

Statutory Instrument No. 74 of 1971

THE CUSTOMARY COURTS (PROCEDURE) RULES, 1971

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SCHEDULE

FORM

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THE CUSTOMARY COURTS PROCLAMATION, 1961
(19 of 1961)

THE CUSTOMARY COURTS (PROCEDURE) RULES, 1971

(Published on 25th June, 1971)

Rules made by the Minister of Local Government and Lands in exercise of the powers conferred upon him by section 42 of the Customary Courts Proclamation, 1961, and of all other powers thereunto him enabling.

1. These Rules may be cited as the Customary Courts (Procedure) Rules, 1971. Citation

2. In these Rules unless the context otherwise requires –

“civil case” means a case in which the complainant seeks to recover from another person – Inter-pretation

- (a) any money owing to the complainant;
- (b) the value of any goods sold;
- (c) any property belonging to the complainant;
- (d) compensation for damage done to the complainant’s person, property or reputation;

and includes a case where the complainant seeks to enforce a legally binding agreement or where the complainant seeks some remedy available under the customary law applicable to the parties.

“clerk” means a clerk of a Customary Court appointed by the Minister;

“compensation” means recompense in money or livestock paid to an aggrieved or injured party;

“complainant” for the purposes of rules 19 and 21 includes a prosecutor;

“Court” means a Customary Court established under the Proclamation;

“criminal case” means a case in which the complainant alleges facts which, if proved, would show that some person had committed an offence and in which the punishment of the offender is sought;

“Fine” means a sum of money fixed as a penalty for an offence;

“Presiding Officer” means a person who being a member of a Court presides over that Court;

“Register” means a case Register kept in accordance with the provisions of rule 3.

Registers	3. The clerk of every Court shall keep a case Register in respect of all criminal and civil cases in such Court.
Identification number of cases	4. (1) A serial number shall be given to every case depending on the year in which the case started and the number of such case in such year. (2) All documents in a case shall bear the serial number of that case, which shall be written at the top of the first page. (3) In every case there shall be recorded in writing and attached to the record of the case the names of the members of the Court trying such case.
Entry of criminal case in Register	5. If a complainant wishes to start a criminal case the clerk, if he is satisfied that the complaint is made in good faith and that the facts complained of constitute an offence within the jurisdiction of the Court, shall enter the case in the Register and shall give it a serial number and, unless the defendant is in custody, shall prepare a summons in <i>Form 1</i> in the Schedule.
Entry of civil case in Register	6. If the complainant wishes to start a civil case the clerk shall enter the case in the Register and shall give it a serial number and shall prepare a summons in <i>Form 2</i> in the Schedule.
Refusal to enter case	7. A complainant who is aggrieved by the refusal of a clerk to enter a case in the Register may appeal to the Presiding Officer.
Date of hearing	8. (1) As soon as possible after a case has been entered in the Register, the clerk shall apply to the Presiding Officer to fix the date of hearing. (2) In fixing the dates for hearing the Presiding Officer shall take account of the necessity for service of the summons to be effected on the defendant not less than 7 clear days before the date of hearing, and of the places of residence of any witnesses of whom the Court is informed : Provided that, if the defendant is present before the Court and consents, the trial may proceed forthwith, or on any convenient date.
Particulars to be entered	9. (1) Every summons, whether in a criminal case or a civil case, shall be prepared in duplicate and shall be signed by the clerk and, if a summons to a defendant, shall be served on the defendant not less than 7 clear days before the date of hearing. (2) Every summons to a defendant in a criminal case shall state briefly the offence with which the defendant is charged. (3) Every summons to a defendant in a civil case shall state briefly the substance of the claim and the matter in dispute. (4) Nothing in this section shall be deemed to affect the power of a Court to warn persons to attend Court.
Summons to witness and notice of hearing	10. (1) If any of the parties wishes to compel the attendance of any witness to give evidence at the trial he shall in sufficient time for service to

be effected apply for a summons to be served on the witness. A summons to a witness shall be in *Form 3* in the Schedule.

(2) Every summons to be served on a witness who resides within the area of jurisdiction of the Court which issues the summons shall be served not less than 3 clear days before the date of hearing.

(3) Every summons to be served on a witness who resides outside the area of jurisdiction of the Court shall, after being endorsed in accordance with the provisions of section 20 of the Proclamation, be delivered to the clerk of the Court in whose jurisdiction the witness resides not less than 10 clear days before the date of hearing.

11. (1) Every summons issued shall require the person named in it to appear before the Court on the date of hearing and shall if reasonably practicable be served personally on him by a Court messenger delivering one copy to him.

Contents and service of summons

(2) If the person named in the summons cannot be found after a careful search the summons may be served by delivering one copy to the husband, wife or guardian of the person named in the summons.

12. Where the defendant in a criminal case or any witness in a criminal or civil case has been summoned or warned to attend before the Court and who, without lawful excuse, fails to attend as required by the summons, or who having attended, goes away without first being given the permission of the Court, or who fails to attend after an adjournment of the Court after being told by the Court to attend, the Court may issue a warrant for his arrest in *Form 4* (Warrant for arrest of Defendant) or *Form 5* (Warrant for arrest of Witness) in the Schedule.

Failure to obey summons

13. (1) Where any Court, either on the application of any party to a case pending before it or on its own motion, desires that any person confined in any prison should be examined as a witness in the hearing of such case, such Court may issue an order in *Form 6* in the Schedule to the officer in charge of such prison requiring him to bring such prisoner in proper custody, at a time to be named in the order, before the Court for examination.

Power of Court to order prisoner to be brought to give evidence

(2) The officer so in charge, on receipt of such order, shall act in accordance therewith and shall provide for the safe custody of the prisoner during his absence from the prison for the purpose aforesaid.

14. (1) In every trial the evidence shall be recorded in writing in the language of the Court by the clerk under the directions of the Presiding Officer.

Recording of evidence

(2) At the close of each case and of each day's hearing the Presiding Officer and the clerk shall sign their names and the date at the last line of the record.

- Adjourment** **15.** (1) The Court may from time to time adjourn the hearing of any case for a suitable period:—
- (a) if the complainant, the defendant or an essential witness is absent, or is otherwise unable or unfit to take part in the proceedings;
 - (b) if the hearing continues for more than one day;
 - (c) if the decision cannot be reached due to lack of time;
 - (d) if the Court is not satisfied that it has jurisdiction to try the case; or
 - (e) for any other sufficient reason to be recorded on the record of the case.
- (2) In a criminal case, if the defendant is being held in custody the period of an adjournment shall not exceed 7 days.
- (3) Before adjourning a case the Court shall inform any of the parties and any witnesses who are present of the date to which the case is to be adjourned.
- Cases to be called on date of hearing** **16.** (1) Every case shall be called for mention or hearing on the date fixed for the hearing and shall either be disposed of or adjourned.
- (2) If the complainant in a criminal case does not appear when the case is called for hearing, the Court shall appoint a later date. If then the complainant shall again fail to appear, the Court may discharge the defendant.
- (3) If the complainant in a civil case does not appear, whether after an adjournment or not, when the case is called for hearing the Court may dismiss the case.
- Rights of defendant** **17.** Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty.
- Hearing of criminal cases** **18.** The hearing of a criminal case shall commence in the following manner:
- (a) the Presiding Officer shall explain to the defendant the charge against him;
 - (b) the Presiding Officer shall ask the defendant whether he admits committing the acts complained of and that he has contravened the law concerned;
 - (c) if the defendant admits unequivocally that he has committed the acts complained of and that he has contravened the law concerned the Presiding Officer shall record a plea of guilty. In all other cases the Presiding Officer shall record a plea of not guilty.
- Procedure at trial** **19.** The procedure on the trial of any criminal case shall be as follows:
- (a) the prosecutor or, if there is no prosecutor the complainant, shall inform the Court briefly of the facts of the case;

- (b)* the complainant shall call witnesses in turn to prove his case;
- (c)* if the complainant wishes to give evidence himself he shall do so before he calls any other witnesses;
- (d)* each witness shall give his name, address and occupation and shall state what he knows about the case and shall answer any relevant questions put to him by the complainant;
- (e)* after the witness has stated what he knows about the case, the Presiding Officer shall inform the defendant that he is entitled to ask the witness any questions relevant to the facts of the case and the defendant may then ask such questions;
- (f)* after the defendant has finished asking any relevant questions under paragraph (e) the Presiding Officer and any member in turn may then ask relevant questions of the witness;
- (g)* after the complainant has called all his witnesses he shall close his case and the Court shall consider whether the evidence that has been given is sufficient to require an answer from the defendant;
- (h)* the Court shall not require an answer from the defendant unless it is satisfied that the charge has been substantiated by credible evidence and that in the absence of explanation or evidence by the defendant, the Court would have the duty to convict him of the offence charged: Unless the Court is so satisfied it shall acquit the defendant;
- (i)* where the Court considers the evidence sufficient to require an answer from the defendant, the Presiding Officer shall inform the defendant that he may say anything he wishes in his defence or that he may remain silent;
- (j)* the Presiding Officer shall inform the defendant that he may call witnesses if he wishes;
- (k)* where the defendant gives evidence or says anything in his defence he may be asked questions by the complainant and by the Presiding Officer and members;
- (l)* where the defendant wishes to give evidence or to say anything in his defence, as the case may be, under paragraph (i), he shall do so before he calls any witnesses;
- (m)* the defendant may ask questions of the witnesses whom he calls, and they may be asked relevant questions by the complainant and by the Presiding Officer and members;
- (n)* after the defendant has called witnesses he wishes to call, if any, and they have been questioned, the Court shall consider all the evidence and pronounce judgment;

(o) where the Court, after considering all the evidence and other matters properly before it in the case, feels any real doubt regarding the guilt or innocence of the defendant, the Court shall acquit the defendant of the offence charged. Where the Court has no such doubt and is satisfied on the evidence before it that the guilt of the person has been proved, the Court shall convict the accused of the offence charged. If the Court is constituted of more than one member, and the members cannot agree to the guilt or innocence of the defendant, the view of the majority of the members shall be the verdict of the Court: if the views of the members are equally divided the defendant shall be acquitted.

Recording
and delivery
of judgment

20. When the Court has determined whether the defendant shall be convicted or acquitted of the offence with which he is charged, it shall record in writing the judgment, including the reasons for it. Such judgment shall be signed by the Presiding Officer of the Court, who shall deliver it in open Court in the presence of the defendant.

Passing of
sentence

21. (1) When a defendant is convicted the complainant may inform the Court of any other offences of which the defendant has been convicted previously, and the Presiding Officer shall ask the defendant whether he agrees that he has been convicted of those offences. If the defendant does not agree that he has been convicted of the offences concerned, the Court may hear evidence from the complainant and the defendant concerning the commission of the offences concerned, and, after making such further enquiries as it shall think fit, the Court, if it is satisfied that the defendant was convicted of the alleged offences, shall take such offences as are similar in nature to the offence of which the defendant stands convicted into consideration in determining the sentence to be passed.

(2) Before passing sentence the Presiding Officer shall ask the defendant whether he wishes to say anything about the sentence which should be passed on him.

(3) After the defendant has said anything he wishes under subrule (2) the Court shall consider and determine the sentence to be imposed.

(4) The sentence of the Court shall be recorded in writing and signed by the Presiding Officer together with the reasons for it, and such sentence and reasons shall be delivered in open Court in the presence of the defendant.

Right of
appeal to be
explained

22. Immediately after passing sentence on the defendant the Presiding Officer shall inform him of his right of appeal as laid down in the Proclamation.

Warrant for
sentence of
imprisonment

23. A warrant in *Form 7* in the Schedule signed by the Presiding Officer of the Court by which any person has been sentenced to imprison-

ment, ordering that the sentence shall be carried out in a specified prison within Botswana shall be issued by the clerk of the sentencing Court. Such warrant shall be subject to the provisions laid down in section 15 of the Proclamation and on the satisfying of such provisions shall be full authority to the officer in charge of such prison and to all other persons for the carrying into effect of the sentence described in such warrant.

24. The hearing of every civil case shall be conducted in accordance with the procedure authorized by the customary law prevailing in the area of jurisdiction of the Court, subject to the following provisions: Procedure on hearing - civil cases

- (a) the complaint shall outline the nature of his claim and may call such witnesses as he may wish to support his case;
- (b) the defendant shall thereupon make an answer to the complainant's claim;
- (c) every witness shall give evidence and may be questioned in the same manner as is laid down in rule 19;
- (d) after the defendant has called all his witnesses, the Court shall give the complainant and the defendant an opportunity to sum up their evidence and make any other relevant submissions which they may wish;
- (e) after considering all the evidence and any submissions made by the complainant and the defendant, the Court shall decide whether and to what extent the complainant's claim has been made out and shall give judgment accordingly;
- (f) the Presiding Officer having heard the views of other members present shall proceed to judgment: The view of the majority of the members shall be the judgment of the Court: If the views of the members are equally divided judgment shall be for the defendant;
- (g) every judgment or order shall be recorded in writing and shall contain the reasons for the decisions, and shall be signed by the Presiding Officer who shall deliver it in open Court.

25. After the judgment or order has been delivered the Presiding Officer shall inform the party against whom the judgment has been given, if he is present, of his right to appeal as laid down in section 34 of the Proclamation. Right of appeal

26. On every civil appeal from a judgment of a Court to the subordinate court a fee of four rand (R4) shall be payable to the Court from whose decision the appeal is made. No fee shall be payable in a criminal trial. Fees

27. All fines imposed by and all fees payable to a Court shall be paid to the clerk of such Court who shall issue a receipt and shall dispose of the same as from time to time directed by the Accountant-General. Payment of fines

Payment of compensation

28. All compensation whether in monies or livestock as ordered by the Court shall be paid to the clerk of the Court in the presence of the aggrieved party or in his absence, in the presence of two members of the Court.

Failure to pay fines or compensation

29. (1) Where a Court makes an order for the payment of a fine and/or compensation, it shall direct by its sentence that in default of the payment of the fine and/or compensation, the offender shall suffer such period of imprisonment as will satisfy the justice of the case:

Provided that in no case shall such imprisonment exceed the maximum fixed by the following scale:-

<i>Amount</i>	<i>Maximum Period</i>
Not exceeding R1	14 days
Exceeding R1 but not exceeding R2	1 month
Exceeding R2 but not exceeding R10	3 months
Exceeding R10 but not exceeding R40	4 months
Exceeding R40	6 months

(2) The imprisonment which is imposed in default of payment of a fine and/or compensation shall terminate whenever the fine is either paid or levied by process of law.

(3) Where a term of imprisonment is imposed by a Court in default of the payment of a fine or of compensation that term shall, on the payment or levy of a part of such sum, be proportionately reduced.

(4) For the purposes of this rule in calculating the maximum period of imprisonment for non-payment of compensation one head of cattle shall be worth R20, and seven head of small stock shall be the equivalent of one head of cattle.

Attachment and sale of property

30. Where a Court believes that a person on whom a fine and/or order of compensation has been imposed by that Court has property liable to seizure it may without application in default of such payment make a sale order for the levy of such fine and/or compensation.

Power of Court of enforce judgment of other Courts

31. Upon receipt of any decree, order, warrant or process directed to a Court, the Court concerned shall enter such decree, order, warrant or process in its own records and enforce, execute or serve them as though they were issued originally by the Court concerned.

SCHEDULE

Form 1

BOTSWANA

In the Customary Court

Case No. of 19.....

(1)

versus

(2)

CRIMINAL SUMMONS

(Rule 5 of the Customary Courts (Procedure) Rules)

To: (3)

of

You are ordered to come to the Court at (4) on (5) the

..... day of 19 at o'clock

to answer a charge that (6)

.....

.....

If you fail to come to Court you will be liable to arrest, and to punishment for your failure.

Seal

.....
Date

.....
Clerk of the Court

Note – See below for instructions on how to complete form.

- (1) Insert complainant's name
- (2) Insert name of defendant
- (3) Insert name and address of defendant
- (4) Insert name and place where defendant is to come
- (5) Insert day, date and time of hearing
- (6) Insert details of offence charged

BOTSWANA

In the Customary Court

Case No. of 19

(1)

versus

(2)

CIVIL SUMMONS

(Rule 6 of the Customary Courts (Procedure) Rules)

To: (3)

.....

You are ordered to come to the Court at (4) on (5) day the
..... day of 19 at to answer the claim against
you that (7)

.....

If you fail to come to Court judgment may be given against you in your absence.

Sent

.....
Date

.....
Clerk of the Court

Note - See below for instructions on how to complete the form.

- (1) Insert name of complainant
- (2) Insert name of defendant
- (3) Insert name and address of defendant
- (4) Insert place where defendant is to come
- (5) Insert day, date and time of hearing
- (6) Insert name of complainant
- (7) Insert details of complaint

BOTSWANA

In the Customary Court

Case No. of 19

(1)

versus

(2)

SUMMONS TO WITNESS

(Rule 10 (1) of the Customary Courts (Procedure) Rules)

To: (3)

of

You are ordered to come to the Court at (4) on (5)

day the day of 19 at the hour of

as witness on behalf of (6)

If you fail to come to Court you will be liable to be punished

Seal

.....
Date

.....
Clerk of the Court

Note - See below for instructions on how to complete the form.

- (1) Insert name of the complainant.
- (2) Insert name of the defendant.
- (3) Insert name and address of witness.
- (4) Insert place where witness is to come.
- (5) Insert the date and time of hearing.
- (6) Insert name of person requiring attendance of this witness.

BOTSWANA

In the Customary Court

(1) Case No. of 19

(2)

versus

(3)

WARRANT FOR ARREST OF WITNESS

(Rule 12 of the Customary Courts (Procedure) Rules)

To all Messengers of the Court and to all Police Officers.

Whereas (4)

of

was summoned to attend the above Court on (5) day the day of

..... 19 for the purpose of giving evidence and failed to do so, you are hereby

directed to arrest the said (6) and to produce him

before this Court in execution of this your Warrant and **HEREIN FAIL NOT.**

Dated this day of 19

Seal

.....
Presiding Officer

.....
Customary Court

Note - See below for instructions on how to complete the form.

- (1) Insert whether civil or criminal
- (2) Insert name of complainant
- (3) Insert name of defendant
- (4) Insert name and address of witness
- (5) Insert day, date and time when witness was summoned to appear
- (6) Insert name of witness.

BOTSWANA

In the Customary Court
..... Case No. of 19

(1)
versus

(2)^a

ORDER FOR PRODUCTION OF PRISONER AS WITNESS
(Rule 13 (1) of the Customary Courts (Procedure) Rules)

To the officer in charge of the Prison at (3)

Whereas (4) is confined as a convicted prisoner in the said prison;

And whereas this Court is desirous that the said (4) be examined before it as a witness;

You are hereby ordered to produce the said (4)

before this Court in proper custody on the (5) day of 19 at o'clock, for the purpose of his being examined as aforesaid.

Dated this day of 19

Seal

.....
Presiding Officer

.....
Customary Court

Note - See below for instructions on how to complete this form.

- (1) Insert name of complainant
- (2) Insert name of defendant
- (3) Insert name of place
- (4) Insert name of prisoner who is required as witness
- (5) Insert date and time when prisoner is required to attend

BOTSWANA

In the Customary Court

Case No. of 19

(1)
versus

(2)

WARRANT OF COMMITTAL
(Rule 23 of the Customary Courts (Procedure) Rules)

To the officer in charge of the Prison at (3)

Whereas (4) of

was on this day convicted of the offence of (5) and was sentenced to:

*(a) imprisonment for a period of (6)

*(b) a fine of (7) or in default of payment to imprisonment for a
period of (8)

AND WHEREAS of the said fine the whole* (or the sum of (9) R) remains unpaid.

You are hereby required to receive the said (10) in the said
prison together with this Warrant and there carry the aforesaid sentence to law.

Dated this day of 19

Seal

.....
Presiding Officer

Seal

Date

.....
District Commissioner

*Delete whichever does not apply.

Note - See below for instructions on how to complete the form.

- (1) Insert name of complainant
- (2) Insert name of defendant
- (3) Insert name of place
- (4) Insert name and address of defendant
- (5) Insert offence
- (6) Insert number of days, weeks or months
- (7) Insert amount
- (8) Insert number of days, weeks or months
- (9) Insert sum
- (10) Insert name of defendant.

Made the 10th day of June, 1971.

R.N. MANNATHOKO,
Permanent Secretary,
Ministry of Local Government and Lands.

L2/7/119