

MAGISTRATES' COURTS ACT, 1974

No. 20



of 1974

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

Date of Assent: 20.8.74

Date of Commencement: On Notice

ENACTED by the Parliament of Botswana.

PART I. *Preliminary*

1. This Act may be cited as the Magistrates' Courts Act, 1974, and shall come into operation on such date as the President may, by notice published in the Gazette, appoint.

Short title
and
commence-
ment

2. (1) In this Act, unless the context otherwise requires—
“clerk of the court” means any person so appointed in accordance with section 11 of this Act;
“court” means the court of a magistrate, of whatever grade, appointed under this Act;
“High Court” includes a judge of that Court;
“magistrate” includes a Chief Magistrate, a Senior Magistrate, a Magistrate Grade I and a Magistrate Grade II, appointed in accordance with section 8 of this Act;
“bailiff” means a court bailiff so appointed in accordance with section 12 or any person lawfully performing the functions of a bailiff in accordance with this Act;
“Registrar” means the Registrar of the High Court.

Inter-
pretation

(2) Where in any existing law reference is made to a Subordinate Court of the First Class, such reference shall be construed to mean a court presided over by a Magistrate Grade I or over, where reference is made to a Subordinate Court of the Second Class, such reference shall be construed to mean a court presided over by a Magistrate Grade II, and where reference is made to an unspecified subordinate court such reference shall be construed to mean a magistrate's court of competent jurisdiction.

PART II. *Establishment and nature of courts*

Establishment of courts	<p>3. There shall be courts subordinate to the High Court to be known as magistrates' courts presided over by magistrates appointed for the purposes of this Act.</p>
Nature of the courts and force and effect of process	<p>4. (1) Every court shall be a court of record.</p> <p>(2) Every summons, subpoena, writ, warrant or other process issued out of any court shall be of force throughout Botswana.</p> <p>(3) Any summons, subpoena, writ, warrant or other process issued out of any court may be served or executed through a bailiff:</p> <p style="padding-left: 20px;">Provided that no costs shall be payable in excess of the costs of personal service in the cheapest and most effective manner suited to the circumstances.</p>
Language to be employed in courts	<p>5. (1) The language to be employed in a court shall be English and the evidence and all records of proceedings in the court shall be in that language.</p> <p>(2) If any of the parties or witnesses in a proceeding before a court does not understand the English language, then the proceedings shall be interpreted from English into the language understood by the parties or the witnesses concerned, as the case may be, and <i>vice versa</i>:</p> <p style="padding-left: 20px;">Provided that in civil proceedings the parties may be called upon by the presiding magistrate to bear part or the whole of the cost of such interpretation where the language understood by the parties or witnesses is not one of the languages commonly spoken within the area of jurisdiction of the court.</p>
Proceedings to be open to the public	<p>6. (1) Except with the agreement of all parties thereto, all proceedings of a court, including the announcement of the decision of the court, shall be held in public.</p> <p>(2) Nothing in subsection (1) shall prevent the presiding magistrate from excluding from the proceedings persons other than the parties thereto and their legal representatives, to such extent as the magistrate may consider necessary or expedient –</p> <ul style="list-style-type: none">(a) in circumstances where publicity would prejudice the interests of justice;(b) in interlocutory proceedings; or(c) in the interests of defence, public safety, public order, public morality, the welfare of persons under the age of eighteen, or the protection of the private lives of persons concerned in the proceedings. <p>(3) If any person in or in the precincts of a court conducts himself in such a manner as is capable of disturbing the peace or order of the court, the presiding magistrate may order that such person be removed or detained in custody until the final rising of the court for the day, or, if in the opinion of the magistrate peace or order</p>

cannot otherwise be secured, may order that the public gallery be cleared and the doors thereof closed to the public.

7. The records and proceedings of every court shall in all cases be accessible to the public under the supervision of an officer of the court at convenient times and upon payment of such fees as may be prescribed by rules made under section 68 of this Act:

Public access
of records

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

PART III. *Judicial Officers*

8. (1) There shall be four grades of magistrates, namely, Chief Magistrate, Senior Magistrate, Magistrate Grade I and Magistrate Grade II.

Grades of
magistrates
and appoint-
ments thereto

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

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

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

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

9. (1) The Chief Justice may assign magistrates to particular courts or to courts in a particular area of Botswana, and transfer magistrates between courts or areas, and may in respect of Chief Magistrates and Senior Magistrates assign them to supervise the administration of justice in particular courts or in particular areas of Botswana.

Assignment
of magistrates
to courts

(2) Where a Chief Magistrate or Senior Magistrate is assigned to supervise the administration of justice in particular courts or in a particular area, he may allocate work between the magistrates of the particular courts or in the particular area, or transfer work from one of such magistrates to another, and may take such steps as may be necessary to ensure that the work in the courts of such magistrates is conducted efficiently and expeditiously.

10. A magistrate shall not be liable to be sued in any civil court or prosecuted for an offence in respect of any act done or ordered

Protection
from actions

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

PART IV. *Officers of the court*

Clerk of the court

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

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

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

Court bailiffs

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

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

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

Service of process by the police

13. Whenever process of a court in a civil case is to be served and no bailiff has been appointed at the place where the court is held, or whenever process of the court in a criminal case is to be served, any police officer shall be as qualified to serve any such process and any other document in such a case as if he had been duly appointed as a bailiff. The fees payable in respect of or in connexion with any such service shall be paid into the public revenue.

Bailiff's return to be evidence

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

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

Suspension of
bailiff for
misconduct

16. Every clerk of the court and bailiff holding office immediately prior to the commencement of this Act shall be deemed to be duly appointed under this Act and shall be invested with power, duties and authority accordingly.

Officers
appointed
previously
to remain
in office

PART V. *Civil matters*

JURISDICTION

17. (1) Subject to section 30 of this Act a Chief Magistrate and a Senior Magistrate shall have jurisdiction —

Jurisdiction
in respect of
causes of
action

- (a) in all civil claims where the total amount claimed either in the way of liquidated or unliquidated damages, or the value of the property claimed, does not exceed R2 000;
- (b) in actions of ejection against the occupier of any premises or land:

Provided that the right of occupation of any such premises or land in dispute between the parties does not exceed R2 000 in value to the occupier.

(2) Subject to section 30 of this Act, a Magistrate Grade I and a Magistrate Grade II shall have jurisdiction in all civil claims where the total amount claimed either in the way of liquidated or unliquidated damages or the value of property claimed does not exceed R1 000 in the case of a Magistrate Grade I and R400 in the case of a Magistrate Grade II.

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

Arrest of
absconding
defendants
and interdicts

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

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

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

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

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

(a) the cause of action appears to amount, exclusive of costs, to at least R100; and

(b) the applicant appears to have no security for the debt, or only security falling short of the amount of the debt by at least R100.

Curator
ad litem

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

Assessors

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

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

Transfer
from one
court to
another

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

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

Rescission
and
correction of
judgments
and orders

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28. In any action before a court a defendant may set off or set up by way of counter-claim, against the claims of the plaintiff, any Set-off and counter-claims

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

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

Counter-
claim
exceeding
jurisdiction

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

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

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

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

Magistrates
not to have
jurisdiction
in certain
matters

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

- (a) in which the dissolution of a marriage or separation from bed and board is sought or in which the division of the goods of married persons is involved;
- (b) in which the validity or interpretation of a will or other testamentary document is in question;
- (c) in which the status of a person in respect of mental capacity is sought to be effected;

- (d) in which is sought the specific performance of an act without an alternative of payment of damages (except the rendering of an account in respect of which the claim does not exceed an amount within the jurisdiction, or the delivery or transfer of property not exceeding in value the jurisdiction of the magistrate);
- (e) in which is sought a decree of perpetual silence; or
- (f) in which a provisional sentence is sought.

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

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

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

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

WITNESSES AND EVIDENCE

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

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

(2) (a) If any person, being duly subpoenaed to give evidence or to produce any books, papers or documents in his possession or under his control which the party requiring his attendance desires to show in evidence, fails, without lawful excuse, to attend or give evidence or to produce those books, papers or documents according to the subpoena, or, unless duly excused, fails to remain in attendance throughout the trial, the magistrate may, upon being satisfied upon oath or by the written return of a bailiff that such person has been duly subpoenaed and that his reasonable expenses have been paid or offered to him, impose upon such person a fine of R50 and imprisonment for one month.

(b) If any person so subpoenaed fails to appear or, unless duly excused, to remain in attendance throughout the trial, the magis-

trate may also, upon being satisfied as aforesaid, and that no lawful excuse for such failure shall seem to exist, issue a warrant for his apprehension in order that he may be brought up to give his evidence and to be otherwise dealt with according to law.

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

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

EXECUTION

Jurisdiction to issue execution

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

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

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

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

Setting aside of warrant

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

Execution in case of judgment debt ceded

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

Manner of execution

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

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

Property exempt from execution

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

- (a) the necessary beds, bedding and wearing apparel of the person against whose property execution is levied, and of his family;
- (b) the necessary furniture and household utensils insofar as the same do not exceed in value the sum of R400;
- (c) the supply of food and drink in the house sufficient for the needs of such person and of his family during one month;
- (d) tools and implements of trade, and tools necessarily used in the cultivation of land, insofar as any such tools or implements do not exceed in value the sum of R400;
- (e) professional books, documents, or instruments, necessarily used by such person in his profession, insofar as the same do not exceed in value the sum of R400.

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

(2) A bailiff may also hold any cheques, bills of exchange, promissory notes, bonds or securities for money which shall have been seized or taken as security for the benefit of the execution creditor for the amount directed to be levied by the execution so far as it is still unsatisfied; and the execution creditor may, when the time of payment shall have arrived, sue in the name of the execution debtor, or in the name of any person in whose name the execution debtor might have sued, for the recovery of the sum secured or made payable thereby.

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

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

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

41. (1) Where any person, not being the judgment debtor, makes any claim to or in respect of any property attached or about to be Interpleader claims

attached in execution under the process of any court, or to the proceeds of such property sold in execution, his claim shall be adjudicated upon after issue of a summons in the prescribed manner.

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

Sale in execution gives good title

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

Surplus after execution

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

Debt, salary or wages may be attached
Proc. 25 of 1961

44. (1) Without prejudice to section 18 of the Hire Purchase Proclamation, 1961 (which, *inter alia*, prohibits the making of any garnishee order for the purpose of enforcing payment by the buyer of any amount payable under a hire-purchase agreement or an instalment sale agreement or as a result of the termination or rescission thereof or as damages for any breach thereof), a magistrate may order the attachment of any debt, salary or wages actually due to a judgment debtor by any other person to the amount necessary to satisfy the judgment debt and the costs of the proceedings for attachment, and may order such other person (hereinafter called the "garnishee") to pay to the bailiff so much of the debt, salary or wages appearing at the time of making the order to be due and payable as may be sufficient to satisfy the said judgment debt and costs, and may enforce the order as if it were a judgment of the court.

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

(3) If, after any such order in respect of salary or wages has been granted, it is shown to the satisfaction of the magistrate that sufficient means to maintain himself and those dependent on him will not, after satisfaction of such order, be left to the judgment debtor, the magistrate shall vary or set aside such order in such manner that such order will only affect the balance of such salary or wages over and above such sufficient means.

45. (1) Without prejudice to the provisions of section 18 of the Hire Purchase Proclamation, 1961 a magistrate may, if satisfied upon sworn information that sufficient means will, after satisfaction of the order, be left to the judgment debtor to maintain himself and those dependent on him, grant a garnishee order in respect of future or accruing earnings as if they were actually payable.

Future and accruing earnings, when attachable

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

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

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

Jurisdiction to decide disputes arising out of garnishee orders

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

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

Execution of payment is discharge *pro tanto*

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

Saving of existing law prohibiting attachment of certain property

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

Order for payments by instalments

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

Execution or suspension in case of appeal

performance of any judgment which may be given upon the appeal or application.

Summons for
civil
imprisonment

51. (1) Without prejudice to section 18 of the Hire Purchase Proclamation, 1961 (which, *inter alia*, prohibits the making of any decree of civil imprisonment for the purpose of enforcing payment by the buyer of any amount payable under a hire purchase agreement or an instalment sale agreement or as a result of the termination or rescission thereof or as damages for any breach thereof), if a judgment has remained unsatisfied during a period of seven days, or if the judgment debtor has admitted in court or in writing or if it appears from the return of the bailiff to any process of execution that the judgment debtor has not sufficient property liable to be attached in execution to satisfy the judgment debt and costs, the judgment creditor may summon the judgment debtor to show cause why a decree of civil imprisonment should not be made against him.

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

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

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

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

(b) if the rights of the judgment creditor against the judgment debtor accrue to the judgment creditor by virtue of a cession.

Decree of
civil
imprisonment

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

Provided that —

(i) a magistrate may at any time suspend the execution of or altogether discharge any such decree or warrant upon such terms as may appear to be fair and reasonable;

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

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

Debtor may show that he has executable property

54. The period of civil imprisonment shall be decided by the magistrate, but shall not in any case exceed three months, and, where the judgment debt and costs, so far as the same are satisfied, amount to less than R20, shall not exceed fourteen days.

Period of imprisonment

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

Costs of civil imprisonment

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

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

Custody of
gaoler

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

Provided always that the judgment creditor shall pay and satisfy the charges for the maintenance of the judgment debtor, which shall be such an amount not exceeding R1.50 per diem as the magistrate shall determine and shall be paid weekly in advance to the keeper of the gaol, who shall then issue to the judgment debtor a daily ration based on the amount of the maintenance money received.

Discharge
from
imprisonment

57. The keeper of the gaol shall forthwith discharge the judgment debtor from imprisonment –

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

Effect of
discharge
from
imprisonment

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

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

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

PART VI. *Criminal matters*

JURISDICTION

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

Jurisdiction in respect of classes of offences

Provided that a Chief Magistrate or Senior Magistrate may try any offence under sections 136, 137, 138, 142, 227, 292 (2), 293 (2) and 325 of the Penal Code and any conspiracy or attempt to commit any such offence, or the counselling or procuring of the commission of any such offence.

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

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

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

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

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

Jurisdiction in the matter of punishment

- (a) Chief Magistrates : 7 years' imprisonment or R4 000 fine or both;
- (b) Senior Magistrates : 5 years' imprisonment or R2 000 fine or both;
- (c) Magistrates Grade I : 3 years' imprisonment or R1 000 fine or both;

(d) Magistrates Grade II : 1 year's imprisonment or R400 fine or both.

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

- (a) Chief Magistrate : 12 strokes;
- (b) Senior Magistrates : 9 strokes;
- (c) Magistrates Grade I and Grade II : 6 strokes.

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

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

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

Return of
criminal
proceedings

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

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

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

Submission of
records to the
High Court

63. Where a Chief Magistrate or Senior Magistrate imposes a sentence of or exceeding 2 years' imprisonment with or without the option of a fine, or where a Magistrate Grade I or Grade II imposes a sentence of or exceeding 6 months' imprisonment, with or without the option of a fine, the clerk of the court shall transmit to the Registrar of the High Court, not later than one week next after the deter-

mination of the case, the record of the proceedings in the case together with such remarks, if any, as the magistrate may desire to append thereto, and with any written statements or arguments which the accused may within three days after the sentence supply to the clerk of the court, and the Registrar shall, with all convenient speed, lay the same before a judge in chambers for his consideration and review.

64. (1) The execution of any sentence of fine or of imprisonment shall not be suspended by the transmission of or the obligation to transmit the record for review unless the person sentenced shall give sufficient bail to pay the fine imposed upon him or to surrender himself in order to undergo such imprisonment (as the case may be) in case the proceedings in the case shall be approved as aforesaid, and in such case a written notice to pay or to surrender (as the case may be), signed by the clerk of the court, shall be served upon or for such person at some place to be mentioned in the bail bond or recognizance.

Execution of sentence suspended under certain conditions

(2) Every such notice requiring the payment of the fine or the surrender of such person (as the case may be) shall be served in like manner as is prescribed in regard to the service of the summons on a defendant in a civil case.

PART VII. *Offences*

65. Any person who –

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

Offences relating to execution

shall be guilty of an offence and shall be liable to a fine of R100 and to imprisonment for six months.

PART VIII. *General and supplementary*

Jurisdiction
as to plea of
ultra vires

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

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

Amendment
of
proceedings

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

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

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

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

Rules of
court

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

- (a) the pleading, practice and procedure of courts, including all matters connected with the forms to be used and the fees to be payable, their amount and the method and time of payment of the same;
- (b) the expenses of parties and witnesses, their amount and the method and time of payment of the same;
- (c) the fees and costs of legal practitioners, and the amount, taxation and recovery of the same;
- (d) regulating the sittings of courts, whether or not sitting in chambers and the times for the holding of courts;
- (e) regulating and prescribing the procedure in connexion with interlocutory applications;
- (f) prescribing the fees to be paid in respect of the service or execution of any process of courts;
- (g) prescribing and regulating the manner of determining the amount of security to be given in any case where security is required to be given and the form and manner in which such security may be given;
- (h) prescribing and regulating the hours during which the registries of courts shall be open for the transaction of business;

- (i) prescribing and regulating the proceedings of bailiffs and other officers of the court;
- (j) prescribing the tariff of costs and expenses which may be allowed in respect of the service or execution of any process referred to in paragraph (f);
- (k) the time within which any requirement of this Act or any rules made thereunder is required to be complied with;
- (l) generally making provision with regard to any matter in respect of which, in the opinion of the Chief Justice, it is necessary or desirable to make provision in order to facilitate the proper despatch and conduct of the business of the courts.

69. (1) The Subordinate Courts Proclamation is hereby repealed. Repeal
Cap 5

(2) References to subordinate courts or to judicial officers contained in any rules made under the repealed Proclamation shall be construed as references to magistrates' courts and magistrates.

70. Section 314 of the Criminal Procedure and Evidence Code is amended – Consequen-
tial
amendments

- (a) in subsection (1) thereof by deleting the words “where the compensation claimed does not exceed the civil jurisdiction of such Court”;
- (b) in subsection (4) thereof by deleting the words “with civil jurisdiction” which occur in line 1.

Passed by the National Assembly this 26th day of June, 1974.

I.P. GONTSE,
Clerk of the National Assembly.