

Statutory Instrument No. 98 of 1970

**THE HIGH COURT OF BOTSWANA ACT, 1967
RULES OF THE COURT (AMENDMENT RULES), 1970**

(Published on the 20th November, 1970)

It is hereby notified for general information that in the exercise of the powers vested in me by Section 28 of the High Court of Botswana Act, 1967 (No. 35 of 1967), I, John Richard Dendy Young, Chief Justice of Botswana, make the following amendments and additions to the Rules of the High Court.

J.R. DENDY YOUNG,
Chief Justice

1. **These** Orders and rules may be cited as the Rules of the High Court (Amendment Rules), 1970, and shall come into operation on publication in the Gazette.
2. **The** following Order is inserted after Order 3:

"ORDER 3A

EFFECT OF NON-COMPLIANCE

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

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

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

3. (1) An application to set aside any proceedings for irregularity shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

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

3. **Order 4** of the Rules of the High Court is hereby amended:

(A) By the deletion of the existing rule 10 and the substitution of the following:

"10. (1) Before a summons is issued it must be endorsed —

- (a) where the plaintiff sues by an attorney, with the plaintiff's address and the attorney's name or firm and a business address of his within the jurisdiction, and also (if the attorney is the agent of another) the name or firm and business address of his principal;

(b) where the plaintiff sues in person, with —

(i) the address of his place of residence and, if his place of residence is not within the jurisdiction, or if he has no place of residence, the address of a place within the jurisdiction at or to which documents for him may be delivered or sent; and

(ii) his occupation.

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

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

(b) where he sues in person, the address within the jurisdiction endorsed on the summons. "

(B) By the addition at the end of rule 13 of the following sentence:

"In actions against the State appearance may be entered at any time within 21 days after service of the summons."

4. The following Order is inserted after Order 4:

"ORDER 4A
DISABILITY

1. In this Order:

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

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

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

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

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

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

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

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

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

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

unless and until the documents listed in rule 4 have been filed.

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

- (a) a written consent to be guardian or guardian *ad litem*, as the case may be, of the person under disability in the cause or matter in question given by the person proposing to be such guardian or guardian *ad litem*;
- (b) except where the person proposing to be such guardian or guardian *ad litem* of the person under disability, being a patient, is authorised under any written law relating to mental health to conduct the proceedings in the cause or matter in the name of the patient or on his behalf a certificate made by the attorney for the person under disability certifying:
 - (i) that he knows or believes, as the case may be, that the person to whom the certificate relates is a person under disability giving (in the case of a patient) the grounds of his knowledge or belief;
 - (ii) where the person under disability is a patient, that there is no person authorised as aforesaid; and
 - (iii) except where the person named in the certificate as guardian or guardian *ad litem*, as the case may be, is an official guardian or guardian *ad litem*, that the person so named has no interest in the cause or matter in question adverse to that of the person under disability.

5. (1) Where —

- (a) in an action against a person under disability begun by summons to which an appearance is required to be entered, no appearance is entered in the action for that person; or
- (b) the defendant to an action serves a plea and counter-claim on the person under disability who is not already a party to the action, and no appearance is entered for that person;

an application for the appointment by the court of a guardian *ad litem* of that person must be made by the plaintiff or defendant, as the case may be, after the time limited (as respects that person) for appearing and before proceeding further with the action or counter-claim.

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

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

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

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

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

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

7. Order 25 shall apply to a person under disability and to his guardian or guardian *ad litem*.

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

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

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

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

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

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

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

- (a) in the case of a person under 21 years (who is not emancipated) and who is not a patient, on his father or guardian, or, if he has no father or guardian, on the person with whom he resides or in whose care he is;
- (b) in the case of a patient, on the person (if any) who is authorised under any written

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

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

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

5. The following Order is inserted after Order 5:

"ORDER 5A

ENTRY OF APPEARANCE TO SUMMONS

1. (1) Subject to paragraph 2 of this rule and to Order 4A, a defendant to an action begun by summons (whether or not he is sued as a trustee or personal representative or in any other representative capacity) may enter an appearance in the action and defend it by an attorney or in person.

(2) Except as provided by any written law, a defendant to such an action who is a body corporate may not enter an appearance in the action or defend it otherwise than by an attorney.

(3) An appearance is entered by properly completing and delivering a memorandum of appearance. Delivery to the plaintiff of a memorandum of appearance may be effected by sending by post to the plaintiff, if the plaintiff sues in person, but otherwise to the plaintiff's attorney, at the plaintiff's address for service, a copy of the memorandum of appearance on the day it is delivered to the Registrar.

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

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

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

(3) A memorandum of appearance must specify —

(a) an address within the jurisdiction;

(b) in the case of a defendant appearing by an attorney, a business address of the attorney within the jurisdiction;

and, where the defendant enters an appearance in person, the address specified under

paragraph (a) of this sub-rule shall be his address for service, but otherwise his attorney's address shall be his address for service.

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

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

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

(2) Except as provided in sub-rule (1), nothing in these rules or any summons or order thereunder shall be construed as precluding the defendant from entering an appearance in an action after the time limited for appearing, but if a defendant enters an appearance after that time he shall not, unless the court otherwise orders, be entitled to serve a defence or do any other thing later than if he had appeared within that time.

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

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

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

6. Order 14 of the Rules of the High Court is hereby amended by the addition at the end of rule 19 of the following sentence:

"Upon failure to comply with any Order for further particulars, the court may, on application, order that the action stand dismissed, or the defence struck out or that the allegation of which particulars were ordered be struck out from the pleading."

7. The following Order is inserted after Order 28:

"ORDER 28A

SET-DOWN OF DEFENDED TRIAL CASES, MOTIONS AND PETITIONS

1. (1) A plaintiff may serve notice of application to the Registrar to set down a defended action for trial when the pleadings are closed, or deemed for the purposes of this rule to be closed. The notice shall state the plaintiff's estimate of the duration of the trial.

(2) If there is no claim in reconvention, pleadings shall, for the purpose of this Order, be deemed to be closed when the plaintiff has filed his replication or, if a replication is unnecessary, when the plea has been filed.

(3) If the defendant has filed a claim in reconvention, the pleadings shall be deemed to be closed when the plaintiff has filed his plea to the claim in reconvention.

(4) An application to set down for trial under this rule shall not affect the right or the obligation, as the case may be, of a party to file further pleadings within the time allowed for that purpose.

(5) The notice of application to set down shall state the date on which, and the time at which, the application to the Registrar will be made. At least seven days' notice shall be given to the defendant.

(6) If the plaintiff fails to apply for a set-down within 30 days after the date on which pleadings are closed or deemed to be closed, the defendant may so apply and thereupon the provisions of sub-rule (5) of this Order shall *mutatis mutandis* apply.

(7) Where a case has been set down for trial, any party may apply to the court or a judge to have the set-down changed or set aside for good cause: Provided that, with the approval of the Registrar, a date of set-down may be changed by consent of all parties.

(8) If a party served with a notice of application to set down for trial disagrees with the plaintiff's estimate of the duration of the trial, he shall inform the Registrar of his own estimate; such information to reach the Registrar before the time fixed for the hearing of the application.

(9) An application to set down for trial shall not be withdrawn except by consent of all parties or by leave of the court or a judge.

2. In motions, petitions and other matters where the opposite party is entitled to notice of set-down and the period of notice is not elsewhere provided for in these rules, the following procedure shall be followed:

In his notice of motion or petition the applicant shall state a day, prior to the proposed day of hearing, on or before which the respondent is required to notify the applicant that he intends to oppose the application and shall further state that the matter will be set down for hearing on some later date which shall be stated in the notice. The applicant shall also state a day on or before which the respondent, if he should give notice of intended opposition, is required to file his defence.

3. Where a notice of motion or a petition has nominated a day for hearing and on return days of *rules nisi* or postponements to a definite date, it shall not be necessary to give notice of set-down to the opposite party or to the Registrar, but the applicant shall send to the Registrar a request to place the case on the roll for hearing; such request shall be delivered to the Registrar not later than the day before the day of hearing. "

8. Order 53 of the Rules of the High Court is hereby amended by the omission of subparagraph (b) and the substitution of the following:

"(b) For copying any document (including a document lodged in the Master's Office) (per folio of 100 words)..... 20 cents.

For certifying same, an additional fee

(per folio of 100 words)..... 10 cents. "

9. Order 56 is hereby amended by the addition of the under-mentioned rule to follow rule 9:

“10. It shall be competent for the Taxing Master to tax bills of costs in connection with criminal matters, whether or not the case relates to the High Court or to a subordinate court. The Taxing Master shall be guided by the tariffs laid down for civil cases insofar only as he is satisfied that the tariffs will ensure to the attorney a fair and reasonable remuneration for his work.”

10. Form 2 (Summons) is hereby deleted and replaced by the following form:

Form 2

SUMMONS

In the High Court of
the Republic of Botswana.

Civil Case No.....

In the matter between:

..... Plaintiff
and
..... Defendant

To the Sheriff or his Deputy:

INFORM..... of
(state sex and occupation) (hereinafter called “the Defendant”)
that..... of
(state sex and occupation) (hereinafter called “the Plaintiff”)

hereby institutes action against him/her in which action the Plaintiff claims the relief and on the grounds set out in the particulars annexed hereto.

INFORM the Defendant further that if he/she disputes the claim and wishes to defend the action he/she shall —

- (i) within day of the service upon him/her of this summons enter appearance to defend. An appearance is entered by properly completing and delivering a memorandum of appearance to the Registrar and to the Plaintiff. Delivery to the Plaintiff may be effected by sending by post to the Plaintiff if the Plaintiff sues in person, but otherwise to the Plaintiff’s attorney at the Plaintiff’s address for service, a copy of the memorandum of appearance on the day it is delivered to the Registrar. The memorandum of appearance shall state an address within the jurisdiction at or to which documents for him/her may be delivered or sent;
- (ii) thereafter, and within 14 days after filing and serving notice of intention to defend as aforesaid, file with the Registrar and serve upon the Plaintiff a plea, exception or notice to strike out, with or without a counter-claim.

INFORM the Defendant further that if he fails to file and serve notice as aforesaid, judgment as claimed may be given against him without further notice to him, or if, having filed and served such memorandum of appearance he fails to plead, except, make application to strike out or counter-claim, judgment may be given against him.

DATED at this day of 19.....

Registrar of the High Court.

ANNEXURE

Particulars of Plaintiff's Claim

.....
.....
.....

Plaintiff's Attorney.

Address of Plaintiff's Attorney: