

Statutory Instrument No. 13 of 2011

MAGISTRATES' COURTS ACT
(Cap. 04:04)

RULES OF THE MAGISTRATES' COURTS
(Published on 4th March, 2011)

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IN EXERCISE of the powers conferred by section 68 of the Magistrates' Court Act, the Chief Justice hereby makes the following rules —

PART I – CIVIL PROCEDURE RULES

ORDER 1

CITATION, APPLICATION AND INTERPRETATION

- 1.** These Rules may be cited as the Rules of the Magistrates' Courts.
- 2.** (1) Order 17 and 25 of these Rules shall be applicable only if —
 - (a) the plaintiff does not apply for summary judgment;
 - (b) the plaintiff, having applied for summary judgment, has his application dismissed; or
 - (c) an order is made giving the defendant leave to defend.
- (2) The forms contained in the First Schedule to these Rules may, where applicable, be used with such variations as the circumstances may require, but non-compliance with this rule shall not in itself be a ground for exception or defence.

(3) All process of the court for service or execution, and all documents or copies to be filed of record, shall be on A4 paper of good quality.

(4) All process of the court shall bear the name and address of the party suing out.

(5) The clerk of the court shall, before issuing any process which is not substantially in the form required by these Rules, refer it to the magistrate who may direct him either to issue or to refuse to issue the process.

(6) The provisions of subrule (5) shall not apply to —

(a) any matter which the opposite party may except under these Rules; or

(b) endorsements of particulars of claim under Order 9 otherwise than as to costs, fees and charges.

3. (1) In these Rules, unless the context otherwise requires —

“clerk of the court” includes any assistant clerk and any person appointed to act as such clerk or assistant;

“commissioner” means a commissioner of interrogatories;

“company” means an incorporated or registered company in terms of the Companies Act;

(Cap. 42:01)

“copy” means a true and correct copy endorsed by the clerk of the court;

“court house” means the building in which the magistrate’s court is usually held;

“default judgment” means a judgment entered or given in the absence of pleadings or appearance by the party against whom it is made in terms of Order 12 of these Rules;

“deliver”, except in Order 6, means to file the original with the clerk of the court and to serve a copy on the opposite party;

“delivery” means filing and serving;

“endorse” means to sign and date stamp;

“filing” means filing with the clerk of the court;

“give security” means to give security to the satisfaction of the clerk of the court, by —

(a) payment into court of the amount in question; or

(b) giving of a security bond by a party either with someone as his surety who is approved by the clerk of the court, or by two or more persons who are so approved;

“Guardian’s Fund” means the fund established under section 101 of the Administration of Estates Act;

(Cap. 31:01)

“judgment” includes any decision, decree, determination, finding, sentence or order of the court;

“Messenger of the Court” includes a court bailiff, a deputy sheriff and any person specially approved of by the court to effect any particular service;

“money” includes all coined money, whether current in Botswana or not, and all banknotes, bank-drafts, cheques, orders, warrants or authorities for the payment of money;

“notice” means notice in writing;

“owner” when used with reference to property or acts, includes corporations of all kinds and any other associations of persons capable of owning or holding property; they also, when relating to Government property, include the President;

“party” means any person who is a party to the proceedings;

“pending matter” means a matter in which a summons has been issued and which has not been withdrawn, discontinued or dismissed and in which judgment has not been given;

“place of security” means the place appointed by the magistrate for the safekeeping of money, securities or other articles of value;

“plaintiff”, “defendant”, “applicant”, “respondent” and “party” include, for the purpose of service, notice, appearance, endorsement, signature and payment of moneys out of court, or out of the hands of the messenger, the attorney appearing for any such party and the mayor, chairman, town clerk, secretary or similar officer of any local authority or similar body nominated by it for the purpose;

“property” includes everything animate or inanimate, corporeal or incorporeal, capable of being the subject of ownership;

“Registrar” means the Registrar of the High Court and includes a Deputy Registrar or a Senior Assistant Registrar performing the duties of the Registrar; and

“valuable security” includes any document which is the property of any person and which is the evidence of the ownership of any property, or of the right to recover or receive any property.

(2) Where anything is required by these Rules to be done within a particular number of days or hours, a Saturday, Sunday or public holiday shall not be counted as part of that period.

(3) Computation of time shall commence from the time of service for anything that requires filing and service under these Rules.

(4) All distances shall be calculated over the shortest route reasonably available in the circumstances.

ORDER 2

MESSENGER OF THE COURT OR OTHER PERSON EFFECTING SERVICE

1. Every messenger who is not an officer within the Public Service Act shall give security to the satisfaction of the Registrar for the due fulfilment of his duties and for the due and punctual disposal of all moneys which shall come into his hands by virtue of his office.

2. (1) Except as otherwise provided in the Act or these Rules, the process of the court shall be served or executed, as the case may be, through the messenger.

(2) Service or execution of process of the court shall be effected without any avoidable delay by a messenger or other person effecting service.

(3) The messenger shall, where there is resistance to the due service or execution of the process of the court or where resistance is reasonably anticipated, have power to call upon any member of the Botswana Police Service for assistance.

3. (1) A messenger or any other person effecting service shall endorse on or annex to all process entrusted to him for service or execution, a return showing the date and the manner of service and the result of execution; and shall immediately return the said process to the clerk of the court.

(2) A messenger or any other person effecting service shall, as soon as is practicable after service, file with the clerk of the court a return or affidavit of service stating that —

- (a) service has been duly effected and the date, time and place of such service; or
 - (b) he has been unable to effect service and specify the reason for such inability.
- (3) The return of service shall be as near as possible to Form 8 in the First Schedule.
- (4) the affidavit under subrule (2) shall be as near as possible to Form 9 set out in the First Schedule.

ORDER 3

THE CLERK OF THE COURT

- 1.** (1) The clerk of the court shall keep a book to be called the Civil Record Book and shall enter in it the following particulars —
- (a) the number of the matter;
 - (b) the names of the parties and their attorneys, if any;
 - (c) the cause of the action;
 - (d) the date of issue of summons;
 - (e) the dates of entry of appearance and of filing subsequent pleadings;
 - (f) the date or dates of hearing, if any;
 - (g) the date and the terms of any judgment and whether by default, consent or after trial; and
 - (h) any remarks required by these Rules or by the special circumstances of the matter.
- (2) In addition to the Civil Record Book, the clerk of the court shall, where applicable, keep these particulars in electronic form through the Court Record Management System which shall be updated as soon as entry has been made in the Civil Record Book.
- 2.** (1) The clerk of the court shall number a summons or an application not relating to a pending matter with a consecutive number, station code and the year.
- (2) The clerk of the court shall enter the action or application in the Civil Record Book under that number and, where applicable, in electronic form.
- (3) Every document served or delivered afterwards in the action or application, or in any subsequent case in continuation of any such application, shall be marked with such number and the magistrate's reference by the party delivering it and shall not be received by the clerk of the court until so marked.
- 3.** (1) All documents delivered to the clerk of the court to be filed of record and all recordings of the proceedings, pre-trial conferences and minutes of judicial case management made by the court shall be filed of record under the number of the respective action or application.
- (2) Any person entitled to such records may apply to the clerk of the court for copies of such records upon payment of the prescribed fees.

- 4.** (1) It shall also be the duty of the clerk of the court —
- (a) to sign and issue all such process of the court as may be sued out;
 - (b) to notify the plaintiff immediately by post or otherwise that the defendant has —
 - (i) consented to judgment; or
 - (ii) made payment into court of the amount claimed or any part thereof before entry of appearance to defend;
 - (c) to assist in drafting any process of court upon request by any party;
 - (d) to note on the notice of attachment all costs incurred by the judgment creditor;
 - (e) to collect all court fees and fines imposed by the court which shall be paid by him directly to the Government Revenue Collector; and
 - (f) to receive and deposit all payments made into court in terms of Order 14 to the Government Revenue Collector.
- (2) The Clerk of the Court shall notify the plaintiff of a consent to judgment under subrule (1) in a form as near as possible to Form 10 set out in the First Schedule.
- 5.** Any act required to be done by the clerk of the court may be done by a magistrate except that a magistrate shall in no case draft any affidavit, pleadings or process for any party or receive revenue.

ORDER 4

REPRESENTATION OF PARTIES

- 1.** (1) A party may institute or defend any legal proceedings either in person or by a legal practitioner.
- (2) A local authority, company or other incorporated body may institute proceedings through an officer nominated by it for that purpose.
- (3) A partnership or group of persons associated for a common purpose may institute proceedings through a member nominated by it for that purpose.
- (4) Any person acting under subrule (1), (2) or (3) shall not be entitled to recover any costs unless such person is a legal practitioner.
- 2.** (1) A legal practitioner shall not appear or lodge any court proceedings for a party unless he has filed a power of attorney with the clerk of the court.
- (2) Notwithstanding subrule (1), a power of attorney shall not be filed by the Attorney General, the Director of Public Prosecutions or any counsel acting for the Attorney General or the Director of Public Prosecutions in any matter in which the Attorney General or the 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.
- 3.** Any person appearing for a company, incorporated body, local authority, voluntary association or institution shall file a resolution with the clerk of the court authorizing him to appear for such party.
- 4.** (1) The court may stay an action on application by an executor, trustee, guardian or other competent person where a party has become incompetent to continue an action.
- (2) The action shall be stayed until an executor, trustee, guardian or other competent person has been appointed in his place, or until the incompetence of that party ceases to exist.

(3) If a party dies while an action is ongoing, the court may, on application, order that the executor, trustee, guardian or other competent person substitute the party who is dead.

ORDER 5

POOR LITIGANTS

1. (1) Any person who desires to sue or defend as a poor litigant may apply to the court in writing for leave to sue or defend as a poor litigant.
- (2) The application shall set out fully the grounds of action or of defence on which the applicant intends to rely and particulars of his means.
2. The court may upon an application under rule 1(1) —
 - (a) examine the applicant on oath as to whether he has a *prima facie* right of action or defence, and as to his means;
 - (b) require the applicant to call further evidence as to his means and whether he has a *prima facie* right of action or defence, as the case may be;
3. If the court is satisfied that the applicant has a *prima facie* right of action or of defence, and is not possessed of means sufficient to enable him to pay the court fees and the charges of the messenger or other person effecting service, the court may order —
 - (a) that the process of the court shall be issued and be served free of charge for the applicant;
 - (b) that an attorney be appointed to act for such applicant; or
 - (c) that the clerk of the court shall, without charge, draft process, affidavits, notices and other documents as may be required to comply with these Rules.
4. (1) If the poor litigant succeeds and is awarded costs against his opponent, he shall, subject to taxation, be entitled to include and recover in such costs his attorney's costs and also the fees and charges so remitted.
- (2) If the poor litigant recovers either the principal debt, interest or costs, he shall first pay and make good, *pro rata*, all such costs, fees and charges.
- (3) If the poor litigant does not succeed or does not recover upon a judgment in his favour, no fees shall be taken from him by the attorney so appointed to act for him.

ORDER 6

SERVICE OF PROCESS, NOTICES AND DOCUMENTS

1. (1) Service of any process, notice or other document of which service is required shall be effected by any adult person who has no personal interest in the cause and is able to explain its nature and contents.
- (2) Notwithstanding subrule (1), service of an interdict, warrant of arrest, warrant of committal or warrant of attachment of persons or property or of any process, notice or other document affecting the liberty of the respondent shall be effected only by a messenger.
- (3) Any process, notice or other document to be served shall comprise of the original of the process, notice or other document together with as many copies as there are persons to be served.

2. Process, notices or other documents shall not be served on a Sunday or a public holiday, except an interdict, warrant of arrest, warrant of committal and a warrant of attachment of persons or property which may be executed on any day, at any time and at any place.

3. (1) Where the application to the court is for an order affecting the liberty of the respondent, the process shall be served by delivery of a copy to the respondent personally, unless the court shall, for good cause shown, give leave for such process to be served in some other specified manner.

(2) All other process shall, subject to the provisions of this Order, be served upon the person affected by delivery of a copy in one or other of the following manners —

- (a) to the said person personally or to his duly authorised agent;
- (b) at his residence or place of business to some person apparently not less than 16 years of age and apparently residing at or employed there;
- (c) at his place of employment to some person apparently not less than 16 years of age and apparently employed with or by the person to be served;
- (d) if the person to be served has chosen an address for service, at the address so chosen; or
- (e) by registered post, where the plaintiff has given written instructions to that effect.

(3) A document in any legal proceedings shall be served on a company as follows —

- (a) by delivery to a person named as a Director of the company on the register of Companies;
- (b) by delivery to an employee of the company at the company's head office or principal place of business;
- (c) by leaving it at the company's registered office or address for service;
- (d) by serving it in accordance with any directions as to service given by the court having jurisdiction in the proceedings; or
- (e) in accordance with any agreement made with the company.

(4) Where service has been effected in the manner prescribed by paragraph (b), (c), (d) or (e) of subrule (2), the court or clerk of the court may, if there is reason to doubt that the process served has come to the actual knowledge of the person to be served, and in the absence of satisfactory evidence, treat such service as invalid.

(5) The messenger or other person effecting service shall show to the person upon whom process is served the original of the process except where service has been effected by post, in which case the original may be inspected in the record of proceedings.

4. (1) Where the person to be served keeps his residence or place of business closed, and thus prevents the messenger or other person effecting service from serving the process, it shall be sufficient service to affix a copy of the process to the outer or principal door of such residence or place of business.

(2) Where the messenger or other person effecting service is unable, after diligent search, to find at the residence or the address for service of the person to be served either that person or such other person as is described in rule 3 (2) (b), it shall be sufficient service to affix a copy of the process to the outer or principal door of such residence or place of business.

5. (1) Service of process in an action where no relief, other than costs is claimed except an order for ejectment from certain premises or a judgment for rent, may be made by affixing a copy of the process to the outer or principal door or on some other conspicuous part of the premises in question if it cannot be effected in the manner prescribed in rule 3.

(2) Service of an interpleader summons where a claim is made to any property attached in execution under process of the court may be made on the party to be served or upon the attorney of record.

6. Where two or more persons are to be served with the same process, service shall be effected upon each, except —

- (a) in the case of a partnership, when service may be effected by delivery at the office or place of business of such partnership, or if there is no office or place of business, then by service on any member of the partnership in any of the manners stated under rule 3 or 4;
- (b) persons sued in their capacity as trustees of an insolvent estate, liquidators of a company, executors, curators or guardians, where service may be effected by delivery to any one of them in any of the manners already stated under rule 3;
- (c) syndicate, unincorporated company, club, society, church, public institution or public body, where service may be effected by delivery at the local office or place of business of such body or, if there is no office or place of business, on the chairman, secretary or similar officer in any of the manners already stated under rule 3 or 4.

7. (1) Service of a subpoena requiring the attendance of a witness may be effected in any of the manners specified in rule 3 or 4, at a reasonable time before attendance is required.

(2) Service of any notice, request, statement or other document which is not process of the court may be effected by delivery by hand at the address given for service, or by facsimile or electronic mail address as given in the summons or appearance to defend, or by sending it by registered post to the postal address given.

(3) An address for service, postal address, facsimile or electronic mail address given may be changed by delivery of notice of a new address or facsimile, and such service may be effected at the new address.

(4) Service by registered post under this Order shall be deemed to have been effected on the fourth day after the postmarked date on the receipt for registration where the recipient is within a radius of a 100km from the court issuing the process; or, on the seventh day after the postmarked date on the receipt for registration where the recipient is outside the radius of 100km.

8. Where the court is satisfied that service cannot be effected in any manner prescribed in these Rules and the matter is within its jurisdiction, it may make an order allowing service to be effected in any manner that it may prescribe.

9. (1) Where the service to be effected is that of —

- (a) a summons for civil imprisonment;
- (b) an order made *ex parte* which calls upon the respondent to show cause at a time stated or limited in the order;
- (c) an interpleader summons; or
- (d) notice to a judgment debtor under Order 36,

service shall be effected at least 3 days plus one additional day for each 10km distance of the place of service from the office of the clerk of the court not exceeding 21 days in total before the time stated or limited for the appearance of the party served.

(2) Except as otherwise provided, notice of application to the court shall be served at least 3 days before the time appointed for the hearing of the application.

10. (1) Where a party has requested to be served by registered post other than under rule 7, service shall be effected by the messenger or other person placing a copy in an envelope, addressing and posting it by prepaid registered letter to the address of the party to be served.

(2) The messenger or other person effecting service by registered post shall make an application to the Post Office requiring to be furnished with an acknowledgement of receipt form by the addressee as provided in the Post Office (Postal and Franking) Regulations.

(3) An acknowledgement of receipt form duly completed shall be sufficient acknowledgement of receipt for the purposes of service; and if no such form is received, the messenger or other person effecting service shall state that fact in his return or affidavit of service.

(4) The registered letter shall have on the envelope a handwritten or typed notice as follows —

“This letter must not be re-addressed. If delivery is not effected before
..... 20..... it must be delivered to the messenger of the
Magistrates’ Court by
..... (or other person effecting service) at (address
of person effecting service).

11. All process shall be valid throughout Botswana.

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

(a) where service has been effected by the Messenger of the Court, by the return of service of such Messenger of the Court;

(b) where service has not been effected by the Messenger of the Court, by an affidavit of the person who effected service, or in the case of service on the Attorney General 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.

13. Nothing in these Rules shall authorise the service of any summons or process outside Botswana without the leave of a magistrate.

ORDER 7

EDICTAL CITATION

1. Except with leave of the court, no process whereby proceedings are instituted shall be served outside Botswana.

2. If process whereby proceedings are instituted is to be served outside Botswana, the person desiring to obtain leave to effect service may apply for such leave to a magistrate.

3. (1) Any person desiring to obtain leave to serve outside Botswana shall make an application to the court setting out concisely —

(a) the nature and extent of his claim;

(b) the grounds upon which it is based;

(c) the grounds upon which the court has jurisdiction to entertain the claim; and,

(d) the manner of service which the court is asked to authorise.

(2) If the manner of service is other than personal service, the application shall further state the last known whereabouts of the person to be served and the inquiries made to ascertain his present whereabouts.

4. (1) Upon receipt of an application under rule 3 the court may —

- (a) make an order as to the manner of service;
- (b) order the time within which notice of intention to defend is to be given;
- or
- (c) order any other step that is to be taken by the person to be served.

(2) Where service by publication is ordered, it shall be in accordance with Form 5 set out in the First Schedule and signed by the clerk of the court.

5. Any person desiring to obtain leave to effect service outside Botswana of any process whereby proceedings are instituted in Botswana may request such leave at any hearing at which the court is dealing with the matter, and the court may act upon such information as may be given and may make such order as it may deem fit.

6. 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.

7. 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 authorized 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.

ORDER 8

SUBSTITUTED SERVICE

1. If service of process whereby proceedings are instituted cannot be effected in any of the manners prescribed in Order 6, the person desiring to obtain leave to effect service by substituted service may apply for such leave to a magistrate.

2. (1) Any person desiring to obtain leave to effect service by substituted service shall make an application to the court setting out concisely —

- (a) the nature and extent of his claim;
- (b) the grounds upon which it is based;
- (c) the grounds upon which the court has jurisdiction to entertain the claim;
- and,
- (d) the manner of service which the court is asked to authorise.

(2) If the manner of service is other than personal service, the applicant shall further state the last known whereabouts of the person to be served and the inquiries made to ascertain his present whereabouts.

3. Upon receipt of an application under rule 2 the court may —

- (a) make an order as to the manner of service;
- (b) order the time within which notice of intention to defend is to be given; or
- (c) order any other step that is to be taken by the person to be served.

4. Where service by publication is ordered, it shall be in accordance with Form 6 set out in the First Schedule and signed by the clerk of the court.

5. (1) Any person desiring to obtain leave to effect service by substitution may —

- (a) make an application for such in terms of rule 1; or,
- (b) request such leave at any hearing at which the court is dealing with the matter, in which event, no papers need be filed in support of such request.

(2) Subject to paragraph (b) of subrule (1), the court may act upon such information as may be given from the bar.

(3) The court may require any other information and make such order as it deems fit.

ORDER 9

SUMMONS COMMENCING ACTION

1. (1) Process of the court for commencing an action shall be by summons calling upon the defendant to —

(a) enter an appearance within —

(i) 7 days after service if the defendant is served within a radius of a 100km from the office of the clerk of the court; or

(ii) 21 days after service if the defendant is outside a radius of a 100km of the office of the clerk of the court; and

(b) answer the claim of the plaintiff, with a warning to the defendant of the consequences of failure to answer.

(2) The summons shall be endorsed and issued by the clerk of the court.

2. (1) The summons shall, before issue, contain —

(a) particulars of claim, and where applicable, all other supporting documents;

(b) consent to judgment;

(c) appearance to defend.

(2) The originating summons shall —

(a) be signed by the plaintiff or his attorney of record;

(b) bear the full address where the plaintiff will accept service of process in the action; and

(c) bear the postal address of the plaintiff or his attorney.

3. (1) The particulars of claim shall show —

(a) the nature and amount of the claim;

(b) the rate of interest and the amount claimed up to the date of the summons; and

(c) the amount which, if the action is undefended, is claimed for attorney's costs and court fees.

(2) The messenger or other person effecting service shall indicate the amount of his charges on the summons on service.

(3) The particulars shall also show —

(a) any abandonment of part of the claim as provided under section 24 of the Act;

(b) any amount admitted as due to the defendant as provided under section 25 of the Act; or

(c) any set-off as provided under section 28 of the Act.

(4) The notice of abandonment in subrule (3) (a) shall be as near as possible to Form 46 set out in the First Schedule.

(5) Where the summons contains more than one claim, the particulars of each claim and the relief sought in respect of each claim shall be stated separately.

(6) Where the particulars contain more than 100 words, they may be contained in an annexure served with the summons and the annexure shall be taken to be part of the summons.

(7) The clerk of the court may refuse to issue a summons in which an excessive amount is claimed for attorney's costs or court fees.

4. The summons shall also show —

- (a) the full names of the defendant as known to the plaintiff, the defendant's sex, residence or place of business and, where known, his occupation and, if the defendant is sued in a representative capacity, the capacity in which he is sued;
- (b) the full names, sex, occupation and residence or place of business of the plaintiff;
- (c) where the plaintiff sues as cessionary, the name, address and description of the cedent at the date of the cession and the date of the cession;
- (d) where the plaintiff sues in a representative capacity, the capacity in which he sues; and
- (e) where the plaintiff sues upon an instrument which was necessary to be presented, the fact and date of presentment of the instrument.

5. A summons may contain more than one claim, either alternatively or otherwise, but claims which are not expressed to be alternative shall not be mutually inconsistent or be based on an inconsistent averment of fact.

6. (1) Any two or more persons claiming or being sued as co-partners may sue or be sued in the name of the firm of which such persons were co-partners at the time of the accruing of the cause of action; and, in any such case, any party may, by notice require from the party so suing or being sued, a statement of the names and places of residence of the persons who were at the time of the accruing of the cause of action co-partners in that firm.

(2) A party receiving a notice under subrule (1) shall, within 5 days after receipt, deliver statement required.

(3) When the names of the partners are so declared, the action shall proceed in the same manner and the same consequences and shall, in all respects, follow as if the parties had been named in the summons; but all the proceedings shall nevertheless continue in the name of the firm.

(4) Any person carrying on business in a name or style other than his own name may sue or be sued in such name or style as if it were a firm name; and so far as the nature of the case will permit all the provisions of this rule relating to proceedings against firms shall apply.

(5) The provisions of this rule shall also apply with the necessary modifications to an unincorporated company, syndicate or association.

(6) The court may, where an action has been instituted by or against a firm, a person carrying on business in a name or style other than his own name or by an unincorporated company, syndicate or association, in the name of the firm or in such name or style or in the name of the company, syndicate or association, as the case may be, on the application of the other party to the action made at any time either before or after judgment, on notice to a person alleged to be a partner in such firm or the person so carrying on business, or a member of such company, syndicate or association, declare such person to be a partner, the person so carrying on business or a member, as the case may be.

(7) Subrule (3) shall apply to a declaration made under subrule (6) as if the name of such person had been declared in a statement delivered under subrule (2).

7. (1) The plaintiff may, subject to this rule and before service, amend or alter a summons.

(2) Any alteration or amendment of a summons before service, and whether before or after issue, shall, before the summons is served, be initialled by the clerk of the court in the original summons, and, until so initialled, such alterations and amendments shall have no effect.

(3) An originating summons may, after service, be amended with the leave of the court —

(a) on application on notice; or

(b) at the hearing,

subject to such order as to adjournment and costs as shall be just; and the court shall take into consideration whether adequate prior notice of intention to apply for such amendment has been served upon the party affected.

ORDER 10

COUNTER-CLAIMS

1. (1) In counter-claims it shall not be necessary to enter an appearance to defend.

(2) All times which, in the case of an originating claim run from the date of appearance shall, in the case of a counter-claim, run from the date of delivery of the claim.

2. A counter-claim shall be made within 7 days of filing of a notice of appearance to defend by delivery of a plea or a statement in writing giving such particulars of the counter-claim as are required for originating claims.

3. (1) A defendant may set up by a counter-claim any right or claim to any amount against the plaintiff —

(a) whether liquid or illiquid; or

(b) whether or not it arises out of or is connected with the subject matter of the originating claim.

(2) A claim under subrule (1) (b) shall, if it is within the jurisdiction of the court, have the same effect as a cross action, so as to enable the court to pronounce a final judgment in the same action, both on the originating claim and on the counter claim.

(3) A defendant delivering a counter-claim may, by notice delivered with the counter-claim or within 2 days after the delivery of the counter-claim, apply to the court to pronounce that the counter-claim exceeds its jurisdiction and to stay the action as provided under section 29 of the Act.

(4) Where the court either on its own motion or on objection by the plaintiff has pronounced that the counter-claim exceeds its jurisdiction, the defendant may immediately or by notice delivered within 2 days after the pronouncement, apply for stay of the proceedings.

(5) If an application for stay is not made as provided under subrule (3) or (4), or, having been made, is dismissed, the court shall on the application of the plaintiff or otherwise of its own motion dismiss the counter-claim pronounced to have exceeded its jurisdiction, unless the defendant abandons part of the claim to bring it within the jurisdiction of the court as provided under section 24 of the Act.

4. Where the originating and the counter-claim proceed to trial under Order 25, each action may be tried separately, but judgment shall be given for both at the same time.

5. A defendant shall not make a counter-claim in a counter-claim of the plaintiff.

6. Where an originating claim is withdrawn, stayed, discontinued or dismissed, it shall be competent to proceed separately with the counter-claim, if any.

ORDER 11

APPEARANCE TO DEFEND

1. (1) A defendant intending to defend an action shall, within the period limited by the summons, enter an appearance to defend by delivery of a notice that he intends to defend.

(2) In an action against the Government an appearance to defend may be entered at any time within 21 days after service of the summons.

(3) Notwithstanding the provisions of subrules (1) and (2), an appearance to defend, even though entered after the expiry of the period mentioned in the summons, or the period specified under subrule (2), shall be effective where —

- (a) a request for default judgment has not yet been filed; or
- (b) the request for default judgment and the appearance to defend are filed on the same day.

(4) Where the appearance to defend and the request for default judgment are filed on the same day, the plaintiff shall be entitled to costs of the request for default judgment as if the matter had been an undefended action.

2. The notice of appearance to defend shall be signed by the defendant or his legal representative, and shall state the full address for service as well as the postal address of the person who has so signed, unless the addresses are the same.

3. The clerk of the court shall, at the request of an illiterate defendant who has not employed an attorney, enter an appearance for him.

4. The entry of an appearance shall be without prejudice to any objection or exception which the defendant may have.

ORDER 12

JUDGMENT BY CONSENT AND DEFAULT JUDGMENT

1. (1) A defendant may, before entry of appearance to defend, consent to judgment by —

- (a) signing the form of consent contained in the original summons;
- (b) lodging with the clerk of the court a consent in a form similar to that in the original summons duly signed by him and by two witnesses whose addresses are also given; or
- (c) lodging with the clerk of the court the copy of the summons served upon him with the form of consent contained in the summons duly signed by him.

(2) Where a defendant consents to judgment before service it shall not be necessary to serve the summons upon him and he shall not be liable to pay fees for service.

(3) A defendant who consents to judgment before the expiration of the time limited for appearance shall not be liable to pay judgment charges.

(4) A defendant may, after entry of appearance, consent to judgment by delivering a consent signed by him or by his attorney in a form similar to that contained in the summons.

(5) If the amount for which consent is given is less than the amount claimed in the summons, the defendant may enter an appearance to defend or may continue his defence for the balance of the claim.

(6) Notwithstanding a judgment upon consent in subrule (5), the action may proceed as to the balance, and it shall in that event be in all subsequent respects an action for such balance.

2. (1) A magistrate may order that any consent to judgment be heard in open court and the court may —

- (a) call upon the plaintiff to produce evidence to satisfy the court that the consent has been signed by the defendant and is a consent to the judgment sought;
- (b) enter judgment in terms of the defendant's consent;
- (c) enter judgment in terms of the plaintiff's request or for as much of the claim as has been established to its satisfaction.

(2) Where one or more of several defendants in an action consent to judgment, judgment may be entered against the defendant or defendants who have consented to judgment and the plaintiff may proceed on such judgment without prejudice to his right to continue the action against the other defendant or defendants.

3. (1) If the defendant fails to enter appearance to defend within the period limited by the summons and has not consented to judgment, the plaintiff may lodge with the clerk of the court a written request for default judgment against the defendant for —

- (a) any sum not exceeding the sum claimed in the summons;
- (b) costs of the action;
- (c) interest from the date of the summons to the date of judgment at the rate specified in the summons or, if no rate is specified, at the rate of 10 per cent per annum; or
- (d) for other relief claimed in the summons.

(2) The written request for default judgment under subrule (1) shall be as near as possible to Form 11 under the First Schedule.

4. (1) When the defendant has failed to enter appearance to defend or when the defendant has consented to judgment the clerk of the court shall place the request for default judgment or the consent to judgment before a magistrate who may, subject to subrule (2) and rules 5 and 6 summarily grant judgment in terms of the plaintiff's request or of the defendant's consent, as the case may be.

(2) If it appears to the magistrate that the defendant intends to defend the action but that his entry of appearance is defective in respect that the notice —

- (a) has not been properly delivered;
- (b) has not been properly signed;

- (c) has not set out the postal address of the person signing it or an address for service as prescribed under Order 11 rule 2; or
- (d) exhibits any two or more of such defects or any other defect of form, he shall not grant judgment against the defendant and the matter shall proceed to the initial case management conference.

5. Judgment in default of appearance to defend shall not be entered in an action, in which the summons has been served by registered post unless there has been filed a return or affidavit of service by the messenger or the person effecting service and an original or copy of the acknowledgement of receipt form by the addressee.

6. (1) The court shall grant interim judgment pending the assessment of damages in a request for judgment on a claim for unliquidated damages under this rule.

(2) The plaintiff shall furnish the court with evidence either oral or by affidavit stating the nature and extent of the damages suffered by him and the court shall assess the amount recoverable as damages and enter judgment for the plaintiff.

7. A magistrate may order that a request for default judgment be heard in open court and the court may —

- (a) call upon the plaintiff to produce such evidence either written or oral in support of his claim as it may deem necessary;
- (b) enter judgment in terms of the plaintiff's request or for as much of the claim as has been established to its satisfaction;
- (c) refuse judgment; or
- (d) make such other order as may be just.

8. When one or more of several defendants in an action fail to enter appearance, judgment may be entered against the defendant or defendants who are in default and the plaintiff may proceed on such judgment without prejudice to his right to continue the action against the other defendant or defendants.

9. Particulars of all judgments granted under this rule shall be recorded in the Civil Record Book and where applicable in electronic form.

ORDER 13

ASSESSMENT OF DAMAGES

1. Where judgment is given for damages, the damages shall be assessed by the magistrate or, if so ordered by the magistrate, by the clerk of the court.

2. Where judgment in default of appearance is sought under Order 12 rule 6 (1) 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 magistrate, or the clerk of the court if so ordered by the Magistrate, may —

- (a) grant an order for such damages or value as he considers proved on affidavit; or
- (b) call for additional evidence, either oral or further on affidavit before he grants the order.

4. When an order is granted by the clerk of the court under rule 3 —
 - (a) the plaintiff may, within 14 days, of the making of the order apply *ex parte* to the magistrate for reassessment of the damages assessed by the clerk of the court; or
 - (b) the defendant may, within 14 days of becoming aware of the judgment, apply on motion to the magistrate for reassessment of the damages assessed by the clerk of the court,failing either of which, the judgment granted by the clerk of the court shall become final.
5. The attendance of witnesses and the production of documents before the magistrate or clerk of the court may be compelled by subpoena and the provisions of Order 25 as to proceedings at a trial shall, apply with any necessary modifications.
6. Where any judgment as is referred to 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 magistrate otherwise orders.

ORDER 14

PAYMENT INTO COURT

1. (1) A defendant may, at any time, pay into court unconditionally the amount claimed in the summons and all further proceedings in the action shall cease, except for the recovery of any costs not included in the payment.
 - (2) A defendant paying money into court after entry of appearance shall, at the same time deliver a notice stating that the amount is paid unconditionally.
 - (3) A plaintiff may, within 10 days of notice of such payment into court accept the amount paid and further proceedings shall cease except for the recovery of costs not included in the payment.
2. (1) A defendant may, without prejudice, pay any amount into court by way of offer in settlement of the plaintiff's claim.
 - (2) A defendant paying money into court after appearance has been entered shall at the same time deliver a notice in a form as near as possible to Form 12 set out in the First Schedule stating that the amount paid is an offer of settlement.
 - (3) A plaintiff may, within 10 days of notice of such payment into court, accept the amount paid and the proceedings shall cease.
3. (1) The clerk of the court shall cause to be paid out to the plaintiff any money paid into court under rules 1 and 2.
 - (2) A plaintiff entitled to payment under subrule (1) shall be entitled to recover from the defendant the costs incurred by him up to the time of payment into court, together with costs of obtaining payment.
 - (3) Where the defendant has made payment in offer of settlement and states in his notice that the amount paid is inclusive of costs, the plaintiff shall be entitled to receive those costs as if ordered by the court.
4. Where the matter goes for trial on the basis that the plaintiff refused an offer for settlement and the court subsequently finds that the plaintiff is not entitled to more than what he is offered, it shall —

- (a) grant judgment in favour of the plaintiff with costs incurred before the offer for settlement was made;
 - (b) grant the defendant costs incurred after the offer for settlement.
5. A defendant admitting part of the plaintiff's claim shall, on the day of filing his plea to the balance pay into court the amount so admitted.
6. Where the claim is for damages or compensation, the amount of a tender or payment into court shall not be disclosed to the court or in the pleadings until after judgment on the claim has been given.
7. The order for costs shall be made only after disclosure of the amount tendered or paid into court and the court, in awarding costs, shall proceed as provided under rule 4.

ORDER 15

EXCEPTIONS, APPLICATIONS TO STRIKE OUT AND SPECIAL DEFENCES

1. (1) A defendant shall, at the time of entry of appearance, deliver particulars of any exception to the summons.
- (2) Where the particulars of the exception have been delivered, the magistrate shall deal with such exception in terms of rule 3 (3).
- (3) A defendant failing to deliver particulars within the period stated in the summons may not raise any exception without leave of the court, which shall only be granted on application and by notice to the plaintiff.
2. (1) The only exceptions which may be taken by the defendant are that —
- (a) the summons does not disclose a cause of action;
 - (b) the summons is vague and embarrassing;
 - (c) the summons does not comply with the requirements of Order 9;
 - (d) the copy of the summons served upon the defendant differs materially from the original.
- (2) Any other defence shall be raised by means of a plea.
- (3) Where more than one claim is made in a summons, exception may be taken to any of such claims.
3. (1) The defendant shall, prior to taking the exception, deliver a notice giving the plaintiff 5 days within which to remove the cause of complaint.
- (2) A defendant raising an exception to the summons shall apply to the court for directions, setting out clearly and concisely the ground upon which the exception is founded.
- (3) The court may at the initial case management conference —
- (a) dismiss the exception and make an order as to the filing of subsequent pleadings;
 - (b) uphold the exception, and —
 - (i) dismiss the action;
 - (ii) allow such amendment as may be necessary to remove the cause of complaint in which event the subsequent pleadings shall be filed and delivered in terms of paragraph (a); or
 - (c) make such other order as it deems just to ensure the expeditious disposal of the case.

4. (1) A defendant may apply to strike out any two or more claims in a summons which, not being in the alternative are —

- (a) mutually inconsistent;
- (b) based on inconsistent averments of fact; or
- (c) argumentative, irrelevant, superfluous or contradictory.

(2) The provisions of rule 1 shall apply, with the necessary modifications, to the delivery of particulars of a motion under subrule (1).

5. (1) Where the defendant has delivered particulars of an exception or an application to strike out before the hearing of any application for summary judgment, the applications shall be heard at the same time.

(2) If an application for summary judgment is not made, then the provisions of rule 3 (3) shall apply with the necessary modification.

(3) Evidence may be called by either party to support or to repel an exception that the summons does not comply with the requirements of Order 9.

(4) In sustaining any dilatory plea, the court may order the proceedings to be stayed and if thereafter the ground of stay is removed it may, on application, discharge the stay.

ORDER 16

SUMMARY JUDGMENT

1. (1) Where a defendant has entered an appearance to defend, the plaintiff in the originating claim may apply to the court for summary judgment if the claim is only —

- (a) on a liquid document;
- (b) for a liquidated amount in money;
- (c) for the delivery of specified movable property;
- (d) for ejectment; or
- (e) for any two or more such matters as are described in paragraph (a), (b), (c) or (d); in addition to costs.

(2) Such an application shall be filed within 3 days after entry of appearance to defend and shall be as near as possible to Form 14 set out in the First Schedule.

(3) The application shall be accompanied by —

- (a) a Notice of Set down;
- (b) in the case of an illiquid claim, a copy of an affidavit made 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 *bona fide* defence to the action and that appearance has been entered solely for the purpose of delay; or
- (c) in the case of a liquid claim, a copy of the liquid document on which the claim is founded, and the application and notice of set down shall be served on the defendant not less than 3 days before the date set for hearing.

(4) The affidavit in subrule 3 (b) shall be in a form as near as possible to Form 15 set out in the First Schedule.

2. (1) At least a day before the date set for the hearing of an application for summary judgment, the defendant may, in order to stop the summary judgment application —

(a) pay into court to abide the result of the action the sum sued for, together with such sums for costs as the court may determine; or

(b) give security to satisfy any judgment which may be given against him in the action.

(2) At least a day before the date set for the hearing of an application for summary judgment, the defendant may deliver an affidavit to satisfy the court that he has a *bona fide* defence to the action or *bona fide* counterclaim against the plaintiff.

(3) The affidavit may, by leave of the court, be supplemented by oral evidence.

(4) The affidavit and evidence referred to under subrule (2) and (3) shall fully disclose the nature and grounds of the defence or counterclaim.

(5) At the hearing of an application for summary judgment the plaintiff shall not adduce any other evidence other than by the affidavit already filed or the liquid document sued upon.

(6) Where the court has allowed oral evidence, any person testifying shall not be cross-examined by the plaintiff, but may, after examination by the defendant be examined by the court.

3. (1) If the defendant does not pay into court or find security or satisfy the court, summary judgment may be entered for the plaintiff.

(2) If the defendant pays into court or finds security or satisfies the court, the court shall give leave to defend, and the action shall proceed to trial.

4. Where leave to defend has been granted by the court, and the matter goes for trial, the evidence given at a summary judgment application shall not be admissible unless by consent of the parties.

5. If, on the hearing of an application for summary judgment, it appears to the court that a defendant is entitled to leave to defend and another defendant is not entitled, or that a defendant is entitled to leave to defend as to only part of the claim, the court may —

(a) give leave to defend to a defendant so entitled and enter judgment against a defendant not so entitled;

(b) give leave to defend as to such part of the claim and enter judgment against the defendant as to the balance of the claim; or

(c) make both orders in terms of paragraphs (a) and (b).

ORDER 17

PLEA

1. (1) Subject to subrules (2) and (3), the defendant shall, within 7 days after entry of appearance, deliver a statement in writing to be called a plea.

(2) Where —

- (a) documents or further particulars have been delivered;
- (b) an order is made for the dismissal of an exception or application to strike out; or
- (c) an amendment of the summons is allowed by the court at the hearing of an exception or application,

a plea shall be filed within the periods specified in a Schedule by the magistrate at an initial case management conference.

(3) Where —

- (a) an application for summary judgment is dismissed; or
- (b) an order giving leave to defend is granted,

a plea shall be filed within the periods given by the magistrate in the judgment.

2. If the defendant is the Government, a plea shall be delivered within 14 days after entry of appearance.

3. The plea shall be dated and signed by the defendant or his attorney.

4. The defendant in his plea shall either admit, deny, confess and avoid or state that he has no knowledge of all the material facts alleged in the particulars to the originating or counter-claim and shall clearly and concisely state the nature of his defence and all the material facts on which it is based.

5. (1) Every allegation in the particulars to the originating or counter-claim shall be dealt with by the defendant specifically.

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

(3) Every allegation of fact by the plaintiff which is inconsistent with the plea shall be presumed to be denied.

6. (1) For the purposes of this rule “defendant” includes a person upon whom a summons has been served and who alleges that he is not the defendant cited in the summons and enters appearance to defend on that ground.

(2) The court may on the hearing of any such defence order costs to be paid to or by such person as if he were a party to the action.

(3) If such a defence is sustained the court, instead of dismissing the summons, may, if moved by the plaintiff, allow any necessary amendment and order that it be served upon the real defendant.

7. Where a tender is pleaded as to part of the amount claimed, the plea shall specify those parts of the plaintiff’s claim to which the tender relates.

8. (1) A plea of tender shall not be admissible unless the amount of the alleged tender is paid into court on the delivery of the plea, if not already paid to the plaintiff.

(2) The amount referred to under subrule (1) shall be paid out to the plaintiff only on the order of the court or upon the written consent of the parties.

9. A tender after the commencement of the action shall include an undertaking to pay the plaintiff’s costs up to the date of the tender.

10. (1) Where payment into court is alleged in the plea, the particulars of the plea shall show whether the payment is unconditional, by way of settlement or by way of tender.

(2) If the nature of the payment is not specified it shall be deemed to be by way of tender after commencement of the action.

11. Any defence which can be adjudicated upon without the necessity of going into the main case may be addressed at the initial case management conference.

12. (1) A plaintiff may, within 7 days of delivery of the plea or further particulars and with or before delivering a reply, deliver particulars of an exception to the plea.

(2) The plaintiff raising an exception to the plea shall clearly and concisely state the grounds upon which it is founded.

13. A plaintiff may except to the plea on the ground that —

(a) it does not disclose a defence to the plaintiff's claim; or

(b) it is vague and embarrassing.

14. (1) The court shall not uphold any exception unless it is satisfied that the plaintiff would be prejudiced in the conduct of his case if the plea were allowed to stand.

(2) The court shall not hear an exception that the plea is vague and embarrassing unless the plaintiff has, prior to taking the exception, delivered a notice giving the defendant an opportunity of removing the cause of the complaint.

15. Where particulars have been delivered by the defendant in terms of a Schedule made by the magistrate at the initial case management conference, they shall be deemed to be included in the plea.

16. The provisions of rule 12 shall apply with necessary modification to the delivery of particulars of an application to strike out.

17. An exception to or application to strike out matter from a plea may be set down for hearing by the court at an initial case management conference.

18. If such an exception or application is sustained and no application for amendment is made or, having been made is refused, the court may, if the plea discloses no defence, give judgment for the plaintiff.

ORDER 18

REPLY TO PLEA

1. The plaintiff may, within 7 days after the filing and service of the plea or further information in respect of the plea, deliver a statement in writing to be called a reply.

2. The rules applicable to the plea shall, with the necessary modifications, apply to the reply.

3. Where the plaintiff does not deliver a reply within 7 days of receipt of the plea, he shall be taken to have denied all the allegations of fact contained in the plea.

4. The pleadings shall be deemed to be closed where —

(a) the reply has been delivered;

(b) where no reply is delivered after the expiry of 7 days.

ORDER 19

DISCOVERY, INSPECTION AND PRODUCTION

1. (1) The court may, at a case management conference, make an order directing the parties to make discovery of the documents, plans, diagrams, models or photographs which are or have been in their possession or control relating to the action which they intend to use, which tend to prove or disprove their cases.

(2) Where the court makes an order for discovery, the parties shall list the documents, plans, diagrams, models or photographs in their possession or control.

(3) The court shall, in the same order, specify the period within which the lists shall be delivered.

(4) If privilege is claimed for any of the documents, plans, diagrams, models or photographs listed, such documents, plans, diagrams, models or photographs shall be separately listed and the ground on which privilege is claimed in respect of each shall be set out.

(5) A book, document, plan, diagram, model or photograph not so disclosed may not be used for any purpose on the trial of the action by the party in whose possession or control it is in without the leave of the court in terms as to adjournment and costs as may be just, but the other party may call for and use such book, document, plan, diagram, model or photograph in the cross-examination of a witness.

2. Upon delivery of the lists the parties shall inspect and exchange copies of all books, documents, plans, diagrams, models or photographs disclosed in the lists.

3. (1) A party may make an application, by notice to the other party and a third party for an order for the production of books, documents, plans, diagrams, models or photographs in the possession and control of the third party for inspection.

(2) A notice for the production of books, documents, plans, diagrams, models or photographs for inspection under subrule (1) shall be in a form as near as possible to form 16 set out in the First Schedule.

(3) The court may grant or refuse the application as it deems just and equitable.

4. (1) Where a party having been given a chance to discover, inspect or produce books, documents, plans, diagrams, models or photographs and does not object to their production in evidence, such books, documents, plans, diagrams, models or photographs shall be received in evidence upon their mere production without further proof.

(2) If the party objects to such books, documents, plans, diagrams, models or photographs such books, documents, plans, diagrams, models or photographs may be proved at the hearing of the action.

5. (1) A party may, by notice, require the other party and a third party to produce books, documents, plans, diagrams, models or photographs in the possession and control at trial.

(2) A notice for the production of books, documents, plans, diagrams, models or photographs shall be in a form as near as possible to Form 18 set out in the First Schedule.

ORDER 20

MEDICAL EXAMINATIONS

1. (1) Any party to proceedings in which damages or compensation in respect of alleged bodily injury is claimed may require a party claiming such damages or compensation whose state of health is relevant to the determination of such damages or compensation to submit to an examination by one or more duly registered medical practitioners.

(2) Any party requiring another party to submit to such examination shall give a notice specifying —

- (a) the nature of the examination required;
- (b) the medical practitioner or medical practitioners by whom it will be conducted;
- (c) the place, time and the date of the examination;
- (d) a requirement for the other party to submit to the examination at such place, date and time; and
- (e) that the other party may have his medical practitioner present at the examination.

(3) The date for the examination shall not be less than 14 days from the date of receipt of such notice.

(4) The notice shall be accompanied by a remittance in respect of the reasonable expense to be incurred by the other party in attending the examination.

(5) The amount of the expense incurred shall be tendered on the same scale as for a witness in a civil suit.

(6) The amount of the expense shall also include —

- (a) if such other party is physically incapable of proceeding on his own to attend the examination, the cost of his travelling by motor vehicle and, where required, the reasonable cost of a person attending upon him; or
- (b) an amount not exceeding his salary, wage or other remuneration per day which he will actually forfeit where such other party will actually forfeit any salary, wage or other remuneration during the period of his absence from work.

(7) Any amount paid by a party in terms of subrules (5) and (6) shall be costs in the cause, unless the court otherwise directs.

2. (1) Any party receiving a notice referred to under rule 1 (2) shall, within 3 days of receipt of the notice, notify the other party in writing of the nature and grounds of any objections which he may have in relation to —

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

(2) Where the party receiving the notice under rule 1 (2) objects to —

- (a) the place, date or time of the examination, he shall suggest an alternative place, date or time for the examination;
- (b) the amount of the expenses tendered, furnish particulars of such increased amount as he may require.

(3) If the party receiving the notice under rule 1 (2) does not deliver any objection within 3 days, he shall be deemed to have agreed to the examination on the terms set by the party giving the notice.

(4) If the party receiving the objection is of the opinion that the objection or any part of it is not well founded, he may apply to the court to determine the conditions upon which the examination, if any, is to be conducted.

3. Any party to proceedings in which damages or compensation in respect of alleged bodily injury is claimed may by notice, at any time after the examination, require any party claiming such damages or compensation to make available to the other party within 10 days any medical report, hospital record, X-ray photograph, or other documentary information of a like nature relevant to the assessment of such damages or compensation.

4. (1) If the party refuses or objects to submit to a medical examination or to release a medical report, hospital record, X-ray photograph or other documentary information, the other party may make a verbal application at a case management conference for an order.

(2) If it appears from any medical examination carried out either by agreement between the parties or in pursuance of any notice given in terms of this Order, or any determination made by the court that any further medical examination by any other medical practitioner is necessary or desirable for the purpose of obtaining full information on matters relevant to the assessment of such damages or compensation, any party may require a second and final examination in accordance with the provisions of this Order.

5. Any party requesting a medical examination shall —

- (a) cause the person making the medical examination to give a full report in writing of the results of such medical examination and the opinions that he formed as a result;
- (b) after receipt of the report and on request, furnish any party with a certified copy of that report; and
- (c) bear the expense of the medical examination.

ORDER 21

THINGS IN GENERAL

1. (1) Where the state or condition of a thing of any nature, whether movable or immovable is relevant to the decision of any matter at issue in any action, any party may at any stage not later than 10 days before the hearing, give notice requiring the other party to make the thing or its fair sample available for inspection or examination.

(2) A notice for inspection under subrule (1) shall be in a form as near as possible to Form 17 set out in the First Schedule.

(3) The party requested to submit the thing for inspection or examination may require the party so requesting to specify the nature of the inspection or examination for which such thing is to be submitted, and shall not be bound to submit the thing if he will be materially prejudiced by reason of the effect of the inspection or examination upon such thing.

(4) In the event of a dispute whether the thing should be submitted for inspection or examination, a party may make a verbal application at a case management conference for an order for such inspection or examination.

2. Any party requesting an inspection or examination of a thing shall —
 - (a) cause the person making the inspection or examination to give a full report in writing of the results of the inspection or examination, and the opinions that he formed as a result;
 - (b) after receipt of the report and upon request, furnish any party with a certified copy of the report; and
 - (c) bear the expense of the inspection or examination and the expense shall form part of the party's costs.
3. (1) A party may, by notice, require the other party and a third party to produce any thing in the possession and control at trial.
(2) A notice for the production of books, documents, plans, diagrams, models or photographs shall be in a form as near as possible to Form 19 set out in the First Schedule.

ORDER 22

EXPERT TESTIMONY

1. (1) The court shall, at a case management conference, give directions as to the calling of expert testimony.
(2) The directions shall include —
 - (a) the time within which documents relating to expert testimony shall be delivered;
 - (b) the time within which the summary of such expert testimony shall be delivered.
2. (1) Where a party having been given a chance to discover, inspect or produce an expert opinion or summary does not object to the opinion or summary's admission in evidence, such opinion or summary shall be received in evidence upon its mere production without further proof.
(2) If the party objects to an expert opinion or summary, the opinion or summary shall be proved at the hearing of the action.

ORDER 23

ADMISSIONS

1. (1) Any party to an action may, before or during trial, admit —
 - (a) the truth of the whole or any part of the action or application of any other party;
 - (b) any document; or
 - (c) any specific fact or facts.
- (2) The admissions shall, if made before trial, be by way of application on 3 days notice to the other party and, if made during trial, be verbal.

ORDER 24

SETDOWN

1. The date or dates of hearing of a trial or an opposed motion or petition shall be set by the magistrate at a case management conference.

2. The clerk of the court shall, not later than 5 days after the set down, give not less than 14 days' notice to all parties to the proceedings of the dates of hearing.

3. The issuance of such notice shall also operate to set down for trial any counter-claim made by the defendant.

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

ORDER 25

TRIAL

1. The trial of an action shall take place at the courthouse from which the summons was issued, unless the court otherwise orders.

2. (1) If there is no appearance by or for the defendant when a case is called for trial, the plaintiff may prove his claim so far as the burden of proof lies upon him and judgment shall be given accordingly in so far as he has discharged such burden.

(2) If the defendant appears and the plaintiff or his counsel fails to appear, the defendant shall be entitled to an order dismissing the plaintiff's claim with costs but may lead evidence with a view to satisfying the magistrate that final judgment should be granted in his favour, and the magistrate, if so satisfied, may grant such judgment.

(3) If, when a trial is called, there is no appearance for either party, the magistrate shall, unless he sees good reason to the contrary, strike the cause out of the roll.

(4) The provisions of this Rule shall apply to any person making any claim whether by way of counter-claim or third party claim.

3. Any judgment which is not final obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the magistrate, upon such terms as the magistrate may deem fit.

4. A witness who is not a party to the action may be ordered by the court —
- (a) to leave the courtroom until his evidence is required or after his evidence has been given; or
 - (b) to remain in the courtroom after his evidence has been given until the trial is terminated or adjourned.

5. The court may, before proceeding to hear evidence, require the parties to give a brief summary of their cases and the issues to be proved.

6. (1) If —
- (a) the burden of proof is on the plaintiff, he shall first adduce his evidence; or
 - (b) absolution from the instance is not then decreed, the defendant shall then adduce his evidence.
- (2) Where such burden of proof is on the defendant, the defendant shall first adduce his evidence, and the plaintiff shall thereafter adduce his evidence.
- (3) Where the burden of proving one or more of the issues is on the plaintiff and that of proving others is on the defendant, the plaintiff shall first call his evidence on any issues for which proof is upon him, and may then close his case, and the defendant shall then call his evidence on all the issues for which proof is upon him.
- (4) A third party who is not a party to the originating claim shall be entitled to address the magistrate in opening his case and shall lead his evidence after the evidence of the plaintiff where he is co-plaintiff and after the defendant where he is co-defendant.
- (5) A third party in an inter-pleader claim may lead evidence before or after the evidence of the plaintiff or defendant depending on the issue to be proved.
- (6) Where there is a dispute as to which party shall lead evidence first, the court shall direct which party shall first adduce evidence.
- (7) Either party may, with the leave of the court, adduce further evidence at any time before judgment; but such leave shall not be granted if it appears to the court that such evidence was intentionally withheld out of its proper order.
- (8) After the evidence on behalf of both parties has been completed, the party who first adduced evidence may first address the court and thereafter the other party, and the party who first adduced evidence may reply.
7. (1) The court may, at any time before judgment, on the application of either party or of its own motion, recall any witness for further examination.
- (2) Any witness may be examined by the court, as well as by the parties.
8. (1) Where the court has authorised the evidence of any witness to be taken on interrogatories, such interrogatories shall be filed within 4 days of the order, and cross-interrogatories within 4 days thereafter.
- (2) The parties or their witnesses may, where the court authorises, give evidence by video conference.

ORDER 26

WITHDRAWAL AND SETTLEMENT

1. (1) A plaintiff or applicant desiring to withdraw an action or application against all or any of the parties before or after service of summons shall deliver a notice of withdrawal and may tender costs.
- (2) The notice of withdrawal shall be in a form as near as possible to Form 13 set out in First Schedule.
- (3) Any party served with a notice of withdrawal may within 5 days thereafter apply to the court for an order that the party so withdrawing shall pay the applicant's costs of the action or withdrawn application, together with the costs incurred in so applying.
- (4) Where the plaintiff, in the notice of withdrawal, embodies a consent to pay the costs, such consent shall then have the force of an order of court, and the clerk of court shall tax the costs on the request of the defendant.

(5) Any party may, by delivery of a notice, abandon any specified claim, objection, exception or defence pleaded by him; and such notice shall be taken into consideration in taxing costs.

2. (1) The parties may, at any time before judgment, file a settlement agreement which may be made an order of the court.

(2) The court shall, where a settlement agreement is signed by all the parties to the action, make an order that the action has been settled on the terms set out in the settlement agreement, and all further proceedings in the action shall be permanently stayed.

(3) After a consideration of the settlement agreement the court may —

- (a) enter judgment as specified in terms of the settlement;
- (b) amend, set aside the settlement or give such directions for the further prosecution of the action as it may deem fit; or
- (c) make such order as may be just as to costs.

ORDER 27

DISMISSAL FOR WANT OF PROSECUTION

1. If a summons in any action has been served and the plaintiff has not, within 6 months, taken further steps in the prosecution of the action, the clerk of the court shall list the matter before a magistrate on a motion date for dismissal for want of prosecution on that date, and serve notice on all parties to the action.

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

3. If the magistrate 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.

4. The provisions of this Order shall, with the necessary modifications be applicable to Motion Proceedings.

ORDER 28

RECORD OF PROCEEDINGS

1. Minutes of court proceedings shall be made of —

- (a) any judgment given by the court;
- (b) any *viva voce* evidence given in court;
- (c) any objection made to any evidence received or tendered; and
- (d) the proceedings of the court generally, including the record of any inspection *in loco*.

2. The court shall also mark each document put in evidence and note such mark on the record.

3. The minutes and marks may be made by the clerk of the court or the presiding magistrate, as the case may be.

4. The magistrate may direct, either generally or specially for the purposes of any particular matter that —

- (a) the addresses of the parties;
- (b) any *viva voce* evidence given during the course of the proceedings;
- (c) any exception or objection taken during the course of the proceedings;

- (d) the rulings and judgment of the court; and
- (e) such other portion of the proceedings as the court may specially indicate, be noted in shorthand and recorded by electronic means.

5. (1) Every person employed for the taking of shorthand notes or the transcription of notes taken by another person shall be called a 'court reporter' and shall be an officer of the court.

(2) The court reporter shall, before assuming his duties, take an oath or make an affirmation before a magistrate in a form as near as possible to Form 49 set out in the First Schedule.

(3) The oath or affirmation shall be administered in the manner prescribed for the taking of an oath or affirmation.

6. (1) Shorthand notes taken under this Order shall be certified as correct by the court reporter and shall be filed with the record of the case by the clerk of the court.

(2) Subject to rule 7, no shorthand notes shall be transcribed unless a magistrate so directs.

(3) The transcript of any shorthand notes shall be certified as correct by the person making it and shall be filed with the record of the case by the clerk of the court.

7. (1) In any case in which no transcription was ordered in terms of rule 6, any person may, on notice to the clerk of the court, request a transcription of any shorthand notes taken by virtue of a direction given under rule 4 and shall pay a fee to be determined by the Registrar from time to time.

(2) The original copy of the transcript of any shorthand notes referred to in subrule (1) shall be certified as correct by the person making it and shall be filed with the record of the case by the clerk of the court.

(3) The person who certifies the record under subrule (2) shall do so in a form as near as possible to Form 20 set out in the First Schedule.

(4) A sum sufficient to cover the approximate fee payable under subrule (1) shall be deposited with the clerk of the court in advance.

8. Subject to rule 11, any shorthand notes taken by virtue of a direction made under rule 4, and any transcript of such shorthand notes certified as correct, shall be deemed to be correct and shall form part of the record of the proceedings in question.

9. All recordings of court proceedings whether taken by shorthand, electronic or other means shall be deemed to be a true and correct record of the proceedings.

10. Any party may, not later than 7 days after having been in receipt of the typed record of the proceedings, apply to the court to correct any errors in the minutes of such proceedings and the court may then correct those errors.

11. If, before the hearing of the application, all parties affected file a consent to the corrections claimed, no costs of such application shall be allowed, otherwise costs shall be in the discretion of the court.

ORDER 29

APPLICATIONS AND PETITIONS

1. (1) Except where otherwise provided, an application to the court for an order affecting any other person shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.

(2) The notice of motion shall state the terms of the order applied for and shall be accompanied by a draft order.

(3) Where the application is not opposed, the clerk of the court shall assign a date on which the application shall be heard.

(4) Where a notice of opposition has been filed, the matter shall be referred to the magistrate for a case management conference.

(5) Delivery of a notice under subrule (1) and (4) shall be effected, in the case where the Government is the respondent, not less than 14 days, and in any other case not less than 3 days before the date of hearing.

2. (1) Except where otherwise provided, an *ex parte* application shall be made in writing stating shortly the terms of the order applied for and the grounds on which the application is made and shall be signed by the party making the application.

(2) Such application shall be supported by affidavit.

(3) An order granted *ex parte* shall call upon any party affected to appear on a stated date to show cause why the order cannot be made final.

(4) An order made *ex parte* shall be in a form as near as possible to Form 21 set out in the First Schedule.

3. Any person affected by an order granted *ex parte* may apply to discharge it with costs on not less than 12 hours' notice.

4. All interlocutory matters may be dealt with upon application, and any application which may be made *ex parte* may, at the applicant's election, be made on notice.

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

(2) In every affidavit filed in support of an application under subrule (1), the applicant shall set out explicitly —

(a) the circumstances which he avers renders the matter urgent; and

(b) the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.

(3) The application shall be accompanied by a certificate signed by the applicant or his attorney certifying that the matter is urgent.

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

ORDER 30

ARRESTS, INTERDICTS, ATTACHMENTS,
AND MANDAMENTEN VAN SPOLIE

1. (1) Except where otherwise provided for in these Rules, every application to the court for an order of arrest, interdict or attachment or for a *mandament van spolie* under section 18 of the Act, may be made *ex parte*.

(2) Every such *ex parte* application shall be upon affidavit stating shortly the facts upon which the application is made and the nature of the order applied for.

2. (1) The court may, before granting an order upon such application, require the applicant to give security for any damages which may be caused by such order and may require such additional evidence as it may think fit.

(2) An order made under subrule (1) shall be in a form as near as possible to Form 22 set out in the First Schedule.

3. (1) Every order granted *ex parte*, other than an order for the arrest of any person, shall call upon the respondent to show cause against it at a time stated in the order, which shall not be a time less than the time allowed for appearance in the summons, unless the court gives leave for shorter service.

(2) The respondent may, after being served with the order, apply to court giving 12 hours' notice to the applicant to have the matter heard on a date earlier than the return date.

4. (1) A copy of any order granted *ex parte* and of the affidavit on which it was made shall be served on the respondent.

(2) Where cause is shown against any such order, the court may order the respondent to any such affidavit to attend for cross-examination.

(3) Any order granted *ex parte* may be discharged or varied by the court on cause shown by any person affected and on such terms as to costs as may be just.

5. (1) An order granted *ex parte* shall be discharged upon security being given by the respondent for the amount to which the order relates together with costs.

(2) Such security may be given to abide the results of the action instituted or to be instituted and may be assigned by the respondent to only part of the order and shall in that event operate to discharge the order as to that part only.

(3) The messenger shall, upon being ordered by the court, release any person arrested upon such person giving security to the satisfaction of the court that he will appear upon the return day of the arrest.

(4) The security given under subrules (2) and (3) shall be in a form as near as possible to Form 23 set in the First Schedule.

6. A person entitled to the order shall draw up a draft order which shall be approved by the clerk of the court.

7. An interdict and a warrant of arrest other than for civil imprisonment may be executed on any day, at any hour, and at any place.

8. So far as may be necessary to the execution of any warrant, writ or order, the messenger may open any door on any premises or of any piece of furniture, if opening is refused or if there is no person at the premises who represents the person against whom such warrant, writ or order is to be executed, the messenger may, if necessary, use force to that end.

ORDER 31

SUBPOENAS

1. (1) The process of the court for compelling the attendance of any person to give evidence or to produce any book, paper or document shall be by subpoena issued by the clerk of the court and sued out by the party desiring the attendance of such person.

(2) In the case of evidence taken on commission, such process shall be sued out by the party desiring the attendance of the witness and shall be issued by the commissioner.

(3) If any witness has in his possession or control any book, paper or document which the party requiring his attendance desires to be produced in evidence, the subpoena shall specify such book, paper or document and require him to produce it to the magistrate at the trial.

(4) The subpoena shall be, as nearly as may be in accordance with Form 24 set out in the First Schedule.

2. (1) If the party suing out the subpoena desires it to be served through the messenger, he shall hand the subpoena to the messenger together with such number of copies as there are witnesses to be subpoenaed.

(2) The party shall also hand to the messenger such sum of money as he considers that the messenger shall pay or offer to the said witnesses for their conduct money.

3. The court may set aside service of any subpoena if it appears that the witness served was not given reasonable time to enable him to appear in pursuance of the subpoena.

4. (1) If any witness who has been duly subpoenaed to give evidence or to produce certain books, papers or documents, as the case may be, fails to abide by the subpoena, he shall be liable to pay a fine or be arrested.

(2) The court shall issue a warrant for a fine under subrule (1) in a form as near as possible to Form 25 set out in the First Schedule.

(3) The warrant of apprehension issued shall be in a form as near as possible to Form 26 set out in the First Schedule.

ORDER 32

INTEREST

1. The court may add in the judgment, interest from the date of issue of the summons to the date of judgment to the amount claimed in the summons at the rate claimed in the summons or, if there is no such rate, then at the rate of 10 per cent per annum where the defendant has not consented to judgment 24 hours before the expiration of the time allowed for appearance to defend.

2. Every judgment for payment of money shall bear interest from the date of judgment until payment at such rate as may be adjudged or, if there is no such rate, then at the rate of 10 per cent per annum.

ORDER 33

EXECUTION

A. General

1. (1) The process for the execution of any judgment for the payment of money, for the delivery of goods or premises or for ejection, shall be by warrant issued and signed by the clerk of the court and addressed to the messenger.

(2) The warrant of execution shall be as nearly as may be in accordance with Form 27 set out in the First Schedule.

2. Such process may be sued out by any person in whose favour any judgment has been given, if such judgment is not then satisfied, stayed or suspended.

3. (1) The process of execution may at any time, on payment of the fees incurred, be withdrawn or suspended by notice to the messenger by the party who has sued out such process.

(2) A request in writing made from time to time by such person to defer execution of such process for a definite period not being longer than one month shall not be deemed to be a suspension.

4. Any alterations in the process shall be initialled by the clerk of the court before it is issued by him.

5. The process of execution shall be invalid if the wrong person is named as a party; but no such process shall be invalid merely by reason of the misspelling of any name or of any error as to the date.

6. (1) Where judgment has been entered by consent or default, the warrant of execution shall take effect on the day following the granting of the judgment.

(2) In any other case a warrant of execution shall, with special leave of the court, also take effect on the day following the granting of the judgment.

7. An attachment shall be made by a Messenger of the court upon a writ.

8. Where any movable property has been attached by the Messenger of the court, the person whose property has been so attached may, together with some person of sufficient means as surety to the satisfaction of the Messenger of the court, undertake in writing as near as may be in accordance with Form 28 in the First Schedule that such property shall be produced on the day appointed for the sale thereof, whereupon the Messenger shall leave the said property attached and inventoried on the premises where it was found.

9. Where the messenger is in doubt as to the validity of any attachment or contemplated attachment, he may require that the party suing out the process shall give security to indemnify him.

10. (1) Where summons commencing action has not been served on the defendant personally or he has not entered appearance to defend or notice of attachment has not been given to him personally and any property, tangible or intangible is attached in execution, the judgment creditor shall, at least 7 days before the day appointed for the sale of such property, give security to the satisfaction of the messenger for the payment to the execution debtor if such attachment is set aside for any sum which the execution debtor may be entitled to recover from the execution creditor for damages suffered by reason of such attachment, or of any proceedings consequent thereon; and if security is not given the attachment shall cease to have effect.

(2) Security under subrule (1) shall be in a form as near as possible to Form 29 set out in the First Schedule.

(3) Where moneys are received by the messenger other than from the proceeds of the sale in execution of property in respect of the attachment of which security has been given in terms of subrule (1), such moneys shall not be paid to the execution creditor until he has given security for the restitution of the full amount received by the messenger if the attachment is thereafter set aside.

(4) The execution debtor may by endorsement to that effect, on the writ of execution, dispense with the giving of security under this rule.

11. The prescribed fee payable to the clerk of the court for security given under this rule shall, without taxation, be recoverable as part of the costs of execution.

12. Any surety bond or other document of security given by the execution creditor in terms of this Order may be sued upon by the execution debtor without formal transfer to him.

13. Unless otherwise ordered by the court, the costs and expenses of issuing a warrant and levying execution shall be a first charge on the proceeds of the property sold in execution and may, so far as such proceeds are insufficient, be recovered from the execution debtor as costs awarded by the court.

14. Subject to any hypothec existing prior to attachment, all warrants of execution lodged with the messenger on or before the day immediately preceding the date of the sale in execution shall rank proportionately in the distribution of the proceeds of the goods sold in execution.

15. (1) The withdrawal of an attachment shall be effected by a note made and signed by the messenger on the warrant of execution that the attachment is withdrawn, stating the time and date of the making of such note.

(2) The messenger shall give notice in writing of the withdrawal and of the time and date of making the withdrawal to the execution creditor, the execution debtor and to any person by whom a claim to the property attached has been lodged with him.

(3) The property attached for execution shall not be released from attachment so long as an unsatisfied warrant of execution lodged under rule 14 remains in the hands of the messenger.

16. If any property attached or about to be attached in execution is claimed by any third party as his property or any third party makes any claim to the proceeds of property so attached and sold in execution, the messenger shall on receipt of the claim immediately give notice to the execution creditor.

17. Notwithstanding such a claim by a third party, the messenger shall attach such property if he has not yet done so and the property shall remain under attachment pending the outcome of interpleader proceedings unless sooner released from attachment upon order of the court or otherwise.

18. The provisions of rule 31 shall with the necessary modifications apply to property so attached.

19. If, in the case of property so attached, the execution creditor gives the messenger notice within 2 days after receipt of the notice that the property belongs to a third party and he admits the claim, he shall not be liable for any costs, fees or expenses afterwards incurred and the messenger may withdraw possession of the property claimed.

20. On completion of any sale in execution of property, whether movable or immovable, the messenger shall attach to his return a vendue roll (Public Auction Sale Roll) showing details of the property sold, the prices realized, and, where known, the names and addresses of the purchasers and an account of the distribution of the proceeds.

21. A messenger, his assistant or any person on behalf of the messenger shall not, at a sale in execution, purchase any of the property offered for sale either for himself or for any other person.

22. Where any money comes into the hands of the clerk of the court by reason of any writ of execution, the clerk of the court shall immediately pay such money into the Government Revenue.

23. The Accountant-General shall, on receipt of a written instruction by the clerk of the court pay to the plaintiff or plaintiff's attorney the sums directed by the clerk of the court out of moneys paid to the Government Revenue under rule 22.

B. Execution against a Partnership

24. (1) Where a judgment debtor is a partner in a firm and the judgment is against him for a separate debt, the court may, after notice to the judgment debtor and to his firm, appoint the messenger as receiver to receive any moneys payable to the judgment debtor in respect of his interest in the partnership.

(2) The appointment shall, until the judgment debt is satisfied, operate as an attachment of the interest of the judgment debtor in the partnership assets.

(3) Where the judgment is against a firm, the partnership property shall first be exhausted so far as it is known to the judgment creditor, before the judgment is executed against the separate property of the partners.

C. Execution against Movable Property

25. (1) The messenger shall, upon receiving a warrant directing him to levy execution on movable property, proceed to the dwelling house or place of employment or place of business of the execution debtor and demand payment of the judgment debt and costs.

(2) Where the execution debtor fails to make a payment under subrule (1), the messenger shall demand that so much movable property be pointed out as he may deem sufficient to satisfy the said warrant.

(3) Where the execution debtor fails to point out movable property as required under subrule (2), the messenger shall search for such property.

(4) If the property pointed out under subrule (2) is insufficient to satisfy the warrant, the messenger shall nevertheless proceed to make an inventory and valuation of so much movable property as may be pointed out in part execution of such warrant with sufficient detail, including serial and other identifying numbers so as to enable their subsequent identification.

(5) If the execution debtor cannot be found or does not point out such property, the messenger shall immediately make an inventory and valuation of so much of the movable property belonging to the execution debtor as he may deem sufficient to satisfy the warrant or of so much of the movable property as may be found in part execution of the warrant.

(6) If on demand the execution debtor pays the judgment debt and costs or part of such debt and costs, the messenger shall immediately endorse the amount paid and the date of payment on the original and copy of the warrant, which endorsement shall be signed by him and countersigned by the execution debtor or his representative.

26. So far as may be necessary to the execution of any warrant, the messenger may open any door on any premises, or of any piece of furniture, if opening is refused or if there is no person at the premises who represents the person against whom such warrant is to be executed, the messenger may, if necessary, use force to that end.

27. The messenger shall show the original warrant of execution and shall hand a copy of the warrant to the execution debtor or leave a copy of the same on the premises.

28. Any goods inventoried by the messenger in compliance with this Order shall be deemed to be judicially attached.

29. (1) The messenger shall hand a copy of the signed inventory together with the notice of attachment to the execution debtor or leave the same on the premises.

(2) The notice of attachment under subrule (1) shall be in a form as near as possible to Form 30 set out in the First Schedule.

30. Where specie and documents are found and attached, their number and kinds shall be specified in the inventory and any such specie or documents shall be sealed and kept in a place of security.

31. (1) The execution creditor or his attorney shall, where movable property, other than specie or documents, has been attached, within 10 days after notification of such attachment, instruct the messenger in writing whether the property shall be removed to a place of security or left upon the premises in the charge and custody of the execution debtor or in the charge and custody of some other person acting on behalf of the messenger.

(2) The messenger shall, unless so instructed within the 10 days specified under subrule (1), leave the movable property, other than specie or documents, upon the premises and in the custody of the person in whose possession the said movable property is attached.

(3) Notwithstanding subrule (2), the execution creditor or his attorney may, upon satisfying the clerk of the court of the desirability of immediate removal upon issue of the warrant of execution, instruct the messenger in writing to immediately remove from the possession of the execution debtor all or any of the articles reasonably believed by the execution creditor to be in the possession of the execution debtor.

(4) The clerk of the court shall, where satisfied as to the desirability of the immediate removal of all or any of the articles reasonably believed by the execution creditor to be in the possession of the execution debtor, endorse his approval on the document containing the instructions for removal.

(5) Where a messenger is instructed under subrule (3) to remove the movable property, he shall do so without any delay, and shall take full responsibility for the custody of the property.

(6) The messenger or any person in whose charge or custody movable property which has been attached has been left, shall not use, let or lend such property, or permit it to be used, let or lent, nor shall he in any way do anything which will decrease its value and, if the property attached shall have produced any profit or increase, the custodian shall be responsible for any such profit or increase in like manner as he is responsible for the property originally attached.

(7) If such a custodian, other than the execution debtor, defaults in the proper care of the attached property in his custody, he shall not be entitled to recover any remuneration for his charge and custody.

(8) The messenger shall release from attachment any property which he has removed to a place of security or left in the charge or custody of a person on his behalf and which has been detained in such a place of security or in the charge or custody of such person on his behalf for a period exceeding 6 weeks, unless an order of court is produced requiring him to detain any movable property under attachment for a further period as may be stipulated in the order, and if a sale in respect of such property is not pending.

(9) If an order to extend the period of detention of any movable property under subrule (8) was made through an application made *ex parte*, the order shall not be subject to confirmation.

32. (1) The execution creditor shall, after consultation with the messenger, prepare a notice of sale and furnish two copies of the notice to the messenger in sufficient time to enable —

(a) one copy to be affixed not later than 7 days before the day appointed for the sale on the notice board or door of the courthouse or other public building in which the said court is held; and

(b) the second copy to be affixed at or as near as may be to the place where the sale is to take place.

(2) Any movable property sold in execution of process of the court shall be sold by public auction and for cash by the messenger or, with the approval of a magistrate, by an auctioneer or other person appointed by the messenger, to the highest bidder at or as near to the place where the property was attached or had been removed.

(3) The messenger shall indicate in some local or other newspaper circulating in the district and require the execution creditor to publish the notice of sale in that newspaper not later than 7 days before the date appointed for the sale in addition to complying with subrule (2), and to furnish him with a copy of the said paper in which the publication appeared not later than the day preceding the date of sale.

33. The day appointed for the sale shall be not less than 21 days after attachment except that where the goods attached are of a perishable nature, the court may, upon application or with consent of the execution debtor, reduce the period referred to in this rule and dispense with the requirements of rule 32 to such extent and on such condition as it may think fit.

34. A sale in execution shall be stopped as soon as sufficient money has been raised to satisfy the said warrant and any warrant referred to in rule 14 and the costs of the sale.

35. Where the messenger has a balance in hand after satisfaction of the claim of the execution creditor and of all warrants of execution lodged with him on or before the day immediately preceding the date of the sale and of all costs, he shall pay the same to the execution debtor if he can be found, otherwise he shall pay such balance into the Guardian's Fund.

D. Execution against Immovable Property

36. A warrant of execution against immovable property shall contain a full and complete description of the nature and situation, including the address of the immovable property to enable it to be traced and identified by the messenger, and shall be accompanied by sufficient information to enable the messenger to give effect to the provisions of rule 37.

37. The mode of attachment of immovable property shall be by notice by the messenger served in like manner as a summons together with a copy of the warrant of execution upon —

- (a) the execution debtor as owner;
- (b) the Registrar of Deeds or other officer charged with the registration of such immovable property;
- (c) all registered holders of bonds, other than the execution creditor, registered against the property attached;
- (d) if the property is in the occupation of some person other than the execution debtor, also upon such occupier; and
- (e) the local authority in whose area the property is situated.

38. After attachment, the messenger shall ascertain and record whether the said property is subject to any claim preferent to that of the execution creditor and, if that be the case, he shall notify the execution creditor of the existence of any such claim, and thereafter section 38 (2) of the Act shall be applied.

39. The messenger may, by notice served in like manner as a summons, require the execution debtor to immediately deliver to him all documents in his possession or under his control relating in any way to his title to the said property.

40. Where the said property is situate in a district other than that in which the judgment was given, the party requiring execution shall forward the warrant of execution to the messenger of the court of the district in which the said property is situate, who shall proceed to attach the property in the manner provided for in the preceding rules.

41. (1) The messenger shall appoint a day and place for the sale of such property which day shall, except by special leave of the court, be not less than one month after service of the notice of attachment.

(2) The execution creditor shall, after consultation with the messenger, prepare a notice of sale containing a short description of the property and its situation, the date, time and place for the holding of the sale and the material conditions and furnish the messenger with as many copies of the said notice as he may require.

(3) The messenger shall indicate two 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 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 one copy of each of the said papers and with the number of the *Government Gazette* in which the notice appeared.

(4) The messenger shall, not less than 7 days prior to the date of the sale, forward by registered post a copy of the notice of sale referred to in subrule (2) to every execution creditor who has lodged a warrant of execution and to every mortgagee in respect of the immovable property whose address is reasonably ascertainable.

(5) The messenger shall, not later than 7 days before the day appointed for the sale, affix one copy of the notice on the notice board or door of the courthouse or other public building in which the said court is held and one copy at or as near as may be to the place where the said sale is to take place.

42. (1) The conditions of sale shall be prepared by the execution creditor and shall, *inter alia*, provide for payment by the purchaser of any interest due to a preferent creditor from the date of sale of the property to the date of transfer.

(2) The execution creditor shall, not less than 28 days prior to the appointed date of sale, deliver two copies of the conditions of sale to the messenger and one copy to each person who may be entitled to notice of the sale.

(3) Any interested party may, not less than 21 days prior to the appointed date of sale, upon 24 hours' notice to such other persons as may have received a copy of such conditions of sale and to the execution creditor, apply to a magistrate for a modification of such conditions of sale and the magistrate may make such order as he may deem just.

43. The execution creditor may appoint a conveyancer for the purposes of effecting the transfer.

44. (1) The execution creditor or any person having an interest in the due and proper realization of such property may, by notice given to the messenger within 14 days after attachment, subject to the provisions of this Order, require that such property be sold by an auctioneer in the ordinary course of business and may in such notice nominate the auctioneer to be employed.

(2) Where such notice is given by any person other than the execution creditor, such notice shall be accompanied by the deposit of a sum sufficient to cover the additional expense of sale by an auctioneer in the ordinary course of business, and in default of such a deposit, such notice shall be void and shall lapse if in fact the services of an auctioneer are not obtainable.

(3) If there are surplus proceeds from the sale of the property after —

(a) satisfying the claim of the execution creditor;

(b) all warrants of execution lodged with the messenger on or before the day immediately preceding the date of the sale; and

(c) all costs, such deposit shall be returned to the depositor, but if there is no such surplus, such deposit shall, as far as may be necessary, be applied in payment of the auctioneer's fees and expenses.

(4) If two or more such notices in terms of subrule (2) are given, the first shall have preference.

(5) Where such notice is given by any interested person other than the execution creditor, and such notice is accompanied by the deposit of the sum sufficient to cover the additional expense of the sale the messenger shall comply with such notice.

(6) Where an auctioneer is appointed the fees and commission recovered by the messenger and the auctioneer from the proceeds of the sale shall not in aggregate exceed those provided for under Order 43.

45. The sale shall be by public auction without reserve and the property shall, subject to any order of the High Court made under section 38 (2) of the Act and to the other conditions of sale, be sold to the highest bidder.

46. The sale shall be held in front of the courthouse of the district, or, for good cause shown, at such other place as a magistrate may determine.

47. Where the said property is situate in a district other than that in which the judgment was given, the sale of the said property shall be effected by the messenger of the court of the district in which it is situate in the manner provided for in this Order.

48. The messenger 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.

49. (1) Subject to the provisions of subrule (4), all moneys in respect of the purchase price shall be paid to the messenger of the court and not to the execution creditor or any other person on his behalf.

(2) The messenger shall immediately pay such moneys into court and shall not pay out the purchase money until transfer has been given to the purchaser.

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

(4) The messenger shall, immediately after the sale, prepare in order of preference as provided in this rule, a plan of distribution of the purchase money received and such plan shall lie in the office of the clerk of the court for inspection by persons having an interest for a period of 14 days, unless all such persons inform the messenger in writing that they have no objection to the plan.

(5) After deduction from the purchase money of the costs of execution, the following shall be the order of preference —

- (a) the claims of creditors secured in respect of that property in their legal order of preference;
- (b) the claims of any creditors ranking in priority to the judgment debtor in their legal order of preference; and
- (c) the claim of the execution creditor to the extent of his judgment, plus costs and the claims of other execution creditors who have lodged warrants of execution in terms of rule 14, plus costs.

(6) Any person having an interest in such plan and objecting to it shall, within 14 days, give notice in writing to the messenger, the clerk of the court and all other persons having an interest of the particulars of his objection and may bring such plan before the court for review.

(7) The review shall be on 4 days' notice to the persons mentioned in subrule (6).

(8) The court, on review, may hear and determine the matter in dispute in a summary manner and may amend or confirm the plan of distribution or may make such order as may be just.

(9) If —

- (a) no objection is lodged to the plan;
- (b) the persons having an interest signify their concurrence with the plan; or
- (c) the plan is amended or confirmed on review,

the clerk of the court shall, on production of evidence that transfer has been given to the purchaser, cause the amount paid into court under subrule (1) to be paid out in accordance with the plan of distribution and any surplus shall, subject to any attachment for any other unsatisfied debt, be paid to the execution debtor.

50. The messenger shall, when notifying the result of the execution in terms of Order 2, rule 2 (3), also show the disposal of the amount recovered.

E. Stay of Execution

51. Where the judgment debtor has applied for stay of execution and the Court has directed that execution be stayed accordingly subject to the Judgment Debtor giving security, the said judgment debtor shall give such security shall in a form as near as possible to Form 31 set out in the First Schedule.

52. (1) Where execution is allowed pending appeal the judgment creditor shall give security for restitution.

(2) Security for restitution in subrule (1) shall be in a form as near as possible to Form 32 set out in the First Schedule.

ORDER 34

INTERPLEADER

1. (1) Where any third party, in this rule referred to as the “applicant” has in his custody or possession property to which two or more persons, in this rule referred to as the “claimants” make adverse claims, the applicant may sue out a summons in Form 35 set out in the First Schedule to these Rules calling upon the claimants to appear and state the nature and particulars of their claims and have such claims adjudicated upon.

(2) If the property in question consists of money, the applicant shall, when suing out the summons, pay the amount into court and the clerk of the court shall immediately pay such amount into the Government Revenue.

- (3) The applicant shall annex to such summons an affidavit setting out —
- (a) that he claims no interest in the subject matter in dispute other than for charges or costs;
 - (b) that he is not colluding with any of the claimants; and
 - (c) that, in the case of property other than money paid into court in terms of subrule (2), he is willing to deal with the property as the court may direct.

2. (1) Where —

- (a) any person other than the execution debtor, in this Order referred to as the “claimant” makes any claim to or in respect of property attached by the messenger in execution of any process of the court and the execution creditor has not admitted the claim within the period referred to in Order 33, rule 17; or
- (b) any such claimant makes any claim to the proceeds of property so attached and sold in execution, the messenger shall immediately prepare and sue out a summons in Form 36 set out in the First Schedule to these Rules, calling upon the claimant and the execution creditor to appear on the date specified in the summons to have the claimant’s claim adjudicated upon.

(2) The clerk of the court shall sign and issue such summons without any fee being paid.

(3) The magistrate shall, when giving judgment, direct which party shall pay fees.

(4) Any person making a claim referred to in subrule (1) shall, not less than 7 days before the date specified in the summons, lodge with the messenger an affidavit together with three copies setting out the particulars of his claim and the grounds for the claim.

(5) The messenger shall forward a copy of the affidavit to the execution creditor and the other copy to the execution debtor.

3. The court may bar the claimant and all persons claiming under him or make such other order as it may consider just in respect of the subject matter referred to in the summons against the applicant or the messenger if —

- (a) the claimant does not appear in pursuance of any summons sued out under this rule or;
- (b) he fails to file an affidavit referred to in rule 2 (4) before the date so referred to or within such further period allowed by the court; or
- (c) he appears but fails or refuses to comply with any order made by the court after his appearance.

4. If any claimant referred to in this Order appears in pursuance of the summons, the magistrate may —

- (a) order him to state, orally or in writing on oath or otherwise as the court may deem expedient, the nature and particulars of his claim;
- (b) order that the matters in issue shall be tried on a day to be appointed for that purpose and, if any such claimant is a claimant referred to in rule 1, order which of the claimants shall be plaintiff and which defendant for the purpose of trial; or
- (c) try the matters in dispute in a summary manner.

5. Where the matters in issue are tried, whether summarily or otherwise, the provisions of Order 25 as to the trial of an action shall apply.

6. The magistrate may, in and for the purposes of any interpleader proceedings, make such order as to any additional expenses of execution occasioned by the claim and as to payment of costs incurred by the applicant or messenger as may be just.

ORDER 35

CIVIL IMPRISONMENT

1. (1) Where the messenger has made a *nulla bona* return, that is a return signifying insufficient 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 37 set out in the First Schedule with such variations as circumstances may require.

(3) The summons for civil imprisonment shall be signed and issued by the clerk of the court where the judgment was granted and shall also be signed by the party suing out the same.

(4) Where the judgment debtor has not paid the amount due, the judgment creditor —

- (a) shall, on the return date of the summons, or on any adjournment, produce to the magistrate the original judgment and the original writ of execution with the return annexed to it; and
- (b) may, thereafter move for judgment in terms of the summons.

(5) Where the judgment creditor has invoked subrule (4), the judgment debtor may show cause why a writ of personal attachment shall not be issued and may be examined, cross examined and re-examined.

(6) The magistrate may adjourn the hearing for further evidence, 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 in his order limit the terms of the imprisonment and make such order as to costs as the justice of the case requires.

(7) The warrant of the court for the civil imprisonment of any person shall be signed and issued by the clerk of the court and shall be addressed to the messenger of the court and to the keeper of a specified prison.

(8) The warrant of civil imprisonment under subrule (7) shall be in a form as near as possible to Form 38 set out in the First Schedule.

(9) The execution of such warrant may be stayed at any time before the arrest of the judgment debtor.

2. Where an order is made for civil imprisonment on account of failure of the payment of certain instalments, the clerk of the court may, before issuing a warrant of civil imprisonment, require the party applying to satisfy him that the debtor has failed to pay instalments that were due.

3. An application by the judgment debtor for the suspension, variation or discharge of an order or warrant of civil imprisonment shall be made on notice.

4. Where there are two or more orders for civil imprisonment against the same debtor, such orders shall be cumulative with effect according to priority of issue of the respective warrants, unless otherwise directed by the court.

5. Except where immunity is conferred by any law, a warrant of civil imprisonment may be executed at any place, at any hour on any day except Sunday, Christmas Day and Good Friday.

6. (1) The magistrate may order the release of a judgment debtor from prison —

- (a) 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;
- (b) where the judgment creditor has failed to pay for the judgment debtor's maintenance;
- (c) where the judgment creditor consents to his release; or
- (d) where a provisional or final order of sequestration is made in respect of the estate of the judgment debtor.

(2) A release form shall be in Form 39 set out in the First Schedule to these Rules.

ORDER 36

GARNISHEE PROCEEDINGS

1. (1) Except as provided in rule 7, an application for a garnishee order may be made *ex parte* and shall be supported by an affidavit setting out —

- (a) that the applicant has obtained judgment against the judgment debtor in a Magistrate's court, and unless the judgment was obtained in the court in which the application is made a certified copy of such judgment shall be annexed to the affidavit;
- (b) that such judgment is still unsatisfied, stating the amount still payable under the judgment;

- (c) that the garnishee resides, carries on business or is employed within the district and is indebted to the judgment debtor, setting out the cause of the said debt and whether or not it is for salary or wages and the amount of the debt or where the amount is not known, stating that the amount is not known to the deponent;
 - (d) that the debt is, at the time of the application, due and payable; and
 - (e) details that the judgment debtor will, after the execution of the order sought, have a sufficient balance of income to maintain himself and those dependent upon him, if the debt is in respect of salary or wages, or both.
- (2) The affidavit in support of an application for a garnishee order shall be as near as possible to Form 40 set out in the First Schedule.
- (3) If, in open court, the judgment debtor admits the sufficiency of the facts set out in subrule (1) to warrant an attachment being granted, such admissions may be made orally without an affidavit and shall be recorded.
- (4) Upon such application the court may require such further evidence as it sees fit.
- 2.** (1) The magistrate may, upon such application, grant an Order Nisi ordering the garnishee to pay to the judgment creditor or his attorney so much of the debt due and payable from him to the debtor as may be sufficient to satisfy the said judgment, together with the costs of the garnishee proceedings, including the costs of service, or, failing such payment, to appear before the court on a day to be stated in the order and show cause why he should not pay such debt.
- (2) The clerk of the court shall note upon the face of the order the day and hour at which it was made.
- (3) The order shall be served upon the garnishee and upon the judgment debtor and shall operate as an attachment of the said debt in the hands of the garnishee.
- (4) Every such order shall be in accordance with Forms 41 and 43 set out in the First Schedule.
- 3.** (1) The judgment debtor may appear upon the return day and shall have *locus standi* to oppose the confirmation of the order but only upon any of the following grounds —
- (a) an irregularity in the proceedings;
 - (b) that the judgment has been satisfied otherwise than under the garnishee order;
 - (c) that for some reason it was not operative against him at the time when he received notice of the garnishee application;
 - (d) that the debt sought to be attached is not due and payable, or
 - (e) that it is due for salary or wages and that its attachment will not leave him a sufficient amount to maintain himself and those dependent on him.
- (2) If, upon the return day, the judgment debtor satisfies the court that the judgment was not so operative, or that the debt is not due and payable, the order shall be set aside.
- (3) If it is shown to the court that the debt is due for salary or wages, and that its attachment, in whole or in part, will not leave the judgment debtor a sufficient amount to maintain himself and those dependent upon him, the amount in the order shall be set aside and the court shall determine an appropriate amount it considers reasonable in the circumstances.
- (4) If on the return day, the debtor, in open court, consents or his written consent is produced the court may, order that the garnishee pay to the judgment creditor or his attorney out of the earnings accruing to the judgment debtor from the garnishee such sums of money at such future times as it may direct.

(5) Rule 7 (3) shall apply to the enforcement of an order under subrule (4) against the garnishee.

4. If the garnishee pays any money to the judgment creditor or his attorney pursuant to the order of the court, the judgment creditor or his attorney shall retain the amount until the return day and shall thereafter deal with it in accordance with the order made by the court.

5. If the garnishee fails to appear on the return date the garnishee order nisi shall be confirmed.

6. (1) The court may order execution to issue against the garnishee for so much of the debt as may be sufficient to satisfy the said judgment debt together with the costs of the garnishee proceedings if the garnishee —

- (a) does not dispute that the debt is owing from him to the debtor;
- (b) alleges that he has a set-off against the debtor;
- (c) alleges that the debt sought to be attached belongs to or is subject to a claim by some other person; or
- (d) does not appear to show cause why he should not pay such debt.

(2) The process for the execution of such order shall be as nearly as possible in accordance with Order 33.

7. (1) If the garnishee disputes his liability to pay the said debt or alleges that he has a defence, set-off or counterclaim which would be available to him if he were sued for the said debt by the judgment debtor, the court may order the garnishee to state, orally or in writing, on oath or otherwise, as to the court may seem expedient, the particulars of the said debt and of his defence and may either hear and determine the matters in dispute summarily or may order —

- (a) that the matters in issue shall be tried under the ordinary procedure of the court; and
- (b) that, for the purpose of such trial, the judgment creditor shall be plaintiff and the garnishee defendant or *vice versa*.

(2) If the garnishee alleges that the said debt belongs to or is subject to a claim by some other person, the court may order such other person to appear and state the nature and particulars of his claim and either to maintain or relinquish it and may deal with the matter as if the judgment creditor and such other person were claimants in interpleader under Order 34.

(3) If the judgment debtor alleges that —

- (a) the judgment has been satisfied;
- (b) the judgment is for some reason not operative against him; or
- (c) the debt is not due and payable to him,

rules 4, 5 and 6 of Order 34 shall apply to the subsequent proceedings in the matter as if the garnishee had taken out an interpleader summons under that Order, and as if the judgment creditor and the judgment debtor were claimants within the meaning of that Order.

(4) After hearing the parties or such of them as shall appear, the court may —

- (a) order execution to issue against the garnishee;
- (b) declare the claims of any person to the debt attached to be barred;
- (c) dismiss the application; or
- (d) make such other order as may be just.

8. (1) An application for the attachment of future or accruing earnings shall be made on notice to the judgment debtor and the garnishee.

(2) The notice shall set out the particulars specified in paragraphs (a), (b), (c) and (e) of rule 1 (1).

(3) At the hearing of the application, the court may, subject to section 45 of the Act, order that the garnishee pay periodically to the judgment creditor, definite amounts out of the earnings of the judgment debtor.

(4) If the garnishee fails to pay to the judgment creditor or his attorney the sums of money at the times specified in the order, the judgment creditor may, on notice to the garnishee, make an application for an order that execution be issued against the garnishee.

(5) The provisions of rule 6 (1) and (2) shall apply to the hearing of an application under subrule (4).

(6) After hearing the parties, the court may —

- (a) dismiss the application;
- (b) order that execution be issued against the garnishee in respect of any sums payable and unpaid and of any costs ordered to be paid by him;
- (c) order that the costs of the application be paid by either party; or
- (d) make such other order as may be just.

ORDER 37

RESCISSION AND VARIATION OF JUDGMENTS AND ORDERS

1. (1) Any party to an action in which a default judgment is given may, within 14 days after such judgment has come to the knowledge of the party against whom it is given, apply to the court to rescind or vary the judgment.

(2) Every such application shall be on affidavit which shall set out shortly the reasons why the applicant did not appear and the grounds of defence to the action or proceedings in which the judgment was given or of objection to the judgment.

(3) An application under this rule shall not be set down for hearing until the applicant has paid into court the amount of the costs awarded against him under such judgment and ten per cent of the judgment debt as security, except where leave has been given to defend as a poor litigant under Order 5.

(4) The judgment creditor may, by consent in writing lodged with the clerk of the court, waive compliance with the requirement for security under subrule (3).

(5) Unless the applicant proves to the contrary, it shall be presumed that he had knowledge of the judgment within 2 days after the date the judgment was issued.

2. (1) The court may, on the hearing of any such application, unless it is proved that the applicant was in wilful default, and if good cause is shown, rescind or vary the judgment in question and may give such directions and extensions of time as may be necessary in regard to the further conduct of the action or application.

(2) The court may also make such order as may be just in regard to moneys paid into court by the applicant.

(3) If the application is dismissed, the default judgment shall become a final judgment.

3. (1) The rules contained in this Order shall also govern all proceedings for the rescission or variation of any judgment made by the court in the exercise of the jurisdiction conferred on it by section 22 of the Act.

(2) Where rescission or variation of a judgment is sought on the grounds of invalidity, fraud or mistake, application may be made not later than 14 days after the applicant first had knowledge of such invalidity, fraud or mistake.

4. (1) The court may, on the application of any person affected by its judgment who was not a party to the action or matter, made within 14 days after he has knowledge of the judgment, rescind or vary that judgment to the extent only to which such applicant is affected.

(2) Rules 1 and 2 shall apply with the necessary modification to any application under subrule (1).

ORDER 38

CIVIL APPEALS

1. (1) An appeal may be noted within 21 days after the date of the judgment.

(2) A notice of appeal in subrule (1) shall be as near as possible to Form 44 set out in the First Schedule.

(3) The clerk of the court shall, within 30 days from the noting of an appeal and payment by the appellant of the prescribed fee, hand the record of proceedings together with judgment to the appellant.

(4) The clerk of the court shall, at the time he hands the record of proceedings to the appellant, transmit the original to the High Court duly signed by the magistrate.

2. The clerk of the court shall, on the noting of an appeal, demand ten per cent of the capital debt as security for the respondent's costs except that no security shall be required from the state.

3. Money paid into court under rule 2 shall be paid into the Government Revenue and shall be available for the payment of the respondent's costs, if so ordered by the court.

4. A cross-appeal shall be noted by the delivery of notice within 7 days after the delivery of the notice of appeal.

5. A notice of appeal or cross-appeal shall state —

(a) whether the whole or part only of the judgment is appealed against, and, if part only, specify which part;

(b) the grounds of appeal, specifying the findings of fact or rulings of law appealed against.

6. The party noting an appeal or a cross-appeal shall prosecute the same within such time as may be prescribed by the Rules of the High Court and, in default of such prosecution, the appeal or cross-appeal shall be deemed to have lapsed, unless the High Court shall otherwise order.

7. (1) A respondent desiring to abandon the whole or any part of a judgment appealed against may do so by the delivery of a notice in writing stating whether he abandons the whole, or, if part only, which part of such judgment.

(2) Every such notice of abandonment shall become part of the record.

8. Where the parties agree that the appeal shall be decided on the basis of a memorandum of agreement, either party may lodge such memorandum of agreement with the clerk of the court, and such memorandum shall become part of the record in the action or matter.

ORDER 39

ASSESSORS

1. (1) The court may from time to time compile a list of persons who, having regard to the nature of the business of the court and to their fitness from ability and reputation, appear to be qualified to act as assessors under section 20 of the Act and who are willing to act upon reasonable notice and upon payment of the fees prescribed.

(2) Every person for the time being named in such list shall be an assessor for the purposes of this Order and shall continue to be an assessor until a new list has been compiled or until he gives to the clerk of the court his resignation in writing.

(3) Upon receipt of such resignation the clerk of the court shall remove the name of such assessor from the list except that an assessor summoned to act as such in any action may not, without the leave of the court, resign during the trial of an action.

(4) Nothing in this Order shall prevent the court from summoning, on its own motion or with the consent of all parties to the action, persons not on the list to act as assessors in any special action.

(5) The summons in subrule (4) shall be as near as possible to Form 46 set out in the First Schedule.

(6) The number and names of the assessors allowed to sit in any case shall be decided by consent of the parties or, where they are unable to agree, by the court except that not more than two assessors shall sit in any case.

2. (1) A party who desires the trial to take place with assessors shall make such a request at a case management conference.

(2) The request in subrule (1) shall be in writing and in a form as near as possible to Form 45 set out in the First Schedule.

(3) The party requesting assessors to be called in any matter shall deposit with the clerk of the court an amount determined by the court for each assessor applied for.

(4) The fees and expenses of the assessors shall, unless otherwise ordered by the court, be costs in the action.

(5) When the court of its own motion, summons any assessor to its assistance, the fees for such assessor shall be paid by the Government.

3. (1) If the application for an assessor is consented to or granted, the clerk of the court shall summon the assessors named in the consent or selected by the court by serving a summons upon each of them in any of the manners provided for the service of a summons commencing an action.

(2) If at the time and place appointed for the trial none of the assessors summoned attend, the court may either proceed to try the action without assistance of assessors or may adjourn the trial.

4. (1) Where a trial is postponed or adjourned, the party applying for assessors shall, immediately after the order for postponement or adjournment, pay to the clerk of the court, in addition to the deposit mentioned in rule 2, the fees due up to the hour of postponement or adjournment to such assessors as have attended.

(2) Where such payment is not made, the court may stay the action until it is made or may continue the trial without the assistance of assessors or may make such order as may be just.

5. Every assessor acting in a case shall be entitled to the fees set out in Table C of the Second Schedule to these Rules.

ORDER 40

COSTS

1. The court in giving judgment or in making any order, including any adjournment or amendment, may award such costs as may be just.
2. The costs of any application, order or issue raised by the pleadings may —
 - (a) be awarded by the court irrespective of the judgment in the action;
 - (b) be made costs in the action; or
 - (c) be reserved to be dealt with on the conclusion of the action,but, if no order is made, such costs shall be costs in the action.
3. Unless the court shall, for good cause otherwise order, costs for interim orders shall not be taxed until the conclusion of the action, and a party may present only one bill for taxation up to and including the judgment or other conclusion of the action.
4. Where a judgment or order for costs is made against two or more persons it shall, unless the contrary is stated, have effect against such persons severally as well as jointly.
5. The scale of fees to be taken by attorneys as between party and party shall be those set out in Table A of the Second Schedule in addition to the necessary expenses.
6. Except as to appearance in open court without counsel, such fees shall be allowable whether the work has been done by the attorney or by his clerk, but shall, except in the case of the fee referred to in paragraph 13 of the general provisions under Table A of the Second Schedule be allowable only in so far as the work to which such fees have been allocated has in fact and necessarily been done.
7. The magistrate presiding over any civil proceedings which last for the period of one hour or longer, shall note on the record of the proceedings in respect of each day —
 - (a) the time of the day when the proceedings actually commenced and actually ended; and
 - (b) the time of the day of the commencement and conclusion of each adjournment on that day.
8. The court may, at the giving of judgment in any contested action or proceeding in which —
 - (a) any difficult question of law or of fact is involved;
 - (b) the plaintiff makes two or more claims which are not alternative claims; or
 - (c) the claim or defence is frivolous or vexatious,award costs on any scale higher than that on which the costs of the action would otherwise be taxable.
9. Where the court is of the opinion that, at the hearing the party to whom costs are awarded has occupied time unnecessarily or in relation to matters not relevant to the issue, the court may disallow a proportionate part of the hearing fee payable to his attorney or counsel.
10. The court may, in its discretion order that the whole of the costs of an action, including the costs of any counter-claim, be paid by the parties in such proportions as it may direct.

11. Where the court is of the opinion that expense has been unnecessarily incurred because of the successful party's failure to take a course which would have shortened the proceedings and decreased the costs, it may award only such costs as would have been incurred if the successful party had taken such course.

12. Where costs in the originating and counter claims are awarded to different parties, the clerk of the court shall, on taxation, subject to any order which has been made by the court, allow as costs in the originating claim all such costs as would in his judgment have been incurred if no counter-claim has been made and as costs in counter-claim all other costs allowed.

13. The costs of issuing any warrant of execution or arrest shall, where they are payable by the party against whom the warrant is issued, be assessed by the clerk of the court without notice, and inserted in the warrant.

14. Witness fees and expenses shall be allowed in respect of the attendance at the trial of a party to an action or proceedings only if such party has been declared by the court to be a necessary witness.

15. Where costs or expenses are awarded to any party by the court, the party to whom such costs or expenses have been awarded shall deliver a bill of such costs or expenses and give at least 5 days' notice of taxation for an hour to be fixed generally or specially by the clerk of the court and he may include in such bill all such payments as have been necessarily and properly made by him.

16. The clerk of the court shall thereupon tax and allow the costs and expenses awarded except that witness fees shall not be allowed in taxation unless supported by documentary evidence.

17. Where more than one-fourth of the bill, excluding expenses, is taxed off, the party presenting the bill shall not be allowed any costs of taxation.

18. (1) Where a bill of costs as between attorney and client is required to be taxed, taxation shall take place on at least 5 days' notice to the attorney or client, whether or not an action is pending.

(2) Notwithstanding the provisions of rule 3, a bill of costs as between attorney and client may be taxed at any time after termination of the mandate.

19. Where liability for costs is determined without judgment of the court by virtue of Order 15 or by a settlement recorded in terms of Order 14, such costs shall be taxable by the clerk of the court as if they had been awarded by the court.

20. On failure of the party giving notice of taxation to appear at the appointed time for taxation, such bill of costs may be taxed in his absence but such party shall not be allowed any costs of taxation.

ORDER 41

TAXATION OF COSTS

1. The clerk of the court shall 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 clerk of court shall nevertheless be guided as far as possible by the scales of fees fixed by the appended tariff except that the clerk of court shall not tax costs in instances where some other official is empowered to do so.

2. During the taxation of any bill of costs the clerk of the court may call for such books, documents, papers or accounts as in his opinion are necessary to enable him to properly determine any matter arising upon such taxation.

3. (1) The clerk of the court shall, on every taxation, allow all such costs, charges or expenses, as appears to him to have been necessary or proper for the attainment of justice, or for defending the rights of any party.

(2) The clerk of the court shall not allow any costs which appear 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. (1) The clerk of the court shall not proceed to the taxation of any bill of costs unless he is satisfied that the party liable to pay has received due notice as to the time and place of such taxation and notice that he is entitled to be present.

(2) Notice referred to under subrule (1) shall not be necessary —

(a) if the person liable to pay costs has consented in writing to taxation in his absence; and

(b) for the taxation of writ and post-writ bills.

5. The clerk of the court shall be entitled, in his discretion, to depart at any time 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 clerk of the court shall not allow the costs of any unnecessary duplication in briefs.

(2) No fees shall be allowed by the clerk of the court as between party and party for the copying of any document not used at the hearing unless the magistrate otherwise directs.

7. Where, in the opinion of the clerk of the court, more than one attorney has been necessarily engaged in the performance of any of the services covered by the tariff, each attorney shall be entitled to be remunerated on the basis set out in the tariff for the work necessarily done by him.

8. The clerk of the court may grant a party wasted costs occasioned by the failure of the taxing party or his attorney or both to appear at a taxation or by the withdrawal by the taxing party of his bill of costs.

9. A folio shall be 150 words or part thereof, four figures are to be counted as a word.

ORDER 42

REVIEW ON TAXATION

1. Any interested party may, within 7 days after he has knowledge of any irregularity relating to —

(a) the costs and expenses claimed in any undefended action;

(b) the assessment by the clerk of the court of any costs and expenses;

(c) the taxation by the clerk of the court of any costs awarded in any action or matter;

(d) the taxation by the clerk of the court of any fees or charges of the messenger,

bring such before a magistrate for review.

2. The review shall be on 5 days' notice to the party entitled to receive or liable to pay such costs and expenses or to the messenger, as the case may be and shall be by way of notice of motion.

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3. The magistrate 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 magistrate as and for costs.

4. The decision of the magistrate on review shall be final

ORDER 43

COURT FEES

1. (1) The fees to be received by the clerk of the court shall be those prescribed in Table D of the Second Schedule to these Rules.

(2) The court fees collected in terms of subrule (1) shall be remitted to Government Revenue.

(3) A document in respect of which a fee is payable shall not be accepted unless payment has been made.

(4) The clerk of the court on receiving any writ, document or other process for filing shall immediately 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.

(5) The clerk of the court shall, if satisfied that the prescribed fees have been paid, file the same in the case file, and an entry of the filing and the date of the filing shall be made in the Civil Record Book and in electronic form, if any.

(6) A writ of summons, document or other process which is required to be filed shall not be filed unless the prescribed fees, if any, have been paid and the document duly date stamped as provided in these Rules.

(7) 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.

2. (1) Where any dispute arises between the clerk of the court and any person desiring to lodge any document as to the fees payable, the dispute shall be referred to a magistrate, who shall decide the same in a summary manner.

(2) The magistrate's decision shall be final for the purpose of the action or matter in respect of which such document is lodged, but such decision shall be without prejudice to any other rights of any interested person.

3. (1) The fees specified in Table D of the Second Schedule shall be paid by the party at whose instance they are incurred, and may afterwards be recovered as costs in the action unless the magistrate orders otherwise.

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

(3) The party requesting the court to dispense with the payment of fees shall make an application stating the grounds upon which he claims the payment of fees should be dispensed with.

(4) Before making an order, the magistrate may direct the clerk of the court, a social welfare officer or a police officer from the district where the applicant resides to make inquiries or investigations regarding the circumstances of the party stated in the application.

(5) The magistrate shall, after considering the application and hearing the applicant, if he considers that necessary, make an order allowing or refusing the application.

(6) The magistrate may, where he allows the application, order that the dispensation shall extend to the whole or any part of the fees payable in the action.

4. Notwithstanding anything to the contrary in any law, there shall be issued a general receipt for all fees received, and the payment in respect of those fees shall be recorded in the relevant document.

5. This Order shall not apply to criminal matters.

ORDER 44

MESSENGERS FEES

1. (1) The fees and charges to be received by the messenger or other person, not being a party to the action but effecting service shall be those prescribed in Table B of the Second Schedule.

(2) The fees and charges contained in Table B of the Second Schedule shall be chargeable by and allowed to the messenger except that fees may not be charged for the service of process in proceedings brought or defended under Order 5.

(3) 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 to it, or unless the party at whose instance process is executed desires any particular way to be adopted at his expense.

2. Every account of fees or charges furnished by a messenger or other person, not being a party to the action, effecting service shall contain the following note — “You may require this account to be taxed and proved by documentary evidence”.

3. (1) Any party having an interest may, by notice in writing, require the fees and charges claimed by or paid to the messenger or other person effecting service to be taxed by the clerk of the court and may attend such taxation.

(2) Upon such taxation, the messenger or other person effecting service shall prove to the satisfaction of the clerk of the court all charges claimed by him.

(3) Where the fees and charges of the messenger or other person, not being a party to the action but effecting service are taxed and passed in full, the messenger or that other person, as the case may be, shall be allowed an additional fee for attending taxation.

4. 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 clerk of the court.

ORDER 45

CASE MANAGEMENT: ALLOCATION OF CASES AND CASE
MANAGEMENT CONFERENCES

1. (1) The clerk of the court shall —
 - (a) allocate each existing cause or matter; and
 - (b) allocate any cause upon registration to a magistrate who shall, from the time of such allocation, manage the cause or matter to its completion.(2) In the event of any magistrate becoming unable for any reason to manage or continue to manage a matter under this Order, the clerk of the court shall immediately, upon that inability being known, allocate the matter to another magistrate and advise all parties in writing of such allocation.
(3) A magistrate allocated the cause under subrule (2) shall be bound by all decisions and rulings given by the previous magistrate.
2. (1) Except where summary judgment is applied for and subject to rule 13, the magistrate shall, with the consent of the parties or their counsel, after —
 - (a) the entry of appearance to defend in an action; or
 - (b) the giving of notice of opposition in an application or petition, schedule an initial case management conference.(2) The magistrate may, in his discretion, dispense with the need for attendance by the parties or any of them.
(3) Where the parties have agreed, then the magistrate may order that the conference be held by means of information communication technology.
(4) The conference shall be held at a time set by order of the magistrate and shall allow sufficient time for compliance with rule 3.
3. (1) The parties shall, at least 14 days before the initial case management conference, meet to discuss —
 - (a) the nature and basis of their claims and defences;
 - (b) the possibilities for a prompt settlement or resolution of the action; and
 - (c) each of the issues to be addressed at the initial case management conference as set out in rule 4.(2) The parties shall jointly prepare a case management report concerning their discussion setting the proposals with respect to the issues identified in rule 4 and shall submit the report to the magistrate at least 7 days before the initial case management conference.
(3) If the parties agree on proposals with respect to some or all of the issues, they shall set out a joint proposal with respect to those issues but if they do not agree, they shall set out their separate proposals with respect to those issues.
(4) The plaintiff or applicant, as the case may be, shall prepare a first draft of the report.
4. (1) 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;
 - (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 19, examination under Order 20, expert testimony under Order 22 and admissions under Order 23.
- (g) narrowing the field of dispute between expert witnesses by their participation at case management conferences or in any other manner;
- (h) hearing and determination of objections on point of law;
- (i) any other matter that might be raised in an application for directions;
- (j) giving orders or directions for the separate hearing of a trial, a claim, a counterclaim, set-off, or third party claim or of any particular issue in the action, including the assessment of damages under Order 13;
- (k) the date for additional or final case management conference, if necessary;
- (l) the possibilities of settlement talks or possible mediation of the dispute;
- (m) such other issues as may facilitate the just and speedy disposal of the action, which may include, where issues are straightforward and a final case management conference may be dispensed with —
 - (i) the agreement on admissions,
 - (ii) facts and legal issues in dispute,
 - (iii) witnesses to be called, and
 - (iv) the setting of trial dates.

(2) The initial case management conference shall, except in exceptional circumstances, be completed in a single conference and shall not be adjourned.

5. (1) The magistrate shall, immediately after completion of the initial case management conference, but not more than 7 days after completion of the conference, issue an initial case management order in Form 51 set out in the First Schedule.

(2) The initial case management order shall address the issues set out in rule 4 (1) that are relevant to the action and shall establish a schedule for all relevant events.

(3) The initial case management order shall govern the subsequent course of the proceedings and shall be modified by the magistrate only for good cause.

6. (1) The magistrate may schedule additional case management conferences, where necessary.

(2) Subject to rule 2 (1), the parties may, by agreement, request in writing for an additional case management conference.

(3) The magistrate may, on good cause shown, grant the request for an additional case management conference.

(4) These additional conferences shall be held to facilitate the continuing judicial control of the action and may address any of the issues set out in rule 4 (1) or any other issues relevant to management or resolution of the action.

7. (1) The magistrate shall, prior to the trial of any party who will participate in the matter, and subject to rule 4 (1) (m) hold a final case management conference.

(2) The conference shall occur at a time set by the magistrate and shall be attended by the parties and/or their Attorneys.

(3) The final case management conference shall address —

- (a) the issues set out in rule 4 (1);
- (b) the parties' proposed final case management order; and
- (c) any other issues related to a fair and efficient trial.

8. (1) At least 7 days before the final case management conference, the parties shall jointly submit to the magistrate a proposed final case management order.

(2) The plaintiff shall prepare a first draft of the proposed final case management order.

(3) The proposed final case management 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.

9. (1) The magistrate shall, immediately after completion of the final case management conference, but in no event more than 7 days after completion of the conference, issue a final case management order in Form 52 set out in the First Schedule.

(2) The clerk of the court shall deliver the final case management order simultaneously with the notice of setdown of dates to the parties under Order 24.

(3) The final case management order shall be based on the parties' proposed final case management order, as modified by the magistrate, and shall set a firm date for the trial.

10. Issues, evidence and objections not set out in the final case management order shall not be raised by the parties at the trial and once issued by the magistrate, the final case management order shall be modified only to prevent manifest injustice.

11. The final case management conference shall, except in exceptional circumstances, be completed in a single conference and shall not be adjourned.

12. (1) If a party or his counsel —

- (a) fails without lawful excuse to attend an initial case management conference, additional case management conference, or final case management conference;
- (b) fails to participate in the creation of a case management report or proposed final case management order;
- (c) fails to obey a case management order or final order; or
- (d) fails to participate in the case management or final case management processes in good faith,

the magistrate may enter such orders as are just.

(2) The orders may include but are not limited to the following —

- (a) an order refusing to allow the non-compliant party to support or oppose claims or defences, or prohibiting that party from introducing new issues in evidence;
- (b) an order striking out pleadings or parts of it;
- (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.

13. In the case of opposed applications, where the issues are straightforward, and no evidence is to be led, the magistrate may dispense with any case management conference, and assign a date for hearing in terms of Order 25, giving such other directions for the conduct of the hearing as he deems fit.

ORDER 46

GENERAL

1. (1) Except as is otherwise provided in these Rules, failure to comply with these Rules or with any request made in terms of these Rules shall not be a ground for the entry of judgment against the party in default.

(2) Where any provision of these Rules or any request made under any provision of these Rules has not been fully complied with, a party may apply for full compliance at a case management conference and the court may order compliance within a stated time.

(3) Where any order made under subrule (2) is not fully complied with within the stated time, the court may, on application, immediately enter judgment in the action against the party in default or may adjourn the application and grant an extension of time for compliance with the order on such terms as to costs and otherwise as shall be just.

(4) The court may, on such application, either make any order or give such directions as may be necessary to prevent any delays.

2. (1) Any time limit prescribed by these Rules, except the period within which an appeal must be noted, may at any time whether before or after the expiry of the period limited be extended by the court on application and on such terms as to costs and otherwise as may be just.

(2) Where there has been short service without leave, the court may, instead of dismissing the application, adjourn it until the expiration of the period required for full service and thereupon any objection to short service shall lapse.

3. (1) The trial of an action or the hearing of an application or matter may be adjourned or postponed by the court, either on application or of its own motion.

(2) The court shall, on adjourning or postponing a matter, set a date for the next hearing.

(3) Any adjournment or postponement shall be on such terms as to the costs and otherwise as the parties may agree to or as the court may order.

4. (1) Subject to subrule (2), the withdrawal or dismissal of an action or a decree of absolution from the instance shall not be a defence to any subsequent action.

(2) Notwithstanding subrule (1), if a subsequent action is brought for the same or substantially the same cause of action before payment of the costs awarded on a withdrawal, dismissal or decree of absolution, the court may, on application, if it thinks fit and if the said costs have been taxed and payment has been demanded, order that the matter must not be registered until payment of such outstanding costs.

5. (1) Process or notice shall not be invalid by reason of any obvious error in spelling or in figures or of date.

(2) If any party has in fact been misled by any such error in any process or notice served upon him, the court may, on application grant him such relief as may be just, and may for that purpose set aside the process or notice and rescind any default judgment given on the process or notice.

6. (1) Where it is necessary to give in evidence, in court, any record, entry or document of the same court in another action, the clerk of the court shall on reasonable notice produce and show the original copy of the record, entry or document and the cost of making copies shall not be allowed.

(2) Where it is necessary to give in evidence, in another court, any such record, entry or document, a certified copy by the clerk of the court may be given in evidence without production of the original.

7. (1) The court may, on application by a person who desires to intervene in an action and has an interest, grant leave to such party to intervene on such terms as may be just.

(2) The court may, on application by any party to an action, order that another person shall be added either as a plaintiff or as a defendant, on such terms as may be just.

8. (1) The defendant may, after service of the summons and before close of the pleadings, require the plaintiff to give security for the costs of the action, not including the principal or costs of any counter-claim made by the defendant, where the plaintiff —

- (a) is a mere nominal plaintiff and is in a condition of poverty or insolvency;
- (b) is a limited company and there is reason to believe that the company will be unable to pay the costs of the defendant if his defence is successful; or
- (c) is ordinarily resident outside of Botswana and has no assets within Botswana which can be reached, unless the plaintiff has obtained leave to sue as a poor litigant.

(2) If the fact relied upon first came to the knowledge of the defendant after the close of pleadings, he may, within 2 days after such fact has come to his knowledge require that such security be given.

(3) If such request is not complied with within 48 hours, the court may, on application, either give a time within which such request should be complied with or dismiss the action.

(4) In this rule —

- (a) “plaintiff” shall not include a plaintiff in a counter-claim; and
- (b) “action” shall not include a counter-claim.

9. (1) If a summons in an action is not served within 6 months of the date of its issue the summons shall lapse.

(2) If a summons in an action has been served and the plaintiff has not within 6 months of its issue taken further steps in the prosecution of the action, but has filed an affidavit with the clerk of the court before the expiration of such period setting out —

- (a) that at the request of the debtor an extension of time in which to pay the debt claimed or any portion of it has been granted to him;
- (b) that in terms of the agreement, judgment cannot, except in case of default, be sought within a period of 6 months from the issue of the summons; and
- (c) the period of the said extension, the summons shall not lapse, in which case the matter shall be placed before a magistrate for case management.

10. (1) When a court imposes upon any person a fine for failure to appear or other contempt of court and the fine is not immediately paid, the clerk of the court may issue process for the recovery of the amount of such fine and such process shall be executed by the messenger of the court in the manner prescribed in Order 33.

(2) For the purposes of issue and execution of such process the Government shall be deemed to be the judgment creditor.

ORDER 47

TARIFF OF ALLOWANCES PAYABLE TO WITNESSES IN CIVIL
PROCEEDINGS IN THE MAGISTRATES' COURTS

1. A witness called by the court in any civil proceedings shall be paid subsistence and transport allowances at the same rates as are provided in the tariff for witnesses in criminal proceedings.

2. A witness called by a party in any civil proceedings may be paid transport and subsistence allowance by such party in accordance with their agreement.

3. Public servants attending as witnesses shall be paid such allowances as are laid down in departmental regulations or instructions.

PART II – *CRIMINAL PROCEDURE RULES*

ORDER 48

CRIMINAL CASE RECORD

1. (1) The clerk of the court shall keep a book to be styled the "Criminal Record Book" in which he shall enter particulars of every criminal case coming before the court.

(2) The particulars to be recorded in the Criminal Record Book shall include the following —

- (a) date of hearing;
- (b) number of the case;
- (c) name and description of the accused;
- (d) crime or offence charged;
- (e) verdict;
- (f) sentence or other disposal; or
- (g) remarks, including date and effect of any order of a superior court on review or appeal.

(3) In addition to the Criminal Record Book, the clerk of the court shall, where applicable, keep these particulars in electronic form through the court record management system which shall be updated as soon as entry has been made in the Criminal Record Book.

(4) The charge sheet shall, when the case first comes before the court, be numbered by him with a consecutive number for the year and the case shall then be entered in the Criminal Record Book and in electronic form, under that number.

(5) The magistrate at the hearing shall cause to be recorded in the Criminal Record Book and in electronic form, any sentence imposed or other order of disposal made by him including acquittal or other discharge, postponement of sentence, adjournment or referral to another court or committal for trial.

2. (1) The court reporter shall, in any criminal trial, record in shorthand verbatim —

- (a) the plea and statement of the accused;
- (b) the evidence given orally;
- (c) any exception or objection taken during the course of the proceedings;
- (d) the rulings and judgment of the court; and
- (e) such other portion of the proceedings as the court may specifically indicate.

(2) The court reporter shall be an officer of the court and shall, before assumption of duty, take an oath before a judicial officer in Form 50 set out in the First Schedule.

(3) The shorthand notes taken in terms of subrule (1) shall be certified as correct by the court reporter and shall constitute the official record of the proceedings of the case.

(4) The clerk of the court shall thereafter file the shorthand notes together with the record of the case.

(5) The notes shall be transcribed within 30 days after the conclusion of the trial, unless the magistrate at the trial otherwise directs, and the transcription shall be certified as correct by the person making it and also filed with the record.

(6) Shorthand notes and transcripts certified as provided under subrule (3) shall be deemed to be correct and shall form part of the record of the proceedings in the trial except that the court may, on application by the prosecutor or by the accused made within 14 days after the conclusion of the trial or after the completion of the transcription of such notes, order the amendment of such notes or transcript.

3. (1) Where, by direction of the judicial officer in terms of subrule (3), the shorthand notes have not been transcribed, any person may, at any time by notice to the clerk of the court require that a transcription be made.

(2) Any person, other than a Government department, prosecutor or the accused, so requiring transcription, shall pay to the clerk of the court at the time of making the request fees at such rates as the Chief Justice may from time to time prescribe.

(3) Any person entitled to inspect the record of proceedings shall pay the prescribed fee.

(4) The request to inspect the record under subrule (3) shall be as near as possible to Form 49 set out in the First Schedule.

ORDER 49

ASSIGNMENT OF CRIMINAL CASES

1. (1) The clerk of the court shall —

(a) allocate each existing case; and

(b) allocate any case upon registration to a magistrate who shall, from the time of such allocation, manage the case to its completion.

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

2. (1) In the event of any magistrate leaving a partly-heard case and is unable to complete it or the matter is unable to proceed for any reason beyond the control of the court, the magistrate heading the station or the regional magistrate shall reallocate the case to be tried afresh.

(2) Where the case is pending judgment and the judgment has been written, such judgment may be read by any other magistrate if directed to do so and proceed to sentence the accused.

(3) If sentence is not passed upon an offender immediately upon his conviction, any magistrate may, in the absence of the magistrate who convicted the offender, pass sentence on the offender after consideration of the evidence recorded and in the presence of the offender.

3. If the case is pending judgment and the accused does not appear on the set date, then the court may, unless good cause is shown, deliver judgment and proceed to sentence the accused in his absence.

ORDER 50

CRIMINAL APPLICATIONS

1. Except where otherwise provided in any other written law, an application in criminal cases may be made verbally.

2. Where the application is opposed, the court may order the filing of affidavits.

3. Where a party does not appear, the court may hear and determine an application in the absence of such party and make an order as it deems just.

ORDER 51

ARRAIGNMENT PROCEDURE

1. The arraignment of the accused shall constitute the initial case management conference and shall be conducted in open court, unless the magistrate directs otherwise.

2. (1) The magistrate shall read and explain the charges which shall, if necessary, be interpreted to the accused in a language which he understands.

(2) The magistrate shall ask the accused to plead to the charge and such plea shall be entered on the record of proceedings.

(3) The magistrate shall, on good cause shown by the prosecution, reserve the accused's plea.

3. (1) Where a plea of not guilty is entered, the magistrate shall inquire as to —

(a) whether or not the accused will engage legal representation;

(b) whether the accused has been served with all copies of witnesses' statements and other documentary evidence which the prosecution intends to adduce during trial; and

(c) the number of witnesses to be called.

(2) The magistrate may then order —

(a) that the defence be served with copies of all witnesses' statements and any documentary evidence which the prosecution intends to produce;

(b) that the prosecution prepare a summary of its case; and

(c) if the accused intends to engage an attorney, that he appears with the attorney at the next case management conference.

(3) Where the accused is represented by an attorney, the attorney shall inform the court of that status, in writing, at least 7 days before the date set for the case management conference.

(4) Once a trial date is set, no attorney shall be permitted to renounce his agency during the 10 days immediately preceding the trial date except with the leave of the magistrate upon good cause shown, which shall not include the failure of a client to pay fees.

(5) The failure of an attorney to appear or to file a notice of renunciation in terms of subrule (4) shall amount to contempt.

(6) The magistrate shall set the date for the next case management conference.

4. (1) At the case management conference the following shall be discussed —

- (a) summary of the prosecution's case;
- (b) admissions by the defence;
- (c) amendment of the charge or change of plea;
- (d) production, inspection or admission of exhibits;
- (e) length of trial;
- (f) trial dates;
- (g) relevance of witnesses;
- (h) interlocutory applications including objections to identified witnesses and exhibits;
- (i) any proposals to expedite the trial;
- (j) prospects for reconciliation;

(2) The magistrate shall, immediately after completion of the final case management conference issue a case management order in Form 52 set out in the First Schedule.

5. (1) If the accused, his attorney or the prosecution fails to attend a case management conference, an additional case management or final case management conference, or fails to obey a case management order, the magistrate may give such orders as are just, including but not limited to the following —

- (a) in the case of the accused, issue a warrant of his arrest; or
- (b) in the case of the accused's attorney or the prosecutor, issue a warrant of arrest the execution of which shall be suspended pending the attorney or the prosecutor showing good cause why it should not be executed.

(2) The court shall set a date on which the attorney or the prosecutor shall show cause why the warrant of arrest may not be executed.

ORDER 52

PLEA OF GUILTY

1. Where an accused pleads guilty to a charge, the magistrate shall call for a brief summary of the facts constituting the essential elements of the offence charged.

2. (1) Upon being satisfied that such facts constitute the essential elements of the offence charged, the magistrate shall explain the elements to the accused and ask him if he agrees with the summary.

(2) The magistrate shall record the reply and note, in particular, anything that the accused says that is inconsistent with a plea of guilty.

(3) If the accused agrees with the summary of facts and says nothing that is inconsistent with a plea of guilty, the magistrate shall put to the accused every element constituting the offence and ask the accused whether he admits all the elements of the offence put to him.

(4) In cases where there is a statutory defence such defence shall be brought to the attention of the accused and he shall be asked to admit its non availability to him in the particular case.

3. When the magistrate is satisfied that the accused has pleaded unequivocally to the offence, he may proceed to convict and after mitigation, sentence him.

ORDER 53

PROCURING EVIDENCE FOR TRIAL

A. Securing Attendance of Witnesses

1. (1) Any party desiring the attendance of any person to give evidence at a trial may, as of right, issue from the office of the clerk of the court one or more subpoenas for that purpose.

(2) Each subpoena shall contain the names of not more than 4 persons and the service upon any of the 4 named persons shall be effected by any member of a law enforcement agency under the instructions of the Director of Public Prosecutions.

(3) Service of a subpoena shall be effected in the manner prescribed under these Rules for service of process, and the process for subpoenaing such witnesses shall be, as nearly as may be, in accordance with Form 24 set out in the First Schedule.

(4) 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 magistrate at the trial.

2. If the subpoena is not sued out by the Government, a sum sufficient to cover the expenses of serving the subpoena shall be lodged with the clerk of the court by the person suing out the subpoena.

3. (1) Every witness duly subpoenaed or warned to attend and give evidence at any criminal trial shall be bound to attend and to remain in attendance throughout the trial unless excused by the court.

(2) If any person who has been served with a subpoena under this Order fails, without lawful excuse, to attend at the time and place mentioned in the subpoena, a magistrate may issue a warrant for the arrest of that person.

(3) The person arrested under subrule (2) shall be liable to be dealt with in the same manner as he might have been dealt with if he had failed to attend without lawful excuse when served with a subpoena to attend a like court in the area where he resides or is present for the time being.

(4) The return showing that service of the subpoena has been duly effected, together with a certificate under the hand of the clerk of the court that the person whose attendance was required by the subpoena failed to attend when called upon, and has established no lawful excuse for the non-attendance, shall be deemed sufficient proof of the non-attendance for the purpose of dealing with the said person under subrule (2) except that, in the case of a warning through a Chief or Headman, the court shall satisfy itself that the person concerned was duly warned.

B. Evidence on Affidavit

4. (1) The witnesses at the trial of any action shall be examined *viva voce* but a magistrate 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 he may deem necessary.

(2) Notwithstanding subrule (1), where it appears to the magistrate that any 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.

C. Evidence on Commission

5. (1) A magistrate may, on application on notice either made at a case management conference or during trial, for good cause shown, in any case where it appears that the witness cannot be procured without any amount of delay, expense or inconvenience —

(a) issue an order to any magistrate or where the witness is outside Botswana, to any person authorised by such court to take evidence on commission within the local limits of whose jurisdiction such witness resides;

(b) require such witness to give evidence by video conferencing.

(2) The order in terms of subrule (1) (a) shall be as near as possible to Form 48 set out in the First Schedule.

6. 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.

7. Unless the magistrate 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 4 shall be adduced upon oral examination in the presence of the parties, their attorney, and the witness concerned shall be subject to cross-examination and re-examination.

8. 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 magistrate hearing the case.

9. (1) Evidence taken on commission shall be recorded in such manner as evidence is recorded when taken before a magistrate in court and the transcript of any shorthand record or record taken by electronic means, duly certified by the person transcribing the same and by the commissioner shall constitute the record of the examination.

(2) Notwithstanding subrule (1), evidence tendered before the commissioner may be taken down verbatim.

10. The commissioner shall return the record of the evidence to the Clerk of the court with a certificate to the effect that it is the record of the evidence given before him and the record and certificate shall become part of the record in the action.

11. Rules 4 to 10 shall be subject to any ruling or order as the magistrate may deem fit to make.

D. *General*

12. The court may at any stage —

- (a) subpoena any person as a witness;
- (b) examine any person in attendance though not subpoenaed as a witness;
- (c) recall and re-examine any person already examined; or
- (d) subpoena and examine or recall and re-examine any person if his evidence appears essential for the purpose of arriving at a just decision of the case.

13. (1) Whenever any person appears in court in obedience to a subpoena, a warning or by virtue of a warrant, or being present and being verbally required by the court to give evidence —

- (a) refuses to be sworn or affirmed;
- (b) having been sworn or affirmed, refuses to answer such questions as are put to him; or
- (c) refuses or fails to produce any document or thing which he is required to produce,

without offering any just excuse for such refusal or failure, the court may adjourn the proceedings for any period not exceeding 8 days, and may, in the meantime, by warrant commit the person so refusing or failing to a prison, unless he sooner consents to do what is required of him.

(2) If a person under subrule (1), upon being brought up at the adjourned hearing refuses or fails to do what is so required of him again, the court may, if it sees fit, adjourn the proceedings again and commit him for the same period, and repeat this process until the person consents to do what is required of him.

(3) Nothing contained in this rule shall, in the meantime, prevent the court from giving judgment in any case or otherwise disposing of the same according to any other sufficient evidence taken.

(4) A person shall not be bound to produce any document or thing not specified or otherwise sufficiently described in the subpoena unless he actually has it in court.

14. (1) Whenever any person is bound by subpoena to give evidence or is likely to give material evidence before any court in respect of any offence, any magistrate may, upon information in writing and on oath that such person is about to abscond or has absconded, issue a warrant for the arrest of such person.

(2) If such person is arrested, any magistrate, upon being satisfied that the ends of justice would otherwise be defeated, may commit him to a prison until the time at which he is required to give evidence.

(3) Any person arrested under subrule (1) shall be entitled, on demand, to receive a copy of the information upon which the warrant for his arrest was issued.

15. Section 66 of the Criminal Procedure and Evidence Act shall apply with the necessary modifications in connection with any person subpoenaed or warned to attend any trial as a witness.

16. (1) When the attendance of any person confined in any prison in Botswana is required in any court presiding over a criminal case, the court before which such prisoner is required to attend may, before or during the sittings or sessions of the court at which the attendance of such person is required, make an order upon the officer in charge of the prison or other person having the custody of such prisoner to deliver such prisoner to the person named in such order to receive him.

(2) The person so named in the order shall, at the time prescribed in the order, convey such prisoner to the place at which he is required to attend, to receive and obey such further order as to the said court seems fit.

(3) The magistrate may at any time order that the evidence of a witness from prison be given by video conferencing or any other electronic means.

(4) Whenever the attendance of any person confined in a prison is required as a witness on behalf of a private prosecutor or an accused person, other than an accused person to whose defence the evidence of such witness is deemed material and who has no sufficient means to make the deposit, there shall be deposited with the officer in charge of a prison or other officer having the custody and control of the person so confined such sum as may be necessary to cover —

(a) the expenses to be occasioned by the person so confined and his necessary escort to and from the court; and

(b) his maintenance during such period that the person so confined and his escort are likely, by reason of the attendance, to be detained outside the prison.

(5) A person shall not be required or bound to obey any such subpoena unless such a sum has previously been deposited.

(6) The sum referred to in subsection (4) shall be determined in accordance with a scale prescribed by the Minister.

(7) Notwithstanding subrule (4), the deposit payable to the officer in charge of a prison shall not be required whenever the attendance of any person confined in a prison is required on behalf of the Government.

E. Witnesses Allowance

17. Any person who has attended any criminal proceedings as a witness for the Government shall be entitled to such allowance as provided under the Tariff of Allowances (Witnesses in Criminal Cases) Regulations.

ORDER 54

TRIAL PROCEDURE

1. At the commencement of trial, the magistrate shall explain the trial procedure and the purpose of cross-examination, which shall be recorded.

2. (1) Subject to subrule (2), the court may allow opening statements by the prosecution and the defence.

(2) The prosecution shall present its statement first, followed by the defence which may preserve its opening statement until the end of the prosecution case.

(3) Notwithstanding subrule (1) and (2), both parties may waive the making of opening statements.

3. The prosecution shall then examine its witnesses and tender in any documentary or any other evidence which may be admissible.

4. At the end of each witness' evidence, the defence may cross-examine the witness for the prosecution.

5. The prosecution may, at the end of such cross-examination, re-examine the witness on issues raised in cross-examination.

6. (1) At the close of the prosecution case, the magistrate may invite the defence to make a submission of no case to answer.

(2) If the court considers that there is no evidence that the accused committed the offence charged or any other offence for which he might be convicted, it may return a verdict of not guilty.

7. (1) If the magistrate rules that the accused person has a case to answer, he shall ask him or his legal representative, if any, whether he intends to adduce evidence in his defence.

(2) Where there is more than one accused person, the magistrate shall ask each of them or their legal representative, if any, whether they intend to adduce evidence in their defence.

(3) If any of the accused persons answers in the affirmative, he or his legal representative may address the court for the purpose of opening evidence intended to be adduced for his defence, but without comment.

(4) The accused person or his legal representative shall examine his witnesses and tender any documentary or other any evidence which may be admissible.

8. After all of the evidence has been presented, the parties may make final submissions and the prosecution shall have the right to open, the defence to follow and the prosecution to close.

9. (1) After the evidence has been concluded and the legal representative or the accused, as the case may be, has addressed the court or stated that they do not wish to do so, the magistrate may give judgment or may postpone the same to a future date.

(2) A judgment shall be written by or under the direction of the magistrate in the language of the court and shall contain the following —

- (a) the charge and the particulars of the offence;
- (b) plea;
- (c) summary of the evidence;
- (d) points for determination of the issues;
- (e) the decision and reasons for the decision; and
- (f) the date of delivery and signature of the magistrate.

(3) The judgment shall be delivered in open court.

10. The rules applicable to a trial shall apply with the necessary modifications to a trial within a trial.

ORDER 55

HOSTILE WITNESSES

1. (1) A witness is hostile if he is not desirous of telling the truth at the instance of the party who called him.

(2) Any party may, in criminal proceedings, impeach his own witness or support the credibility of the other party's witness.

2. (1) When a witness gives evidence which is materially different from a previous statement made by him, the party calling the witness may make a verbal application to the magistrate to declare the witness hostile.

(2) The magistrate shall ask such witness whether he did or did not previously make a statement with which his evidence in the said proceedings is inconsistent.

(3) If the witness admits to having made the statement, the magistrate shall declare him a hostile witness.

(4) Where the witness has been declared hostile, the magistrate shall direct the party applying to cross-examine the witness to clear up the discrepancies between his previous statement and his evidence in the proceedings.

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3. (1) If the witness denies having made the previous statement, the party so alleging shall prove the existence of such statement.

(2) If the court is satisfied that the witness made such previous statement it may declare him hostile and the same procedure as in rule 2 shall apply.

(3) Where the court rules that the witness did not make the previous statement, it shall dismiss the application and the witness shall proceed to give evidence in the normal way.

(4) Where the witness declared hostile has been cross-examined by the party calling him, the other party may also cross-examine him and he may be re-examined by the party who called him.

(5) The court may, at the time of judgment, in assessing the evidence of a witness who has been declared hostile, reject or accept in part or in whole such evidence.

ORDER 56

PRODUCTION AND PROOF OF PREVIOUS CONVICTIONS

1. If the prosecution alleges that the accused has previous convictions, it shall file the criminal record of the accused person in court at any time after conviction but before sentencing.

2. Where the criminal record of the accused person is filed in court under rule 1, the court shall ask him whether he admits or denies the previous convictions set out in the criminal record.

3. The accused may admit orally all or any of the previous convictions set out in the criminal record.

4. If he admits the previous convictions, the court shall sentence him accordingly.

5. If he does not admit to any or all of the previous convictions, the prosecution may lead evidence to prove such previous convictions.

6. Where the prosecution leads evidence to prove the previous convictions, the rules of procuring evidence in a trial shall apply with the necessary modifications.

ORDER 57

ADDRESS BY THE PARTIES ON SENTENCING

1. The accused person shall be entitled to address the court in mitigation of sentence.

2. The prosecution may address the court on aggravating factors before sentence.

3. Where the prosecution disputes factors raised by the accused in mitigation, he may adduce evidence to rebut such mitigating factors.

4. The court may allow the victim to address the court before sentence in an effort to assist the court in coming to a just sentence.

5. Where a person has been convicted of an offence which has caused personal injury to some other person or damages to or loss of property belonging to some other person, the court trying the case may, after recording the conviction, invite such victim or other person to address the court on —

(a) compensation in terms of section 316 of the Criminal Procedure and Evidence Act;

(b) how he has been affected by the offence committed by the accused; or

(c) any mitigating or aggravating factors.

6. The court may before sentencing, seek the expert opinion of any professional in determining the appropriate sentence.

ORDER 58

PRIVATE PROSECUTIONS

1. The provisions of these Rules shall apply to Private Prosecutions with the necessary modifications.

Revocation of Cap. 04:04 (Sub. Leg.)

59. The Rules of the Magistrates Courts are hereby revoked.