THE HIGH COURT OF BOTSWANA ACT, 1967

No. 35 of 1967

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AN ACT TO CONSOLIDATE AND AMEND THE LAW RELATING TO THE HIGH COURT OF BOTSWANA

Date of Assent: 11.10.67.

Date of Commencement: On a date to be appointed.

ENACTED by the Parliament of Botswana

Short Title and Commencement

1. This Act may be cited as the High Court of Botswana Act, 1967, and shall come into operation on a date to be appointed by the Minister by notice in the *Gazette*.

Interpretation

2. In this Act, unless inconsistent with the context —

"Court" means the High Court;

"Registrar" means Registrar of the High Court;

"Sheriff" means the person performing the functions of a sheriff under section 6 and shall include a deputy sheriff.

Puisne Judges

3. In addition to the Chief Justice there shall be not more than two puisne judges.

Rank and Precedence

4. The Chief Justice shall take rank and precedence before the puisne judges, and the puisne judges shall take rank and precedence between themselves according to the priority of their appointments.

Acting Judges

5. Every person appointed to act as a judge of the Court under subsection (6) of section 97 of the Constitution shall have the jurisdiction, functions and privileges of a judge of that Court —

(a) during the whole of the period of his appointment in the case of a person appointed for continuous service in that capacity; or

(b) during those periods when he performs the functions of a judge, in the case of a person appointed for temporary service in that capacity;

but shall not otherwise be deemed to be a judge save in so far as paragraph (b) of the proviso to section 97(5) of the Constitution provides to the contrary.

Appointment of Officers

6. (1) The Registrar may appoint any public officer in his department to perform any of the functions vested in the Registrar by this Act or under any law; and any officer so appointed may perform such functions subject to such direction as may be given by the Registrar.

(2) The Minister may appoint a public officer to perform any of the functions vested in the Sheriff by this Act or under any law and, in the absence of any such appointment, the Registrar shall be Sheriff and may perform such functions.

(3) The Sheriff may appoint one or more persons, to be styled deputy sheriffs, to perform subject to the direction of the Sheriff, the functions vested in the Sheriff by this Act or any law:

Provided that —

(a) no person who holds any office in the public service shall be appointed as deputy sheriff to perform the functions vested in the Sheriff as aforesaid in addition to the functions of such office without the consent of the authority empowered to exercise disciplinary control over such officer in terms of section 111 of the Constitution;

(b) the office of deputy sheriff shall not be an office of emolument in the public service.

(4) A deputy sheriff who is not also an officer in the public service shall

as soon as possible after his appointment furnish security to the satisfaction of the Sheriff for the due and faithful performance of his functions, and if he fails or neglects to furnish such security within a period fixed by the Sheriff, his appointment shall lapse at the expiration of the said period.

(5) The Chief Justice may give such directions as he thinks fit as to the duties to be carried out by, and for the apportionment of functions among the officers of the Court, and, without prejudice to the generality of the power hereby conferred, such directions may specify, either by name or office, the officers of the Court who shall be responsible for the issue of summonses, warrants and writs of execution, for the registration of orders and judgments, for the taxing of bills of costs, for the keeping of the records of the proceedings of the Court, and for the custody of and other matters relating to fines, fees and other moneys paid into or out of the Court.

Seal of the High Court

7. (1) The High Court shall have, and use as occasion may require a seal, bearing the device and impression of the Arms of Botswana surrounded by the legend "The High Court of Botswana".

(2) Such seal shall be delivered to and kept in the custody of the Registrar.

Proceedings to be in Open Court and in English

8. (1) Save as is otherwise provided in the rules of court or in any other law, all proceedings in the High Court shall be carried on, and sentences, judgments and orders thereof pronounced and declared in open Court:

Provided that at any time during the trial the Judge presiding may, if he thinks fit and subject to the provisions of subsections (10) and (11) of section 10 of the Constitution, order the Court to be cleared or that any person or class of persons shall leave the Court; and such Judge is hereby empowered to exclude from the proceedings, being proceedings to which the said subsections apply, persons other than the parties thereto and their legal representatives to such extent as he may consider desirable in the interests of defence, public safety, public order, public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of the persons concerned in the proceedings.

(2) The pleadings and proceedings of the High Court shall be in the English language.

Jurisdiction of the High Court

9. (1) The High Court shall be a court of record and shall have jurisdiction in all cases and proceedings whatsoever, both civil and criminal, arising or which have arisen in Botswana.

(2) Subject to the provisions of section 12 the jurisdiction of the High

Court may, subject to any rules of court, be exercised by one judge sitting alone or by two or more judges.

Decisions of the High Court

10. (1) Where more than two judges are sitting together the decision of the majority shall be taken and deemed to be the decision of the High Court.

(2) Wherever there is a difference of opinion on any matter being heard by two judges sitting together the decision of the Chief Justice, or in his absence, by the senior judge present shall be taken and deemed to be the decision of the Court.

(3) If at any stage during the hearing of any matter by two or more judges, any such judge dies or retires or is otherwise incapable of continuing to sit as a member of the court or is absent, the hearing shall proceed before the remaining judge or judges.

(4) The Court shall be deemed to be duly constituted during, and notwithstanding, any vacancy in the office of Chief Justice or of any puisne judge.

Powers of High Court on hearing Appeals

11. The High Court shall be a Court of Appeal from all subordinate courts in Botswana, with power —

(a) to confirm, amend or set aside any judgment, decision or order, civil or criminal, of any subordinate court;

(b) to order a new trial of any cause heard or decided in any subordinate court, or to direct, if it deems fit, that such new trial shall be heard in the High Court;

(c) to receive further evidence, or to remit the case to the court of first instance for further hearing, with such instructions as to any further proceedings as the High Court may deem necessary;

(d) to impose such punishment (whether more or less severe than, or of a different nature from, the punishment imposed by the court of first instance) as in the opinion of the High Court ought to have been imposed by that court:

Provided that notwithstanding that the High Court is of the opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record of proceedings, unless it appears to the High Court that a failure of justice has in fact resulted therefrom.

Assistance of Assessors

12. (1) The High Court may call to its assistance at any civil or criminal

trial or appeal, and shall call to its assistance in any criminal trial in respect of an offence for which the person charged may be sentenced to death, two or more assessors who shall be chosen by the presiding Judge, from a panel nominated by the Minister.

(2) It shall be the duty of such assessors to give, either in open court or otherwise, such assistance and advice as the Judge may require, but the decision shall be vested exclusively in the Judge.

(3) The agreement or disagreement of an assessor with the decision of the Judge shall be noted on the record.

Review of Judicial Proceedings

13. (1) The High Court shall have full power, jurisdiction and authority to review the proceedings of all inferior courts within Botswana, and if necessary to set aside or correct the same.

(2) The grounds upon which the proceedings of all inferior court may be brought under review before the High Court shall be —

(a) absence of jurisdiction on the part of the court; or

(b) interest in the cause, bias, malice, or corruption on the part of the presiding judicial officer; or

(c) gross irregularity in the proceedings; or

(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

(3) Nothing in this section shall affect the provisions of any other law relating to the review of proceedings in inferior courts.

Declaratory Orders

14. The High Court may, at the instance of any interested person, inquire into and determine any existing, future or contigent right or obligation notwithstanding that such person cannot claim any relief consequential upon such determination.

Manner of Dealing with Commissions Rogatoire etc.

15. (1) Whenever a commission rogatoire or letter of request received from any State or territory or court outside Botswana is transmitted to the Registrar by the Permanent Secretary, Ministry of Home Affairs together with a translation in English if the original is in any other language, and an intimation that the Minister considers it desirable that effect should be given thereto without requiring an application to be made to such division by the agents, if any, of the parties to the action or matter, the Registrar shall submit the same to a judge in chambers in order to give effect to such commission rogatoire or letter of request.

(2) Whenever a request for the service on a person in Botswana of any civil process or citation is received from a State, territory or court outside Botswana, is transmitted to the Registrar by the Permanent Secretary, Ministry of Home Affairs, together with a translation in English if the original is in any other language, and an intimation that the Minister considers it desirable that effect should be given thereto, the Registrar shall cause service of the said process or citation to be effected in accordance with the rules of court by the Sheriff or deputy sheriff or any person specially appointed thereto by a judge of the High Court.

(3) The Registrar shall, after effect has been given to any such commission rogatoire, letter of request, process or citation, return all relevant documents, duly verified in accordance with the rules of court, to the Permanent Secretary, Ministry of Home Affairs for transmission.

(4) Except where the Minister otherwise directs, no fees other than disbursements shall be recovered from any State, territory or court on whose behalf any service such as is referred to in this section has been performed.

Jurisdiction Founded on Attachment or Arrest

16. The High Court may exercise the jurisdiction founded on or confirmed by attachment or arrest by the issue of process for service outside the jurisdiction of the court, with or without an order for attachment or arrest as to that court seems fit.

Manner of Securing Attendance of Witnesses in Civil Proceedings

17. (1) A party to civil proceedings before the High Court in which the attendance of witnesses is required may procure the attendance of any witness in the manner provided for in the rules of court.

(2) Wherever any person subpoenaed to attend any civil proceedings as a witness fails without reasonable cause to obey the subpoena and it appears from the return of the proper officer or from evidence given on oath that the subpoena was served upon the person to whom it is directed and that his reasonable expenses calculated in accordance with the tariff prescribed in the rules of court have been paid or offered to him, or that he is evading service, or if any person who has attended in obedience to a subpoena fails to remain in attendance, the court in which such proceedings are conducted may issue a warrant directing that he be arrested and brought before the court at a time and place stated in the warrant or as soon thereafter as possible.

(3) A person arrested under any such warrant may be detained thereunder before the court which issued it or in any prison or lock-up or other place of detention or in the custody of the person who is in charge of him with a view to securing his presence as a witness at the said proceedings:

Provided that the court may release him on a recognizance with or without securities, for his appearance at the inquiry referred to in subsection (4).

(4) The Court may in a summary manner inquire into such person's evasion of the service of the subpoena or failure to obey the subpoena or to remain in attendance, and may, unless it is proved that such person has a reasonable execuse such for evasion or failure, sentence him to a fine not exceeding one hundred rand or to imprisonment for a period not exceeding three months.

(5) Any sentence imposed by the court under subsection (4) shall be enforced and shall be subject to appeal as if it were a sentence imposed for a criminal case.

(6) If a person who has entered into any recognizance for his appearance to give evidence at such proceedings or for his appearance at an inquiry referred to in subsection (4) fails so to appear, he may, apart from the forfeiture of his recognizance, be dealt with as if he had failed to obey a subpoena to attend such proceedings or appear at such inquiry.

Refusal of Witness to Give Evidence

18. (1) Whenever any person who either appears in obedience to a subpoena, or by virtue of a warrant issued under section 17, or is present and is verbally required by the Court to give evidence in any civil proceedings, refuses to be sworn or to make an affirmation, or, having been sworn or made an affirmation, refuses to answer such questions as are put to him, or refuses or fails to produce any document or thing which he is required to produce, without any just excuse for such refusal or failure, the Court may adjourn the proceedings for any period not exceeding eight days, and may, in the meantime, by warrant commit the person so refusing or failing to prison unless he sooner consents to do what is required of him.

(2) If any person referred to in subsection (1) again refuses at the resumed hearing of the proceedings to do what is so required of him, the Court may again adjourn the proceedings and commit him for a like period and so again from time to time until such person consents to do what is required of him.

(3) Nothing in this section contained shall prevent the Court from giving judgment in any case or otherwise disposing of the proceedings according to any other sufficient evidence taken.

Execution of Instruments by Order of Court

19. Where any person neglects or refuses to comply with a judgment or order directing him to execute any conveyance, contract or other document, or to endorse any negotiable instrument, the Court may, on such terms and conditions as it thinks fit, order that the conveyance, contract or other document shall be endorsed by such person as the Court shall nominate for such purpose, and a conveyance, contract, document or instrument so executed or endorsed shall operate and be for all purposes available as if it had been executed or endorsed by the person originally directed to execute or endorse it.

Recovery of Costs in Civil Proceedings by Attorney–General

20. (1) Notwithstanding anything contained in the Attorney-General's Proclamation (Cap. 19), the functions of the Attorney-General shall include the performance in the High Court of such work on behalf of the Government of Botswana as is by law, practice or custom performed by advocates or attorneys.

(2) The Attorney-General may depute any person, either specially or generally, to exercise on his behalf the functions vested in him by subsection (1).

(3) In every application, motion, action, suit or other legal proceedings whatever of a civil nature, in or before the High Court, in or in connection with which the Attorney-General or any person deputed by him has appeared, or in any matter wherein he or such person has acted in performance of the said functions, fees and cost may be taxed and recovered in the same manner as if such function has been performed by a legal practitioner in private practice.

(4) Any fees and costs recovered under this section shall be paid into the Consolidated Fund.

(5) Nothing in this section contained shall be construed so as to prevent the Attorney-General employing in the ordinary manner advocates or attorneys in private practice, and recovering any fees payable to such attorneys and advocates.

Restriction of Vexatious Actions

21. If, on application made by the Attorney General under this section, the Court is satisfied that any person has habitually and persistently and without reasonable cause instituted vexatious legal proceedings, whether in the Court or in any subordinate court, and whether against the same persons or against different persons, the Court may, after hearing such person or giving him an opportunity of being heard, order that no legal proceedings shall, without the leave of the Court, be instituted by him in any court before the making of the order and shall not be continued by him without such leave, and such leave shall not be given unless the Court is satisfied that the proceedings are not an abuse of the process of the Court and that there is *prima facie* ground for such proceedings.

Restriction on Decree of Civil Imprisonment

22. No writ of civil imprisonment for non-payment or non-satisfaction of any judgment or decree shall be granted or issued by the Court in cases in which the defendant or other party against whom such writ of civil imprisonment is sought to be issued proves to the satisfaction of the Court that such defendant or other party has no property or means sufficient to satisfy in whole or in part the said judgment or decree.

Execution of Process

23. (1) The Sheriff shall by himself or by a deputy sheriff execute all sen-

tences, decrees, judgments, writs, summonses, rules, orders, warrants, commands and processes of the High Court, and shall make a return thereof to the High Court, together with the manner of the execution thereof.

(2) The Sheriff may, notwithstanding the appointment of a deputy sheriff, give special directions for the service of any particular process by some person other than the duly appointed deputy sheriff for the area concerned.

(3) The return of the Sheriff or deputy sheriff or person mentioned in subsection (2) of what has been done upon any process of the court, shall be *prima facie* evidence of the matters therein stated.

(4) The Sheriff shall receive and detain, or cause to be detained, in prison all such persons as are arrested by order of the Court or committed to his custody by that court or by the Chief Justice or by any other judge of that court.

Service of Process on Sheriff

24. Whenever any process requires to be served on the Sheriff, such process may be served by the other party by delivering a copy thereof to him at his office during ordinary office hours against his signature.

Property not liable to be Seized in Execution

25. The following property shall not be seized in execution of any process of the Court —

(a) the necessary beds and bedding and wearing apparel of the person against whom execution is levied or of any member of his family;

(b) the necessary furniture, other than beds, and household utensils in so far as they do exceed in value the sum of four hundred rand;

(c) stock, tools and agricultural implements of a farmer in so far as they do not exceed in value the sum of four hundred rand;

(d) any food or drink sufficient to meet the needs of such person and the members of his family for one month;

(e) tools and implements of trade in so far as they do not exceed in value the sum of four hundred rand;

(f) professional books, documents or instruments necessarily used by the debtor in his profession in so far as they do not exceed in value the sum of four hundred rand;

Provided that the Court, in exceptional circumstances and on such conditions as it may determine, may increase the amount specified in paragraph (b), (c), (e) and (f) to not more than double the amount therein mentioned.

Offences Relating to Execution

26. (1) Any person who —

(a) obstructs the Sheriff or a deputy sheriff a Sheriff's agent in the execution of his duty;

(b) being aware that goods are under arrest, interdict or attachment by the court, makes away with or disposes of those goods in a 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 such a manner;

(c) being a judgment debtor and being required by the Sheriff or a deputy sheriff or a Sheriff's agent to point out property to satisfy a warrant issued in execution of judgment against such person —

(i) falsely declares to the Sheriff or deputy sheriff or a Sheriff's agent that he possesses no property or insufficient property to satisfy the warrant; or

(ii) although knowing of such property neglects or refuses to point out such property or deliver it to the Sheriff or deputy sheriff or a Sheriff's agent when required to do so; or

(d) being a judgment debtor refuses or neglects to comply with any requirement of the Sheriff or a deputy sheriff or a Sheriff's agent in regard to the delivery of documents in his possession or under his control relating to the title of immovable property under execution;

shall be guilty of an offence and liable to a fine not exceeding one hundred rand or to imprisonment for a period not exceeding three months.

(2) For the purposes of this section, "Sheriff's agent" means a person mentioned in subsection (2) of section 23.

Jurisdiction of Registrar

27. When the Chief Justice and every puisne judge are absent from Botswana the Registrar may exercise jurisdiction in respect of the following matters —

(a) in criminal matters applications to the Court or a Judge of the High Court for bail in terms of Part VIII of the Criminal Procedure and Evidence Proclamation (Chapter 18);

(b) in civil matters —

(i) applications to sue by edictal citation or to found jurisdiction by attachment;

(ii) applications for the appointment of a curator of any property;

(iii) applications for the arrest and interdict of persons or things;

(iv) applications for provisional sentence;

(v) applications for the grant of a provisional order for the sequestration of an insolvent estate;

(vi) where any party is in default or where consent to judgment is filed by a defending party;

(vii) applications for admission and enrolment by advocates, attorneys, notaries and conveyancers:

(viii) increases under the provisions of the proviso to section 25:

Provided that —

(A) the Registrar shall not exercise jurisdiction under paragraph (b) (vi) in matrimonial matters;

(B) when the Registrar exercises jurisdiction under this section there shall be a right of appeal to a Judge in Chambers except under paragraph (b) (vi) where consent to judgement is filed.

Rules of Court

28. The Chief Justice may make Rules of Court regulating the proceedings of the High Court, and, without derogating from the generality of the foregoing, such rules may provide for the following matters —

(a) the pleading, practice and procedure of the Court, 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 expences of parties and witnesses, their amount and the method and time of payment of the same;

(c) the fees and costs of advocates, attorneys and notaries public, and the amount, taxation and recovery of the same;

(d) the duties and powers of the several officers of the Court;

(e) regulating the sittings of the Court and of the Judges, whether sitting in chambers and the times for the holding of Courts:

(f) providing that in any matrimonial matter the judge may, if the parties agree, interview them privately in his chambers in the presence of their legal advisers for the purpose of discussing with them a settlement of the matter or any other matter affecting the future conduct of the proceedings;

(g) providing that in any case affecting the custody of children, the judge may, if he thinks fit, interview such children privately in his chambers;

(h) regulating and prescribing the procedure on appeals or reviews from any court or person to the High Court;

(i) regulating and prescribing the procedure in connection with interlocutory applications;

(j) subject to the provisions of section 15, regulating and prescribing the manner of dealing with commissions rogatoire, letters of request and documents for service from foreign countries;

(k) allowing and regulating in any proceedings or in any application in connection therewith at any stage of any proceedings, the proof of any particular facts by affidavit, and regulating the examination of witnesses by interrogatories or otherwise, and allowing the same in evidence;

(l) providing for the appointment of commissioners to take evidence and to examine witnesses, and the examination of witnesses *de bene esse*, and allowing the same in evidence;

(m) prescribing the fees to be paid in respect of service or execution of any process of the Court or in respect of the summoning of persons to answer interrogatories;

(n) prescribing and regulating 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;

(o) prescribing and regulating the hours during which the office of the registrar shall be open for the transaction of business;

(p) prescribing and regulating the manner of recording or noting of evidence;

(q) prescribing and regulating the proceedings of the Sheriff and other officers of the Court;

(r) prescribing the tariff of costs and expenses which may be allowed in respect of service or execution of any process referred to in paragraph (m) or to persons appearing to answer interrogatories;

(s) providing for the summary determination of any appeal which appears to the court to be frivolous or vexatious or to be brought for the purpose of delay;

(t) the time within which any requirement of the rules is required to be complied with;

(u) prescribing the circumstances in which an appeal shall be deemed to have been abandoned;

(v) generally making provision in 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 Court.

Repeal and Savings

29. (1) The High Court Proclamation (Chapter 4) is hereby repealed.

(2) Anything done under any provisions of the High Court Proclamation shall be deemed to have been done under the corresponding provisions of this Act; and any security given under the Proclamation shall remain in full force and effect.

Passed by the National Assembly this day, the 31st August, 1967.

G.T. MATENGE,
Clerk of the National Assembly.