on the ..... day of ....., 20 ....., at 10 a.m. or as soon thereafter as counsel can be heard, for an order that .....

And that the costs of and incidental to this appeal may be paid by .....

And take notice further that the grounds of this appeal are .....

DATED at ..... this ..... day of ....., 20 .....

.....  
 Agent for the appellant  
 Address for service  
 To: (1) .....  
 of .....  
 (2) Registrar of the High Court,  
 Francistown/Lobatse.

**Form 28**  
**PRAECIPE OF RENEWED ORIGINATING PROCESS**  
*(Order 11 rule 1 (3))*

In the High Court of the Republic of Botswana  
 SEAL in pursuance of order dated the ..... day of ....., 20 .....,  
 a renewed originating process in this action endorsed as follows: <sup>1</sup>  
 Dated the ..... day of ....., 20 .....

(Signed) .....  
 (Address) .....

(Attorney for the plaintiff)

**Form 29**  
**FORM OF NOTICE OF HEARING**  
*(Order 12 rule 5 (8))*

In the High Court of the Republic of Botswana

No .....

In the matter between:  
 ..... Plaintiff  
 and  
 .....Defendant

**NOTICE OF HEARING**

TAKE NOTICE that the above cause will be heard and determined by the High Court at  
 ..... on ..... the .... day of ....., 20 .....  
 at ..... o'clock in the forenoon.

DATED the ..... day of ....., 20 .....

.....  
 Registrar of the High Court

To: ..... Plaintiff's attorney  
 ..... Defendant's attorney

**Form 30**  
**FORMS OF JUDGMENT:**  
**JUDGMENT IN DEFAULT OF APPEARANCE IN CASES OF LIQUIDATED DEMAND**  
*(Order 30 rule 1)*

In the High Court of the Republic of Botswana  
 DATED at ..... the ..... day of ....., 20 .....

The defendant not having appeared to the writ of summons herein, it is this day adjudged  
 that the plaintiff recover against the said defendant P..... and together with interest at .....  
 per cent per annum to the date of payment and P..... cost (or costs to be taxed).

.....  
 Registrar of the High Court

**Form 31**  
**FORMS OF JUDGMENT:**

**JUDGMENT IN DEFAULT OF APPEARANCE WHERE DEMAND UNLIQUIDATED**

*(Order 30 rule 2)*

In the High Court of the Republic of Botswana

DATED at ..... the ..... day of ....., 20.....

No appearance having been entered to the writ of summons herein, it is this day adjudged that the plaintiff recover against the defendant the value of the goods (or damages, or both, as the case may be) and that the amount found due to the plaintiff under this judgment having been assessed by the Registrar it is adjudged that the plaintiff recover against the defendant P..... together with interest at..... per cent per annum to the date of payment and P..... costs (or costs to be taxed).

.....  
Registrar of the High Court

**Form 32**

**FORMS OF JUDGMENT:**

**DEFAULT JUDGMENT IN DETENTION OF GOODS**

*(Order 30 rule 3)*

In the High Court of the Republic of Botswana

DATED at ..... the ..... day of ....., 20 .....

The defendant not having appeared to the writ of summons herein (or not having delivered any defence).

It is this day adjudged that the plaintiff do have a return of the goods in the writ of summons (or declaration) mentioned and described as (description of chattels) or recover against the defendant their value to be assessed, and damages for their detention to be also assessed.

The value of the ..... having been assessed by Registrar at the sum of P..... and the damages at the sum of P.....

It is adjudged that the plaintiff recover from the defendant the sum of P..... together with interest at ..... per cent per annum to the date of payment and costs to be taxed.

.....  
Registrar of the High Court

**Form 33**

**FORMS OF JUDGMENT:**

**INTERLOCUTORY JUDGMENT IN DEFAULT OF APPEARANCE IN ACTION FOR RECOVERY OF LAND, DAMAGES AND COSTS**

*(Order 30 rule 4)*

In the High Court of the Republic of Botswana

DATED at ..... the ..... day of ....., 20 .....

No appearance having been entered to the writ of summons herein, it is this day adjudged that the plaintiff recover possession of the land in the endorsement on the writ described as .....

And it is further adjudged that the plaintiff recover against the defendant damages to be assessed.

.....  
Registrar of the High Court

**Form 34**

**FORMS OF JUDGMENT:**

**FOR RECOVERY OF LAND ONLY**

*(Order 30 rule 4 (1))*

In the High Court of the Republic of Botswana

DATED at ..... the ..... day of ....., 20 .....

No appearance having been entered (or, no defence having been delivered) herein it is

this day adjudged that the plaintiff recover possession of the land in the writ of summons (or, declaration) mentioned and described as ..... (describe the property), and costs to be taxed.

.....  
Registrar of the High Court

**Form 35**  
**APPLICATION FOR EXAMINATION OF JUDGMENT DEBTOR**

*(Order 54 rule 1)*

In the High Court of the Republic of Botswana  
In the matter between:

..... Judgment creditor  
and

..... Judgment debtor

TAKE NOTICE that application will be made on ..... the ..... day of ..... 20 ..... at ..... o'clock in the ..... noon or so soon thereafter as counsel may be heard on the hearing of an application of the above named judgment creditor that the above-named judgment debtor attend and be orally examined as to whether any and what debts are owing to him, and whether the debtor has any other property or means of satisfying the judgment signed herein on the ..... day of ..... 20 ..... and that the said judgment debtor produce any books or documents in his possession or power relating to the same before the court on the date and time fixed for the examination and that the costs of this application and of the examination thereunder await the result of the examination.

DATED the ..... day of ..... 20 .....

.....  
Applicant's attorney  
TO: The Registrar of the High Court,  
Lobatse/Francistown.

**Form 36**  
**ORDER FOR EXAMINATION OF JUDGMENT DEBTOR**

*(Order 54 rule 1)*

In the High Court of the Republic of Botswana  
In the matter between:

..... Judgment creditor  
and

..... Judgment debtor

UPON HEARING ..... and upon reading the affidavit of ..... filed herein,

IT IS ORDERED THAT the above—  
named judgment debtor..... (name) attend and be orally examined as to whether the said judgment debtor has any and what debts are owing to him, and whether the debtor has any other property or means of satisfying the judgment signed herein on the ..... day of ..... 20 ..... before a judge at such time and place as the court or judge may appoint and that the said judgment debtor produce any books or documents in his possession or power relating to the same before the court at the time of the examination and that the costs of this application and of the examination thereunder await the result of the examination.

DATED the ..... day of ..... 20 .....

.....  
Registrar of the High Court

**Form 37**

**APPLICATION FOR GARNISHEE ORDER NISI**

*(Order 55 rule 1(1))*

In the High Court of the Republic of Botswana  
In the matter between:

.....Judgment creditor  
and

.....Judgment debtor  
..... Garnishee

TAKE NOTICE that application will be made on ..... the ..... day of ....., 20 ..... at ..... o'clock in the ..... noon or so soon thereafter as counsel may be heard on the hearing of an application of the above-named judgment creditor for an order that all debts owing or accruing due from the above-named garnishee to the above-named judgment debtor (in the sum of P.....) be attached to answer a judgment recovered against the said judgment debtor by the above-named judgment creditor in the High Court on the ..... day of ....., 20 .... for the sum of P..... debt and interest at the rate of ..... per cent per annum to date of payment and P..... costs on which judgment the said sum of P..... remains due and unpaid.

AND for a further order that the said garnishee attend the court before a judge on a date and time to be appointed to show cause why he should not pay to the above-named judgment creditor the debt due from him and/or future debts becoming due from him to the above-named judgment debtor, so much thereof as may be sufficient to satisfy the judgment or order together with the costs of the garnishee proceedings.

AND that the judgment debtor pay the costs of this application. On the hearing of this application, the applicant intends to use the affidavit of ..... sworn on the ..... day of ....., 20 ..... and filed herein.

.....  
Applicant's attorney  
To: The Registrar of the High Court,  
Francistown/Lobatse.

**Form 38  
GARNISHEE ORDER NISI (ATTACHING DEBT)**

*(Order 55 rule 3)*

In the High Court of the Republic of Botswana  
In the matter between:

.....Judgment creditor  
and

.....Judgment debtor  
..... Garnishee

UPON READING the affidavit of ..... filed on .....day the ..... day of ....., 20 .....

It is ordered by the Hon..... that all debts owing or accruing due and all future debts accruing from the above-named garnishee to the above-named judgment debtor (in the sum of P.....) be attached to answer a judgment recovered against the said judgment debtor by the above-named judgment creditor in the High Court on the ..... day of ....., 20 ....., for the sum of P..... debt, together with interest at the rate of ..... per cent per annum to date of payment and P..... cost (together with the costs of the garnishee proceedings), on which judgment the said sum of P..... remains due and unpaid.

And it is further ordered that the said garnishee attend at the High Court at Lobatse/Francistown, on ..... the ..... day of ....., 20 ...., at ..... o'clock in the ..... noon, on an application by the said judgment creditor, that the said garnishee pay the debt due from him to the said judgment debtor, or so much thereof as may be sufficient to satisfy the judgment together with the costs of the garnishee proceedings.

DATED at ..... on the ..... day of ....., 20 ....

.....  
Registrar of the High Court

**Form 39**  
**GARNISHEE ORDER (ABSOLUTE) WHERE GARNISHEE OWES MORE THAN JUDGMENT DEBT**

*(Order 55)*

(Title as in application)

UPON hearing counsel for the judgment creditor and the garnishee, and upon reading the affidavit of ....., filed herein and the order *nisi* made herein, dated the.... day of ....., 20.....whereby it was ordered that that all debts owing or accruing due and all future debts accruing from the above-named garnishee to the above-named judgment debtor should be attached to answer a judgment recovered against the said judgment debtor by the above-named judgment creditor in the High Court at Lobatse/Francistown on the ..... day of ....., 20....., for the sum of P..... together with interest at the rate of ..... per cent per annum to day of payment and P..... costs (together with the costs of the garnishee proceedings), on which judgment the sum of P..... remained due and unpaid.

It is ordered that the said garnisheed of orth with pay the said judgment creditor the sum of P .....being so much of the debt from the said garnishee to the said judgment debtor as is sufficient to satisfy the said judgment debt, interest and costs, together with P....., the costs of the garnishee proceedings, and that in default thereof execution may issue for the same.

And that the said garnishee be at liberty to retain for his costs of this application out of the balance of the debt due from him to the judgment debtor.

DATED at ..... on the ..... day of ....., 20 ...

.....  
Registrar of the High Court

**SECOND SCHEDULE**

*(Order 2)*

*First Column*

1. On filing a writ of summons, originating motion, petition or provisional sentence
2. On filing a renewed writ of summons
3. On filing an amended writ of summons or amended originating motion or other originating process
4. On filing a power of attorney to sue or defend
5. On filing resolution in support of power of attorney
6. On filing notice of change of attorney
7. On filing notice of renunciation of agency
8. On filing any pleading
9. On filing any amended pleading
10. On filing a notice of motion or other application in a pending matter
11. On filing founding affidavit in support of an originating motion or other originating application
12. On filing any other affidavit
13. On entering appearance
14. On filing a third party notice
15. On filing notice of intention to bar
16. On filing request for particulars
17. On filing answer to request for particulars
18. On filing notice of withdrawal
19. On filing consent to judgment
20. On filing an entry for trial
21. On filing a notice of set down

*Second Column*

P120  
P60  
P30  
P30  
P20  
P20  
P20  
P30  
P15  
P30  
P30  
P10  
P10  
P30  
P30  
P20  
P20  
P20  
P60  
P20

22. On filing notice to produce	P20
23. On filing the minutes of pre-trial conference	P30
24. On filing a notice for inspection, examinations and expert testimony	P30
25. On filing notice of objection to such notice	P20
26. On filing a notice to admit facts or documents	P30
27. On filing notice of payment into court	P10
28. On filing a special case	P30
29. On filing a subpoena (for each witness)	P30
30. On filing a final judgment	P60
31. On filing an interlocutory judgment	P30
32. On filing a final order	P60
33. On filing an order <i>nisi</i> or interlocutory order	P30
34. On filing any other order	P30
35. On filing any other notice	P20
36. On filing registrar's certificate of assessment	P30
37. On filing referee's certificate	P30
38. On filing any other certificate	P20
39. On filing any writ of execution	P60
40. Filing summons for imprisonment for debt	P60
41. For copying any document including a document lodged in the Master's office (per folio of 100 words)	P3
42. For certifying copy of document (per folio of 100 words)	P20
43. For inspecting records (per record per occasion)	P20
44. For a typewritten or photocopy of any document (per page)	P5
45. For a photocopy (per page)	P5
46. For drawing up any order or judgment for an unrepresented party	P30
47. On filing a security bond	P50
48. On filing a bill of costs	P60
49. On filing any other document not specifically provided for	P20

**THIRD SCHEDULE**

**Criminal Form H1**

**NOTICE OF APPEAL FROM DECISIONS OF SUBORDINATE COURTS TO THE HIGH COURT**

*(Order 60 rule 1(1))*

IN THE HIGH COURT OF THE REPUBLIC OF BOTSWANA

To: The Registrar of the High Court

I, ..... having been convicted of the offence of ..... and being now a prisoner in prison at ..... or whose address for service is ..... do hereby give notice of appeal against my conviction/sentence/the order (particulars of which hereinafter appear) to the court on the following grounds—

.....  
.....  
.....

.....  
Signature or mark of appellant  
Witness to mark:

Name .....  
Signature .....  
Address .....  
DATED this ..... day of ..... , 20 .....  
Particulars of trial and conviction  
1. Date of trial .....

- 2. In what court tried .....
- 3. Sentence .....
- 4. Order .....

.....  
Signature or mark of appellant

**FOURTH SCHEDULE**  
**Form 1**  
**INITIAL CASE MANAGEMENT ORDER**

Agenda/Minute  
(Order 42 rule 4)

<sup>ii</sup>1 Having considered the agreed case management report dated the ..... <sup>iii</sup>2 submitted by the parties under Order 42 rule 2 (2);

<sup>iv</sup>3 Having considered the separate case management proposals of the plaintiff, dated the ..... <sup>v</sup>4, and the defendant dated the ..... <sup>vi</sup>5, respectively submitted under Order 42 rule 2 (2)

<sup>vii</sup>6 and

Following the initial case management conference:

held on the ..... <sup>viii</sup>7; and

attended by ..... <sup>ix</sup>8

under the provisions of Order 42 rule 8, I now order that:

**1. Joinder (Order 42 rule 2 (4) (a))**

1.1 <sup>x9</sup> There is no need for joining any other party in the cause;

1.2 <sup>xi</sup>10 The following party/ies must be joined in the cause:

1.2.1 ..... <sup>xii</sup>11

1.3 <sup>xiii</sup>12..... <sup>xiv</sup>13

**2. Pleadings (Order 42 rule 2 (4) (b) and rule 2 (4) (d))**

2.1 <sup>xv</sup>14 The pleadings are closed.

2.2 <sup>xvi</sup>15 The following further pleadings/amendments to pleadings or filing of better statements or further particulars must be filed on or before the following dates:

2.2.1 ..... <sup>xvii</sup>16

2.3 <sup>xviii</sup>17 The pleadings must be closed by ..... <sup>xix</sup>18

**3. Interlocutory motions (Order 42 rule 2 (4) (c)); objections on points of law (Order 42 rule 2 (4) (h)) and applications for directions under Order 28 (Order 42 rule 2 (4) (i))**

3.1 <sup>xx</sup>19 No interlocutory motions are required.

3.2 <sup>xxi</sup>20 The following interlocutory motions are required and must be prosecuted in the following manner:

3.2.1 ..... <sup>xxii</sup>21

**4. <sup>xxiii</sup>22 Special case of law or facts (Order 42 rule 2 (4) (i))**

4.1 ..... <sup>xxiv</sup>23

**5. Admissions of facts and other evidence (Order 42 rule 2 (4) (e))**

5.1 By consent of the parties, the following facts and other evidence are admitted:

5.1.1 ..... <sup>xxv</sup>24

**6. Discovery, inspection, production of documents (Order 42 rule 2 (4) (f))**

6.1 <sup>xxvi</sup>25 Discovery, inspection and production of documents shall be conducted under the provisions of Order 39.

6.2 <sup>xxvii</sup>26 Notwithstanding the provisions of Order 39:

6.2.1 ..... <sup>xxviii</sup>27

**7. Admissions under Order 40 (Order 42 rule 2 (4) (f))**

7.1 In addition to the admissions by consent recorded in paragraph 4, the following facts are admitted by virtue of Order 40 rule 1 <sup>xxix</sup>28;

7.2	xxx29.....	xxxi30
<b>8.</b>	<b>Inspection, examinations and expert testimony under Order 41 (Order 42 rule 2 (4) (f))</b>	
8.1	xxxii31	Inspection, examinations and expert testimony shall be conducted under the provisions of Order 41.
8.2	xxxiii32	Notwithstanding the provisions of Order 41:
8.2.1	.....	xxxiv33
<b>9.</b>	<b>Examination of witnesses under Order 44 (Order 42 rule 2 (4) (f))</b>	
9.1	xxxv34	Witnesses shall be examined as provided in Order 44.
9.2	xxxvi35	Notwithstanding the provisions of Order 44:
9.2.1	.....	xxxvii36
<b>10.</b>	<b>Expert witnesses (Order 42 rule 2 (4) (g))</b>	
10.1	xxxviii37	There shall be no expert opinion evidence.
10.2	xxxix38	The provisions of Orders 40 and 41 shall be followed in the production of expert opinion evidence.
10.3	xl39	Notwithstanding the provisions of Orders 40 and 41, the following expert witnesses:
10.3.1	.....	xli40
	shall, with a view to narrowing the field of dispute	
10.3.2	.....	xlii41
<b>11.</b>	<b>Hearing (Order 42 rule 2 (4) (j) and rule 2 (4) (o))</b>	
11.1	xliii42	All issues shall be determined in one hearing.
11.2	xliiv43	There shall be separate hearings for the following:
11.2.1	xlv44	.....
11.2.1	.....	xlvii45
11.3	xlviii46	The following hearings shall be held on the following dates:
11.3.1	.....	xlvi47
<b>12.</b>	<b>xliv48 Inquiries and accounts (Order 42 rule 2 (4) (k))</b>	
12.1	.....	49
<b>13.</b>	<b>li50 Settlement talks or possible mediation (Order 42 rule 2 (4) (n))</b>	
13.1	.....	lii51
<b>14.</b>	<b>Additional case management conferences (Order 42 rule 2 (4) (m) and Order 2 (4) (o))</b>	
14.1	liii52	The initial case management conference is deemed to be the final pre-trial conference.
14.2	liiv53	An additional case management conference shall be held:
14.2.1	.....	lv54;
14.2.2	and attended by.....	lvi55;
14.2.3	for the purpose of .....	lvii56
<b>15.</b>	<b>lviii57 Further procedures to facilitate just and speedy disposal (Order 42 Rule 2 (4) (o))</b>	
15.1.1	.....	lix58

**Form 2**  
**FINAL PRE-TRIAL ORDER**  
 Agenda/Minute  
 (Order 42 rule 8)

Having considered the agreed proposed final pre-trial order dated the ..... lx1  
 submitted by the parties under Order 42 rule 7;  
 and

Following the final pre-trial conference:  
 held on the ..... lxi2; and

attended by .....<sup>lxii</sup>3  
under the provisions of Order 42 Rule 8, I now order that:

**1. Issues to be resolved during the trial (Order 43 rule 2 read with Order 42 rule 9)**

- 1.1. <sup>lxiii</sup>4 The proposed pretrial order is made final.  
1.2. <sup>lxiv</sup>5 The proposed pretrial order is made final, subject to the following amendments and variations:  
1.2.1 .....<sup>lxv</sup>6

---

<sup>i</sup> Copy original writ and the endorsements

<sup>ii</sup> Delete if inapplicable.

<sup>iii</sup> Insert date.

<sup>iv</sup> Delete if inapplicable.

<sup>v</sup> Insert date of plaintiff 's proposals.

<sup>vi</sup> Insert date of defendant's proposals.

<sup>vii</sup> Insert reference to any further parties and the dates of their separate proposals under Order 42 rule 6 (1).

<sup>viii</sup> Insert date.

<sup>ix</sup> Insert names and capacities of all persons present at initial case management conference.

<sup>x</sup> Delete if inapplicable.

<sup>xi</sup> Delete if inapplicable

<sup>xii</sup> Insert full particulars of party/ies to be joined and capacity in which he/they is/are to be joined.

<sup>xiii</sup> Delete if inapplicable.

<sup>xiv</sup> Insert directions as to which party is to join the party/parties to be joined, the manner in which and the date by which joinder is to be made.

<sup>xv</sup> Delete if inapplicable.

<sup>xvi</sup> Delete if inapplicable.

<sup>xvii</sup> Insert details of the party to file, the pleading/amendment/statement/particulars to be filed and the date by which filing is to take place.

<sup>xviii</sup> Delete if inapplicable.

<sup>xix</sup> Insert date.

<sup>xx</sup> Delete if inapplicable.

<sup>xxi</sup> Delete if inapplicable.

<sup>xxii</sup> Insert details of motions, procedures to be followed, parties respective obligations and dates for filing of papers and dates for hearing.

<sup>xxiii</sup> Delete if inapplicable.

<sup>xxiv</sup> Insert procedures to be followed under Order 35.

<sup>xxv</sup> Insert all facts/evidence admitted.

<sup>xxvi</sup> Delete if inapplicable.

<sup>xxvii</sup> Delete if inapplicable.

<sup>xxviii</sup> Insert details of procedure to be followed and dates by which each procedure is to be complete.

<sup>xxix</sup> Insert admissions by reference to the pleading or other writing in which they are made.

<sup>xxx</sup> Delete if inapplicable.

<sup>xxxi</sup> Insert details of procedure to be followed and dates by which each procedure is to be complete under Order 40.

<sup>xxxii</sup> Delete if inapplicable.

<sup>xxxiii</sup> Delete if inapplicable.

<sup>xxxiv</sup> Insert details of procedure to be followed and dates by which each procedure is to be complete.

<sup>xxxv</sup> Delete if inapplicable.

- 
- xxxvi Delete if inapplicable.
- xxxvii Insert details of procedure to be followed and dates by which each procedure is to be complete.
- xxxviii Delete if inapplicable.
- xxxix Delete if inapplicable.
- xl Delete if inapplicable.
- xli Insert names of experts and party by whom each is being called.
- xlii Insert procedures to be followed and dates by which each procedure must be complete.
- xliii Delete if inapplicable.
- xliv Delete if inapplicable.
- xlv Delete if inapplicable.
- xlvi Insert details of separate hearings for e.g. plea in bar, claim, counterclaim, set-off, third party claim; assessment of damages etc.
- xlvii Delete if inapplicable.
- xlviii Insert fixed and credible dates for hearing/hearings that can be established at initial case management meeting.
- xlix Delete if inapplicable.
- l Insert detail of any order or procedure under Order 37.
- li Delete if inapplicable.
- lii Insert procedures to be followed, by whom they are to be followed and time limits for completion of procedures.
- liii Delete if inapplicable.
- liv Delete if inapplicable.
- lv Insert date.
- lvi Insert parties and representatives.
- lvii Insert details.
- lviii Delete if inapplicable.
- lix Insert procedures, issues and means of performance.
- lx Insert date.
- lxi Insert date.
- lxii Insert names and capacities of all persons present at initial case management conference.
- lxiii Delete if inapplicable
- lxiv Delete if inapplicable.
- lxv Insert detailed amendments and variations.