

THE MATRIMONIAL CAUSES ACT, 1973

No. 1



of 1973

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AN ACT TO PROVIDE FOR THE DESIGNATION OF CERTAIN MAGISTRATES' COURTS AS SUBORDINATE MATRIMONIAL COURTS: TO AMEND THE GROUNDS FOR DIVORCE AND JUDICIAL SEPARATION: AND TO PROVIDE FOR MATTERS INCIDENTAL THERETO.

Date of Assent: 2.2.73

Date of Commencement:

ENACTED by the Parliament of Botswana.

Short title
Inter-
pretation

1. This Act may be cited as the Matrimonial Causes Act, 1972.

2. In this Act, unless the context otherwise requires —
“court” includes the High Court and a subordinate matrimonial court;

“Registrar” means the Registrar of the High Court of Botswana;
“subordinate matrimonial court” means a court held by a judicial officer appointed under section 5.

Non-appli-
cation to
customary
marriages

3. This Act shall not apply to any marriage contracted in accordance with customary law.

4. Nothing in this Act shall authorise any court to pronounce a decree of divorce, nullity, judicial separation or presumption of death and dissolution of marriage or to make any other order than an order dismissing an action unless the marriage to or in respect of which the decree or order relates was a monogamous marriage.

Power to grant relief limited to monogamous marriages

5. (1) The President, by notice in the Gazette, may, on the recommendation of the Chief Justice, appoint any judicial officer appointed by the Judicial Service Commission to hold a court (hereinafter called a subordinate matrimonial court) for the exercise of the jurisdiction and powers conferred by this Act in respect of such area or areas as may be specified in such notice.

Subordinate matrimonial court

(2) Subject to subsections (3), (4) and (5), a subordinate matrimonial court shall have the same jurisdiction as the High Court.

(3) A subordinate matrimonial court shall have no jurisdiction as to the validity or otherwise of any marriage or divorce and shall have no power to make any order of presumption of death and dissolution of marriage.

(4) If, during the pleadings prior to, or at the hearing of, any action by a subordinate matrimonial court any question or matter arises in relation to the validity or otherwise of any marriage or divorce of any of the parties to the action, the subordinate matrimonial court shall either —

- (i) (a) refer such question or matter to the High Court by way of case stated for determination by the High Court;
- (b) adjourn the case pending the decision on such question or matter by the High Court; and
- (c) on receiving the determination of the High Court allow pleadings to continue or proceed with the hearing of the case, whichever is appropriate, in accordance with such determination; or
- (ii) if it considers that it would be in the interest of the parties, transfer the entire case to the High Court for hearing and determination.

(5) A subordinate matrimonial court shall exercise jurisdiction under this Act only —

- (a) if both plaintiff and defendant are ordinarily resident within its jurisdiction; or

- (b) where one of the parties is not so resident, if a consent to jurisdiction is filed by or on behalf of the non-resident party.

Reservation
of question of
law

6. (1) A subordinate matrimonial court may, on its own motion or at the request of any party to the action, reserve for the opinion of the High Court any question of law which arises upon the hearing of the action by such subordinate matrimonial court and shall adjourn the action pending receipt of the determination of the High Court.

(2) The question of law so reserved shall be transmitted to the High Court in the form of a special case stated.

(3) Upon receipt of the determination of the High Court, the subordinate matrimonial court shall determine the issues of the action in accordance with such determination.

Jurisdiction
in matri-
monial cases

7. (1) A court shall have jurisdiction to try an action instituted by one spouse against the other for divorce or judicial separation if, at the date of the institution of proceedings —

- (a) either spouse is domiciled in Botswana; or
(b) in the case of an action brought by a wife, the wife has been resident within Botswana for a continuous period of three years immediately preceding the date of the institution of proceedings.

(2) For the purposes of subsection (1) proceedings shall be deemed to be instituted on the date on which the summons is issued or if the action is preceded by an application under the provisions of section 9, on the date on which such application is filed.

Jurisdiction
in presump-
tion of death

8. (1) The High Court shall have jurisdiction in proceedings for presumption of death and dissolution of marriage and for nullity under this Act if —

- (a) the plaintiff was domiciled in Botswana at the date of the action; or
(b) in the case of an action brought by a wife, the wife was resident in Botswana at the date of the action and has been ordinarily resident in Botswana for the period of three years immediately preceding the date of the petition.

(2) In determining for the purposes of this section whether a woman was domiciled in Botswana, her husband shall be treated as having died immediately after the last occasion on which she knew or had reason to believe him to be living.

9. A court with jurisdiction to try an action for divorce or judicial separation shall also have jurisdiction to hear an application by a husband or wife who is a party or an intending party to such action before the said court —

Application
pendente lite

- (a) for leave to issue in *forma pauperis*;
- (b) for an interdict pending the action; or
- (c) for an order of contribution towards the costs;

and shall have jurisdiction to hear an application by a wife for an order for alimony *pendente lite*.

10. Any court with jurisdiction to try an action for judicial separation shall also have jurisdiction to set aside an order of judicial separation insofar as it may be necessary to set aside such order before a fresh action may be instituted or a divorce granted.

Jurisdiction
to set aside
order for
judicial
separation

11. Any court with jurisdiction to try an action for divorce or judicial separation shall also have jurisdiction to try any claim in reconvention for divorce or judicial separation as if it were a claim in convention.

Jurisdiction
in recon-
vention

12. (1) Immediately upon the conclusion of an action heard by a subordinate matrimonial court such court shall transmit to the Registrar —

Orders made
by sub-
ordinate
matrimonial
court issuable
by Regis-
trar

- (a) its complete original record of the case so heard; and
- (b) the judgment of the subordinate matrimonial court upon the case heard.

(2) Upon receipt of the case record and judgment the Registrar shall thereupon draw up and sign an order in terms of the judgment made by the subordinate matrimonial court.

(3) Such order made under subsection (2) shall be the official record of the determination of the action by the subordinate matrimonial court.

(4) The original record of the action transmitted to him shall be retained by the Registrar as if it were a record of the High Court.

13. (1) Any court which tries an action for divorce or for judicial separation under this Act shall also have jurisdiction to make an order —

Property
rights of
spouses

- (i) determining the mutual property rights of the husband and the wife;
- (ii) concerning the custody, guardianship and maintenance of any minor children born to the marriage subsisting between the parties; and

(iii) varying an order made under paragraphs (i) and (ii) hereto:

Provided that, where the value of the property in dispute or the amount claimed exceeds R2,000, a subordinate matrimonial court may *mero motu*, and shall on the application of either spouse, transfer such application for an order under this section to the High Court and thereafter all proceedings which have previously been taken in such action in the subordinate matrimonial court shall be deemed to be proceedings taken in the High Court.

(2) The High Court shall have full power, jurisdiction and authority to review any order made by a subordinate matrimonial court under subsection (1) and may set aside, vary or correct any such order.

Breakdown of marriage to be sole ground for divorce

14. After the commencement of this Act the sole ground on which an action for divorce may be presented to the court by either party to a marriage shall be that the marriage has broken down irretrievably.

Proof of breakdown

15. (1) The court hearing an action for divorce shall not hold the marriage to have broken down irretrievably unless the plaintiff satisfies the court of one or more of the following facts, that is to say —

- (a) that the defendant has committed adultery and the plaintiff finds it intolerable to live with the defendant;
- (b) that the defendant has behaved in such a way that the plaintiff cannot reasonably be expected to live with the defendant;
- (c) that the defendant has deserted the plaintiff for a continuous period of at least two years immediately preceding the commencement of the action.
- (d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the commencement of the action and the defendant consents to a decree being granted;

(2) On an action for divorce it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged by the plaintiff and into any facts alleged by the defendant.

(3) If the court is satisfied on the evidence of any such fact as is mentioned in subsection (1), then, unless it is satisfied on all the evidence that the marriage has not broken down irretrievably, it shall grant a *rule nisi* for divorce.

(4) For the purposes of subsection (1) (c) the court may treat a period of desertion as having continued at a time when the deserting party was incapable of continuing the necessary intention if the evidence before the court is such that, had that party not been so incapable, the court would have inferred that his desertion continued at that time.

(5) For the purposes of this Act a husband and wife shall be treated as living apart unless they are living with each other in the same household.

(6) Provision shall be made by rules of court for the purpose of ensuring that where in pursuance of subsection (1) (d) the plaintiff alleges that the defendant consented to a decree being granted the defendant has been given such information as will enable him to understand the consequences to him of his consenting to a decree being granted and the steps which he must take to indicate that he consents to the grant of a decree.

16. Where the court on granting a decree of divorce held that the only fact mentioned in section 15(1) on which the plaintiff was entitled to rely in support of his action was that mentioned in paragraph (d), it may, on an application made by the defendant at any time before the rule is made absolute, rescind the rule if it is satisfied that the plaintiff misled the defendant (whether intentionally or unintentionally) about any matter which the defendant took into account in deciding to consent to the grant of a decree.

Power to
rescind decree
nisi in certain
cases

17. (1) The following provisions of this section shall have effect where —

Financial
protection for
defendant in
certain cases

- (a) the defendant to an action for divorce in which the plaintiff alleged any such fact as is mentioned in section 16(1) (d) or (e) has applied to the court under this section for it to consider for the purposes of subsection (2) hereof the financial position of the defendant after the divorce; and
- (b) a *rule nisi* of divorce has been granted on the action and the court has held that the only fact mentioned in the said section 15 (1) on which the plaintiff was entitled to rely in support of his petition was that mentioned in the said paragraph (d)

(2) The court hearing an application by the defendant under this section shall consider all the circumstances, including the age, health, conduct, earning capacity, financial resources and financial obligations of each of the parties, and the financial position of the defendant as, having regard to the divorce, it is likely to be after the death of the plaintiff should the plaintiff die first; and notwith-

standing anything in the foregoing provisions of this Act but subject to subsection (3), the court shall not make absolute the rule of divorce unless it is satisfied —

- (a) that the plaintiff should not be required to make any financial provision for the defendant, or
 - (b) that the financial provision made by the plaintiff for the defendant is reasonable and fair or the best that can be made in the circumstances.
- (3) The court may if it thinks fit proceed without observing the requirements of subsection (2) if —
- (a) it appears that there are circumstances making it desirable that the rule should be made absolute without delay, and
 - (b) the court has obtained a satisfactory undertaking from the plaintiff that he will make such financial provision for the respondent as the court may approve.

Rules may enable certain agreements or arrangements to be referred to the court

18. Provision may be made by rules of court for enabling the parties to a marriage or either of them, on application made either before or after the presentation of an action for divorce, to refer to the court any agreement or arrangement made or proposed to be made between them, being an agreement or arrangement which relates to, arises out of, or is connected with, the proceedings for divorce which are contemplated or, as the case may be, have begun, and for enabling the court to express an opinion, should it think it desirable to do so, as to the reasonableness of the agreements or arrangement and to give such directions, if any, in the matter as it thinks fit.

Alleged adulterer as a party

19 (1) On an action for divorce brought by the husband in which adultery is alleged or on the counter-action of a husband suing for divorce and alleging adultery, the husband shall make the alleged adulterer a co-defendant unless excused by the court if it thinks fit, from doing so.

(2) On an action for divorce brought by the wife in which adultery is alleged or on the counteraction of a wife suing for divorce and alleging adultery, the wife shall make the alleged adulteress a co-defendant unless excused by the court if it thinks fit, from doing so.

(3) Where an alleged adulterer or adulteress is made a co-defendant on such an action as is mentioned in subsection (1) or (2), the court may, on the close of the evidence on the part of the plaintiff, direct that the co-defendant be dismissed from the suit if the court is of opinion that there is not sufficient evidence against him or her.

20. In every case in which any person is charged with adultery with any party to the action, or in which the court may consider in the interests of any party not already a party to the action, that person should be made a party to the action, the court may, if it thinks fit, allow that person to intervene upon such terms, if any, as the court thinks just.

Power to allow intervention on terms

21. (1) Subject to subsection (2), no action for divorce shall be brought before the court before the expiration of the period of two years from the date of the marriage (hereinafter in this section referred to as "the specified period").

Restriction on actions within two years of marriage

(2) The court may, on an application made to it, allow the bringing of an action for divorce within the specified period on the ground that the case is one of exceptional hardship suffered by the plaintiff or of exceptional depravity on the part of the respondent; but in determining the application the court shall have regard to the interests of any relevant child and to the question whether there is reasonable probability of a reconciliation between the parties during the specified period.

(3) Nothing in this section shall be deemed to prohibit the bringing of an action based on matters which occurred before the expiration of the specified period.

22. (1) A husband or wife may bring an action before the High Court that his or her marriage may be declared null and void on any of the grounds mentioned in subsections (2) and (3).

Action for nullity and grounds thereof

(2) A marriage shall be void on any of the following grounds —

(a) that the parties to the marriage are within the prohibited degrees of consanguinity or affinity as provided in section 18 of the Marriage Proclamation;

(b) that the former husband or wife of either party to the marriage was living at the time of the marriage and the marriage with such former husband or wife was then in force;

(c) that the marriage is invalid under the laws of Botswana.

(3) A marriage shall, subject to subsection (4), be voidable on any of the following grounds —

(a) that the marriage has not been consummated owing to the wilful refusal of the defendant to consummate it;

(b) that at the time of the marriage either party to the marriage—

(i) was of unsound mind;

(ii) was a mentally disordered or defective person within

the meaning of the Mental Disorders Act, 1969, of such a kind or to such an extent as to be unfitted for marriage and the procreation of children; or

- (iii) was subject to recurrent attacks of insanity or epilepsy;
- (c) that the defendant was at the time of the marriage suffering from venereal disease in a communicable form;
- (d) that the defendant was at the time of the marriage pregnant by some person other than the plaintiff; or
- (e) that at the time of the marriage either party to the marriage was impotent or incapable of consummating the marriage;
- (f) that the consent of either party to the marriage was obtained by force or fraud.

(4) The High Court shall not grant a declaration of nullity in a case falling within paragraph (b), (c) or (d) or subsection (3) unless it is satisfied that —

- (a) the plaintiff was at the time of the marriage ignorant of the facts alleged;
- (b) proceedings were instituted within a year from the date of the marriage; and
- (c) marital intercourse with the consent of the plaintiff has not taken place since the plaintiff discovered the existence of the grounds for a decree.

(5) If the High Court is satisfied that the case for the plaintiff has been proved, the High Court may grant a decree of nullity.

(6) Where a declaration of nullity is granted in respect of a voidable marriage, any child who would have been the legitimate child of the parties to the marriage if at the date of the declaration it had been dissolved instead of being annulled shall be deemed to be their legitimate child unless such declaration be made on the grounds specified in subsection 3 (d).

(7) Nothing in this section shall be construed as validating any marriage which is by law void but with respect to which a declaration of nullity has not been granted.

Abolition of
the action for
restitution of
conjugal
rights

23. (1) After the date of commencement of this Act no action shall be brought in any court for the restitution of conjugal rights.

(2) Where, before the date of commencement of this Act, an action for restitution of conjugal rights has been commenced in any court such action shall, notwithstanding subsection (1), be heard and determined as if this Act had not been in force.

(3) Where an action for divorce or judicial separation has been commenced in any court before the commencement of this Act, and the ground for such action for divorce or judicial separation is failure to comply with an order for restitution of conjugal rights, then, notwithstanding the provisions of subsection (1), such action for divorce or judicial separation shall be heard and determined as if this Act had not been in force.

24. (1) Subject to the provisions of section 8 any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may bring an action before the High Court to have it presumed that the other party is dead and to have the marriage dissolved, and the High Court may, if satisfied that such reasonable grounds exist, make an order of presumption of death and dissolution of the marriage.

Presumption of death and dissolution of marriage

(2) In any proceedings under this section the fact that for a period of seven years or more the other party to the marriage has been continually absent from the plaintiff and the plaintiff has no reason to believe that the other party has been living within that time shall be evidence that the other party is dead until the contrary is proved.

25. (1) In any action for divorce or nullity of marriage, the court may make such interim orders for the payment of alimony to the wife as the court thinks just and equitable.

Maintenance in cases of divorce and nullity of marriage

(2) On any decree for divorce or nullity of marriage, the court may, if it thinks fit, order —

- (i) that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as, having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem reasonable; and
- (ii) that the husband should pay to the wife, during their joint lives, such periodical sum for the maintenance and support of the wife as the court may think reasonable, and any such order may either be in addition to or instead of an order made under subsection (1).

(3) This section shall have effect, in any case where an action for divorce is brought by the wife on the grounds of her husband's insanity, as if for the reference to the husband there were substituted reference to the wife, and for reference to the wife there were substituted reference to the husband.

(4) For the purposes of this section, in respect to any decree for nullity the High Court shall have power to make an order under subsections (1) and (2) as it would have had if the decree had been a decree for divorce notwithstanding that the court has declared that no marriage exists.

Declarations
of legitimacy
etc.

26. (1) Any person who is a Botswana citizen or whose right to be deemed a Botswana citizen depends wholly or in part on his legitimacy or on the validity of any marriage, may, if he is domiciled in Botswana or claims any property situate in Botswana, apply to the High Court for an order declaring that he is the legitimate child of his parents, or that the marriage of his father and mother or of his grandfather or grandmother was a valid marriage or that his own marriage was a valid marriage.

(2) Any person claiming that he or his parent or any remoter ancestor became or has become a legitimated person may apply to the High Court for an order declaring that he or his parent or remoter ancestor, as the case may be, became or has become a legitimated person.

(3) For the purposes of subsection (2), "legitimated person" means a person legitimated or recognised as legitimated by or under any law.

Alimony in,
cases of
judicial
separation

27. (1) In any action for judicial separation, the court may make such interim orders for the payment of alimony to the wife, as the court thinks just.

(2) On or at any time after a decree for judicial separation, the court may make such order for the payment of alimony to the wife as the court thinks just.

(3) The foregoing provisions of this section shall have effect in any case where an action for judicial separation is brought by a wife on the ground of her husband's insanity, as if for the reference to the wife there were substituted reference to the husband.

Custody and
maintenance
of children

28. (1) In any proceedings for divorce, nullity or judicial separation, the court may from time to time, either before or at or after the decree or declaration make such provision as appears just with respect to the custody, maintenance and education of the children, the marriage of whose parents is the subject of the proceedings.

(2) On any decree of divorce or declaration of nullity of marriage, the court shall have power to order the husband, and, on a decree of divorce, where the decree is a decree of divorce and is made on the ground of the husband's insanity, shall also have

power to order the wife to secure for the benefit of the children such gross sum of money, or annual sum of money as the court may deem reasonable:

Provided that the term for which any sum of money is secured for the benefit of a child shall not extend beyond the date when the child will attain 21 years of age.

29. (1) Where an action is to be brought before or is being heard by a subordinate matrimonial court under this Act and such subordinate matrimonial court on the application of any of the parties thereto considers it necessary or expedient that service of any document be made outside the jurisdiction, such subordinate matrimonial court shall make an order remitting the documents for service to the High Court.

Power of subordinate matrimonial court to order service outside the jurisdiction

(2) Upon receipt of documents remitted by a subordinate matrimonial court under the provisions of subsection (1) the High Court shall, if it considers that such service should be effected, order such service out of the jurisdiction and shall in all respects treat such documents as if they had originated in the High Court.

(3) Any documents which the High Court order be served outside the jurisdiction shall be returned to the High Court duly served in such manner as the High Court may from time to time direct and the High Court, on being satisfied that they have been duly and properly served shall remit the documents to the subordinate matrimonial court from which they originated.

(4) Upon receipt of documents from the High Court duly served no objection or query shall be made either by the subordinate matrimonial court or by any of the parties to the action as to the validity of the manner in which they were so served but they shall be treated in all respects as if they had been properly and validly served.

30. An appeal shall lie to the Court of Appeal —

Appeals

- (a) from all final judgments of the High Court or of any subordinate matrimonial court appointed under section 5; and
- (b) by leave of the High Court or Court of Appeal, from any interlocutory order, any order made ex parte, or any order as to costs only.

31. (1) The Chief Justice may, with the approval of the Minister, make such rules as he may deem expedient to give effect to this Act or for its better administration.

Powers of Chief Justice to make rules

(2) Without derogating from the generality of subsection (1) the rules may provide mutatis mutandis for all the matters set out in section 28 of the High Court of Botswana Act, 1967.

Act 35 of 1967

Passed by the National Assembly this 27th day of October, 1972.

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