

CHAPTER 04:04
MAGISTRATES' COURTS
ARRANGEMENT OF SECTIONS

SECTION

PART I
Preliminary

1. Short title
2. Interpretation

PART II
Establishment and Nature of Courts

3. Establishment of courts
4. Nature of the courts and force and effect of process
5. Language to be employed in courts
6. Proceedings to be open to the public
7. Public access of records

PART III
Judicial Officers

8. Grades of magistrates and appointments thereto
9. Magisterial districts and regions
10. Assignment of magistrates to courts
11. Protection from actions

PART IV
Officers of the Court

12. Clerk of the court
13. Court bailiffs
14. Service of process by the police
15. Bailiff's return to be evidence
16. Suspension of bailiff for misconduct

PART V
Civil Matters
JURISDICTION

17. Jurisdiction in respect of causes of action
18. Arrest of absconding defendants and interdicts
19. Curator *ad litem*
20. Assessors
21. Transfer from one court to another
22. Rescission and correction of judgments and orders
23. Incidental jurisdiction
24. Abandonment of part of claim
25. Deduction of admitted debt
26. Splitting of claims disallowed
27. Jurisdiction cumulative
28. Set-off and counter-claims
29. Counter-claim exceeding jurisdiction
30. Magistrates not to have jurisdiction in certain matters
31. Judgment
32. Return of civil proceedings

WITNESSES AND EVIDENCE

33. Modes of procuring attendance of witnesses and penalty for non-attendance

EXECUTION

34. Jurisdiction to issue execution
35. Superannuation of judgments and revival thereof, and force of warrants of execution
36. Setting aside of warrant
37. Execution in case of judgment debt ceded
38. Manner of execution
39. Property exempt from execution
40. Property executable
41. Interpleader claims
42. Sale in execution gives good title
43. Surplus after execution
44. Debt, salary or wages may be attached
45. Future and accruing earnings, when attachable
46. Jurisdiction to decide disputes arising out of garnishee orders
47. Execution of payment is discharge *pro tanto*
48. Saving of existing law prohibiting attachment of certain property
49. Order for payments by instalments
50. Execution or suspension in case of appeal
51. Summons for civil imprisonment
52. Decree of civil imprisonment
53. Debtor may show that he has executable property
54. Period of imprisonment
55. Costs of civil imprisonment
56. Custody of gaoler
57. Discharge from imprisonment
58. Effect of discharge from imprisonment
59. Warrant of civil imprisonment may be suspended by court of area wherein it is executed

PART VI

Criminal Matters

JURISDICTION

60. Jurisdiction in respect of classes of offences
61. Jurisdiction in the matter of punishment
62. Return of criminal proceedings
63. Execution of sentence not to be suspended

PART VII

Offences

64. Offences relating to execution

PART VIII

General and Supplementary

65. Jurisdiction as to plea of *ultra vires*
66. Amendment of proceedings
67. Rules of court

Act 20, 1974,
Act 12, 1975,
Act 12, 1976,
S.I. 121, 1983,
Act 6, 1992,

Act 6, 1995,
Act 12, 1999,
S.I. 67, 2003,
Act 30, 2004,
S.I. 95, 2004,
S.I. 67, 2008.

An Act to make provision for magistrates' courts and for the jurisdiction of persons presiding over such courts and matters incidental thereto or connected therewith.

PART I

Preliminary (ss 1-2)

1. Short title

This Act may be cited as the Magistrates' Courts Act.

2. Interpretation

In this Act, unless the context otherwise requires-

"**bailiff**" means a court bailiff so appointed in accordance with section 13 or any person lawfully performing the functions of a bailiff in accordance with this Act;

"**clerk of the court**" means any person so appointed in accordance with section 12;

"**court**" means the court of a magistrate, of whatever grade, appointed under this Act;

"**High Court**" includes a judge of that Court;

"**magistrate**" includes a Regional Magistrate, a Chief Magistrate, a Principal Magistrate, a Senior Magistrate, a Magistrate Grade I, a Magistrate Grade II and a Magistrate Grade III, appointed in accordance with section 8;

"**Registrar**" means the Registrar of the High Court.

PART II

Establishment and Nature of Courts (ss 3-7)

3. Establishment of courts

There shall be courts subordinate to the High Court to be known as magistrates' courts presided over by magistrates appointed for the purposes of this Act.

4. Nature of the courts and force and effect of process

(1) Every court shall be a court of record.

(2) Every summons, subpoena, writ, warrant or other process issued out of any court shall be of force throughout Botswana.

(3) Any summons, subpoena, writ, warrant or other process issued out of any court may be served or executed through a bailiff:

Provided that no costs shall be payable in excess of the costs of personal service in the cheapest and most effective manner suited to the circumstances.

5. Language to be employed in courts

(1) The language to be employed in a court shall be English and the evidence and all records of proceedings in the court shall be in that language.

(2) If any of the parties or witnesses in a proceeding before a court does not understand the English language, then the proceedings shall be interpreted from English into the language understood by the parties or the witnesses concerned, as the case may be, and *vice versa*:

Provided that in civil proceedings the parties may be called upon by the presiding magistrate to bear part or the whole of the cost of such interpretation where the language understood by the parties or witnesses is not one of the languages commonly spoken within the area of jurisdiction of the court.

6. Proceedings to be open to the public

(1) Except with the agreement of all parties thereto, all proceedings of a court, including the announcement of the decision of the court, shall be held in public.

(2) Nothing in subsection (1) shall prevent the presiding magistrate from excluding from

the proceedings persons other than the parties thereto and their legal representatives, to such extent as the magistrate may consider necessary or expedient-

- (a) in circumstances where publicity would prejudice the interests of justice;
- (b) in interlocutory proceedings; or
- (c) in the interests of defence, public safety, public order, public morality, the welfare of persons under the age of 18, or the protection of the private lives of persons concerned in the proceedings.

(3) If any person in or in the precincts of a court conducts himself in such a manner as is capable of disturbing the peace or order of the court, the presiding magistrate may order that such person be removed or detained in custody until the final rising of the court for the day, or, if in the opinion of the magistrate peace or order cannot otherwise be secured, may order that the public gallery be cleared and the doors thereof closed to the public.

7. Public access of records

The records and proceedings of every court shall in all cases be accessible to the public under the supervision of an officer of the court at convenient times and upon payment of such fees as may be prescribed by rules made under section 67 of this Act:

Provided that after a period of 30 years has expired from the date of judgment in such proceedings, the President may order the removal of such records and proceedings to a central place of custody.

PART III

Judicial Officers (ss 8-11)

8. Grades of magistrates and appointments thereto

(1) There shall be seven grades of magistrates, namely, Regional Magistrate, Chief Magistrate, Principal Magistrate, Senior Magistrate, Magistrate Grade I, Magistrate Grade II and Magistrate Grade III.

(2) The qualifications for appointment in the various grades of magistrate specified in subsection (1) shall be as prescribed from time to time by the President acting in accordance with the advice of the Judicial Service Commission:

Provided that the President may, acting on such advice, and in regard to any particular candidate, waive the qualifications required for appointment to any grade of magistrate to facilitate the localization of the public service.

(3) Notwithstanding the provisions of subsection (2) the President may, acting in accordance with the advice of the Judicial Service Commission, appoint administrative officers of and above the grade of District Officer as Magistrates Grade I or Magistrate Grade II or Magistrate Grade III.

(4) The Registrar and the Deputy Registrar shall have all the powers of a Regional Magistrate, Chief Magistrate, and the Assistant Registrar of the High Court shall have all the powers of a Senior Magistrate, appointed under this Act.

9. Magisterial districts and regions

(1) The Chief Justice may make regulations establishing magisterial districts and magisterial regions.

(2) For the purposes of this section, any area prescribed as an administrative district under the Administrative Districts Act shall be deemed to be a magisterial district established under this section.

10. Assignment of magistrates to courts

(1) The Chief Justice may-

- (a) assign magistrates to courts in any magisterial districts or regions referred to in section 9(1); or
- (b) transfer magistrates between courts in any magisterial district or region or from courts in one magisterial district or region to another magisterial district or region.

(2) The Chief Justice may assign-

- (a) a Regional Magistrate to supervise the administration of justice in any magisterial region; and
- (b) Chief Magistrates, Principal Magistrates and Senior Magistrates to supervise the administration of justice in courts in any magisterial district.

(3) Where a Regional Magistrate is assigned to supervise the administration of justice in accordance with subsection (2)(a), he may, in consultation with the magistrate in charge of the district where the work emanates-

- (a) allocate himself work;
- (b) allocate work between the magistrates in one district to magistrates in another district; or
- (c) take such steps as may be necessary to ensure that the work in the courts of such region is conducted efficiently and expeditiously.

(4) Without prejudice to the provisions of subsection (3) a Chief Magistrate, Principal Magistrate or Senior Magistrate who is assigned, in terms of subsection (2)(b), to supervise the administration of justice in courts in any magisterial district may allocate work between the magistrates of the district, or transfer work from one of such magistrates to another, and may take such steps as may be necessary to ensure that the work in the courts of such magistrates is conducted efficiently and expeditiously.

11. Protection from actions

A magistrate shall not be liable to be sued in any civil court or prosecuted for an offence in respect of any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, if he at the time in good faith believed himself to have jurisdiction to do or order the act complained of to be done, and an officer of any magistrate's court or other person bound to execute the lawful warrants or orders of any such magistrate shall not be liable to be sued in any civil court or prosecuted for an offence for the execution of any warrant or order which he would be bound to execute if within the jurisdiction of the person issuing the same.

PART IV

Officers of the Court (ss 12-16)

12. Clerk of the court

(1) There shall be appointed a clerk of the court for every court.

(2) The duties of a clerk of the court shall be such as are laid down under this Act or under rules made under this Act.

(3) The refusal by a clerk of the court to do any act which he is empowered by this Act or by rules made thereunder to do, and any order made by any such clerk, shall be subject to review by the magistrate presiding over such court on application of any party aggrieved, either *ex parte* or on notice, as the circumstances may require.

13. Court bailiffs

(1) There shall be appointed such court bailiffs as may be necessary for the business of each court. In addition to such bailiffs as are public officers, the Registrar may appoint other persons to be bailiffs as he considers necessary.

(2) Whenever in any matter objection is made to the service or execution of process by a bailiff by reason of his interest in such matter, or of his relationship to a party to such matter or for any other good cause, the magistrate presiding over the court in which such matter arose shall inquire into the objection and may, if he thinks fit, appoint some other person to act as bailiff in such matter and shall, as soon as practicable, report the facts to the Registrar.

(3) If at any time a bailiff is unable to carry out his duties the magistrate presiding over the court to which such bailiff has been appointed may appoint a person to act as a bailiff.

14. Service of process by the police

Whenever process of a court in a civil case is to be served and no bailiff has been appointed at the place where the court is held, or whenever process of the court in a criminal

case is to be served, any police officer shall be qualified to serve any such process and any other document in such a case as if he had been duly appointed as a bailiff. The fees payable in respect of or in connection with any such service shall be paid into the public revenue.

15. Bailiff's return to be evidence

The written return of a bailiff or of any person authorized to perform any of the functions of a bailiff in respect of any process of the court shall be *prima facie* evidence of the matters therein stated.

16. Suspension of bailiff for misconduct

A bailiff who is not a public officer and who is alleged to have been negligent or dilatory in the service or execution of process, or to have knowingly or wilfully demanded payment of more than his proper fees or expenses, or to have made a false return, or in any other manner to have misconducted himself in connection with his duties, may, pending investigation, be suspended from office by the magistrate presiding over the court, who may appoint a person to act in his place during the period of suspension. The magistrate shall report forthwith to the Registrar any action he has taken under this section, and the Registrar shall, if the facts warrant it, set aside the order of suspension or may confirm it and may also dismiss from his office the bailiff who has been so suspended.

PART V

**Civil Matters (ss 17-59)
JURISDICTION (ss 17-32)**

17. Jurisdiction in respect of causes of action (1) Subject to section 30, a Regional Magistrate, a Chief Magistrate, a Principal Magistrate and a Senior Magistrate shall have jurisdiction in all civil claims where the total amount claimed either in the way of liquidated or unliquidated damages, or the value of the property claimed, does not exceed-

- (a) P40,000, in the case of a Regional Magistrate and a Chief Magistrate;
- (b) P30,000, in the case of a Principal Magistrate; and
- (c) P20,000 in the case of a Senior Magistrate.

(2) Subject to section 30, a Regional Magistrate, a Chief Magistrate, a Principal Magistrate and a Senior Magistrate shall have jurisdiction in all actions of ejectment against the occupier of any premises or land where the right of occupation of any such premises or land in dispute between the parties does not exceed, in value to the occupier-

- (a) P40,000, in the case of a Regional Magistrate and a Chief Magistrate;
- (b) P30,000 in the case of a Principal Magistrate; and
- (c) P20,000 in the case of a Senior Magistrate.

(3) Subject to section 30, a Magistrate Grade I, a Magistrate Grade II and a Magistrate Grade III shall have jurisdiction in all civil claims where the total amount claimed either in the way of liquidated or unliquidated damages or the value of property claimed does not exceed-

- (a) P15,000, in the case of a Magistrate Grade I; and
- (b) P10,000 in the case of a Magistrate Grade II and a Magistrate Grade III.

18. Arrest of absconding defendants and interdicts

(1) Any magistrate may grant orders for the arrest of any person who is suspected of being about to flee from the country in order to avoid payment of his debts:

Provided that if the matter in question is beyond the limits of the magistrate's jurisdiction, he shall order the person arrested to be brought before a court of competent jurisdiction without delay.

(2) Subject to the limits of his jurisdiction prescribed by this Act, any magistrate may grant-

- (a) orders for the attachment of things *pendente lite*; and
- (b) perpetual and temporary interdicts.

(3) Confirmation by a court of any such attachment or interdict in the judgment in the action shall operate as an extension of the attachment or interdict until execution or further order

of the court.

(4) No order shall be made under subsection (1) unless-

- (a) the cause of action appears to amount, exclusive of costs, to at least P100; and
- (b) the applicant appears to have no security for the debt, or only security falling short of the amount of the debt by at least P100.

19. Curator *ad litem*

Any magistrate may appoint a curator *ad litem* in any case in which such a curator is required or allowed by law for a party to any proceedings brought or to be brought before the court.

20. Assessors

(1) In any action any magistrate may summon to the assistance of the court one or more persons to sit and act as assessors in an advisory capacity.

(2) Where any action is tried by a magistrate with the assistance of assessors, the magistrate shall not be obliged to follow the advice of the assessors or of any of them, but shall record the opinion of each of such assessors.

21. Transfer from one court to another

(1) An action or proceeding may, with the consent of all the parties thereto, or upon the application of any party thereto, and upon its being made to appear that the trial of such action or proceeding in the court wherein summons has been issued may result in undue expense or inconvenience to such party, be transferred by the magistrate to any other court of competent jurisdiction.

(2) Upon the rejection of an application for transfer made under subsection (1) the High Court may on the application of one or all the parties to an action or proceeding transfer the same from one court to another court of competent jurisdiction.

22. Rescission and correction of judgments and orders

(1) Any judgment or order given in the absence of one or more of the parties to an action or proceeding may be rescinded or varied upon the application of the party or parties in whose absence the judgment or order was made, upon terms and conditions as may be laid down in rules made under this Act.

(2) A magistrate may, on the application of the party in whose favour a judgment has been given, rescind or vary such judgment in the absence of the party against whom the judgment was granted, provided such last-mentioned party has received notice of the application and has been given an opportunity to appear at the hearing of the same.

(3) A magistrate may rescind or vary any judgment granted by him which was void *ab origine* or was obtained by fraud or by mistake common to the parties.

(4) A magistrate may correct patent errors in any judgment in respect of which no appeal is pending.

(5) A magistrate may rescind or vary any judgment in respect of which no appeal lies.

23. Incidental jurisdiction

(1) In actions wherein the sum claimed, being within the jurisdiction, is the balance of an account, a magistrate may enquire into and take evidence if necessary upon the whole account, even though such account contains items and transactions exceeding the amount of jurisdiction.

(2) Where the amount claimed or other relief sought is within the jurisdiction, such jurisdiction shall not be ousted merely because it is necessary for the magistrate, in order to arrive at a decision, to give a finding upon a matter beyond the jurisdiction.

(3) In considering whether a claim is or is not within the jurisdiction, no prayer for interest on the principal sum claimed or for costs or for general or alternative relief shall be taken into account.

24. Abandonment of part of claim

(1) In order to bring a claim within the jurisdiction, a plaintiff may, in his summons or at any time thereafter, explicitly abandon part of such claim.

(2) If any part of a claim be so abandoned it shall be thereby finally extinguished:

Provided that if the claim be upheld in part only, the abandonment shall be deemed first to take effect upon that part of the claim which is not upheld.

25. Deduction of admitted debt

In order to bring a claim within the jurisdiction, a plaintiff may, in his summons, or at any time after the issue thereof, deduct from his claim, whether liquidated or unliquidated, any amount admitted by him to be due by himself to the defendant.

26. Splitting of claims disallowed

A substantive claim exceeding the jurisdiction may not be split with the object of recovering the same in more than one action, if the parties to all such actions would be the same and the point of issue in all such actions would also be the same.

27. Jurisdiction cumulative

(1) If two or more claims, each based upon a different cause of action, are combined in one summons, the magistrate shall have the same jurisdiction to decide each such claim as he would have had if each claim had formed the sole subject of a separate action.

(2) If a claim for the confirmation of an interdict or arrest granted *pendente lite* be joined in the same summons with a claim for relief of any other character, the magistrate shall have the same jurisdiction to decide each such claim as he would have had if each claim had formed the sole subject of a separate action, even though all the claims arise from the same cause of action.

28. Set-off and counter-claims

In any action before a court a defendant may set-off or set up by way of counter-claim, against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim be found in damages or not, and such set-off or counter-claim shall have the same effect as a claim by the defendant against the plaintiff in a cross action and the provisions of this Part shall apply *mutatis mutandis*:

Provided that the plaintiff and the defendant may be referred to as such through the proceedings even though the plaintiff has become the defendant in reconvention and the defendant has become the plaintiff in reconvention.

29. Counter-claim exceeding jurisdiction

(1) When in answer to a claim within the jurisdiction the defendant sets up a counter-claim exceeding the jurisdiction, the claim shall not on that account be dismissed; but the magistrate may, if satisfied that the defendant has a reasonable prospect of recovering an amount exceeding the jurisdiction, stay the action for a reasonable period in order to enable the defendant to institute an action in a competent court. The plaintiff in the court in which the action was originally instituted may (notwithstanding his action therein) counterclaim in such competent court, and in that event all questions as to the costs incurred shall be decided in that competent court.

(2) If the period for which such action has been so stayed has expired and the defendant has failed to issue and serve a summons in a competent court in relation to the matters the subject of such counter-claim, the magistrate of the court in which the action was originally instituted shall, upon application, either-

- (a) stay the action for a further reasonable period; or
- (b) dismiss the counter-claim (whether the defendant does or does not reduce such counter-claim to an amount within the jurisdiction).

(3) If the defendant has failed to institute action within such further period, or if the action instituted by the defendant be stayed, dismissed, withdrawn or abandoned, or if the competent court has granted absolution from the instance thereon, the magistrate of the court in which the action was originally instituted shall, upon application, dismiss the counter-claim and shall proceed to determine the claim.

30. Magistrates not to have jurisdiction in certain matters

Except as otherwise provided in this Act or in any other written law, a magistrate shall have no jurisdiction in matters-

- (a) in which the dissolution of a marriage or separation from bed and board is sought or in which the division of the goods of married persons is involved;
- (b) in which the validity or interpretation of a will or other testamentary document is in question;
- (c) in which the status of a person in respect of mental capacity is sought to be effected;
- (d) in which is sought the specific performance of an act without an alternative of payment of damages (except the rendering of an account in respect of which the claim does not exceed an amount within the jurisdiction, or the delivery or transfer of property not exceeding in value the jurisdiction of the magistrate);
- (e) in which is sought a decree of perpetual silence; or
- (f) in which a provisional sentence is sought.

31. Judgment

A magistrate may, as a result of the trial of an action, grant-

- (a) judgment for the plaintiff in respect of his claim insofar as he has proved the same;
- (b) judgment for the defendant in respect of his defence insofar as he has proved the same; or
- (c) absolution from the instance, if it appears to the magistrate that the evidence does not justify giving judgment to either party; and
- (d) such judgment as to costs as may be just.

32. Return of civil proceedings

(1) At such intervals as the Chief Justice may require, every magistrate shall forward to the High Court, in such form as the Chief Justice may from time to time direct, a complete list of all civil matters decided by, pending in, or brought before the court during such interval.

(2) The Chief Justice may require separate lists in respect of individual magistrates or separate lists in respect of specified grades or groups of magistrates.

WITNESSES AND EVIDENCE (s 33)

33. Modes of procuring attendance of witnesses and penalty for non-attendance

(1) Any party to any civil action or other civil proceeding where the attendance of witnesses is required may procure the attendance of any witness (whether residing or for the time being within the district or not) in the prescribed manner.

(2) If any person, being duly subpoenaed to give evidence or to produce any books, papers or documents in his possession or under his control which the party requiring his attendance desires to show in evidence, fails, without lawful excuse, to attend or give evidence or to produce those books, papers or documents according to the subpoena, or, unless duly excused, fails to remain in attendance throughout the trial, the magistrate may, upon being satisfied upon oath or by the written return of a bailiff that such person has been duly subpoenaed and that his reasonable expenses have been paid or offered to him, impose upon such person a fine not exceeding P50 or imprisonment for a term not exceeding one month, or to both.

(3) If any person so subpoenaed fails to appear or, unless duly excused, to remain in attendance throughout the trial, the magistrate may also, upon being satisfied as aforesaid, and that no lawful excuse for such failure shall seem to exist, issue a warrant for his apprehension in order that he may be brought up to give his evidence and to be otherwise dealt with according to law.

(4) A magistrate may, on cause shown, remit the whole or any part of any fine or imprisonment which he may have imposed under subsection (2).

(5) A magistrate may order the costs of any postponement or adjournment occasioned by the default of a witness, or any portion of such costs, to be paid out of any fine imposed upon such witness.

EXECUTION (ss 34-59)

34. Jurisdiction to issue execution

Any magistrate who has jurisdiction to try any action shall have jurisdiction to issue against any party thereto any form of process in execution of judgment in such action.

35. Superannuation of judgments and revival thereof, and force of warrants of execution

(1) A judgment shall become superannuated by the lapse of three years from the day on which it was pronounced, and execution against property may not thereafter be issued upon it; but it may be revived for the purpose of the issue of such execution on the application and at the expense of the judgment creditor, after due notice to the judgment debtor to show cause why it should not be revived, either in the court in which judgment was pronounced or in any court of competent jurisdiction.

(2) A warrant of execution once issued shall remain of force until the judgment in respect of which it was issued has been satisfied.

36. Setting aside of warrant

A magistrate may, on good cause shown, stay or set aside any warrant of execution or arrest issued from his court.

37. Execution in case of judgment debt ceded

Any person who has, either by cession or by operation of law, become entitled to the benefit of a judgment debt may, after notice to the judgment creditor and the judgment debtor, be substituted on the record for the judgment creditor and may obtain execution or process in aid in the manner provided for judgment creditors.

38. Manner of execution

(1) Whenever a magistrate gives judgment for the payment of money the amount shall be recoverable, in case of failure to pay the same forthwith or at the time or times and in the manner ordered by the magistrate, by execution against the movable property and, if there be not found sufficient movable property to satisfy the judgment, then against the immovable property of the party against whom such judgment has been given.

(2) Where it is required that immovable property be sold in execution, such property shall be sold only through the Sheriff after process in aid to that end has been granted by the High Court.

39. Property exempt from execution

In respect of any process of execution issued out of any court, the following property shall be protected from seizure and shall not be attached or sold, namely-

- (a) the necessary beds, bedding and wearing apparel of the person against whose property execution is levied, and of his family;
- (b) the necessary furniture and household utensils insofar as the same do not exceed in value the sum of P400;
- (c) the supply of food and drink in the house sufficient for the needs of such person and of his family during one month;
- (d) tools and implements of trade, and tools necessarily used in the cultivation of land, insofar as any such tools or implements do not exceed in value the sum of P400;
- (e) professional books, documents, or instruments, necessarily used by such person in his profession, insofar as the same do not exceed in value the sum of P400.

40. Property executable

(1) A bailiff executing any process of execution against movable property may, by virtue of such process, also seize and take any money or bank notes, and may seize, take and sell in execution cheques, bills of exchange, promissory notes, bonds or securities for money belonging to any person against whom any such execution shall have been issued as aforesaid.

(2) A bailiff may also hold any cheques, bills of exchange, promissory notes, bonds or securities for money which has been seized or taken as security for the benefit of the execution

creditor for the amount directed to be levied by the execution so far as it is still unsatisfied; and the execution creditor may, when the time of payment has arrived, sue in the name of the execution debtor, or in the name of any person in whose name the execution debtor might have sued, for the recovery of the sum secured or made payable thereby.

(3) A bailiff may also, under any process of execution against movable property, attach and sell in execution the interest of the execution debtor in any movable property belonging to him and pledged or sold under a suspensive condition to a third person, and may also sell the interest of the execution debtor in movable property sold to the execution debtor under any hire purchase contract or under a suspensive condition.

(4) Whenever, if the sale had not been in execution, it would have been necessary for the execution debtor to endorse a document or to execute a cession in order to pass the property to a purchaser, a bailiff may so endorse the document or execute the cession as to any property sold by him in execution.

(5) Where judgment is given against a member of a partnership or syndicate in an action in which he individually was plaintiff or defendant, his interest in the partnership or syndicate may be attached and sold in execution.

41. Interpleader claims

(1) Where any person, not being the judgment debtor, makes any claim to or in respect of any property attached or about to be attached in execution under the process of any court, or to the proceeds of such property sold in execution, his claim shall be adjudicated upon after issue of a summons in the prescribed manner.

(2) Upon the issue of such summons any action which may have been brought in any court whatsoever in respect of such claim shall be stayed, and the court in which such action has been brought or any magistrate thereof may, on proof of the issue of such summons, order the party bringing such action to pay the costs of all the proceedings in such action after the issue of the aforesaid summons, and such action shall abide the result of the proceedings taken upon such summons.

42. Sale in execution gives good title

A sale in execution of movable property by a bailiff shall not, after delivery thereof, be liable to be impeached as against a purchaser for value in good faith and without notice of any defect.

43. Surplus after execution

If, after a sale in execution, there remains any surplus in the hands of the bailiff, it shall be liable to attachment for any other unsatisfied judgment debt.

44. Debt, salary or wages may be attached

(1) Without prejudice to section 18 of the Hire Purchase Act (which, *inter alia*, prohibits the making of any garnishee order for the purpose of enforcing payment by the buyer of any amount payable under a hire-purchase agreement or an instalment sale agreement or as a result of the termination or rescission thereof or as damages for any breach thereof), a magistrate may order the attachment of any debt, salary or wages actually due to a judgment debtor by any other person to the amount necessary to satisfy the judgment debt and the costs of the proceedings for attachment, and may order such other person (hereinafter called the "garnishee") to pay to the bailiff so much of the debt, salary or wages appearing at the time of making the order to be due and payable as may be sufficient to satisfy the said judgment debt and costs, and may enforce the order as if it were a judgment of the court.

(2) No such order in respect of salary or wages shall be granted unless the magistrate is satisfied upon sworn information that sufficient means will, after satisfaction of the order, be left to the judgment debtor to maintain himself and those dependent on him.

(3) If, after any such order in respect of salary or wages has been granted, it is shown to the satisfaction of the magistrate that sufficient means to maintain himself and those dependent on him will not, after satisfaction of such order, be left to the judgment debtor, the magistrate

shall vary or set aside such order in such manner that such order will only affect the balance of such salary or wages over and above such sufficient means.

45. Future and accruing earnings, when attachable

(1) Without prejudice to the provisions of section 18 of the Hire Purchase Act, a magistrate may, if satisfied upon sworn information that sufficient means will, after satisfaction of the order, be left to the judgment debtor to maintain himself and those dependent on him, grant a garnishee order in respect of future or accruing earnings as if they were actually payable.

(2) Such an order may require the garnishee to pay periodically to a bailiff definite amounts out of the earnings of the judgment debtor.

(3) The provisions of section 44(3) shall apply to any order made under this section if the judgment debtor proves to the satisfaction of the magistrate that his financial position has changed substantially for the worse since the date of the order other than by his own serious and wilful default.

46. Jurisdiction to decide disputes arising out of garnishee orders

(1) If the garnishee disputes that the debt sought to be attached is owing or accruing, or alleges that it is subject to a set-off or belongs to or is subject to a claim by some third person, the magistrate may determine the rights and liabilities of all the parties and may declare the claim of that third person to be barred, provided that the claim or value of the matter in dispute is otherwise within the jurisdiction of the magistrate.

(2) If it be proved that such third person neither resides nor carries on business nor is employed within Botswana, and that he has a *prima facie* claim to the debt, the magistrate shall not have jurisdiction under this section.

47. Execution of payment is discharge *pro tanto*

Payment made by or execution levied upon the garnishee under the provisions of this Act shall be a valid discharge of the debt or amount of salary or wages due from him to the judgment debtor to the extent of the amount paid or levied.

48. Saving of existing law prohibiting attachment of certain property

Nothing in this Act contained shall be construed as authorizing the attachment of any debt, salary or wages or any moneys or property specially declared by any written law not to be liable to attachment.

49. Order for payments by instalments

Every magistrate may make orders concerning the time or times, and by what instalments, any debt or costs for which judgment is obtained in his court shall be paid, and all such moneys shall be paid into court unless such magistrate otherwise directs, and every such order shall be in the prescribed form.

50. Execution or suspension in case of appeal

Where an appeal has been noted or an application to rescind, correct or vary a judgment has been made, the magistrate may direct either that the judgment shall be carried into execution or that execution thereof shall be suspended pending the decision upon the appeal or application. The direction shall be made upon such terms, if any, as the magistrate may determine as to security for the due performance of any judgment which may be given upon the appeal or application.

51. Summons for civil imprisonment

(1) Without prejudice to section 18 of the Hire Purchase Act (which, *inter alia*, prohibits the making of any decree of civil imprisonment for the purpose of enforcing payment by the buyer of any amount payable under a hire-purchase agreement or an instalment sale agreement or as a result of the termination or rescission thereof or as damages for any breach thereof), if a judgment has remained unsatisfied during a period of seven days, or if the judgment debtor has admitted in court or in writing or if it appears from the return of the bailiff to any process of execution that the judgment debtor has not sufficient property liable to be

attached in execution to satisfy the judgment debt and costs, the judgment creditor may summon the judgment debtor to show cause why a decree of civil imprisonment should not be made against him.

(2) Such summons may be taken out either in the court wherein the original judgment was given or in the court of any area wherein the judgment debtor is for the time being residing, carrying on business, or employed.

(3) Where it appears from the return of such summons that service was issued, the proceedings shall, unless the judgment debtor appears, be stayed until the magistrate is satisfied that the judgment debtor has been paid or tendered the sum which would have been payable to him if he had been subpoenaed as a witness.

(4) A judgment debtor shall not be liable for any costs incurred by the judgment creditor in any proceedings in connection with a decree of civil imprisonment against such debtor (other than fees or charges which accrue to the Government or to the bailiff)-

- (a) if the judgment debt arose from the purchase on credit of goods other than foodstuffs or medicine or from a loan of money, unless it is proved that the seller of those goods was induced to grant such credit or the lender was induced to lend the money, as the case may be, by wilful misrepresentation made by or on behalf of the judgment debtor; or
- (b) if the rights of the judgment creditor against the judgment debtor accrue to the judgment creditor by virtue of a cession.

52. Decree of civil imprisonment

A magistrate may, upon the return of the summons and whether the judgment debtor appears or not, make a decree of civil imprisonment against such judgment debtor and authorize the issue of a warrant for his arrest and detention in any gaol named in such warrant:

Provided that-

- (i) a magistrate may at any time suspend the execution of or altogether discharge any such decree or warrant upon such terms as may appear to be fair and reasonable;
- (ii) no such decree shall be pronounced and no such warrant shall be issued if the judgment debtor proves to the satisfaction of the magistrate that he has no means of satisfying the judgment debt either wholly or in part and either out of present means or out of future earnings or income, unless it appears that the judgment debtor either-
 - (a) has wilfully made away with any property in order to defeat or delay payment of the judgment debt;
 - (b) is able to earn sufficient to satisfy the judgment debt by instalments or otherwise to settle the same, but in order to defeat or delay payment of the judgment debt wilfully refuses to do so; or
 - (c) is squandering his money or is apparently living beyond his means; and
- (iii) in computing the degree to which the debtor can satisfy such debt the magistrate shall take into consideration the conditions under which he obtains his income and the amount of his necessary expenses and those of the persons dependent on him.

53. Debtor may show that he has executable property

When, on the hearing of a summons for civil imprisonment, the judgment debtor satisfies the magistrate that he has property capable of being attached in execution by the bailiff and sufficient to satisfy the judgment debt and costs, the magistrate shall either dismiss the summons or adjourn the further hearing thereof until the said property has been sold in execution.

54. Period of imprisonment

The period of civil imprisonment shall be decided by the magistrate, but shall not in any case exceed three months, and, where the judgment debt and costs, so far as the same are satisfied, amount to less than P20, shall not exceed 14 days.

55. Costs of civil imprisonment

(1) Unless it appears to the magistrate upon the hearing of any proceedings for civil imprisonment that the debtor has, within 48 hours after having notice of the judgment upon which such proceedings are founded, made to the judgment creditor an offer to satisfy the debt by instalments which the magistrate considers to be reasonable, or notified the creditor that he is unable to make an offer and the magistrate finds this to be true, the magistrate may order the debtor to pay the costs of such proceedings; but if it appears that the judgment creditor has refused such offer, the magistrate may order the creditor to pay those costs.

(2) Upon any proceedings for the discharge or suspension of any decree, warrant or order for civil imprisonment, the magistrate may order the judgment debtor to pay the costs of such proceedings, unless it appears that the proceedings were due to some fault or omission on the part of the judgment creditor.

(3) Nothing contained in this section shall be construed as depriving the magistrate of his discretion to make such order as to costs as may be just.

56. Custody of gaoler

The keeper of any gaol thereto authorized by warrant or order shall receive into his custody and detain in such gaol the judgment debtor named in such warrant or order in accordance with the tenor of such warrant and the provisions of any written law relating to prisons:

Provided always that the judgment creditor shall pay and satisfy the charges for the maintenance of the judgment debtor, which shall be such an amount not exceeding P1,50 per diem as the magistrate shall determine and shall be paid weekly in advance to the keeper of the goal, who shall then issue to the judgment debtor a daily ration based on the amount of the maintenance money received.

57. Discharge from imprisonment

The keeper of the goal shall forthwith discharge the judgment debtor from imprisonment-

- (a) upon expiry of the time for which such judgment debtor was imprisoned;
- (b) when the judgment creditor gives his written consent to such discharge;
- (c) when the judgment creditor or the bailiff certifies in writing that the amount of the judgment debt and costs mentioned in the warrant and of any maintenance money that may have been paid by him for the unexpired portion of the period of the imprisonment has been satisfied; and upon such satisfaction the judgment creditor or the bailiff shall so certify to the said keeper;
- (d) when such amount is paid to the said keeper by or on behalf of the judgment debtor; or
- (e) upon an order given by a judge of the High Court or by a magistrate.

58. Effect of discharge from imprisonment

No judgment debtor who has been once lawfully discharged from imprisonment (except a debtor discharged by an order of court suspending such imprisonment) shall ever again be liable to be arrested for the same debt or cause of action; but no arrest or imprisonment or discharge therefrom shall be deemed to be a satisfaction of the judgment debt, or of any part thereof, so as to prevent the judgment creditor from having further execution against the property of the said debtor.

59. Warrant of civil imprisonment may be suspended by court of area wherein it is executed

Any magistrate of the area wherein a judgment debtor is arrested shall have the same jurisdiction as the magistrate by whom the warrant was issued to suspend such warrant and may cancel or vary any order of suspension made by himself; but such first-mentioned magistrate may not discharge altogether any warrant issued by such other magistrate.

PART VI

Criminal Matters (ss 60-63)

JURISDICTION (ss 60-63)

60. Jurisdiction in respect of classes of offences

(1) A Regional Magistrate, a Chief Magistrate, a Principal Magistrate and a Senior Magistrate shall have jurisdiction to try any offence, excepting an offence which is punishable by death or imprisonment in excess of 21 years, and any conspiracy or attempt to commit or the counselling or procuring the commission of any such offence:

Provided that a Chief Magistrate, a Principal Magistrate or a Senior Magistrate may try any offence under sections 141, 142, 143, 147, 227, 292(2), 293(2) and 326 of the Penal Code and any conspiracy or attempt to commit any such offence, or the counselling or procuring of the commission of any such offence.

(2) A Magistrate Grade I, a Magistrate Grade II and a Magistrate Grade III shall have jurisdiction to try only those offences for which the maximum punishments prescribed do not exceed 10 years with or without options of fines, and any conspiracy or attempt to commit such offences.

(3) The limits to jurisdiction prescribed in subsections (1) and (2) shall not derogate from the powers of any magistrate to remand on bail or in custody any person accused of any offence until the hearing and determination of the case by a magistrate of competent jurisdiction or the committal of the accused for trial in the High Court, as the case may be.

(4) The limits of jurisdiction prescribed in subsections (1) and (2) shall be subject to such extended jurisdictions as may be prescribed in other written laws in respect of offences created under those laws.

(5) Notwithstanding the provisions of subsections (1) and (2), all magistrates shall have jurisdiction to try offences of stock theft under section 274 of the Penal Code.

(6) Notwithstanding the provisions of subsections (1) and (2), the Chief Justice may, by order published in the *Gazette*, authorize any magistrate or any class or grade of magistrates to exercise jurisdiction to try an offence, other than an offence punishable with death, which, but for the provisions of this subsection, he would not have jurisdiction to try:

Provided that the magistrate's powers of punishment as specified in section 61 shall not be increased.

61. Jurisdiction in the matter of punishment

(1) Subject to the provisions of this Act and of any other written law, the limits to the punishment that may be imposed by magistrates shall be as follows-

- | | |
|---|---|
| (a) Regional and Chief Magistrates | 15 years' imprisonment or P40,000 fine,
or both; |
| (b) Principal Magistrates | 12 years' imprisonment or P30,000 fine,
or both; |
| (c) Senior Magistrates | 10 years' imprisonment or P20,000 fine,
or both; |
| (d) Magistrates Grade I | 7 years' imprisonment or P15,000 fine,
or both; |
| (e) Magistrates Grade II and
Magistrates Grade III | 5 years' imprisonment or P10,000 fine,
or both: |

Provided that a Regional Magistrate, a Chief Magistrate or a Principal Magistrate may impose a maximum sentence of 20 years' imprisonment where a minimum sentence has been prescribed as punishment for commission of an offence.

(2) In respect of offences for which such punishment is specifically authorized by written law, all magistrates shall be competent to impose a sentence of whipping subject to the following maximum strokes-

- | | |
|------------------------------------|------------|
| (a) Regional and Chief Magistrates | 12 strokes |
| (b) Principal Magistrates | 10 strokes |
| (c) Senior Magistrates | 9 strokes |
| (d) Magistrates Grade I | 7 strokes |

- (e) Magistrates Grade II and 5 strokes
Magistrates Grade III.

(3) The punishment of whipping shall be suspended if the accused gives notice of appeal, and such suspension shall continue until the final determination or abandonment of such appeal.

(4) Notwithstanding subsections (1) and (2) where any written law provides that for any offence there may be imposed any forfeiture, confiscation, disqualification, or the cancellation or revocation of any permit or licence, or that compensation may be awarded or restitution made to any person, the magistrate before whom such offence is prosecuted may impose or award or make such forfeiture, confiscation, disqualification, compensation, restitution, cancellation or revocation in addition to any other penalty.

(5) Nothing in this section shall be construed as authorizing a magistrate to impose for any offence a punishment greater than that which may by law be imposed for such offence, or as preventing a magistrate from imposing, as often as he is specially authorized by any written law so to do, any other or more severe punishment than the punishments mentioned in subsection (1).

62. Return of criminal proceedings

(1) At the end of every month every magistrate's court shall forward to the High Court, in such form as the Chief Justice may from time to time direct, a complete list of all criminal cases decided by, pending in or brought before such court during that month.

(2) The Chief Justice may require separate lists in respect of individual magistrates or separate lists in respect of specified grades or groups of magistrates.

(3) The High Court may, in respect of any case mentioned in any such list, call for the record and take any or all such steps and make such orders in connection therewith as if the case had been submitted to the High Court for review.

63. Execution of sentence not to be suspended

The execution of any sentence of fine or of imprisonment shall not be suspended by the transmission of, or the obligation to transmit, the record for review.

PART VII

Offences (s 64)

64. Offences relating to execution

Any person who-

- (a) obstructs a bailiff in the execution of his duty;
- (b) being aware that goods are under arrest, interdict, or attachment by the court, makes away with or disposes of those goods in any manner not authorized by law, or knowingly permits those goods, if in his possession or under his control, to be made away with or disposed of in any such manner;
- (c) being a judgment debtor and being required by a bailiff to point out property to satisfy any warrant issued in execution of judgment against such person, either-
 - (i) falsely declares to that bailiff that he possesses no property or not sufficient to satisfy the warrant, or
 - (ii) although owning such property neglects or refuses to point out the same; or
- (d) being a judgment debtor refuses or neglects to comply with any requirement of a bailiff in regard to the delivery of documents in his possession or under his control relating to the title of the immovable property under execution,

shall be guilty of an offence and shall be liable to a fine not exceeding P100 or to imprisonment for a term not exceeding six months, or to both.

PART VIII

General and Supplementary (ss 65-67)

65. Jurisdiction as to plea of *ultra vires*

(1) Subject to the provisions of section 18 of the Constitution no magistrate shall be competent to pronounce on the validity of any written law, and every magistrate shall assume such law to be valid.

(2) Nothing in this section shall prevent a magistrate from pronouncing on the validity of any bye-laws made by a local authority.

66. Amendment of proceedings

(1) In any proceedings, whether civil or criminal, a magistrate may, at any time before judgment, amend any summons or other document forming part of the record:

Provided that no amendment shall be made by which any party other than the party applying for such amendment may (notwithstanding adjournment) be prejudiced in the conduct of his action or defence.

(2) In civil proceedings an amendment may be made upon such terms as to costs and otherwise as the magistrate may deem reasonable.

(3) A misnomer in regard to the name of any person or place shall not vitiate any proceeding of the court if the person or place be described so as to be commonly known.

67. Rules of court

The Chief Justice may make rules of court regulating the proceedings in magistrates' courts, and, without derogating from the generality of the foregoing, such rules may provide for the following matters-

- (a) the pleading, practice and procedure of courts, including all matters connected with the forms to be used and the fees to be payable, the amount and the method and time of payment of the same;
- (b) the expenses of parties and witnesses, their amount and the method of time of payment of the same;
- (c) the fees and costs of legal practitioners, and the amount, taxation and recovery of the same;
- (d) regulating the sitting of courts, whether or not sitting in chambers and the times for the holding of courts;
- (e) regulating and prescribing the procedure in connection with interlocutory applications;
- (f) prescribing the fees to be paid in respect of the service or execution of any process of courts;
- (g) prescribing and regulating the manner of determining the amount of security to be given in any case where security is required to be given and the form and manner in which such security may be given;
- (h) prescribing and regulating the hours during which the registries of courts shall be open for the transaction of business;
- (i) prescribing and regulating the proceedings of bailiffs, and other officers of the court;
- (j) prescribing the tariff of costs and expenses which may be allowed in respect of the service or execution of any process referred to in paragraph (f);
- (k) the time within which any requirement of this Act or any rules made thereunder is required to be complied with;
- (l) generally making provision with regard to any matter in respect of which, in the opinion of the Chief Justice, it is necessary or desirable to make provision in order to facilitate the proper despatch and conduct of the business of the courts.