

Statutory Instrument No. 22 of 1973

MATRIMONIAL CAUSES ACT, 1972
(1 of 1973)

MATRIMONIAL CAUSES RULES, 1973

(Published on the 16th March, 1973)

IN EXERCISE of the powers conferred by sections 15 (6), 18, and 31 of the Matrimonial Act, 1972, and of all other powers enabling in that behalf the Chief Justice with the approval of the Minister hereby makes the following rules:

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|-----------------------------|---|
| Citation | 1. These Rules may be cited as the Matrimonial Causes Rules, 1973. |
| Inter-pretation | 2. In these Rules unless the context otherwise requires —
“the Act” means the Matrimonial Causes Act, 1972.
“the court” means the High Court of Botswana.
“Registrar” means the Registrar of the High Court of Botswana. |
| Application of other rules | 3. Subject to the provisions of these rules and of any enactment, the Rules of the High Court shall apply with the necessary modifications to the practice and procedure in matrimonial proceedings in the High Court. |
| Commencement of proceedings | 4. (1) An application under section 21 for leave to bring an action for divorce before the expiration of 2 years from the date of the marriage shall be made by notice of motion.
(2) To the application must be attached —
(a) an affidavit by the applicant exhibiting a copy of the proposed declaration and stating —
(i) the grounds of the application;
(ii) particulars of the hardship or depravity alleged;
(iii) whether there has been any previous application under the said section 21;
(iv) whether any, and if so what, attempts at reconciliation have been made;
(v) particulars of any circumstances which may assist the court in determining whether there is a reasonable probability of reconciliation between the parties;
(b) a copy of the application and of the supporting affidavit for service on the defendant; and
(c) unless otherwise directed on an application made <i>ex parte</i> , a certificate of the marriage.
(3) Unless otherwise directed the application shall be heard in Chambers. |

5. (1) Every cause other than an application under section 21 of the Act shall be begun by a writ of summons to which shall be attached a declaration.

Cause to be begun by writ of summons

(2) Unless otherwise directed, every declaration shall contain the information set down in Schedule I to these Rules, as near as may be in the order there set out, and any further or other information required by such of the following paragraphs of this rule as may be applicable.

(3) If the action has been brought for a decree of nullity under paragraphs (b), (c) or (d) of subsection 3 of section 22 of the Act, the declaration shall state whether the plaintiff was at the time of the marriage ignorant of the facts alleged and whether marital intercourse with the consent of the plaintiff has taken place since the plaintiff discovered the existence of the grounds for a decree.

(4) If the action has been brought for a decree on the ground contained in section 15 (1) (d) of the Act, then the plaintiff shall attach to his declaration a document of consent as in Form I. The plaintiff's declaration shall also contain sufficient information as will enable the defendant to understand the consequences of his signing the document, and that the defendant is not obliged to sign it, but that if he signs it a decree of divorce may be pronounced in favour of the plaintiff.

(5) If the action has been brought for a decree of presumption of death and dissolution of marriage, the declaration shall state —

the last place at which the parties to the marriage cohabited, the circumstances in which the parties ceased to cohabit, the date when and the place where the respondent was last seen or heard of, and the steps which have been taken to trace the respondent.

6. Before the writ of summons is served on any person, the plaintiff may file a notice of discontinuance and the cause shall thereupon stand dismissed.

Discontinuation of cause before service of writ

7. (1) A writ of summons and a declaration may be amended without leave before they are served.

Amendment of declaration

(2) After service, a declaration can be amended only with the leave of the Court.

(3) An application for leave under this rule may —

(a) if every opposite party consents in writing to the proposed amendment being filed, be made *ex parte*, and

(b) shall in any other case be made on notice to be served unless otherwise directed, on every opposite party.

(4) Every such application shall be supported by an affidavit.

(5) An order granting leave shall, where any party has given notice of intention to defend, fix the time within which the answer must be filed or amended.

Service of amended declaration

8. Unless otherwise directed a copy of every amendment to a declaration, and of every amended declaration together with a copy of the order (if any) made under rule 7 shall be served on every party to the original action and to the summons as amended.

Filing of plea by the defendant

9. (1) Subject to paragraph 2 of this rule and rule 11, a defendant who —
(a) wishes to defend the action or to dispute any of the facts alleged in it;
(b) being the defendant spouse, wishes to make in the proceedings any charge against the plaintiff in respect of which the defendant spouse prays for relief, shall within 21 days after (Declaration) service on him of the plaintiff's file his plea.

(2) A plea may be filed at any time before the matter is set down for hearing, notwithstanding that the time for filing the plea has expired or that the person filing the plea has not given notice of intention to defend.

(3) In his plea a defendant spouse shall be free to counter-claim against the plaintiff in respect of any relief which he may have claimed as plaintiff in writ of summons.

(4) A plea which also contains a counter-claim shall contain all the information required under rule 5 of these Rules.

Filing of reply and subsequent pleading

10. (1) A plaintiff may file a reply to the defendant's plea within 14 days after he has received a copy of the plea.

(2) If the plaintiff does not file a reply, he shall, unless the plea prays for a decree, be deemed on making a request for set down for trial, to have denied every material allegation of fact made in the plea.

(3) No pleading subsequent to a reply shall be filed without leave.

(4) Where an alleged adulterer is made a party through a counter-claim copies of all papers served on all other parties previous to his being made a party shall be served on him.

Right to be heard on ancillary questions

11. (1) A defendant spouse may, without filing an answer, be heard on—
(a) any question of custody of, or access to, any child of the family, and
(b) any question of ancillary relief.

Decrees and orders

12. Every decree, every order made in open court and every other order which is required to be drawn up shall be drawn up by the Registrar.

Application for rescission of decree

13. (1) An application to rescind a decree *nisi* shall be heard in open court.

(2) Unless otherwise directed, the notice of the application shall be served on the plaintiff or in the case where a decree has been made on the defendant's counter-claim, on the defendant not less than 14 days before the day fixed for the hearing of the application.

(3) The application shall be supported by an affidavit setting out the allegations on which the applicant relies and a copy of the affidavit shall be served on the plaintiff or the defendant as the case may be.

14. (1) A copy of every decree shall be sent by the Registrar to every party to the cause.

Copies of
decrees and
orders

(2) A sealed or other copy of a decree or order made in pursuant to rule 12 shall be issued to any person requiring it on payment of the prescribed fee.

15. (1) Where an order made in matrimonial proceedings has been drawn up, the Registrar shall unless otherwise directed, send a copy of the order to every party affected by it.

Service of
order

(2) Where a party against whom the order is made is acting by a legal practitioner, a copy may, if the Registrar thinks fit, be sent to that party as if he were acting in person, as well as to his Attorney.

(3) It shall not be necessary for the person in whose favour the order was made to prove that a copy of the order has reached any other party to whom it is required to be sent.

16. (1) Where, after a decree *nisi* has been pronounced but before it has been made absolute, a reconciliation has been effected between the plaintiff spouse and defendant spouse, either party may apply for an order rescinding the decree by consent.

Rescission of
decree *nisi* by
consent.

(2) The application may be made in chambers.

17. (1) An application by a spouse to make absolute a decree *nisi* pronounced in his favour may be made to the Registrar as in Form 2 any time not earlier than six weeks after the decree *nisi* has been made.

Decree
absolute:
Form 2

(2) On receiving such an application, the Registrar shall search the court records and if he is satisfied —

- (a) that no appeal against the decree and no application for re-hearing of the cause or for rescission of the decree is pending;
- (b) that no order has been made by the Court for the Court of Appeal extending the time for appealing against the decree or for making an application for re-hearing of the cause or, if any such order has been made, that the time so extended has expired;
- (c) that no application for such an order as is mentioned in subparagraphs (b) is pending;

(d) that the provisions of section 17 of the Act do not apply or have been complied with;

the Registrar shall make the decree absolute:

Provided that if the notice is lodged more than 12 months after the decree *nisi*, the Registrar may require the applicant to file an affidavit accounting for the delay and may make such order on the application as he thinks fit or refer the application to a Judge.

(3) An application by a spouse for a decree *nisi* pronounced against him to be made absolute may be made to the Registrar but it shall be served on the other spouse not less than 4 clear days before the day on which the application is heard.

(4) Where a decree *nisi* is made absolute, the Registrar shall make an indorsement to that effect on the decree, stating the precise time and date it was made absolute.

Certificate of
decree
absolute

Forms 3
and 4

Rescission of
decree of
judicial
separation

Revocations

18. (1) On a decree *nisi* being made absolute, the Registrar shall ---

send to the plaintiff and the defendant spouse a certificate in Form 3 or 4 which ever is appropriate, authenticated by the seal of the Court.

(2) A certificate in Form 3 or 4 that a decree *nisi* has been made absolute shall be issued to any person requiring it on payment of the prescribed fee.

19. (1) An application for the rescission of a decree of judicial separation shall be brought by writ of summons which shall set out particulars of the decree and the grounds for rescission relied on by the plaintiff.

(2) The party in whose favour the decree was pronounced may file an answer within 14 days after service of a copy of the summons on him.

(3) Except as provided in paragraph (2), all proceedings on the summons shall be carried on in the same manner, so far as practicable, as proceedings on a summons for judicial separation.

20. Orders 34 and 35 of the High Court Rules are hereby revoked.

SCHEDULE 1

Rule 5 (2)

Information to be given in a Declaration

1. The date and place of the marriage to be dissolved or connected with other reliefs claimed and the names of the parties at the time of the marriage if different. A certified copy of the Marriage Certificate shall be attached.
2. Addresses at which the parties have cohabited within and outside Botswana.
3. The domicile of the parties; or in cases where the wife is plaintiff, the domicile of the defendant and the addresses where she had been resident for the period of 3 years before filing the action.
4. The names, if any, of all the children of the family then living, and the dates of their birth.
5. The whereabouts of each minor child of the marriage and whether each such child is receiving instruction at an educational establishment or undergoing training for a trade profession or other occupation.
6. Whether there has been previous proceedings in Botswana or elsewhere with reference to the marriage or to any children of the marriage. If there had been any, give details including in what court and with what result.
7. Where there is a dispute whether a child is a child of the family, the name and date of birth of such child and the reason why the plaintiff says that the child is not a child of the family.
8. Whether an agreement or an arrangement has been or is proposed to be made between the parties in respect of the defendant or/and the said children. Attach a copy.
9. Full particulars of the allegation that the said marriage has broken down irretrievably.
10. Allegations of any facts which would bring the case of the plaintiff within section 15 (1) of the Act.
11. In the case of an action for a decree of nullity, an allegation that the action has not been brought in collusion with the defendant.
12. Decree and Orders which the plaintiff is praying the court to make.

FORM 1

Rule 5 (4)

In the High Court of
The Republic of Botswana

Matrimonial Causes No.

BETWEEN:

..... Plaintiff
and

..... Defendant

I,,
being the defendant in this suit have carefully read the Plaintiff's declaration, more particularly paragraphs

.....
granted in favour of the Plaintiff on the ground that the marriage between myself and the said Plaintiff has broken down
irretrievably by reason of the fact that we have lived apart for a continuous period of at least two years immediately
preceding the commencement of this action.

I hereby acknowledge that I fully understand the consequences of my consent to a decree being granted in favour
of the Plaintiff as aforesaid and I agree to abide by those consequences.

Dated at,
this day of, 19.....

.....
Defendant

Read, interpreted and explained to the Defendant in
..... language by me.

.....
(Name of Interpreter in Capitals)

and he seemed perfectly to understand same before
affixing his signature/thumb impression in my pre-
sence.

.....
Signature

FORM 2

Rule 17 (1)

In the High Court of
The Republic of Botswana

Matrimonial Causes No.

BETWEEN:

..... *Plaintiff*
and

..... *Defendant*

TAKE NOTICE that the Plaintiff/Defendant applies for the decree *vis* pronounced in his/her favour on the
..... day of 19.....
to be made absolute.

Dated this day of 19.....

.....
Attorney for the Plaintiff/Defendant.

FORM 3

Rule 18 (1)

In the High Court of
The Republic of Botswana

Matrimonial Causes No.

BETWEEN

..... *Plaintiff*
and

..... *Defendant*

Referring to the decree made in this cause on the
day of 19.....
whereby it was decreed that the marriage solemnised on the
day of 19.....
between the Plaintiff
and the Defendant
be dissolved unless sufficient cause be shown to the court within

..... from the making thereof why the said decree should not be made absolute, and no such cause having been shown, it is hereby certified that the said decree was on the day of 19..... made final and absolute and that the said marriage was thereby dissolved.

Dated this day of 19.....

.....
Registrar

FORM 4

Rule 18 (1)

**In the High Court of
The Republic of Botswana**

Matrimonial Causes No.

BETWEEN:

..... *Plaintiff*
and

..... *Defendant*

Referring to the decree made in this cause on the day of 19.....

whereby it was ordered that the marriage in fact solemnised on the day of 19.....

at between the Plaintiff and the Defendant

be pronounced and declared to have been by law void and the said Plaintiff, be pronounced to have been and to be free of all bond of marriage with the said Defendant, unless sufficient cause be shown to the court within

from the making thereof why the said decree should not be made absolute, and no such cause having been shown, it is hereby certified that the said decree was on the day of 19..... made final and absolute and that the said marriage was by law void and that the said Plaintiff was and is free from all bond of marriage with the said Defendant.

Dated this day of 19.....

.....
Registrar

Made this 12th day of March, 1973.

T. AKINOLA AGUDA,
Chief Justice.

Approved this 13th day of March, 1973.

M.P.K. NWAKO,
The Minister.

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