# HIGH COURT RULES, 1971

*R.G.N's 1047/1971, 1016/72,407/75, 554/75, 1093/75; S.Is 142/1981, 277/1981, 273/1983, 356/1984, 144/1985, 126/1989, 368/1990, 108/1991, 43/1992, 25/1993, 251/1993, 101/1994, 120/1995, 33/1996, 192/1997, 202/1997, 80/1998, 80/2000.*

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## ORDER 1

APPLICATION AND INTERPRETATION

### *1. Title*

These rules may be cited as the High Court Rules, 1971.

[Rule amended by s.i. 273 of 1983 and s.i. 192 of 1997]

### *2. Date of commencement and application*

(1) These rules shall come into operation on the 1st January, 1972, and shall have effect in relation to all proceedings in the High Court, including so far as is practicable proceedings pending on that date.

[Subrule amended by s.i. 25 of 1993]

(2) These rules shall not have effect in relation to any criminal proceedings other than proceedings to which Order 33, Order 34 or Order 45 relates.

### *3. Definitions*

In these rules—

"advocate" and "counsel"….

[Definition repealed by s.i. 277 of 1981]

"another legal practitioner" means a legal practitioner who is instructed by a legal practitioner not of the same association or firm of legal practitioners;

[Definition inserted by s.i. 277 of 1981]

"attorney"…..

[Definition repealed by s.i. 277 of 1981]

"chamber application" means an application to a judge in terms of paragraph (*b*) of subrule (1) of rule 226;

[Definition inserted by s.i. 43 of 1992]

"court" means the general division of the High Court;

"court application" means an application to the court in terms of paragraph (*a*) of subrule (1) of rule 226;

[Definition inserted by s.i. 43 of 1992]

"judge" means a judge of the court, sitting otherwise than in open court;

"legal practitioner" means a legal practitioner registered in terms of the Legal Practitioners Act, 1981 [*Chapter 27:07*];

[Definition inserted by s.i. 277 of 1981]

"Master" means the Master, and Additional Master and an Assistant Master of the court;

"registrar" means—

(*a*) the registrar of the court;

(*b*) a deputy registrar who, and an assistant registrar who has been designated as a registrar of the court;

but does not include a deputy registrar or assistant registrar who has been designated as a registrar of the appellate division while acting in his capacity as registrar of the appellate division.

### *4. Forms*

(1) The forms in the First Schedule shall be used where applicable and any reference in these rules to a form by number is a reference to the form in that Schedule bearing that number.

(2) The forms prescribed in the First Schedule may be used with such alterations as circumstances require.

[Subrule inserted by s.i. 25 of 1993]

### *4A. Reckoning of time*

Unless the contrary intention appears, where anything is required by these rules or in any order of the court to be done within a particular number of days or hours, a Saturday, Sunday or public holiday shall not be reckoned as part of such period.

[Rule inserted by s.i. 142 of 1981 and amended by s.i. 251 of 1993]

### *4B. References to legal practitioners*

Any reference in these rules to an advocate or to counsel or to an attorney shall be read and construed as references to a legal practitioner.

[Rule inserted by s.i. 277 of 1981 and amended by s.i. 25 of 1993]

### *4C. Departures from rules and directions as to procedure*

The court or a judge may, in relation to any particular case before it or him, as the case may be—

(*a*) direct, authorize or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interests of justice;

(*b*) give such directions as to procedure in respect of any matter not expressly provided for in these rules as appear to it or him, as the case may be, to be just and expedient.

[Rule inserted by s.i. 126 of 1989]

### *4D. Certain proceedings to be by way of application*

Where in any law reference is made to proceedings in the High Court by way of petition, notice of motion or application, such proceedings shall be taken by way of application in terms of Order 32.

[Rule inserted by s.i. 43 of 1992]

## ORDER 2

CHANGE OF LEGAL PRACTITIONER

[Order substituted by s.i. 43 of 1992]

### *5. Change of legal practitioner*

(1) A party who is represented by a legal practitioner shall be at liberty to change or dispense with his legal practitioner at any stage in the proceedings.

(2) As soon as possible after a party has changed his legal practitioner, he shall file with the registrar notice of the change, specifying his new address for service, and shall serve a copy of the notice upon all the other parties to the proceedings.

(3) Where a notice in terms of subrule (2)—

(*a*) specifies the party's new address for service, no further service at his former address for service shall be valid;

(*b*) does not specify the party's new address for service—

(i) service of further process by registered post at the party's last-known address at which post may be delivered shall be valid; or

(ii) where there is no such address as is referred to in subparagraph (i), service of further process at the address of the party's former legal practitioner shall be valid.

### *6. Renunciation by legal practitioner*

(1) A legal practitioner may for good cause renounce his agency by giving reasonable notice to his client, the registrar and all other parties to the proceedings.

(2) Where a notice given in terms of subrule (1)—

(*a*) specifies a new address for service in terms of these rules, no further service at the address of the retiring legal practitioner shall be valid;

(*b*) does not specify a new address for service in terms of these rules but provides the client's last known address at which post may be delivered, service of further process by registered post at that address shall be valid, where such service is verified by affidavit;

(*c*) does not specify a new address for service or the client's last known address at which post may be delivered, service of further process at the address of the retiring legal practitioner shall be valid.

## ORDER 2A

PROCEEDINGS BY OR AGAINST ASSOCIATIONS, ETC

[Order inserted by s.i. 192 of 1997]

### *7. Interpretation in Order 2A*

In this Order—

"associate", in relation to—

(*a*) a trust, means a trustee;

(*b*) an association other than a trust, means a member of the association;

"association" includes—

(*a*) a trust; and

(*b*) a partnership, a syndicate, a club or any other association of persons which is not a body corporate.

### *8. Proceedings by or against associations*

Subject to this Order, associates may sue and be sued in the name of their association.

### *8A. Naming of associates*

(1) In any proceedings to which an association is a party, any other party may, by written notice to the association, require a statement of the names and places of residence of the persons who were the association's associates at the time the cause of action accrued.

(2) A person who receives a notice in terms of subrule (1) shall, within five days after receiving it—

(*a*) furnish the party concerned with a written statement containing the required information; and

(*b*) file a copy of the written statement with the registrar;

and the proceedings shall continue in the same manner, and the same consequences shall follow, as if the associates had been named in the summons or notice commencing the proceedings:

Provided that the proceedings shall continue in the name of the association except where a writ of civil imprisonment is sought against an associate, in which event the associate shall be specifically named in the civil imprisonment proceedings.

### *8B. Declaration of persons to be associates*

(1) Where proceedings have been instituted by or against an association in terms of this Order, the court or a judge may, on court application made by any party to the proceedings either before or after judgment, declare any person to be an associate of the association.

(2) Upon a declaration being made in terms of subrule (1), the proceedings shall continue in the same manner, and the same consequences shall follow, as if the person who is the subject of the declaration had been named in the summons or notice commencing the proceedings:

Provided that the proceedings shall continue in the name of the association except where a writ of civil imprisonment is sought against an associate, in which event the associate shall be specifically named in the civil imprisonment proceedings.

### *8C. Proceedings by or against persons under their trade name*

Subject to this Order, a person carrying on business in a name or style other than his own name may sue or be sued in that name or style as if it were the name of an association, and rules 8A and 8B shall apply, *mutatis mutandis*, to any such proceedings.

### *8D. Order not to affect liability or non-liability of associates*

This Order shall not be construed as affecting—

(*a*) the entitlement of an associate to institute proceedings on behalf of his association or fellow associates; or

(*b*) the liability or non-liability under any other law of associates for the conduct of their association or of their fellow associates.

## ORDER 3

SUMMONS

### *9. Action to be commenced by summons*

Every action shall be commenced by a summons addressed to the defendant and signed by the registrar who issues it.

[Rule substituted by s.i. 80 of 2000]

### *10. Matters required by summons*

A summons shall—

(*a*) call on the defendant, if he intends to oppose the plaintiff's claim, to enter appearance to defend at the registry specified in the summons; and

(*b*) require the sheriff or his deputy to serve a copy of the summons on the defendant and to return a copy, with the return of service duly completed, to the registrar who issued it:

Provided that, where it is necessary for service to be effected outside the jurisdiction, the summons shall be served in the manner provided in rule 44 or 45, as may be appropriate.

[Rule substituted by s.i. 80 of 2000]

### *11. Contents of summons*

Before issue every summons shall contain—

(*a*) the full name of the defendant and his residence or place of business and, if he is sued in a representative capacity, the capacity in which he is so sued. Where the defendant's full name is unknown to the plaintiff, that fact should be stated and his name and initials, or his name and such of his initials as are known, should be given;

(*b*) the full name, and address for service of the plaintiff and, if he sues in a representative capacity, the capacity in which he sues;

(*c*) a true and concise statement of the nature, extent and grounds of the cause of action and of the relief or remedies sought in the action;

(*d*) the date of issue.

[Rule amended by s.i. 80 of 1998 and by s.i. 80 of 2000]

### *12. Form and filing of summons: form of edictal citation*

(1) The summons shall be in Form No. 2 or, in matrimonial causes, in Form No. 30A, at the option of the plaintiff, and shall be filed in triplicate with the registrar at the time of issue.

[Subrules amended by s.i. 142 of 1981]

(2) ….

[Subrule repealed by s.i. 25 of 1993]

### *13. Summons for debt or liquidated demand: endorsement*

(1) In an action where the claim, apart from costs, is for a debt or a liquidated demand only, the summons may, at the option of the plaintiff, be endorsed with the particulars of the claim.

(2) Such particulars shall take the place of a declaration and shall state truly and concisely the nature, extent and the grounds of the cause of action.

(3) Where such particulars are drawn and signed by another legal practitioner, the taxing officer, at his discretion, may allow a fee therefor.

[Subrule substituted by s.i. 277 of 1981]

(4) Subject to subrule (5), where the amount claimed includes capital and interest on the capital, the particulars endorsed on the summons in terms of subrule (1) shall state clearly—

(*a*) the capital amount claimed; and

(*b*) the total amount of interest claimed on the capital as at the date of the summons or as at an earlier date specified in the particulars; and

(*c*) whether or not interest is claimed on the total amount of capital and interest referred to in paragraph (*a*) and (*b*) and, if not, the amount in respect of which any interest is claimed and the date from which interest is to run

[Subrule inserted by s.i. 192 of 1997]

(5) Where the claim relates to a bank overdraft, the particulars endorsed on the summons in terms of subrule (1) shall state clearly—

(*a*) the total amount claimed; and

(*b*) the total capital amount lent by the bank to its client; and

(*c*) the total amount of interest claimed on the capital amount referred to in subparagraph (*b*) as at the date of the summons or as at an earlier date specified in the particulars; and

(*d*) any amount claimed in respect of bank charges, cheque books and similar matters; and

(*e*) any interest claimed on any amount referred to in subparagraph (*d*) as at the date of the summons or as at an earlier date specified in the particulars; and

(*f*) any payments made by the client or respondent, and whether such payments have been appropriated to capital or interest.

[Subrule inserted by s.i. 192 of 1997]

### *14. Amendment of summons*

Subject to the provisions of this Order, a summons may, before service, be amended by the plaintiff as he thinks fit. An amendment of a summons, whether before or after issue, shall, before service thereof, be initialled by the registrar, and until so initialled shall have no effect.

### *15. Address for service to be endorsed on summons*

An address called "the address for service" where notices, pleadings, petitions, orders and other documents may be left by the defendant for the plaintiff shall be endorsed on every summons. The address for service shall be within a radius of five kilometres from the registry where the defendant is required to enter appearance. Where the plaintiff sues through the agency of an attorney, the name of the attorney shall be endorsed on the summons and his address, if within the area mentioned, shall be the address for service.

[Rule amended by s.i. 142 of 1981]

### *16. Preparation of summons*

A summons shall be prepared by the plaintiff or his attorney and shall be written or printed or partly printed and partly written on foolscap paper of good quality.

### *17. Time allowed for entering appearance to defend: dies induciae*

The time within which a defendant shall be required to enter appearance to defend shall be ten days, exclusive of the day of service.

[Rule substituted by s.i. 80 of 1998]

### *18. When leave of court required for issue of process*

No summons or other civil process of the court may be sued out against the President or against any of the judges of the High Court without the leave of the court granted on court application being made for that purpose.

[Rule amended by s.i. 25 of 1993]

### *19. Return of summons*

Every summons, including those issued from a district registry, shall be made returnable to the court at Harare or Bulawayo, and a copy of the summons shall be returned thereto by the sheriff or his deputy after service has been effected.

[Rule amended by s.i. 43 of 1992]

## ORDER 4

CLAIMS FOR PROVISIONAL SENTENCE

### *20. Summons claiming provisional sentence*

Where the plaintiff is the holder of a valid acknowledgement in writing of a debt, commonly called a liquid document, the plaintiff may cause a summons to be issued claiming provisional sentence on the said document.

### *21. Contents of summons for provisional sentence*

A summons claiming provisional sentence shall state the amount and any interest due by virtue of the said liquid document or other such demand as by virtue of the said liquid document is legally claimable, and shall call upon the defendant to satisfy the plaintiff's claim, or in default to appear before the court at the hour and on the day and at the place stated in the summons to show why he has not done so, and to acknowledge or deny the signature to the said liquid document or the validity of the said claim.

### *22. Forms and rules applicable*

A summons for provisional sentence shall be in one of the Forms No. 4 or 5. The provisions of rules 10, 11, 14, 15, 16, 17, 18 and 19 shall be observed in a summons for provisional sentence.

### *23. Copy of document to be served with summons*

A copy of the document on which the claim for provisional sentence is founded shall be served on the defendant with the summons.

### *24. Particulars where claim based on mortgage bond*

When provisional sentence is claimed on a mortgage bond which has become due by reason of notice given or interest being unpaid, the date when and the manner in which notice was given or the particulars of the unpaid interest shall be stated in the summons.

### *25. Notice of opposition and answering affidavits*

(1) Prior to the date stated in the summons for appearance to answer the plaintiff's claim, the defendant may file a notice of opposition in form No. 29A, together with one or more supporting affidavits.

(2) Order 32 shall apply, *mutatis mutandis*, to the service of a notice of opposition in terms of subrule (1) and to the filing and service of any answering affidavits or further affidavits by the parties.

### *26. Plaintiff may file answering affidavits*

[Rule repealed by S.I. 43 of 1992]

### *27. Court may permit personal appearance of person summoned*

Notwithstanding anything hereinbefore contained, the court may permit any person, summoned to answer a claim for provisional sentence, to appear personally on the floor of the court and acknowledge or deny the same.

### *28. Rights of defendant when provisional sentence granted*

A defendant against whom provisional sentence has been granted may—

(*a*) within one month after the attachment made under a writ of execution issued by virtue of such sentence; or

(*b*) if he has satisfied the judgment without an attachment, then within one month after having done so;

cause an appearance to be entered with the registrar to defend the action, and shall notify the plaintiff of such entry. If he fails to do so within the stipulated time, the provisional sentence shall immediately thereafter become a final judgment of the court and the security given by the plaintiff shall *ipso facto* become null and void.

### *29. When court may give final judgment*

The court may give final judgment against a defendant if—

(*a*) he appears in court and there acknowledges the claim set forth in the summons; or

(*b*) he has previously filed with the registrar an acknowledgement of the claim over his signature witnessed by an attorney acting for him or verified by affidavit.

### *30. Court may require security when granting provisional sentence*

A provisional sentence is granted subject to the plaintiff giving where required security *de restituendo* in case it appears at the trial that the debt or claim was not legally due.

### *31. Cases where plaintiff must give security*

The plaintiff shall give security *de restituendo* in the following cases—

(*a*) when he desires to issue a writ of execution against the defendant and before its issue;

(*b*) against payment by the defendant who demands security.

### *32. Security to be fixed by registrar*

The nature of the security and the amount thereof shall be fixed by the registrar with leave to either party to appeal against his decision to the court.

### *33. Where provisional sentence granted and defendant enters appearance to defend action*

Where a defendant against whom a provisional sentence has been granted enters appearance to defend the action, the summons shall stand as the plaintiff's declaration, and the defendant shall file his plea within ten days after his entry of appearance, and thereafter the matter shall proceed as in an ordinary action.

[Rule amended by s.i. 101 of 1994]

### *34. Where provisional sentence refused and case ordered to stand over for trial*

Where provisional sentence has been refused and the case has been ordered to stand over for trial, the summons shall stand as a summons in an ordinary action and the defendant shall enter appearance within five days of the court's judgment, and thereafter the rules for procedure in an ordinary action shall apply unless the court gives other directions.

[Rule amended by s.i. 101 of 1994]

## ORDER 5

SERVICE OF PROCESS

[Order substituted by s.i. 251 of 1993]

### *35. Interpretation in Order 5*

(1) In this Order—

"process" means any document which is required to be served on any person in terms of these rules.

(2) Where the person upon whom any process is to be served is a minor or a person under legal disability, any reference to that person in this Order shall be construed as a reference to his guardian, tutor, curator and other legal representative.

### *36. Application of Order 5*

This Order shall apply to the service of all process within Zimbabwe except to the extent that it is inconsistent with—

(*a*) any other provision of these rules relating to the service of any particular process; or

(*b*) any order or direction which a court or judge may give in relation to the service of any particular process.

### *37. Persons by whom process may be served*

(1) Service of a summons, writ, warrant or order of court shall be effected by the sheriff or his deputy.

(2) Service of any process, other than a summons, writ, warrant or order of court, may be effected by the sheriff or his deputy or by the party concerned or his legal practitioner or agent.

(3) Any party who requires the sheriff or his deputy to serve any process shall deliver to him a copy of the process, together with as many further copies as there are persons to be served.

### *38. Times for service of process*

Service of process shall not be valid if served between 10 p.m. and 6 a.m.:

Provided that—

(*a*) process for the arrest of any person; and

(*b*) process served by post, telegraph, telefacsimile or courier;

shall be valid whenever it is served.

### *39. Manner of service of process generally*

(1) Process in relation to a claim for an order affecting the liberty of a person shall be served by delivery of a copy thereof to that person personally.

(2) Subject to this Order, process other than process referred to in subrule (1) may be served upon a person in any of the following ways—

(*a*) by personal delivery to that person or his duly authorized agent;

(*b*) by delivery to a responsible person at the residence or place of business or employment of the person on whom service is to be effected or at his chosen address for service;

(*c*) in the case of process other than a summons or an order of court, by delivery to that person's legal practitioner of record;

(*d*) in the case of process to be served on a body corporate—

(i) by delivery to a responsible person at the body corporate's place of business or registered office; or

(ii) if it is not possible to serve the process in terms of subparagraph (i), by delivery to a director or to the secretary or public officer of the body corporate;

(*e*) in the case of process to be served on a partnership—

(i) by delivery to a responsible person at the partnership's office or place of business; or

(ii) if it is not possible to serve the process in terms of subparagraph (i), by delivery to any of the partners;

(*f*) in the case of process to be served on a syndicate, club, society, church or other unincorporated association—

(i) by delivery to a responsible person at the local office or place of business of the association; or

(ii) if it is not possible to serve the process in terms of subparagraph (i), by delivery to the chairman or secretary or similar officer of the association.

### *40. Service where person to be served prevents service or cannot be found*

Where any process is to be served, and—

(*a*) the person upon whom it is to be served keeps his residence, place of business or employment, address for service or registered office closed and thus prevents the process from being served; or

(*b*) the person seeking to effect service of any process is unable, after diligent search at the residence, place of business or employment, address for service or office of the person to be served, to find that person or a responsible person referred to in paragraph (*b*), (*d*), (*e*) or (*f*) of subrule (2) of rule 39

it shall be sufficient service to leave a copy of the process in a letter-box at or affixed to or near the outer or principal door of, or in some other conspicuous position at, the residence, place of business or employment, address for service or office, as the case may be.

### *41. Service on two or more persons*

Where two or more persons are to be served with the same process, service shall be effected upon each of them, except in the case of—

(*a*) married persons who are not separated under an order of judicial separation, when service of process relating to property jointly held by them may be effected on either spouse;

(*b*) two or more persons sued in their capacities as joint trustees of an insolvent estate, liquidators of a company, executors, curators or guardians, when service may be effected on any one of them.

### *42. Postal service*

(1) Any process, other than process referred to in subrule (1) of rule 39, may be served by registered post in accordance with this rule.

(2) Where—

(*a*) the party requiring service of any process, other than process referred to in subrule (1) of rule 39, has given written instructions to the sheriff or his deputy to serve the process by registered post; or

(*b*) the registrar has directed the sheriff or his deputy that any process, other than process referred to in subrule (1) of rule 39, shall be served by registered post;

the sheriff or his deputy, as the case may be, shall serve the process by registered post in accordance with this rule.

(3) Process shall be served in accordance with this rule by placing a copy of the process in an addressed envelope endorsed with the words:

"If delivery of this letter cannot be made within fourteen days, it is to be returned to the sender";

or words to the same effect, and posting it by prepaid registered post to the address of the person upon whom the process is to be served.

(4) An acknowledgement of receipt of an envelope posted in terms of subrule (3), signed by the person to whom the envelope was addressed and furnished in terms of by-laws made under the Postal and Telecommunication Services Act [*Chapter 12:02*], shall be *prima facie* proof that the process contained in the envelope was served upon him.

### *42A. Service of process in proceedings for ejectment or rent*

Service of process in proceedings in which the only relief that is claimed, apart from costs, is an order of ejectment from premises or judgment for the rent thereof may, if it cannot otherwise be effected, be made by leaving a copy of the process in a letter-box at or affixed to or near the outer or principal door of, or in some other conspicuous position at, the premises in question.

### *42B. Proof of service*

(1) Where service of any process has been effected by—

(*a*) the sheriff or his deputy, proof of service shall be by return of service in Form No. 5A or by endorsement on the process concerned;

[Paragraph amended by s.i. 101 of 1994]

(*b*) a legal practitioner or a responsible person in his employ, proof of service shall be by a certificate of service in Form No. 6 or 7, as the case may be;

(*c*) a person other than a sheriff or his deputy or a person referred to in paragraph (*a*) or (*b*), proof of service shall be by affidavit;

(*d*) post in accordance with rule 42, proof of service shall be by signed acknowledgement referred to in subrule (4) of that rule.

(2) Where any process has been served on a responsible person in terms of paragraph (*b*), (*d*), (*e*) or (*f*) of subrule (2) of rule 39, the name of that person shall be stated on the return of service, endorsement, certificate or affidavit referred to in subrule (1).

### *42C. Change of address for service*

An address for service may be changed by the delivery of notice of a new address for service, and thereafter service may be effected in accordance with this Order at the new address.

### *42D. Transmission of telegraphic or faxed copies of process*

Any process for service may be transmitted by telegraph or telefacsimile, and a telegraphic or telefacsimile copy that is served in any of the ways prescribed in this Order shall be of the same effect as if the original had been so served.

### *43. Inspection of original process*

The original of any process which has been served on any person may be inspected by that person at the office of the registrar where it is filed.

## ORDER 5A

SERVICE OF PROCESS IN PROCEEDINGS AGAINST STATE

[Order inserted by s.i. 368 of 1990]

### *43A. Application of Order*

This Order shall apply to claims for—

(*a*) money, whether arising out of contract, delict or otherwise; or

(*b*) the delivery or release of any goods;

whether or not joined with or made as an alternative to any other claim, where the claims are instituted against—

(i) the State; or

(ii) the President, a Vice-President or any Minister or Deputy Minister in his official capacity; or

(iii) any officer or employee of the State in his official capacity.

### *43B. Persons upon whom notice and process to be served*

Where a person mentioned in the first column of the Seventh Schedule is the defendant or respondent in any proceedings to which this Order applies—

(*a*) the notice of intention to bring the proceedings required by section 6 of the State Liabilities Act [*Chapter 54*]; and

(*b*) all process by which the proceedings are instituted or by which effect is given to any judgment arising out of the proceedings;

shall be served upon the person specified in relation to the defendant or respondent in the second column of the Seventh Schedule, and copies of the notice and process shall be served, for information, upon the person or persons specified in relation to the defendant or respondent in the third column of that Schedule.

### *43C. Notice of intention to bring claim to be attached to process*

Where process instituting proceedings to which this Order applies is served on a defendant or respondent, there shall be attached to the process a copy of the notice of intention to bring the proceedings required by section 6 of the State Liabilities Act [*Chapter 54*];

### *43D. Order not to affect jurisdiction of Court*

Nothing in this Order shall be construed as requiring a departure from the general practice that process should be issued by the registrar at the seat of the court where the proceedings concerned are to be heard.

## ORDER 6

SERVICE OUTSIDE THE JURISDICTION AND SUBSTITUTED SERVICE

### *44. Edictal Citation*

(1) Save as is provided in rule 45 or in any Act relating to the service of process on a reciprocal basis in any territory, no process or document whereby proceedings are instituted shall be served outside Zimbabwe without the leave of the court or a judge.

[Subrule amended by s.i. 43 of 1992]

(2) ….

[Subrule repealed by s.i. 251 of 1993]

(3) Application for leave of the court or of a judge shall be made by application in terms of Order 32 setting out concisely—

(*a*) the facts upon which the cause of action is based;

(*b*) the grounds upon which the court has jurisdiction to entertain the claim;

(*c*) the manner of service which the court or judge is asked to authorize, and if personal service cannot be effected the last-known whereabouts of the person to be served and the inquiries made to ascertain his present whereabouts.

[Subrule amended by s.i. 43 of 1992]

(4) On such application the court or judge may make such order as to the manner of service as to it or him seems proper and necessary, and shall further order the time within which notice of intention to defend or any other step is to be taken by the person to be served.

(5) In all cases in which publication is directed, it shall not be necessary to publish the document or documents *in extenso* but the publication of a short form thereof to be approved and signed by the registrar shall be deemed to be sufficient compliance with the direction of the court or judge.

(6) Any process or document in such case shall be served in such a manner and subject to such conditions as the court or judge in each particular case directs.

### *45. Service of summons in Republic of South Africa and its neighbouring territories*

(1) Where it is necessary to serve any summons or application on any person in a province of the Republic of South Africa or in Namibia, Lesotho, Swaziland or Botswana, service by the sheriff, deputy sheriff or under sheriff of that province or country may be accepted by the court:

Provided that, where the service is effected by a deputy or under sheriff, his appointment shall be certified by the sheriff of the province or country concerned.

[Subrule substituted by s.i. 43 of 1992]

(2) The signature and seal of the sheriff on any return of service effected under this rule shall be sufficient authentication. The fees to be paid for such service shall be at the scale charged for such service of such process or document of the province or country in which such service is effected.

[Subrule amended by s.i. 43 of 1992]

(3) Application for leave to effect service in terms of this rule shall be made by way of a chamber application accompanied by a draft of the summons proposed to be issued and a statement setting out concisely the matters mentioned in paragraph (*a*), (*b*) and (*c*) of subrule (3) of rule 44.

[Subrule amended by s.i. 43 of 1992]

(4) On such application the judge may make such order as to the manner of service as to him seems proper and necessary.

### *46. Substituted service*

(1) Whenever it is necessary to serve any process or document whereby proceedings are instituted, on any person within the jurisdiction who cannot be served in any of the ways provided in Order 5, the leave of a judge shall be obtained by application made in terms of Order 32.

[Subrule amended by s.i. 43 of 1992]

(2) Such application shall be accompanied by a draft of the process or document proposed to be issued and shall set out concisely—

(*a*) the facts upon which the cause of action is based;

(*b*) the reason why service cannot be effected in any of the ways provided in Order 5;

(*c*) sufficient relevant facts to indicate the best manner in which service may be effected.

[Subrule amended by s.i. 43 of 1992]

(3) On such application a judge shall, by his order, give such directions in the premises as he deems proper and necessary, having due regard to the place where the defendant is or is believed to be residing and to the other circumstances of the case.

(4) In all cases in which publication is directed, it shall not be necessary to publish the document or documents *in extenso* but the publication of a short form thereof to be approved and signed by the registrar shall be deemed to be sufficient compliance with the direction of the judge.

(5) Any process or document in such case shall be served in such a manner and subject to such conditions as the judge in each particular case directs.

## ORDER 7

APPEARANCE TO DEFEND

### *47. Appearance book*

There shall be maintained in the office of the registrar at Harare and Bulawayo a book called an appearance book.

### *48. Mode of entering appearance*

Entry of appearance to defend shall be effected by the defendant or his legal practitioner who shall record in the appearance book at the registry where he has been called upon to enter appearance—

(*a*) the title and number of the action;
(*b*) notification of his intention to defend;
(*c*) an address called an address for service which shall be within a radius of five kilometres of the registry;
(*d*) his postal address;
(*e*) the date of entry;

and shall sign the entry thus made.

[Rule amended by s.i. 25 of 1993]

### *49. Notice of entry of appearance*

Within twenty-four hours of the entry of appearance to defend written notice thereof shall be served on the plaintiff or on his legal practitioner where he sues by a legal practitioner, at the plaintiff's address for service. Such notice shall be in Form No. 8.

### *50. Failure to enter appearance: defendant deemed to be barred*

A defendant who has failed to enter appearance shall be deemed to be barred.

### *51. Entry of appearance: defendant may still raise objection in law to action*

An entry of appearance to defend shall not prejudice the defendant in any objection in law he may subsequently raise to the plaintiff's action.

### *52. Withdrawal by plaintiff after appearance entered*

(1) Where the defendant has entered appearance the plaintiff shall not be entitled, save with the defendant's consent in writing, to withdraw the action until he has paid the defendant's taxed costs or has undertaken to pay such costs and has given notice of intention to withdraw to the defendant and to the registrar. Such undertaking shall be incorporated in the notice of withdrawal.

(2) If such taxed costs are not paid within twelve days of demand the defendant may make a chamber application for judgment for his taxed costs.

[Subrule amended by s.i. 43 of 1992]

## ORDER 8

JUDGMENT BY CONSENT

### *53. Consent to judgment without appearance in court*

At any time after service of the summons a defendant may, save in matters affecting status, consent to judgment without appearing in court.

### *54. Requisites to consent to judgment*

A consent to judgment shall be in writing and be signed by the defendant personally or by a legal practitioner who has entered appearance on his behalf. The defendant's signature shall be verified by an affidavit made by someone other than himself, or by the signature of a legal practitioner acting for him and not for the opposite party.

### *55. Judgment or Order*

Upon filing a consent to judgment with the registrar the plaintiff may make a chamber application for judgment and thereupon judgment may be given or an order made according to such consent.

[Rule amended by s.i. 43 of 1992]

### *56. Court may set aside judgment given by consent*

A judgment given by consent under these rules may be set aside by the court and leave may be given to the defendant to defend, or to plaintiff to prosecute his action. Such leave shall only be given on good and sufficient cause and upon such terms as to costs and otherwise as the court deems just.

## ORDER 9

JUDGMENT IN DEFAULT

### *57. Claim for debt or liquidated demand only and no appearance entered*

In cases where the plaintiff's claim, not being a claim for provisional sentence, is for a debt or liquidated demand only, and the defendant has failed to enter appearance within the period prescribed in the summons for entering appearance, or, having entered appearance, has been duly barred for default of plea, the plaintiff may without notice to the defendant make a chamber application for judgment, and thereupon judgment may be granted or such order may be made as the judge considers the plaintiff is entitled to upon the summons or declaration.

[Rule substituted by s.i. 142 of 1981 and amended by s.i. 43 of 1992]

### *58. Claim other than for debt or liquidated demand and no appearance entered*

(1) In cases where the plaintiff's claim is not for a debt or liquidated demand only, and the defendant has failed to enter appearance after the period prescribed in the summons for entering appearance, the plaintiff shall file and serve his declaration if he desires to obtain judgment.

(2) Where the defendant remains in default the plaintiff may after the expiry of ten days from the date of service of the declaration set down the case for judgment on an appropriate day specified in subrule (1) of rule 223 without notice to the defendant, and thereupon, subject to rule 60, the court may grant judgment or make such order as it considers the plaintiff is entitled to upon the summons or declaration.

[Subrules amended by s.i. 126 of 1989 and s.i. 25 of 1993]

(3) The provisions of this rule shall not apply to actions for the restitution of conjugal rights, for divorce, for judicial separation or for nullity of marriage.

### *59. Appearance entered but defendant barred for default of plea*

(1) In cases where the plaintiff's claim is not for a debt or liquidated demand only, or where it is for a debt or liquidated demand only but argument in relation to any aspect of the suit is considered necessary, and the defendant has failed to enter appearance to defend within the period prescribed in the summons for entering appearance, or, having entered appearance, has been duly barred in default of plea, the plaintiff may without notice to the defendant set down the case for judgment on an appropriate day specified in subrule (1) of rule 223, and thereupon, subject to rule 60, the court may grant judgment or make such order as it considers the plaintiff is entitled to upon the summons or declaration.

[Subrule substituted by s.i. 142 of 1981 and amended by s.i.. 126 of 1989 and s.i. 25 of 1993]

(2) The provisions of this rule shall not apply to actions for the restitution of conjugal rights, for divorce, for judicial separation or for nullity of marriage.

### *59A. Party in default at trial*

(1) If on the calling of any case the plaintiff or the plaintiff in reconvention appears in court personally, or by his counsel, and the other party is in default, the court may, subject to rule 60, grant judgment or make such order as it considers the plaintiff or the plaintiff in reconvention, as the case may be, is entitled to upon the summons, declaration or claim in reconvention, as the case may be.

(2) This rule shall not apply to actions for the restitution of conjugal rights, for divorce, for judicial separation or for nullity of marriage.

[Rule inserted by s.i. 25 of 1993]

### *60. When court may enter judgment without hearing evidence*

The court may grant judgment or make an order under rule 58, 59 or 59A without hearing any evidence, except in actions where the claim is for damages in which case evidence as to quantum only need be adduced:

Provided that, in such actions for damages, if, not later than ten o'clock in the morning—

(*a*) on the Friday immediately preceding the Wednesday on which the case is set down for hearing, where the case is set down for hearing in Harare;

(*b*) on the Wednesday immediately preceding the Friday on which the case is set down for hearing, where the case is set down for hearing in Bulawayo;

the plaintiff or plaintiff in reconvention files with the registrar an affidavit setting out evidence as to quantum, the court may enter judgment relying on evidence in the affidavit.

[Proviso inserted by s.i. 126 of 1989 and amended by s.i. 25 of 1993]

### *61. Dismissal of action where plaintiff barred*

Where the plaintiff has been duly barred from declaring or making a claim the defendant may, without notice to the plaintiff, make a chamber application to dismiss the action for want of prosecution, and the judge may order the action to be dismissed with costs, or make such other order on such terms as he thinks fit.

[Rule substituted by s.i. 43 of 1992]

### *62. Defendant may be absolved where plaintiff makes default*

When on the calling of any case the defendant appears in court personally, or by his counsel, and the plaintiff makes default, the defendant shall be absolved from the said suit or action, unless sufficient cause to postpone the same, or to make some other order therein, appears to the court.

### *63. Court may set aside judgment given in default*

(1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment, for the judgment to be set aside.

[Subrule amended by s.i. 43 of 1992]

(2) If the court is satisfied on an application in terms of subrule (1) that there is good and sufficient cause to do so, the court may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute his action, on such terms as to costs and otherwise as the court considers just.

(3) Unless an applicant for the setting aside of a judgment in terms of this rule proves to the contrary, he shall be presumed to have had knowledge of the judgment within two days after the date thereof.

[Rule substituted by s.i. 126 of 1989]

### *63A. Setting aside of default judgment by consent*

[Rule inserted by s.i. 25 of 1993]

(1) Where judgment has been given in default, whether under these rules or under any other law, and all the parties to the proceedings jointly file a consent to the rescission of the judgment, the registrar shall forthwith lay the papers before a judge who may set aside the judgment and make such other order in accordance with the consent as may be appropriate.

(2) In a consent filed under subrule (1) the parties may agree on—

(*a*) the filing of further affidavits; and

(*b*) the time within which anything is to be done; and

(*c*) the payment of costs; and

(*d*) any other matter which the parties consider to be necessary or desirable to ensure the expeditious and just resolution of the proceedings.

## ORDER 10

SUMMARY JUDGMENT

### *64. Application for summary judgment*

[Rule substituted by s.i. 43 of 1992]

(1) Where the defendant has entered appearance to a summons, the plaintiff may, at any time before a pre-trial conference is held, make a court application in terms of this rule for the court to enter summary judgment for what is claimed in the summons and costs.

[Subrule amended by s.i. 101 of 1994]

(2) A court application in terms of subrule (1) shall be supported by an affidavit made by the plaintiff or by any other person who can swear positively to the facts set out therein, verifying the cause of action and the amount claimed, if any, and stating that in his belief there is no *bona fide* defence to the action.

(3) A deponent may attach to his affidavit filed in terms of subrule (2) documents which verify the plaintiff's cause of action or his belief that there is no *bona fide* defence to the action.

(4) Order 32 shall apply to the form and service of an application in terms of this rule and to any opposition thereto.

### *65. Notice of application to be served on defendant*

[Rule repealed by s.i. 43 of 1992]

### *66. Courses open to defendant at hearing of application*

(1) Upon the hearing of an application for judgment under rule 64 the defendant may—

(*a*) give security to the satisfaction of the registrar to satisfy any judgment which may be given against him in the action; or

(*b*) satisfy the court by affidavit or with the leave of the court by oral evidence of himself or any other person who can swear positively to the facts that he has a good *prima facie* defence to the action.

[Subrule amended by s.i. 126 of 1989]

(2) A person who—

(*a*) deposes to an affidavit filed in terms of paragraph (*b*) of subrule (1); or

(*b*) gives oral evidence in terms of that paragraph;

may attach to his affidavit or produce in the course of his evidence, as the case may be, documents which verify the defendant's defence to the action.

[Subrule inserted by s.i. 126 of 1989]

### *67. Limitations as to evidence at hearing of application*

No evidence may be adduced by the plaintiff otherwise than by the affidavit of which a copy was delivered with the notice, nor may either party cross-examine any person who gives evidence viva voce or by affidavit:

Provided that the court may do one or more of the following—

(*a*) permit evidence to be led in respect of any reduction of the plaintiff's claim;

(*b*) put to any person who gives oral evidence questions—

(i) to elucidate what the defence is; or

(ii) to determine whether, at the time the application was instituted, the plaintiff was or should have been aware of the defence;

(*c*) permit the plaintiff to supplement his affidavit with a further affidavit dealing with either or both of the following—

(i) any matter raised by the defendant which the plaintiff could not reasonably be expected to have dealt with in his first affidavit; or

(ii) the question whether, at the time the application was instituted, the plaintiff was or should have been aware of the defence.

[Proviso substituted by s.i. 25 of 1993]

### *68. When court may enter summary judgment*

If the defendant does not find security or satisfy the court, as provided in rule 66 the court may enter summary judgment for the plaintiff, and thereupon the plaintiff may sue out of the office of the registrar a writ or process of execution in terms of any rule of court.

### *69. When court will give leave to defend*

If the defendant finds security or satisfies the court as provided in rule 66 the court shall give leave to defend, and the action shall proceed as if no application had been made.

### *70. Court may give leave to defend unconditionally or on terms*

Leave to defend may be given unconditionally, or subject to such terms as to giving security or time or mode of trial or otherwise as the court may think fit.

### *71. Time for pleading*

Where leave to defend is given, and the defendant has not already pleaded, the time within which the defendant must so plead shall run from the date of such leave, subject to any terms which the court may impose under rule 70 of this Order.

### *72. Costs of application for summary judgment*

The costs in respect of an application for summary judgment shall be in the discretion of the court:

Provided that where—

(*a*) the plaintiff makes an application under this Order and the case is not within the Order; or

(*b*) the plaintiff in the opinion of the court knew that the defendant relied on a contention which would entitle him to unconditional leave to defend;

the court may order that the action be stayed until the plaintiff has paid the defendant's costs, and may order that such costs shall be taxed as between attorney and client.

### *73. Other orders which court may make*

If on the hearing of an application made under this Order it appears -

(*a*) that a defendant is entitled to leave to defend and some other defendant is not so entitled; or

(*b*) that a defendant is entitled to leave to defend as to part of the claim;

the court may—

(i) give leave to defend to a defendant so entitled thereto and give judgment against a defendant not so entitled; or

(ii) give leave to defend to the defendant as to such part of the claim, and enter judgment against the defendant as to the balance of the claim;

or make both orders mentioned in (i) and (ii).

### *74. Setting aside of summary judgment*

(1) If a defendant against whom judgment in terms of this Order has been granted satisfies the same within one month thereafter or within such extended time, not being more than three months in all, as the court at the

time of giving judgment may allow, he may within one month after so satisfying the judgment make a court application to set aside the judgment.

[Subrule amended by s.i. 43 of 1992]

(2) On such application the court may on good cause shown set aside the judgment and give leave to defend, and may give directions as to the giving of security by the plaintiff for the return of the money or goods recovered, if the defendant should be successful, or for the payment into court of such money or the deposit with a custodian of such goods, to abide the result of the action.

(3) Where such leave is given the action shall proceed in the ordinary manner subject to any directions which the court may give.

## ORDER 11

DISMISSAL OF ACTION

### *75. Application for dismissal of action*

(1) Where a defendant has file his plea, he may maker a court application for the dismissal the action on the ground that it is frivolous or vexatious.

(2) A court application in terms of subrule (1) shall be supported by affidavit made by the defendant or a person who can swear positively to the facts or averments set out therein, stating that in his belief the action is frivolous or vexatious and setting out the grounds for his belief.

(3) A deponent may attach to his affidavit filed in terms of subrule (2) documents which verify his belief that the action is frivolous or vexatious.

[Rule substituted by s.i. 25 of 1993]

### *76. Application of Order 32*

Subject to this Order, Order 32 shall apply to an application under rule 75 and to any opposition thereto.

[Rule substituted by s.i. 25 of 1993]

### *77. Plaintiff's answer to defendant*

[Rule repealed by s.i. 25 of 1993]

### *78. No evidence by defendant: no cross-examination by either party*

[Rule repealed by s.i. 25 of 1993]

### *79. Powers of court on application*

(1) Unless the court is satisfied, whether the plaintiff has given evidence or not, that the action is frivolous or vexatious, it shall dismiss the application, and the action shall proceed as if no application had been made.

(2) If the court is satisfied that the action is frivolous or vexatious, it may dismiss the action and enter judgment of absolution from the instance with costs.

(3) Where the court is of opinion that the defendant has no good grounds for alleging that the action was frivolous or vexatious, it may order that the defendant pay the plaintiff's costs as between attorney and client.

(4) Where on the hearing of an application made under this Order in a case in which there is more than one defendant, it appears that as against one defendant the action is frivolous or vexatious, but it does not so appear as against another defendant, the court may order that as against one defendant the action be dismissed and judgment of absolution from the instance with costs be entered, but that against another defendant the plaintiff be at liberty to proceed with the action.

## ORDER 12

PROCEDURE FOR BARRING

### *80. Notice of intention to bar*

A party shall be entitled to give five day's notice of intention to bar to any other party to the action who has failed to file his declaration, plea or request for further particulars within the time prescribed in these rules and shall do so by delivering a notice in Form No. 9 at the address for service of the party in default.

[Rule amended by s.i. 43 of 1992 and by s.i. 80 of 2000]

### *81. Procedure for barring*

On the expiry of the time limited by the notice, the party who has served the notice may bar the opposite party by filing a copy of the notice with the registrar. The endorsement on Form No. 9 shall be duly completed before filing and it shall be signed by the party who has given the notice or his legal practitioner.

### *82. Withdrawal of bar by party*

A party who has barred his opponent may withdraw such bar by filing a notice with the registrar in Form No. 10.

### *83. Effect of bar*

While a bar is in operation—

(*a*) the registrar shall not accept for filing any pleading or other document from the party barred; and

(*b*) the party barred shall not be permitted to appear personally or by legal practitioner in any subsequent proceedings in the action or suit;

except for the purpose of applying for the removal of the bar:

[Rule substituted by s.i. 33 of 1996]

### *84. Removal of bar and effect*

(1) A party who has been barred may—

(*a*) make a chamber application to remove the bar; or

(*b*) make an oral application at the hearing, if any, of the action or suit concerned;

and the judge or court may allow the application on such terms as to costs and otherwise as he or it, as the case may be, thinks fit.

(2) The withdrawal or removal of a bar shall not preclude a subsequent bar for subsequent default.

[Rule substituted by s.i. 33 of 1996]

## ORDER 13

JOINDER OF PARTIES AND ACTIONS

### *85. Joinder of parties*

Subject to rule 86 two or more persons may be joined together in one action as plaintiffs or defendants whether in convention or in reconvention where—

(*a*) if separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions; and

(*b*) all rights to relief claimed in the action, whether they are joint, several or alternative, are in respect of or arise out of the same transaction or series of transactions.

### *85A. Change of party through death, change of status, etc.*

[Rule inserted by s.i. 43 of 1992]

(1) No proceedings shall terminate solely as a result of the death, marriage, or other change of status of any person, unless the cause of the proceedings is thereby extinguished.

(2) If, as a result of an event referred to in subrule (1), it is necessary or desirable to join or substitute a person as a party to any proceedings, any party to the proceedings may, by notice served on that person and all other parties and filed with the registrar, join or substitute that person as a party to the proceedings, and thereupon, subject to subrule (4), the proceedings shall continue with the person so joined or substituted, as the case may be, as if he had been a party from their commencement:

Provided that—

(i) except with the leave of the court, no such notice shall be given after the commencement of the hearing of any opposed matter;

(ii) the copy of the notice filed on the person to be joined or substituted shall be accompanied by copies of all documents previously filed or served in the proceedings.

(3) Where a party to any proceedings dies or ceases to be capable of acting as such, his executor, curator, trustee or other legal representative may, by notice filed with the registrar and served on all other parties to the proceedings, state that he wishes to be substituted for that party, and thereupon, subject to subrule (4), he shall be deemed to have been so substituted in his capacity as curator, trustee or legal representative, as the case may be.

(4) A judge may, on chamber application being made to him within fifteen days after the service of a notice in terms of subrule (2) or (3), set aside or vary any joinder or substitution of a party effected in terms of subrule (2) or (3), as the case may be.

### *86. Court may order separate trials*

(1) If claims in respect of two or more causes of action are included by a plaintiff in the same action or by a defendant in a claim in reconvention, or if two or more plaintiffs or defendants are parties to the same action, and it appears to the court that the joinder of causes of action or of parties, as the case may be, may embarrass or delay the trial or is otherwise inconvenient, the court may order separate trials or make such other order as may be expedient.

(2) If it appears on the application of any party against whom a claim in reconvention is made that the subject matter of such claim ought for any reason to be disposed of by a separate action, the court may order the claim in reconvention to be struck out or may order it to be tried separately or make such other order as may be expedient.

(3) A judge may make an order referred to in subrule (1) or (2) where the parties to the action consent to the order.

[Subrule inserted by s.i. 368 of 1990]

### *87. Misjoinder or nonjoinder of parties*

(1) No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

(2) At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application—

(*a*) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;

(*b*) order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, to be added as a party;

but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised.

(3) A court application by any person for an order under subrule (2) adding him as a defendant shall, except with the leave of the court, be supported by an affidavit showing his interest in the matters in dispute in the cause or matter.

[Subrule amended by s.i. 43 of 1992]

### *88. Provisions consequential on making of order under rule 87*

(1) Where an order is made under rule 87, the summons by which the action in question was begun shall be amended accordingly and shall be endorsed with—

(*a*) a reference to the order in pursuance of which the amendment is made; and

(*b*) the date on which the amendment is made;

and the amendment shall be made within such period as may be specified in the order or, if no period is so specified, within twelve days after the making of the order.

(2) Where, by an order under rule 87, a person is to be made a defendant, the rules as to service of a summons shall apply accordingly to service of the amended summons on him, but before serving the summons on him the person on whose application the order was made shall procure the order to be noted in the registry.

(3) Where, by an order under rule 87, a person is to be made a defendant, the rules as to entry of appearance shall apply accordingly to entry of appearance by him.

(4) Where, by an order under rule 87, a person is to be added as a party or is to be made a party, that person shall not become a party until the summons has been amended in relation to him under this rule and, if he is a defendant, has been served on him.

### *89. Representative proceedings*

(1) Where numerous persons have the same interest in any proceedings, the proceedings may be begun, and, unless the court orders otherwise, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

(2) At any stage of proceedings under this rule, the court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons as representing whom the defendants are sued, to represent all, or all except one or more, of those persons in the proceedings; and where, in the exercise of the power conferred by this rule, the court appoints a person not named as a defendant, it shall make an order under rule 87 adding that person as a defendant.

(3) A judgment or order given in proceedings under this rule shall be binding on all the persons as representing whom the plaintiffs sue or, as the case may be, the defendants are sued, but shall not be enforced against any person not a party to the proceedings, except with the leave of the court.

(4) An application for the grant of leave under subrule (3) shall be made by way of a court application which shall be served personally on the person against whom it is sought to enforce the judgment or order.

[Subrules amended by s.i. 43 of 1992]

(5) Notwithstanding that a judgment or order to which such application relates is binding on the person against whom the application is made, that person may dispute liability to have the judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from such liability.

(6) The court hearing an application for the grant of leave under subrule (3) may order the question whether the judgment or order is enforceable against the person against whom the application is made to be tried and determined in any manner in which any issue or question in an action may be tried or determined.

### *90. . Married women: capacity to sue or to be sued*

[Rule repealed by s.i. 80 of 1998]

### *91. Representation of beneficiaries by trustees and others*

Any proceedings may be brought by or against trustees, executors or administrators in their capacity as such without joining any of the persons having a beneficial interest in the trust or estate, as the case may be; and any judgment or order given or made in those proceedings shall be binding on those persons unless the court in the same or other proceedings otherwise orders on the ground that the trustees, executors or administrators, as the case may be, could not or did not in fact represent the interests of those persons in the first-mentioned proceedings.

### *92. Consolidation of actions*

Where separate actions have been instituted and it appears to the court convenient to do so, it may upon the application of any party thereto and after notice to all interested parties, make an order consolidating such actions, whereupon—

(*a*) the said actions shall proceed as one action;

(*b*) the court may make any order which it considers proper with regard to the further procedure, and may give one judgment disposing of all matters in dispute in the said actions.

[Paragraph amended by s.i. 368 of 1990]

Provided that, with the consent of the parties to the actions, a judge may make an order consolidating the actions and any order which he considers proper with regard to the further procedure.

[Proviso inserted by s.i. 368 of 1990]

## ORDER 14

THIRD-PARTY PROCEDURE

### *93. Grounds on which defendant may apply by notice of motion to join third party in action*

Where in any action a defendant who has entered appearance claims as against any person not already a party to the action (in this Order called the third party)—

(*a*) that he is entitled to contribution or indemnity;

(*b*) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or

(*c*) that any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between the plaintiff and the defendant, and should properly be determined, not only as between the plaintiff and the defendant, but as between the plaintiff and the defendant and the third party, or between any or either of them;

the defendant may make a court application to join that person as a third party in the action.

[Rule amended by s.i. 43 of 1992]

### *94. Contents and service of application and other documents*

(1) The application shall state the nature and grounds of the claim or the nature of the question or issue sought to be determined and the nature and extent of any relief or remedy claimed. It shall be served on the third party and on all other parties to the action.

(2) The application shall, unless otherwise ordered by a judge, be served within the time limited for filing the plea, or where the application is served by a defendant to a claim in reconvention, the plea thereto, and with it there shall be served upon the third party a copy of the summons and of any pleadings filed in the action.

### *95. Powers of court on hearing application*

The court hearing the application may—

(*a*) give the third party liberty—

(i) to defend the action either alone or jointly with the original defendant, upon such terms as may be just; or

(ii) to appear at the trial and take such part therein as may be just;

and

(*b*) generally—

(i) order such proceedings to be taken, pleadings to be filed or documents to be delivered, or amendments to be made; and

(ii) give such directions;

as to the court appears proper for having the question and the rights and liabilities of the parties most conveniently determined and enforced, and as to the mode and extent in or to which the third party shall be bound and made liable by the decision or judgment in the action.

### *96. Judgment or order which court may give*

(1) Where the action is tried, the court may, at or after the trial, enter such judgment as the nature of the case may require for or against the defendant giving the notice, against or for the third party, and may grant to the

defendant or to the third party any relief or remedy which might properly be granted if the third party had been made a defendant to an action duly instituted against him by the defendant:

Provided that execution against the third party shall not be issued without leave of the court until after satisfaction by the defendant of any judgment given against him in the action.

(2) Where the action is decided otherwise than by trial, the court may, on notice of set down given by the defendant or the third party, make such order as the nature of the case may require, and, where the defendant has satisfied any judgment given in favour of the plaintiff, may order such judgment as may be just to be entered for or against the defendant giving notice against or for the third party.

### *97. Costs as between third party and other parties*

The court may decide all questions of costs as between a third party and other parties to the action, and may order any one or more of them to pay the costs of any other, or others, or give such direction as to costs as the justice of the case may require.

### *98. Claims and issues between a defendant and another defendant*

(1) Where a defendant claims against another defendant—

(*a*) that he is entitled to contribution or indemnity;

(*b*) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or

(*c*) that any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between the plaintiff and the defendant making the claim and should properly be determined, not only as between the plaintiff and the defendant making the claim, but as between the plaintiff and that defendant and another defendant or between any or either of them;

the defendant making the claim may issue and serve on such other defendant a notice making such claim or specifying such question or issue, and if he does so shall apply for directions in terms of Order 23.

(2) On such application the court or judge may exercise any of the powers *mutatis mutandis* contained in rule 95.

(3) If the court or judge orders that the issue between the two defendants be determined in the action, then as between the two defendants the provisions of rules 96 and 97 shall apply *mutatis mutandis*.

(4) Nothing herein contained shall prejudice the rights of the plaintiff against any defendant to the action.

## ORDER 15

PLEADING GENERALLY

### *99. Form and content of pleadings*

[Rule substituted by s.i. 43 of 1992]

A pleading shall—

(*a*) be legibly written on A4 size paper on one side only; and

(*b*) state the title of the action, the case number, if any, and the description of the pleading; and

(*c*) contain a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved; and

(*d*) be divided into paragraphs numbered consecutively, each paragraph containing wherever possible a separate allegation; and

(*e*) have each page, including every document annexed to it, numbered consecutively; and

(*f*) be signed by the party concerned or by his legal practitioner; and

(*g*) give the party's address for service.

### *100. Filing of pleadings and delivery of copy*

Every pleading shall be filed with the registrar of the registry where the action is proceeding and, except in the cases provided for by these rules, a copy of it shall be delivered forthwith by the party to the other party or parties to the action.

### *Copies of documents to be filed with pleadings*

[Rule inserted by s.i. 192 of 1997 and amended by s.i. 202 of 1997]

101. Where by any law a certificate or other document is required to be attached to or filed with any pleading, it shall be sufficient to attach or file a photocopy or other facsimile of the certificate or document:

Provided that the original certificate or document shall be produced at the trial if the court or a judge requires the party concerned to do so.

### *102. Certain matters of fact not required to be pleaded unless denied*

Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied, for example,

consideration for a bill of exchange, where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim.

### *103. Particulars required: misrepresentation, fraud, etc.*

(1) In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary, particulars (with dates and items, if necessary) shall be stated in the pleading:

Provided that if the particulars are of debt, expenses or damages, and exceed three folios, the fact may be so stated, with a reference to full particulars already delivered or to be delivered with the pleading.

(2) Whenever the contents of a document are material, it shall be sufficient in a pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.

### *104. Matters which must be specifically pleaded*

(1) The defendant or plaintiff, as the case may be, shall raise by his pleading all matters which show the action or claim in reconvention not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, prescription, release, payment, performance or facts showing illegality, either by statute or common law.

(2) Except as provided by rule 117, every allegation in a declaration or claim in reconvention shall be dealt with by the opposite party specifically. He shall admit or deny every allegation, or state that he has no knowledge concerning it, or confess and avoid it. Every allegation not so dealt with shall be taken to be admitted. The same rule shall apply to every allegation in subsequent pleadings, except where a joinder of issue is justified.

(3) Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be, and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading.

[Subrule amended by s.i. 126 of 1989]

(4) When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he shall not do so evasively, but shall answer the point of substance.

(5) When a contract, promise or agreement is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract, promise or agreement alleged or of the matters of fact from which the same may be implied by law, and not as a denial of the legality or sufficiency in law of such contract, promise or agreement.

### *105. Departure*

A party shall not in any pleading, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with a previous pleading of his.

### *106. No objection on ground of want of form*

No technical objection shall be raised to any pleading on the ground of any alleged want of form.

## ORDER 16

CLOSURE OF PLEADINGS

### *107. Close of pleadings*

The pleadings shall be considered closed—

(*a*) if one of the parties is barred;

(*b*) if either of the parties has joined issue upon any pleading of the opposite party without adding any further or special pleading thereto;

(*c*) if a written agreement signed by the counsel of both parties that the pleadings shall be considered as closed has been filed with the registrar.

### *108. Application for closure*

[Rule substituted by s.i. 43 of 1992]

Any party, if he believes the record to be complete and that the pleadings ought to be closed, may make a chamber application for an order that the pleadings should be adjudged to be closed, whereupon the judge may make such order as he thinks fit.

## ORDER 17

DECLARATION

### *109. Declaration: statement of plaintiff's claim*

The statement of the plaintiff's claim shall be called his declaration, and it shall state truly and concisely the name and description of the party suing and his place of residence or place of business, and if he sues in a representative capacity, the capacity in which he sues, the name of the defendant and his place of residence or place of business, and if he is sued in a representative capacity, the capacity in which he is sued and the nature, extent and grounds of the cause of action, complaint or demand.

### *110. Mode of stating relief claimed*

(1) Every declaration shall state precisely the relief which the plaintiff claims, either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the court may think just to the same extent as if it had been asked for.

(2) Where the claim if for a debt or liquidated amount which includes capital and interest on the capital, the declaration shall state such of the particulars set out in subrules (4) and (5) of rule 13 as may be relevant to the claim.

[Subrule inserted by s.i. 192 of 1997]

### *111. Distinct claims to be separately stated*

Where the plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct grounds, they shall be stated, as far as may be, separately and distinctly.

### *112. Barring: failure of plaintiff to file declaration*

Where the defendant has entered appearance to defend and the plaintiff has failed to file his declaration within twelve days of the date of entry, the defendant may give the plaintiff notice of intention to bar him from declaring.

### *113. Filing and service of declaration*

Subject to the provisions of rule 112 the plaintiff may file and serve his declaration with the summons or at any time after issue of the summons.

### *114. Costs of declaration where defendant tenders in full*

Unless the court orders otherwise on good cause shown, no costs of the declaration shall be allowed if the defendant within the time allowed for entering appearance, tenders to satisfy the plaintiff's claim in full.

### *115. Amendment in declaration of claim stated in summons*

In his declaration a plaintiff may alter, modify or extend his claim or claims as stated in the summons and the summons shall thereupon be deemed to be amended in accordance with the claim or claims made in the declaration:

Provided that where the defendant shows that he is prejudiced by such amendment the court may make such order as to costs or otherwise as the justice of the case demands.

## ORDER 18

PLEA AND CLAIM IN RECONVENTION

### *116. Plea: requisites*

(1) The defendant's answer to the plaintiff's declaration shall be called his plea, and it shall set forth concisely the nature of his defence, and deal with the allegations in the declaration as provided by subrule (2) of rule 104.

(2) Where the defendant relies upon several distinct grounds of defence or set-off founded upon separate and distinct facts, they shall be stated as far as may be separately and distinctly.

### *117. Plea: denial or defence not necessary as to damages claimed or amount*

No denial or defence shall be necessary as to damages claimed or their amount, but they shall be deemed to be put in issue in all cases unless expressly admitted.

### *118. Extra costs occasioned by denial or failure to admit facts*

Where the court is of the opinion that any allegation of fact denied or not admitted by the defendant ought to have been admitted, the court may make such order as shall be just with respect to any extra costs occasioned by their having been denied or not admitted.

### *119. Time for filing plea, exception or special plea*

The defendant shall file his plea, exception or special plea within ten days of the service of the plaintiff's declaration:

Provided that where the plaintiff has served his declaration with the summons as provided for in rule 113 there shall be added to the period of ten days above referred to the time allowed a defendant to enter appearance as calculated in terms of rule 17.

[Rule amended by s.i. 80 of 2000]

***120. Claim in reconvention and effect***

(1) The defendant in an action may set up by way of claim in reconvention any right or claim he may have against the plaintiff, and such claim in reconvention shall have the same effect as a cross-action, so as to enable the court to pronounce a final judgment in the same action both on the original claim and on the claim in reconvention.

(2) Where a defendant establishes a counterclaim against the claim of the plaintiff and there is a balance in favour of one of the parties, the court may give judgment for the balance, so, however, that this provision shall not be taken as affecting the court's discretion with respect to costs.

***121. Claim in reconvention: rules relating to declaration to apply***

(1) A claim in reconvention shall be so described and shall be bound and filed with the defendant's plea.

(2) A claim in reconvention shall be governed *mutatis mutandis* by the rules relating to a declaration, including rules 110 and 111.

***122. Incorporation in claim in reconvention of facts and allegations by reference***

Facts and allegations already set forth in the plea, or in the declaration and admitted in the plea, may be incorporated in the claim in reconvention by reference to the relevant paragraphs of the plea or declaration as the case may be.

***123. Claim in reconvention may be proceeded with although plaintiff's action stayed***

If, in any case in which the defendant sets up a claim in reconvention, the action of the plaintiff is stayed, discontinued or dismissed, the claim in reconvention may nevertheless be proceeded with.

***124. Court may order plaintiff's claim and claim in reconvention to be tried separately***

The court may for good cause shown order the plaintiff's claim and the claim in reconvention to be tried separately.

## ORDER 19

## SUBSEQUENT PLEADINGS

***125. Plaintiff's replication: reply to plea: time for filing***

Where a reply to the defendant's plea is necessary it shall be called the plaintiff's replication and shall be filed within twelve days of the service of the plea.

***126. Plaintiff's replication: confession and avoidance***

Where the plaintiff desires to meet the allegations in the plea by confession and avoidance he must do so in a replication, and he must raise by his replication all such grounds of reply to the plea as, if not raised, would be likely to take the defendant by surprise, or would raise issues of fact not arising out of the preceding pleadings. In the replication the plaintiff shall admit such allegations in the plea as he is willing to admit with a view to saving expense at the trial.

***127. Plaintiff's plea: claim for reconvention: rules***

The plaintiff's answer to a claim in reconvention shall be called "the plaintiff's plea—claim in reconvention" and it shall be governed *mutatis mutandis* by the rules relating to a plea and it shall be bound with the plaintiff's replication.

***128. Defendant's replication: claim in reconvention: rules***

The defendant's answer to the plaintiff's plea shall be called "the Defendant's Replication – Claim in Reconvention" and the rules for a replication shall *mutatis mutandis* be observed in regard to it.

***129. Rejoinder: answer to allegations in replication: time for filing***

(1) Where an answer to allegations in a replication is made it shall be called a Rejoinder.

(2) Where a rejoinder is necessary it shall be filed within twelve days of the service of the replication which it answers.

***130. Notification where answer is a joinder of issue***

Where a party's only answer to a plea or to any subsequent pleadings is a joinder of issue, he shall by letter notify his opponent of that fact within twelve days of the delivery to him of the last pleading filed. The costs of any such letter and of any matters incidental to it, including any necessary conference with counsel, shall be allowed on taxation

### *131. Joinder of issue: effect*

A joinder of issue shall operate as a denial of every material allegation of fact in the pleadings upon which issue is joined except any facts which the party may be willing to admit.

## ORDER 20

## AMENDMENT OF PLEADINGS AND MATTERS ARISING PENDING ACTION

### *132. Court may allow amendment of pleading*

Subject to rules 134 and 151, failing consent by all parties, the court or a judge may, at any stage of the proceedings, allow either party to alter or amend his pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.

[Rule amended by s.i. 126 of 1989]

### *133. Amendment of pleadings: method*

Pleadings may be amended by written alterations in the copy which has been delivered and by additions on paper to be interleaved therewith if necessary, but where the amendments are so numerous or of such a nature that the making of them in writing would render the document difficult or inconvenient to read, copies of the pleadings as amended shall be filed.

### *134. Amendment of summons or declaration: cause of action arising after issue of summons*

(1) A summons or declaration may with the leave of the court or a judge be amended to substitute or to include a cause of action arising after the issue of summons:

Provided that in the opinion of the court or a judge such an amendment does not change the action into, or add to it, an action of a substantially different character which would more conveniently be the subject of a fresh action.

(2) The court or a judge granting such leave shall fix the times for the defendant's entry of appearance to the new cause of action and for the filing of all subsequent pleadings.

[Rule amended by s.i. 126 of 1989]

### *135. Further ground of defence arising in course of pleading*

(1) Any ground of defence which has arisen after the issue of summons, but before the defendant has delivered his plea, may be raised by the defendant in his plea, either alone or together with other grounds of defence.

(2) If, after a plea has been delivered, any ground of defence arises to any set-off or claim in reconvention alleged therein by the defendant, it may be raised by the plaintiff in his replication or plea—claim in reconvention, either alone or together with any other ground of reply.

(3) Where any ground of defence arises after the defendant has delivered a plea, the defendant may within twelve days after such ground of defence has arisen, or at any subsequent time by leave of the court, file a further plea setting forth the same.

(4) Where any ground of defence to any set-off or claim in reconvention arises after the plaintiff's replication or plea—claim in reconvention, the plaintiff may within twelve days after such ground of defence has arisen, or at any subsequent time by leave of the court, file a further plea setting forth the same.

### *136. Confession of defence arising after commencement of action*

(1) Whenever any defendant in his plea or in any further plea as in the last rule mentioned, alleges any ground of defence which has arisen after the commencement of the action, the plaintiff may file with the registrar a confession of such defence and deliver a copy thereof to the defendant, and he shall thereupon be entitled to tax his costs incurred to the time of the pleading of such defence and thereafter to make a chamber application for judgment for such taxed costs, unless the court or a judge, either before or after the delivery of such confession, otherwise orders.

[Subrule amended by s.i. 43 of 1992]

(2) The confession shall be in Form No. 11.

## ORDER 21

SPECIAL PLEAS, EXCEPTIONS, APPLICATIONS TO STRIKE OUT AND APPLICATIONS FOR PARTICULARS

### *137. Alternatives to pleading to merits: forms*

(1) A party may—

(*a*) take a plea in bar or in abatement where the matter is one of substance which does not involve going into the merits of the case and which, if allowed, will dispose of the case;

(*b*) except to the pleading or to single paragraphs thereof if they embody separate causes of action or defence as the case may be;

(*c*) apply to strike out any paragraphs of the pleading which should properly be struck out;

(*d*) apply for a further and better statement of the nature of the claim or defence or for further and batter particulars of any matter stated in any pleading, notice or written proceeding requiring particulars.

[Subrule amended by s.i. 120 of 1995]

(2) A plea in bar or abatement, exception, application to strike out or application for particulars shall be in the form of such part of Form No. 12 as may be appropriate *mutatis mutandis*, and a copy thereof filed with the registrar. In the case of an application for particulars, a copy of the reply received to it shall also be filed.

### *138. Procedure on filing special plea, exception or application to strike out*

When a special plea, exception or application to strike out has been filed—

(*a*) the parties may consent within ten days of the filing to such special plea, exception or application being set down for hearing in accordance with subrule (2) of rule 223;

[Paragraph amended by s.i. 126 of 1989 and s.i 120 of 1995]

(*b*) failing consent either party may within a further period of four days set the matter down for hearing in accordance with subrule (2) of rule 223;

[Paragraph substituted by s.i. 126 of 1989]

(*c*) failing such consent and such application, the party pleading specially, excepting or applying, shall within a further period of four days plead over to the merits if he has not already done so and the special plea, exception or application shall not be set down for hearing before the trial.

### *139. Special pleas, etc. to be stated or made at one time: pleading to merits*

(1) A party shall state all his special pleas and exceptions and make all his applications to strike out at one time:

Provided that where an exception or special plea is taken or where application to strike out is made it shall not be necessary to plead to the merits of the case.

(2) A party who pleads over may be allowed the costs of such plea to the merits even where the case is disposed of without going into such merits.

### *140. Complaint by letter before applying to strike out or filing exception*

(1) Before—

(*a*) making a court application to strike out any portion of a pleading on any grounds; or

(*b*) filing any exception to a pleading;

the party complaining of any pleading may state by letter to the other party the nature of his complaint and call upon the other party to amend his pleading so as to remove the cause of complaint.

[Subrules amended by s.i. 43 of 1992]

(2) The costs of any such necessary letter and of any matters incidental to it, including any necessary conferences with another legal practitioner, shall be allowable on taxation.

[Subrule amended by s.i. 277 of 1981]

(3) In dealing with the costs of any motion to strike out or of any exception, the provisions of this rule shall be taken into consideration by the court.

### *141. Powers of court in relation to pleadings*

At any stage of the proceedings the court may—

(*a*) order to be struck out or amended—

(i) any argumentative or irrelevant or superfluous matter stated in any pleading;

(ii) any evasive or vague and embarrassing or inconsistent and contradictory matter stated in any pleading;

(iii) any matter stated in any pleading which may tend to prejudice, embarrass or delay the fair trial of the action;

(*b*) order either party to furnish a further and better statement of the nature of his claim or defence, or further and better particulars of any matter stated in any pleading, notice or written proceeding requiring particulars.

### *142. Time for replying to pleading where application for particulars made*

If a party applies for particulars, the time for replying to the pleading of which particulars are sought shall be calculated—

(*a*) where the particulars are supplied voluntarily or pursuant to an order of court, from the date on which the particulars are supplied;

(*b*) where the particulars are refused and the applicant fails to make a court application for an order within twelve days of the refusal, from the date of expiry of such period of twelve days;

(*c*) where the particulars are refused and the court refuses to order the particulars to be supplied, from the date of the court's refusal.

[Rule amended by s.i. 43 of 1992]

### *143. Further particulars after close of pleadings*

After the close of pleadings, any party may, not less than twelve days before trial, deliver notice in accordance with Form No. 13 calling for such further particulars of any pleading, notice or written proceeding as are necessary to enable him to prepare for trial. The party so called upon shall reply thereto within ten days of delivery of the notice.

## ORDER 22

OFFERS AND TENDERS IN SETTLEMENT

[Order substituted by s.i. 43 of 1992]

### *144. Offers to settle*

(1) In any proceedings in which a sum of money is claimed, whether alone or together with any other relief, any person who may be ordered to pay or contribute towards that sum or any part of it may at any time make a written offer to settle the whole or any part of the claim.

(2) Without derogation from subrule (1), a person who may be ordered to contribute towards an amount for which any other person may be held liable may give a written indemnity to that other person by way of an offer of settlement.

(3) A person making an offer in terms of this rule may specify that the offer is made without prejudice.

(4) An offer made in terms of this rule, and any indemnity given in terms of subrule (2), shall—

(*a*) be signed by the person making or giving it or by his legal practitioner; and

(*b*) set out all the terms and conditions under which it is made or given; and

(*c*) be served on the person to whom it is made or given; and

(*d*) indicate that it is made in terms of this rule.

### *145. Tender of performance*

(1) In any proceedings in which the performance of some act is claimed, whether alone or together with any other relief, any person who may be ordered to perform the act may at any time make a written tender to perform it, either wholly or in part.

(2) A person who tenders performance of an act in terms of subrule (1) shall execute and deliver to the registrar an irrevocable power of attorney authorizing its performance by the person who claims performance, unless the act is such that it can be performed only by the person making the tender.

(3) A person making a tender in terms of this rule may specify that the tender is made without prejudice.

(4) A tender made in terms of this rule shall—

(*a*) be signed by the person making it or by his legal practitioner; and

(*b*) set out all the terms and conditions under which it is made; and

(*c*) be served on the person to whom it is made; and

(*d*) indicate that it is made in terms of this rule.

### *146. Notice of offer or tender*

(1) Written notice of an offer or tender in terms of this Order shall be given to all parties to the proceedings concerned and shall state—

(*a*) whether or not the offer or tender is made without prejudice; and

(*b*) whether the offer or tender is made in settlement of both claim and costs or of the claim only; and

(*c*) whether or not the offer or tender is accompanied by an offer to pay all or part of the costs of the party to whom the offer or tender is made and, if so, any conditions subject to which the costs will be paid.

(2) Where the person making an offer or tender in terms of this Order disclaims liability for the payment of costs or any part thereof, the notice given in terms of subrule (1) shall state his reasons for such disclaimer.

### *147. Acceptance of offer or tender*

(1) Within the period prescribed in subrule (2), a person to whom an offer or tender has been made in terms of this Order may accept it by filing with the registrar a written notice signed by the person accepting the offer or tender or by his legal practitioner.

(2) An offer or tender shall not be capable of acceptance more than fifteen days after it was served on the person to whom it was made, unless—

(*a*) the person who made the offer or tender gives his written consent to its acceptance after that period; or

(*b*) the court, on application, directs that the offer or tender may be accepted after that period, subject to such terms and conditions as it thinks fit.

(3) As soon as possible after filing a notice of acceptance in terms of subrule (1), the person who filed it shall serve a copy on the person who made the offer or tender concerned, and shall file with the registrar proof of such service in accordance with rule 14.

(4) Where a power of attorney has been delivered to the registrar in terms of subrule (2) of rule 145, the registrar, after satisfying himself that the requirements of this rule have been complied with, shall forthwith hand it over to the person accepting the tender concerned.

(5) If an offer or tender accepted in terms of this rule is not—

(*a*) stated to be in settlement of both the claim and the costs of the person to whom the offer or tender is made; or

(*b*) accompanied by an offer to pay all the costs of the person to whom the offer or tender is made;

the person who accepted the offer or tender make a court application for an order as to costs, including the costs of the application.

### *148. Failure to pay or perform in accordance with offer or tender*

If a person who has made an offer or tender that has been accepted in terms of rule 147 fails to pay or perform in accordance with the offer or tender within ten days of such acceptance, or within such later period as may be specified in the offer or tender, the person who accepted the offer or tender may make a chamber application, on not less than ten days' notice, for judgment in accordance with the offer or tender as well as for the costs of the application.

### *149. Non-disclosure of offer or tender made without prejudice*

Where an offer or tender is made in terms of this Order without prejudice—

(*a*) it shall not be disclosed to the court at any time before judgment has been given in the proceedings concerned; and

(*b*) the registrar shall ensure that, until judgment has been given in the proceedings concerned, no reference to the offer or tender appears in any file in his office which contains the papers in the proceedings; and

(*c*) any party who, in contravention of paragraph (*a*), discloses to a judge or the court that the offer or tender has been made shall be liable to have costs awarded against him even if he is successful in the proceedings.

### *150. Effect of offer or tender on costs in proceedings*

(1) The fact that an offer or tender has been made in terms of this Order may be brought to the notice of the court after judgment has been given in the proceedings concerned as being relevant to the question of costs.

(2) Where the court has made an order as to costs in any proceedings in ignorance of an offer or tender made in terms of this Order, the court may reconsider the question of costs if any party to the proceedings makes a court application within five days for the question of costs to be reconsidered.

## ORDER 23

APPLICATIONS FOR DIRECTIONS

### *151. (Application for directions after pleadings closed: notice to opposite party*

(1) In any action after pleadings are closed, or by leave of a judge after appearance has been entered, either party may make a chamber application for directions in respect of any interlocutory matter on which a decision may be required.

[Subrules amended by s.i. 43 of 1992]

(2) ….

[Subrule repealed by s.i. 43 of 1992]

### *152. Matters to be stated in notice*

(1) The party applying for directions shall in his affidavit state the matters in respect of which he intends to ask for directions, and such matters shall, so far as is necessary and practicable, include generally the proceedings to be taken in the action and the costs of the application, and more particularly the following: pleadings, amendments of pleadings, particulars, special pleas and exceptions, admissions, removal of trial, the hearing of arguments on points of law, the hearing separately of one or more of the issues, discovery, inspection of documents, inspection of movable and immovable property, commissions, examination of witnesses, place and date of trial.

[Subrule amended by s.i. 25 of 1993]

(2) ….

[Subrule repealed by s.i. 25 of 1993]

### *153. Opposite party may also apply for directions*

(1) The party to whom notice of an application is given shall also, as far as is practicable, apply at the hearing of the application for any directions which he may desire in respect of the matters specified in rule 152.

(2) Such party, if he intends to apply for any directions, shall before the hearing give notice to the other party or parties to the action of the matters in respect of which he intends to ask for directions.

(3) …..

[Subrule repealed by s.i. 25 of 1993]

### *154. Order on hearing of application*

Upon the hearing of the application the judge shall, as far as practicable, make such order as may be just as to any matters in respect of which directions were asked.

### *155. Application for directions before close of pleadings*

Where a party desires to make application for directions after the entry of appearance but before the close of pleadings, he or his legal practitioner may do so by entry in the chamber book stating the grounds on which he seeks leave, and the judge may grant or refuse leave or make such order thereupon as he deems just.

[Rule amended by s.i. 25 of 1993]

### *156. . Affidavit may not be used at hearing except with leave*

[Rule repealed by s.i. 25 of 1993]

### *157. Further application for directions and costs*

(1) A party may, before judgment is given on his original application for directions, make a further chamber application for directions.

[Subrule amended by s.i. 43 of 1992]

(2) The costs of any application subsequent to the original application may be ordered to be borne by the party applying if the judge is of the opinion that such application should have been made at the hearing of the original application.

### *158. Hearing of application: order as to particular matters*

On the hearing of an application under this Order the judge may—

(*a*) make an order—

(i) that evidence of any particular fact to be specified in his order shall be given at the trial by affidavit; or

(ii) by consent of parties dispensing with any of the technical rules of evidence for the avoidance of expense and delay;

(*b*) in commercial causes make in addition such order or orders as he thinks fit for the speedy determination of the questions really in issue between the parties, and particularly he may make orders dispensing with formal pleadings and settling the issues to be tried between the parties. Commercial causes shall include causes arising out of the ordinary transactions of merchants and traders; amongst others, those relating to the construction of mercantile documents, export or import of merchandise, affreightment, insurance, banking and mercantile agency and mercantile usages.

### *159. Directions where disputes of fact arise in application*

[Rule substituted by s.i. 43 of 1992]

Where in any application, including an application for provisional sentence or for the arrest of a person or the attachment of property, there is a conflict of evidence and the matter cannot be decided without the hearing of oral evidence, the court may—

(*a*) order that such oral evidence as the parties may desire to produce be heard forthwith or on such date as the court may fix;

(*b*) order that the matter should stand over for trial as if the proceedings had been commenced by summons, in which event the court may give directions as to—

(i) dispensing with all pleadings or any particular pleading; or

(ii) dispensing with the oral evidence of any person who has given or may give evidence upon affidavit;

(*c*) make such other orders or give such other directions as the court considers are most conducive to the speedy and inexpensive determination of the matters in issue.

## ORDER 24

DISCOVERY, INSPECTION AND PRODUCTION OF DOCUMENTS

### *160. Notice to make discovery*

A party to a cause or matter may require any other party thereto, by notice in writing, to make discovery on oath within twenty-four days of all documents relating to any matter in question in such cause or matter which are or have at any time been in the possession or control of such other party, whether such matter is one arising between the party requiring discovery and the party required to make discovery or not. Such notice shall not, save with the leave of a judge, be given before the close of pleadings.

### *161. Requirements as to making discovery*

(1) The party required to make discovery shall within twenty-four days or within the time stated in any order of a judge, make discovery of such documents on affidavit in accordance with Form No. 18 specifying separately—

(*a*) such documents in his possession or that of his agent other than the documents mentioned in paragraph (*b*);

(*b*) such documents in respect of which he has a valid objection to produce;

(*c*) such documents which he or his agent had but has not in his possession at the date of the affidavit.

(2) A document shall be deemed to be sufficiently specified if it is described as being one of a bundle of documents of a specified nature, which have been consecutively numbered. Statements of witnesses taken for the purposes of the proceedings, communications between attorney and client, attorney and advocate, pleadings, affidavits and notices in the action shall be omitted from the schedules.

### *162. Further discovery*

If a party believes that there are, in addition to documents as disclosed as aforesaid, documents, including copies thereof, which may be relevant to any matter in question in the possession of any other party thereto, the former may give notice to the latter requiring him to make the same available for inspection in accordance with rule 164 or to state on oath within six days that such documents are not in his possession, in which event he shall, if known to him, state their whereabouts.

### *163. Effect of non-disclosure of document*

A document not disclosed as aforesaid may not, save with the leave of the court granted on such terms as to it may seem just, be used for any purpose at the trial by the party who was obliged but failed to disclose it, but any other party may use such document.

### *164. Inspection of documents disclosed*

(1) Where a party has made discovery, any other party may require him, by notice in accordance with Form No. 19, to make available for inspection any documents he has disclosed in terms of rule 161 and 162.

[Subrule substituted by s.i. 80 of 2000]

(1a) A notice in terms of subrule (1) shall require the party who has discovered the documents to deliver to the party who wishes to inspect the, within five days, a notice in accordance with Form No. 20 specifying—

(*a*) subject to subrule (2), a place where the documents may be inspected; and

(*b*) a period of not less than five days, beginning not later than three days from the delivery of the latter notice, during which the documents may be inspected; and

(*c*) any documents which the party concerned refuses to produce for inspection.

[Subrule inserted by s.i. 80 of 2000]

(2) The place for such inspection shall be—

(*a*) if the person called upon is represented by an attorney, the office of that attorney;

(*b*) in the case of banker's books or other books of account or books in constant use for the purposes of any trade, business or undertaking, their usual place of custody;

(*c*) in any other case, some convenient place mentioned in the notice.

(3) The party receiving the latter notice referred to in subrule (1a) shall be entitled, during normal business hours on one or more of the days within the period specified in the notice, to inspect any documents that are specified in the notice as being available for inspection and to make copies of those documents.

[Subrule substituted by s.i. 80 of 2000]

(4) A party's failure to produce any such document for inspection shall preclude him from using such document at the trial save where the court on good cause shown allows otherwise.

### *165. Failure to give discovery or permit inspection*

(1) If a party fails to make discovery under this Order or, having been served with a notice under rule 164, fails to give notice of a time for inspection or fails to permit inspection as required by that rule, the party desiring discovery or inspection may make a chamber application for an order compelling such discovery or inspection, and the judge may grant or refuse the order as he thinks appropriate.

(2) If a party fails to comply with an order made in terms of subrule (1), the party in whose favour the order was made may make a further chamber application for the dismissal of the defaulting party's claim or the striking out of his defence, as the case may be, and the judge may give judgment in default against the defaulting party.

Provided that, in cases where the claim is for damages a judge shall not give judgment in default unless evidence as to quantum has been adduced either by affidavit or orally in terms of rule 229B.

[Rule substituted by s.i. 25 of 1993 and proviso in subrule (2) inserted by s.i. 101 of 1994]

### *166. Notice to produce original document*

(1) A party may give to any other party who has made discovery of a document, notice in accordance with Form No. 21 to produce at the hearing the original of such document, not being a privileged document, in such party's possession.

(2) Such notice shall be given not less than three days before the hearing but may, if the court so allows, be given during the course of the hearing.

(3) If any such notice is so given, the party giving the same may require the party to whom notice is given to produce the said document in court and shall be entitled, without calling any witness, to hand in the said document, which shall be receivable in evidence to the same extent as if it had been produced in evidence by the party to whom notice is given.

### *167. Court may order production in course of proceedings*

The court may, during the course of any action or proceedings, order the production by any party thereto under oath of such documents in his power or control relating to any matter in question in such action or proceedings as the court may think just, and the court may deal with such documents, when produced, as it thinks just.

### *168. Failure to produce*

If a party, having been served with a notice under rule 166 or having been ordered to produce any documents in terms of rule 167, fails to produce any document as required in terms of the two said rules, the court may dismiss the claim or strike out the defence and may give judgment in default against that party.

Provided that, in cases where the claim is for damages a judge shall not give judgment in default unless evidence as to quantum has been adduced either by affidavit or orally in terms of rule 229B.

[Rule amended by s.i. 25 of 1993 and proviso inserted by s.i. 101 of 1994]

### *169. Notice to produce document referred to in pleadings*

(1) A party to any cause or matter may at any time before the hearing thereof give a notice in accordance with Form No. 22 to any other party in whose pleadings or affidavits reference is made to any document to produce such document for his inspection within ten days and to permit him to take a copy thereof.

[Subrule as amended by s.i. 80 of 2000]

(2) A party failing to comply with such notice shall not, save with the leave of the court, use such document in such action, or proceeding, but any other party may use such document.

(3) Where a party has failed to comply with a notice under subrule (1), the party desiring production of the document concerned may make a chamber application for an order compelling its production, and the judge may order compliance with this rule.

[Subrule substituted by s.i. 43 of 1992]

(4) If a party fails to comply with an order under subrule (3), the other party may make a chamber application to dismiss the claim or strike out the defence, as the case may be, and the judge may give judgment in default against the defaulting party.

Provided that, in cases where the claim is for damages a judge shall not give judgment in default unless evidence as to quantum has been adduced either by affidavit or orally in terms of rule 229B.

[Subrule inserted by s.i. 43 of 1992 and amended by s.i. 25 of 1993, s.i. 101 of 1994 and s.i 120 of 1995

### *170. Court or judge may inspect document for which privilege claimed*

Where on an application for an order for discovery, inspection or production privilege is claimed for any document, it shall be lawful for the court or judge to inspect the document for the purpose of deciding on the validity of the claim of privilege.

### *171. Service of order or notice for discovery etc. on attorney*

Service of an order or notice for discovery, inspection or production made against a party on his attorney shall be sufficient service, but the party against whom the order was made or to whom notice was given may show that he had had no notice or knowledge of the order.

### *172. Failure of attorney to give notice to client*

An attorney upon whom an order is served or to whom notice is given under the last preceding rule who neglects, without reasonable excuse, to give notice thereof to his client, shall be liable to attachment.

### *173. Application of Order extended: minors and their curators ad litem*

The application of this Order shall extend to plaintiffs and defendants who are minors and to their curators *ad litem*.

## ORDER 25

INSPECTIONS, EXAMINATIONS AND EXPERT TESTIMONY

### *174. Claims for damages: bodily injury: medical examination*

Subject to the provisions of this Order a party to proceedings in which damages or compensation in respect of alleged bodily injury is claimed shall have the right to require a party claiming such damage or compensation, whose state of health is relevant for the determination thereof, to submit to medical examination.

### *175. Notice requiring medical examination*

(1) A party requiring another party to submit to such examination shall deliver a notice specifying the nature of the examination required and—

(*a*) the person or persons by whom;
(*b*) the place being within the jurisdiction where;
(*c*) the date being not less than twelve days from the date of such notice;
(*d*) the time when;
it is desired that such examination shall be conducted and requiring such other party to submit himself for examination then and there.

(2) Such notice shall state that such other party may have his own medical adviser present at such examination, and shall be accompanied by a remittance in respect of the reasonable expense to be incurred by such other party in attending such examination. Such expense shall be tendered on the scale as if such person were a witness in a civil suit before the court, subject to the following conditions—

(*a*) if such other party is immobile, the amount to be paid to him shall include the cost of his travelling by motor vehicle and, where required, the reasonable cost of a person attending upon him;
(*b*) where such other party will actually lose his salary, wage or other remuneration during the period of his absence from work, he shall in addition to his expenses on the basis of a witness in a civil case be entitled to receive an amount equal to the salary, wage or other remuneration which he will actually lose;
(*c*) any amounts paid by a party as aforesaid shall be costs in the cause unless the court otherwise directs.

### *176. Objection to medical examination*

(1) The person receiving such notice shall within six days of the service thereof notify the person delivering it in writing of the nature and grounds of any objection which he may have in relation to—

(*a*) the nature of the proposed examination;
(*b*) the person or persons by whom the examination is to be conducted;
(*c*) the place, date or time of the examination;
(*d*) the amount of the expenses tendered to him;
and shall further—

(i) in the case of his objection being to the place, date or time of the examination furnish an alternative place, date or time as the case may be;
(ii) in the case of the objection being to the amount of the expenses tendered furnish particulars of such increased amount as may be required.

(2) If the person receiving the notice fails to deliver such objection within the said period of six days, he shall be deemed to have agreed to the examination upon the terms set forth by the person giving the notice.

(3) If the person giving the notice regards the objection raised by the person receiving it as invalid in whole or in part he may make a chamber application to determine the conditions upon which the examination, if any, is to be conducted.

[Subrule amended by s.i. 43 of 1992]

### *Notice to make available medical reports and other documents*

177. A party to the proceedings may at any time by notice in writing require any person claiming such damages to make available in so far as he is able to do so to such party within ten days any medical reports, hospital records, X-ray photographs, or other documentary information of a like nature relevant to the assessment of such damages.

### *Further medical evidence*

178. If it appears from any medical examination carried out either by agreement between the parties or in terms of this Order or by order of a judge, that any further medical examination by any other person is necessary or desirable for the purpose of giving full information on matters relevant to the assessment of such damages, a party may require a second and final medical examination in accordance with the provisions of this Order.

### *179. Notice to make things available for examination or inspection*

If it appears that the state or condition of any thing of any nature whatsoever whether movable or immovable may be relevant with regard to the decision of any matter at issue in any action, a party thereto may at any stage thereof not later than twelve days before the hearing, give notice requiring the party relying upon the existence of such state or condition of such thing or having such thing in his possession or under his control to make it available for inspection or examination in terms of this rule, and may in such notice require him to submit the thing or a fair sample thereof for inspection or examination within a period of not more than six days from the date of the receipt of the notice.

### *180. Dispute as to submission of things for examination*

The party called upon to submit such thing for examination may require the party requesting it to specify the nature of the examination to which it is to be submitted, and shall not be bound to submit such thing thereto if this will materially prejudice such party. In the event of any dispute whether such thing should be submitted for examination, such dispute shall be referred to a judge on notice delivered by either party stating that the

examination is required and that objection is taken in terms of this rule. In considering any such dispute the judge may make such order as to him seems meet.

***Report on examination***

181. A party causing an examination to be made in terms of rules 174 and 179 shall—

(*a*) cause the person making the examination to give a full report in writing of the results of his examination and the opinions that he formed as a result thereof on any relevant matter; and

(*b*) after receipt of such report and upon request furnish any other party with a complete copy thereof; and

(*c*) bear the expense of carrying out any such examination:

Provided that such expense shall, unless otherwise ordered by the court, form part of such party's costs.

## ORDER 26

CURTAILMENT OF PROCEEDINGS

***182. Pre-trial conference***

[Rule substituted by s.i. 43 of 1992 and amended by s.i. 620 of 1995]

(1) Subject to this rule, when the pleadings in any action are closed, a party who wishes to have the action brought to trial shall request the other parties to the action to attend a pre-trial conference at a mutually convenient time and place with the object of reaching agreement on or settling the matters referred to in subrule (2).

(2) At a pre-trial conference the parties shall attempt to reach agreement on possible ways of expediting or curtailing the duration of the trial and on the following matters—

(*a*) the obtaining of admissions of fact and of documents;

(*b*) the holding of any inspection or examination;

(*c*) the exchange of reports of experts;

(*d*) the giving of further particulars reasonably required for the purposes of trial;

(*e*) plans, diagrams, photographs, models and the like, to be used at the trial;

(*f*) the consolidation of trials;

(*g*) the quantum of damages;

(*h*) a definition of the real issues and the manner in which any particular issue may be proved;

(*i*) an estimation of the probable duration of the trial;

(*j*) the preparation of correspondence and other documents to be handed in at the trial in the form of a paged bundle with copies for the court and all parties;

and, if it is practicable to do so, the parties shall attempt to reach a settlement of all or any of the matters in dispute between them.

(3) If the parties to an action consent to such a course, a pre-trial conference in terms of subrule (1) shall be held before a judge in chambers at a date and time fixed by the registrar in consultation with the parties.

(4) The registrar, acting on the instructions of a judge, may at any time on reasonable notice notify the parties to an action to appear before a judge in chambers, on a date and at a time specified in the notice, for a pre-trial conference or a further pre-trial conference, as the case may be, with the object of reaching agreement on or settling the matters referred to in subrule (2), and the judge may at the same time give directions as to the persons who shall attend and the documents to be furnished or exchanged at such conference.

(5) Where the registrar has given notice in terms of subrule (4) to parties who have not yet held a pre-trial conference, it shall not be necessary for them to hold such a conference in terms of subrule (1).

(6) If—

(*a*) a party does not accede to a request for the holding of a pre-trial conference in terms of subrule (1); or

(*b*) a party refuses to consent in terms of subrule (3) to a pre-trial conference being held before a judge; or

(*c*) the parties are unable to agree on a suitable date or venue for a pre-trial conference in terms of subrule (1) or who should attend;

any party may make a chamber application for directions in regard to the matters in dispute.

(7) Upon the conclusion of a pre-trial conference, other than a conference held before a judge, the parties shall draw up a minute of the conference proceedings and such minute shall be signed by the parties or their legal practitioners.

(8) If at a pre-trial conference, other than a conference held before a judge, the parties cannot agree on any matter referred to in subrule (2), any party may make a chamber application for directions in regard to the matter in dispute.

(9) If at a pre-trial conference the parties agree on a settlement of any matter in dispute, a judge may, on a chamber application being made by the parties, make an order embodying the terms of the settlement.

(10) Upon the conclusion of a pre-trial conference held before a judge, the judge—

(*a*) shall record any decisions taken at the conference and any agreements reached by the parties as to the matters considered; and

(*b*) may make an order limiting the issues for trial to those not disposed of by admission or agreement; and

(*c*) may give directions as to any matter referred to in subrule (2) upon which the parties have been unable to agree; and

(*d*) shall record the refusal of any party to make an admission or reach agreement, together with the reasons therefor.

(11) A judge may dismiss a party's claim or strike out his defence or make such other order as may be appropriate if—

(*a*) the party fails to comply with directions given by a judge in terms of subrule (4), (6), (8) or (10) or with a notice given in terms of subrule (4); and

(*b*) any other party applies orally for such an order at the pre-trial conference or makes a chamber application for such an order.

[Subrule substituted by s.i. 33 of 1996]

### *183. Judge may consult counsel in chambers before trial*

Before the trial proceeds the judge may call into his chambers the counsel for the parties with a view to securing agreement on any matters likely to curtail the duration of the trial.

### *184. Matters done under this Order to be considered when making order as to costs*

When giving judgment, the court shall take into consideration the provisions of this Order and anything done thereunder in making any order as to costs. Where in the opinion of the court a party has been unreasonable in refusing to make an admission or in declining to reach an agreement in respect of any of the matters set out in subrule (1) of rule 182 the court may order that such party shall pay the additional costs resulting therefrom notwithstanding the fact that such party may be successful in the main action.

## ORDER 27

ADMISSIONS

### *185. Admission of whole or part of case of other party*

A party to a cause or matter may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party.

### *186. Notice to admit facts or documents: forms and filing*

(1) A party may by notice in writing at any time not later than ten days before the day for which notice of trial has been given—

(*a*) call on any other party to admit for the purposes of the cause, matter or issue only, the facts mentioned in such notice;

(*b*) call on any other party to admit, saving all just exceptions, that any document was properly executed or is what it purports to be.

[Subrule amended by s.i. 43 of 1992]

(2) The notice to admit facts shall be in Form No. 23 and admissions of facts shall be in Form No. 24 and the notice to admit documents shall be in Form No. 25 and these documents shall be filed before trial.

### *187. Effect of failure to reply or refusal to admit facts*

(1) In the case of failure to reply to the notice to admit any facts within ten days of delivery the party called upon therein shall be taken as having admitted all such facts for the purposes of the cause, matter or issue only.

[Subrule amended by s.i. 43 of 1992]

(2) In the case of refusal to admit any facts, the costs of proving them shall be paid by the party so refusing, whatever the result of the cause may be, unless the court considers that the refusal to admit was reasonable.

### *188. Effect of failure to reply or refusal to admit documents*

(1) In the case of failure by the party to reply within ten days when called upon to admit that any documents was properly executed or is what it purports to be, then as against such party the party giving the notice shall be entitled to produce the documents specified at the trial without proof other than proof that the documents are the documents referred to in the notice and that notice was duly given, if those facts are disputed.

[Subrules amended by s.i. 43 of 1992]

(2) If the party receiving the notice states that the documents are not admitted as aforesaid, such documents shall be proved by the party giving the notice before he is entitled to use them at the trial but the party not admitting them may be ordered to pay the costs of their proof.

### *189. Withdrawal of admission*

The court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

### *190. If Costs where notice includes unnecessary facts or documents*

a notice to admit includes unnecessary facts or documents, the extra costs occasioned thereby shall be borne by the party giving such notice.

## ORDER 28

INTERROGATORIES

### *191. Discovery by interrogatories*

(1) A party to a cause or matter may make a chamber application for directions for an order—

(*a*) giving him leave to serve on any other party interrogatories relating to any matter in question between the applicant and that other party in the cause or matter; and

(*b*) requiring that other party to answer the interrogatories on affidavit within such period as may be specified in the order.

[Subrule amended by s.i. 43 of 1992]

(2) A copy of the proposed interrogatories in Form No. 26 shall be served with the notice by which the application for such leave is made.

(3) On the hearing of an application under this rule, the judge shall give leave as to such only of the interrogatories as he considers necessary either for disposing fairly of the cause or matter or for saving costs; and in deciding whether to give leave the judge shall take into account any offer made by the party to be interrogated to give particulars or to make admissions or to produce documents relating to any matter in question.

(4) A proposed interrogatory which does not relate to such a matter as is mentioned in subrule (1) shall be disallowed notwithstanding that it might be admissible in oral cross-examination of a witness.

### *192. Interrogatories where party is a body of persons*

Where a party to a cause or matter is a body of persons, whether corporate or incorporate, being a body which is empowered by law to sue or be sued whether in its own name or in the name of an officer or other person, a judge may, on the application of any other party, make an order allowing him to serve interrogatories on such officer or member of the body as may be specified in the order.

### *193. Statement as to party, etc., required to answer*

When interrogatories are to be served on two or more parties or are required to be answered by an agent or servant of a party, a note at the end of the interrogation shall state which of the interrogatories each party or, as the case may be, an agent or servant is required to answer, and which agent or servant.

### *194. Objection to answer on ground of privilege*

Where a person objects to answering any interrogatory on the ground of privilege he may take the objection in his affidavit in answer.

### *195. Insufficient answer*

If a person on whom interrogatories have been served answers any of them insufficiently, a judge on a chamber application being made to him for directions may make an order requiring him to make a further answer, and either by affidavit or on oral examination as the judge may direct.

[Rule amended by s.i. 43 of 1992]

### *196. Failure to comply with order*

If a party against whom an order is made under subrules (1) and (3) of rule 191 or rule 195 fails to comply with it, the court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly.

### *197. Use of answers to interrogatories at trial*

A party may put in evidence at the trial of a cause or matter, or of any issue therein, some only of the answers to interrogatories, or part only of such an answer, without putting in evidence the other answers or, as the case may be, the whole of that answer, but the court may look at the whole of the answers and if of opinion that any other answer or other part of an answer is so connected with an answer or part thereof used in evidence that the one ought not to be so used without the other, the court may direct that that other answer or part shall be put in evidence.

### *198. Revocation and variation of orders*

Any order made under this Order, including an order made on appeal, may, on sufficient cause being shown, be revoked or varied by a subsequent order or direction of the court or a judge made or given at or before the trial of the cause or matter in connexion with which the original order was made.

## ORDER 29

SPECIAL CASES

### *199. Special case by consent*

(1) The parties to a civil action or suit may, after summons has been issued, concur in a statement of the questions of law arising therein in the form of a special case for the opinion of the court.

(2) Every such special case shall be divided into paragraphs numbered consecutively, and shall concisely state such facts and documents as may be necessary to enable the court to decide the questions raised thereby.

(3) Upon the argument of such case, the court and the parties shall be at liberty to refer to the whole contents of such documents, and the court shall be at liberty to draw from the facts and documents stated in any such special case any inference, whether of fact or law, which might have been drawn therefrom if proved at a trial.

### *200. Special case by order before trial*

If it appears to the court that there is in any cause or matter a question of law which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, the court may make an order accordingly, and may direct such question of law to be raised for the opinion of the court, either by special case or in such other manner as the court may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed.

### *201. Special case to be typewritten, etc.*

Every special case shall be typewritten or printed by the plaintiff and signed by the several parties or their counsel, and shall be filed by the plaintiff. If the registrar so requests, one or more copies of the special case shall be filed for the use of the court.

### *202. Special case affecting person under disability*

If a minor or person of unsound mind is a party to such proceedings, the court may, before determining the questions of law in dispute, require proof that the statements in such special case so far as concerns the minor or person of unsound mind, are true.

### *203. Judgment and directions regarding other issues*

When giving its decision upon any question in terms of this Order, the court may give such judgment as may upon such decision be appropriate and may give any direction with regard to the hearing of any other issues in the proceedings which may be necessary for the final disposal thereof.

### *204. Judgment without hearing evidence*

If the question in dispute is one of law, and the parties are agreed upon the facts, the facts may be admitted and recorded at the trial and the court may give judgment without hearing any evidence.

## ORDER 30

INTERPLEADER

### *205. Interpretation in Order 30*

[Rule substituted by s.i. 43 of 1992]

In this Order—

"applicant" means a person who holds property or has incurred a liability in respect of which there are two or more claimants and who, in consequence of such claims, has served an interpleader notice on the claimants;

"claimant" means a person who has made a claim in respect of any property held or liability incurred by an applicant, which claim is adverse to a claim made by another such claimant;

"interpleader notice" means a notice referred to in rule 205A.

### *205A. Interpleader notice: conflicting claims*

[Rule inserted by s.i. 43 of 1992]

(1) Where any person alleges he holds any property or is under any liability in respect of which he is or expects to be sued by two or more persons making adverse claims in respect of the property or liability, he may deliver to the claimants a notice and an affidavit setting out the matters referred to in rules 207 and 208 respectively.

(2) In regard to conflicting claims with respect to property attached in execution, the Sheriff or Deputy Sheriff shall have the rights of an applicant and an execution creditor shall have the rights of a claimant.

### *206. Duties of applicant according to subject matter of claims*

(1) Where the claims relate to money the applicant shall be required, on delivering the notice mentioned in rule 205, to pay the money to the registrar who shall hold it until the conflicting claims have been decided.

(2) Where the claims relate to a thing capable of delivery the applicant shall tender the subject matter to the registrar when delivering the interpleader notice or take such steps to secure the availability of the thing in question as the registrar may direct.

(3) Where the conflicting claims relate to immovable property the applicant shall place the title deeds thereof, if available to him, in the possession of the registrar when delivering the interpleader notice and shall at the same time hand to the registrar an undertaking to sign all documents necessary to effect transfer of such immovable property in accordance with any order which the court may make or any agreement of the claimants.

### *207. Contents of notice*

The interpleader notice shall—

(*a*) state the nature of the liability, property or claim which is the subject matter of the dispute;

(*b*) call upon the claimants to deliver particulars of their claims in the form of a notice of opposition in terms of rule 223; and

(*c*) state that the applicant is applying for the court's decision as to his liability or the validity of the respective claims.

[Rule amended by s.i. 43 of 1992]

### *208. Affidavit by applicant*

There shall be delivered together with the interpleader notice an affidavit stating that the applicant—

(*a*) claims no interest in the subject matter in dispute other than for charges and costs;

(*b*) does not collude with any of the claimants;

(*c*) is willing to deal with or act in regard to the subject matter of the dispute as the court may direct.

[Rules amended by s.i. 43 of 1992]

### *209. Provisions of Order 32 to apply*

Order 32 shall apply to any application made in terms of this Order.

[Rule substituted by s.i. 43 of 1992]

### *210. Powers of court*

(1) Where a claimant to whom an interpleader notice and affidavit have been delivered has failed to file and serve a notice of opposition in terms of rule 233 or is in default of appearance at any hearing of the matter, the court may make an order declaring him and all persons claiming under him barred as against the applicant from making any claim on the subject matter of the dispute.

(2) At the hearing of any matter in terms of this Order, the court may—

(*a*) adjudicate upon the claim after hearing such evidence as it thinks fit;

(*b*) order that any claimant be made a defendant in any action already commenced in respect of the subject matter in dispute in place of or in addition to the applicant;

(*c*) order that any issue between the claimants be stated by way of a special case or otherwise and tried, and for that purpose order which claimant shall be plaintiff and which shall be defendant:

Provided that, in making such order the court may leave any question of onus of proof for determination at the trial;

(*d*) if it considers the matter is not a proper matter for relief by way of interpleader notice, dismiss the application;

(*e*) make such order as to costs and any expenses incurred in terms of subrule (2) of rule 206 as it thinks fit.

[Rule substituted by s.i. 43 of 1992]

### *211. Effect of interpleader notice issued by defendant in action*

If an interpleader notice is issued by a defendant in an action, proceedings in that action shall be stayed pending a decision upon the interpleader, unless the court upon an application made by any other party to the action otherwise orders.

## ORDER 31

SETTING DOWN, VACATIONS, ETC.

A. DEFENDED TRIAL CASES

### *212. When pleadings deemed to be closed*

For the purposes of this Order the pleadings shall be deemed to be closed—

(*a*) where there is no claim in reconvention, when the plaintiff has filed his replication or if a replication is unnecessary, when the plea has been filed;

(*b*) where the defendant has filed a claim in reconvention, when the plaintiff has filed his plea to the claim in reconvention.

### *213. Defendant may file further pleadings although pleadings deemed closed*

The fact that pleadings are deemed to be closed for the purpose of this Order shall not preclude the defendant from filing any further pleadings within the time limited for the purpose, nor relieve him of the obligation to do so where it is necessary.

### *214. Placing case on cause list*

The registrar shall keep a list of civil cases for trial. In cases not proceeding by default, whenever the pleadings in any action are closed and discovery has been effected by all parties and a pre-trial conference has been held in terms of rule 182, the plaintiff or the defendant may request the registrar to place the case on the list. Such request shall be accompanied by a completed Form No. 26A, and a signed copy of the pre-trial conference

minute made in terms of rule 182. The party making the request shall forthwith notify the other parties that he has done so.

[Rule substituted by s.i. 142 of 1981]

### *215. Set-down for trial*

(1) In subrules (2), (3) and (4)—

"date" includes a period not exceeding two weeks.

(2) Once a date becomes available for the hearing of a case placed on the list in terms of rule 214 the registrar shall allocate a date for the case to be heard and shall give the parties notice of the date.

(3) The registrar may for good cause, and after consultation with the parties, alter a date of set-down allocated in terms of subrule (2), and shall give the parties notice of any such alteration.

(4) Notice given by the registrar in terms of subrule (2) or (3)—

(*a*) shall be delivered by the registrar to each party's legal practitioner; or

(*b*) in the case of a party who is not represented by a legal practitioner, shall be posted by the registrar by registered post to the address for service or last known address of the party.

(5) At the request of one or more of the parties, the registrar may, in consultation with the Judge President, allocate a fixed date for the hearing of a case, whether in or out of term.

[Rule substituted by s.i. 43 of 1992]

### *216. When defendant may apply for case to be placed on list and for set down*

[Rule repealed by s.i. 142 of 1981]

### *217. Alteration of set down*

Where a case has been set down for trial or argument any party may apply to the court or a judge to have the set down set aside and for good cause shown the court or judge may set it aside and fix another day for the trial or argument or make such other order as it or he, as the case may be, considers just:

Provided that with the consent of all parties and with the approval of the registrar a set down may be altered without application to court or to a judge.

[Rule amended by s.i. 126 of 1989]

### *218. Withdrawal of application to set down*

[Rule repealed by s.i. 43 of 1992]

## B. SITTINGS, VACATIONS, SET DOWN AND OFFICE HOURS

### *219. Computation of time*

(1) In this Part of the rules, "business day" means any day which is not a Saturday, Sunday or a public holiday.

[Subrule amended by s.i. 126 of 1989]

(2) Whenever a particular day is appointed for the commencement of a civil term, criminal session, or circuit sitting or for the hearing of matters by a court or a judge, whether in term or in vacation, and that day is not a business day, such term, session or circuit sitting shall commence, and such hearing shall take place, on the next succeeding business day.

(3) Whenever a particular day is appointed for the termination of a civil term and such day is not a business day, that term shall, unless the court orders otherwise, terminate on the preceding business day.

(4) Where the time limited by any rule for the doing of any thing in the office of the registrar, for example entering appearance or the filing of any document, expires or falls upon a Saturday, the time so limited shall extend to and the thing may be done on the next succeeding business day.

### *220. Office hours*

The hours during which the office of the registrar at Harare and at Bulawayo shall be open for the transaction of business shall be between 8 a.m. and 1 p.m. and 2 p.m. and 4 p.m. on each business day.

[Rule amended by s.i. 126 of 1989]

### *221. Sittings and vacations*

The Chief Justice shall in each year cause to be published a calendar of the sittings of the court for the ensuing year. Such calendar shall fix sessions at Harare and Bulawayo for the dispatch of criminal business, terms at Harare and Bulawayo for the dispatch of civil business, circuit sittings and vacations.

### *222. Set down: contested civil trials and special cases*

[Rule repealed by s.i. 43 of 1992]

### *223. Set down of other matters on notice*

(1) Subject to subrule (5)—

(*a*) uncontested cases for provisional sentence; and

(*b*) summonses for civil imprisonment; and

(*c*) uncontested actions for restitution of conjugal rights, divorce, judicial separation or nullity of marriage; and

(*d*) cases set down for judgment in terms of subrule (2) of rule 58 or subrule (1) of rule 59;

[Paragraph amended by s.i. 43 of 1992]

(*e*) applications in which a notice of opposition and opposing affidavit have not been filed;

may be set down for hearing—

(i) in Harare, on any Wednesday, by filing a notice of set-down with the registrar not later than the Thursday preceding the Wednesday of set down;

[Paragraph amended by s.i. 80 of 00]

(ii) in Bulawayo, on any Friday, by filing a notice of set-down with the registrar not later than the Tuesday preceding the Friday of set down.

[Paragraph amended by s.i. 80 of 00]

(2) Subject to subrules (3), (4) and (5) and to rule 238, exceptions, applications to strike out and other applications which are opposed shall be set down for hearing—

(*a*) in Harare, on a business day agreed with the registrar, by filing a notice of set-down with the registrar not less than six business days before the day of set-down;

(*b*) in Bulawayo, on a Friday, by filing with a notice of set-down with the registrar not later than ten o'clock in the morning of the Wednesday preceding the day of set down.

[Subrules amended by s.i. 108 of 1991 and s.i. 33 of 1996]

(3) Subject to rule 223A, without the consent of the respondent, no application in which a notice of opposition and an opposing affidavit have been filed shall be set down for hearing less than eight business days after the notice of opposition and opposing affidavit were filed.

(4) No contested matter shall be set down for hearing during vacation unless a legal practitioner certifies in writing that it is urgent, giving reasons for its urgency, and the prior approval of a judge to the hearing of the matter has been obtained.

(5) With the consent of the parties and after consultation with the Judge President, the registrar may set a matter down for hearing on a day other than a day specified in subrule (1) or (2).

[Rule substituted by s.i. 126 of 1989 and amended by s.i. 108 of 1991 and s.i. 43 of 1992]

### *Set down of urgent cases*

223A. Where a legal practitioner has certified in writing that a matter is urgent, giving reasons for its urgency, the court or a judge may direct that the matter should be set down for hearing at any time and additionally, or alternatively, may hear the matter at any time or place, and in such event rule 223 shall not apply or shall apply with such modifications as the court or judge may direct.

[Rule inserted by s.i. 126 of 1989]

### *224. Set down of postponed matters*

Where a case has been postponed to a definite date the registrar shall place the case on the roll for hearing on the date to which the case was postponed.

[Rule substituted by s.i. 43 of 1992]

### *225. Set down by special leave*

[Rule repealed by s.i. 43 of 1992]

### *225A. Set-down of incomplete cases*

No effect shall be given by the registrar to any notice of set-down lodged in terms of rule 223 or to any request lodged in terms of rule 224 in respect of any matter if the papers in such matter are incomplete except in urgent cases set down in terms of rule 223A:

Provided that this rule shall not apply in the case of a return-day of a rule *nisi*.

[Rule inserted by s.i. 142 of 1981 and amended by s.i. 126 of 1989]

## ORDER 32

APPLICATION PROCEDURE

[Order substituted by s.i. 43 of 1992]]

A. PRELIMINARY

### *226. Nature of applications*

(1) Subject to this rule, all applications made for whatever purpose in terms of these rules or any other law, other than applications made orally during the course of a hearing, shall be made—

(*a*) as a court application, that is to say, in writing to the court on notice to all interested parties ; or

(*b*) as a chamber application, that is to say, in writing to a judge.

(2) An application shall not be made as a chamber application unless—

(*a*) the matter is urgent and cannot wait to be resolved through a court application; or
(*b*) these rules or any other enactment so provide; or
(*c*) the relief sought is procedural or for a provisional order where no interim relief is sought only; or
[Paragraph amended by s.i. 101 of 1994]
(*d*) the relief sought is for a default judgment or a final order where—
(i) the defendant or respondent, as the case may be, has previously had due notice that the order will be sought, and is in default; or
(ii) there is no other interested party to the application; or
(iii) every interested party is a party to the application; or
(*e*) there are special circumstances which are set out in the application justifying the application.

B. GENERAL PROVISIONS FOR ALL APPLICATIONS

### *227. Written applications, notices and affidavits*

(1) Every written application, notice of opposition and supporting and answering affidavit shall—
(*a*) be legibly written on A4 size paper on one side only; and
(*b*) be divided into paragraphs numbered consecutively, each paragraph containing, wherever possible, a separate allegation; and
(*c*) have each page, including every annexure and affidavit, numbered consecutively, the page numbers, in the case of documents filed after the first set, following consecutively from the last page number of the previous set, allowance being made for the page numbers of the proof of service filed for the previous set.

(2) Every written application and notice of opposition shall—
(*a*) state the title of the matter and a description of the document concerned; and
(*b*) be signed by the applicant or respondent, as the case may be, or by his legal practitioner; and
(*c*) give an address for service which shall be within a radius of five kilometres from the registry in which the document is filed; and
(*d*) where it comprises more than five pages, contain an index clearly describing each document included and showing the page number or numbers at which each such document is to be found.

(3) Every written application shall contain a draft of the order sought.

(4) An affidavit filed with a written application—
(*a*) shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out in therein; and
(*b*) may be accompanied by documents verifying the facts or averments set out in the affidavit, and any reference in this Order to an affidavit shall be construed as including such documents.

(5) Where by any law a certificate or other document is required to be attached to or filed with any application, it shall be sufficient to attach or file a photocopy or other facsimile of the certificate or document:

Provided that, if required to do so by the court or a judge at the hearing, the party concerned shall produce the original certificate or document.

[Subrule inserted by s.i. 192 of 1997]

### *228. Order where extra costs incurred*

Where extra costs have been incurred by a party owing to an unreasonably short time having been allowed in any application, or owing to the failure of either party to file his affidavits, the court or a judge may make such order in respect of those costs as it or he thinks fit.

### *229. Extension of time*

Where a party desires an extension of any of the time fixed by or in terms of this Order and the other party refuses to agree thereto, the party so desiring may make a chamber application for such extension and the judge may make such order on the application as he thinks just.

[Rule substituted by s.i. 25 of 1993]

### *229A. Counter-applications*

[Rule inserted by s.i. 25 of 1993]

(1) Where a respondent files a notice of opposition and opposing affidavit, he may file, together with those documents, a counter-application against the applicant in the form, *mutatis mutandis*, of a court application or a chamber application, whichever is appropriate.

(2) This Order shall apply, *mutatis mutandis*, to a counter-application under subrule (1) as though it were a court application or a chamber application, as the case may be, and subject to subrule (3) and (4), it shall be dealt with at the same time as the principal application unless the court or a judge orders otherwise.

(3) If, in any application in which the respondent files a counter-application under subrule (1), the application is stayed, discontinued or dismissed, the counter-application may nevertheless be proceeded with.

(4) The court or a judge may for good cause shown order an application and a counter-application filed under subrule (1) to be heard separately.

### *229B. Oral evidence in applications*

[Rule inserted by s.i. 25 of 1993]

In any application the court or a judge may permit or require any person to give oral evidence if the court or judge, as the case may be, considers it will be in the interests of justice to hear such evidence.

### *229C. Adoption of incorrect form of application*

[Rule inserted by s.i. 251 of 1993]

Without derogation from rule 4C but subject to any other enactment, the fact that an applicant has instituted—

(*a*) a court application when he should have proceeded by way of a chamber application; or

(*b*) a chamber application when he should have proceeded by way of a court application;

shall not in itself be a ground for dismissing the application unless the court or judge, as the case may be, considers that—

(i) some interested party has or may have been prejudiced by the applicant's failure to institute the application in proper form; and

(ii) such prejudice cannot be remedied by directions for the service of the application on that party with or without an appropriate order of costs.

## C. COURT APPLICATIONS

### *230. Form of court application*

A court application shall be in Form No. 29 and shall be supported by one or more affidavits setting out the facts upon which the applicant relies.

Provided that, where a court application is not to be served on any person, it shall be in Form No. 29B with appropriate modifications.

[Proviso inserted by s.i. 251 of 1993]

### *231. Filing and Service*

(1) A copy of a court application and of every affidavit by which it is supported shall be served upon every respondent.

(2) Except as otherwise provided in this Order, no affidavit which has not been served with a court application shall be used in support of the application unless it is otherwise ordered by the court or a judge.

(3) A court application and supporting documents shall be filed with the registrar before or as soon as practicable after the application has been served on every respondent.

(4) As soon as possible after service of a court application and the supporting documents, the applicant shall file with the registrar proof of such service in accordance with rule 41.

Time for opposition

232. The time within which a respondent in a court application may be required to file a notice of opposition and opposing affidavits shall be not less than ten days, exclusive of the day of service, plus one day for every additional 200 kilometres or part thereof where the place at which the application is served is more than 200 kilometres from the court where the application is to be heard:

Provided that in urgent cases a court application may specify a shorter period for the filing of opposing affidavits if the court on good cause shown agrees to such shorter period.

### *233. Notice of opposition and opposing affidavits*

(1) The respondent shall be entitled, within the time given in the court application in accordance with rule 232, to file a notice of opposition in Form No. 29A, together with one or more opposing affidavits.

(2) As soon as possible after filing a notice of opposition and opposing affidavit in terms of subrule (1), the respondent shall serve copies of them upon the applicant and, as soon as possible thereafter, shall file with the registrar proof of such service in accordance with rule 42B.

[Subrule amended by s.i. 192 of 1997]

(3) A respondent who has failed to file a notice of opposition and opposing affidavit in terms of subrule (1) shall be barred.

### *234. Answering affidavit*

(1) Subject to subrules (3) and (4) of rule 236, where the respondent has filed a notice of opposition and an opposing affidavit, the applicant may file an answering affidavit with the registrar, which may be accompanied by supporting affidavits.

Provided that no answering affidavit may be filed less than ten day's before the hearing of the application.

[Proviso inserted by s.i. 25 of 1993]

(2) As soon as possible after filing an answering affidavit in terms of subrule (1), the applicant shall serve a copy of it upon the respondent and, as soon as possible thereafter, shall file with the registrar proof of such service in accordance with rule 41.

### *235. Further affidavits*

After an answering affidavit has been filed, no further affidavits may be filed without the leave of the court or a judge.

### *236. Set down of applications*

(1) Where the respondent is barred in terms of subrule (3) of rule 233, the applicant may, without notice to him, set the matter down for hearing in terms of rule 223.

(2) Where the respondent has filed a notice of opposition and an opposing affidavit and the applicant has filed any answering affidavit he may wish to file, the applicant may set the matter down for hearing in terms of rule 223.

(3) Where the respondent has filed a notice of opposition and an opposing affidavit and, within one month thereafter, the applicant has neither filed an answering affidavit nor set the matter down for hearing, the respondent, on notice to the applicant, may either—

(*a*) set the matter down for hearing in terms of rule 223; or

(*b*) make a chamber application to dismiss the matter for want of prosecution, and the judge may order the matter to be dismissed with costs or make such other order on such terms as he thinks fit.

[Subrule substituted by s.i. 80 of 2000]

(4) Where the applicant has filed an answering affidavit in response to the respondent's opposing affidavit but has not, within a month thereafter, set the matter down for hearing, the respondent, on notice to the applicant, may either—

(*a*) set the matter down for hearing in terms of rule 223; or

(*b*) make a chamber application to dismiss the matter for want of prosecution, and the judge may order the matter to be dismissed with costs or make such other order on such terms as he thinks fit.

[Subrule substituted by s.i. 80 of 2000]

### *237. Alteration of set down*

Where an application has been set down for hearing in terms of rule 223 or 223A any party may apply orally during the course of any hearing or make a chamber application to have the set down set aside and, for good cause shown, the court or judge may set it aside and fix another day for the hearing or make such other order as it or he thinks fit:

Provided that, with the consent of all parties, a set down may be altered to another day in accordance with Rule 223 without such application.

### *238. Heads of Argument*

(1) If, at the hearing of an application, exception or application to strike out, the applicant or excipient, as the case may be, is to be represented by a legal practitioner—

(*a*) before the matter is set down for hearing, the legal practitioner shall file with the registrar heads of argument clearly outlining the submissions he intends to rely on and setting out the authorities, if any, which he intends to cite; and

(*b*) immediately afterwards, he shall deliver a copy of the heads of argument to every other party and file with the registrar proof of such delivery.

[Subrule substituted by s.i. 192 of 1997]

(1a) An application, exception or application to strike out to which subrule (1) applies shall not be set down for hearing at the instance of the applicant or excipients, as the case may be, unless—

(*a*) his legal practitioner has filed with the registrar in accordance with subrule (1)—

(i) heads of argument; and

(ii) proof that a copy of the heads of argument has been delivered to every other party; and

(*b*) in the case of an application, the pages have been numbered in accordance with paragraph (*c*) of subrule (1) of rule 227.

[Subrule inserted by s.i. 192 of 1997]

(2) Where an application, exception or application to strike out has been set down for hearing in terms of subrule (2) of rule 223 and any respondent is to be represented at the hearing by a legal practitioner, the legal practitioner shall file with the registrar, in accordance with subrule (2a), heads of argument clearly outlining the submissions relied upon by him and setting out the authorities, if any, which he intends to cite, and immediately thereafter he shall deliver a copy of the heads of argument to every other party.

[Subrule amended by s.i. 33 of 1996]

(2a) Heads of Argument referred to in subrule (2) shall be filed by the respondent's legal practitioner not more than ten days after heads of argument of the applicant or excipients, as the case may be, were delivered to the respondent in terms of subrule (1):

Provided that—

(i) no period during which the court is on vacation shall be counted as part of the ten-day period;

(ii) the respondent's heads of argument shall be filed at least five days before the hearing.

[Subrule substituted by s.i. 192 of 1997]

(2b) Where heads of argument that are required to be filed in terms of subrule (2) are not filed within the period specified in subrule (2a), the respondent concerned shall be barred and the court or judge may deal with the matter on the merits or direct that it be set down for hearing on the unopposed roll.

[Subrule inserted by s.i. 33 of 1996 and amended by s.i. 192 of 1997]

(2c) A legal practitioner shall not be precluded from making a submission or citing an authority that was not outlined or set out, as the case may be, in heads of argument filed in terms of subrule (2) unless the court or judge hearing the matter considers that—

(*a*) the submission or authority was omitted from the heads of argument with the intention of misleading the other party; or

(*b*) to permit the legal practitioner to make the submission or cite the authority would prejudice the other party in a manner which could not be remedied adequately by a postponement or an appropriate order of costs.

[Subrule inserted by s.i. 192 of 1997]

(3) In relation to any application, exception or application to strike out which has been set down for hearing by a respondent, any reference—

(*a*) in subrule (1) to the applicant or excipient, shall be construed as a reference to the respondent;

(*b*) in subrule (2), (2a) or (2b) to a respondent, shall be construed as a reference to the applicant or excipients.

[Subrule as amended by s.i. 33 of 1996]

(4) Where an applicant, excipient or respondent is not to be represented at the hearing by a legal practitioner, he may, if he so wishes, file heads of argument, in which event he shall comply with subrule (1) or (2) as the case may be.

### *239. Hearing of application*

At the hearing of an application—

(*a*) unless the court otherwise orders, the applicant shall be heard in argument in support of the application, and thereafter the respondent's argument against the application shall be heard and the applicant shall be heard in reply;

(*b*) the court may allow oral evidence.

Provided that if one of the parties has been barred the court shall deal with the application as though it were unopposed, unless the bar is lifted.

[Proviso inserted by s.i. 33 of 1996]

### *240. Granting of Order*

(1) At the conclusion of the hearing or thereafter, the court may refuse the application or may grant the order applied for, including a provisional order, or any variation of such order or provisional order, whether or not general or other relief has been asked for, and may make such order as to costs as it thinks fit.

[Subrule amended by s.i. 25 of 1993 and s.i. 33 of 1996]

(2) Where the court grants a provisional order under subrule (1), rule 247 shall apply, *mutatis mutandis*, to the provisional order as though it were granted following a chamber application.

[Subrule inserted by s.i. 25 of 1993]

## D. CHAMBER APPLICATIONS

### *241. Form of chamber applications*

(1) A chamber application shall be made by means of an entry in the chamber book and shall be accompanied by Form 29B duly completed and, except as is provided in subrule (2), shall be supported by one or more affidavits setting out the facts upon which the applicant relies.

Provided that, where a chamber application is to be served on an interested party, it shall be in Form No. 29 with appropriate modifications.

[Proviso inserted by s.i. 251 of 1993]

(2) Where a chamber application is for default judgment in terms of rule 57 or for other relief where the facts are evident from the record, it shall not be necessary to annex a supporting affidavit.

### *242. Service of chamber applications*

(1) A chamber application shall be served on all interested parties unless the defendant or respondent, as the case may be, has previously had due notice of the order sought and is in default or unless the applicant reasonably believes one or more of the following—

(*a*) that the matter is uncontentious in that no person other than the applicant can reasonably be expected to be affected by the order sought or object to it;

(*b*) that the order sought is—

(i) a request for directions; or

(ii) to enforce any other provision of these rules

in circumstances where no other person is likely to object; or

[Paragraph substituted by s.i. 25 of 1993]

(*c*) that there is a risk of perverse conduct in that any person who would otherwise be entitled to notice of the application is likely to act so as to defeat, wholly or partly, the purpose of the application prior to an order being granted or served;

(*d*) that the matter is so urgent and the risk of irreparable damage to the applicant is so great that there is insufficient time to give due notice to those otherwise entitled to it;

(*e*) that there is any other reason, acceptable to the judge, why such notice should not be given.

(2) Where an applicant has not served a chamber application on another party because he reasonably believes one or more of the matters referred to in paragraphs (*a*) to (*e*) of subrule (1)—

(*a*) he shall set out the grounds for his belief fully in his affidavit; and

(*b*) unless the applicant is not legally represented, the application shall be accompanied by a certificate from a legal practitioner setting out, with reasons, his belief that the matter is uncontentious, likely to attract perverse conduct or urgent for one or more of the reasons set out in paragraphs (*a*), (*b*), (*c*), (*d*) or (*e*) of subrule (1).

### *243. Heads of Argument*

A chamber application may be accompanied by heads of argument clearly outlining the submissions relied upon and setting out the authorities which justify the application being made without notice and in support of the order sought.

### *244. Urgent applications*

Where a chamber application is accompanied by a certificate from a legal practitioner in terms of paragraph (*b*) of subrule (2) of rule 242 to the effect that the matter is urgent, giving reasons for its urgency, the registrar shall immediately submit it to a judge, who shall consider the papers forthwith.

Provided that, before granting or refusing the order sought, the judge may direct that any interested person be invited to make representations, in such manner and within such time as the judge may direct, as to whether the application should be treated as urgent.

[Proviso inserted by s.i. 101 of 1994]

### *245. Non-urgent applications*

Where a chamber application is not accompanied by a certificate referred to in Rule 244, the registrar shall in the normal course of events, but without undue delay, submit it to a judge who shall consider the papers without undue delay.

### *246. Consideration of applications*

(1) A judge to whom papers are submitted in terms of rule 244 or 245 may—

(*a*) require the applicant or the deponent of any affidavit or any other person who may, in his opinion, be able to assist in the resolution of the matter to appear before him in chambers or in court as may to him seem convenient and provide, on oath or otherwise as the judge may consider necessary, such further information as the judge may require;

(*b*) require either party's legal practitioner to appear before him to present such further argument as the judge may require.

[Subrule amended by s.i. 25 of 1993]

(2) Where in an application for a provisional order the judge is satisfied that the papers establish a *prima facie* case he shall grant a provisional order either in terms of the draft filed or as varied.

(3) Before granting a provisional order a judge may require the applicant to give security for any loss or damage which may be caused by the order and may order such additional evidence or information to be given as he thinks fit.

### *247. Provisional Order*

(1) Subject to subrule (3), a provisional order shall—

(*a*) be in Form 29C; and

(*b*) specify upon whom copies of the provisional order and the application, together with all supporting documents, shall be served and, if service is not to be effected in terms of these rules, how service is to be effected; and

(*c*) specify the time within which the respondent shall file a notice of opposition if he opposes the relief sought.

[Subrule amended by s.i. 120 of 1995]

(2) Rules 231 to 240 shall apply *mutatis mutandis* to the enrolment and hearing of a matter consequent upon the issue of a provisional order referred to in subrule (1):

Provided that, where a legal practitioner has certified in writing that a matter is urgent, giving reasons for its urgency, the court or a judge may direct that the matter be set down for hearing at any time and additionally, or alternatively, may hear the matter at any time and place, and in such event the ordinary periods of notice to the registrar and any other party shall not apply to the matter.

[Subrule amended by s.i. 120 of 1995]

(3) Where a provisional order relates to the sequestration of an estate, the winding up of a company or any other matter in which interested parties generally are to be given an opportunity to oppose the granting of a final order, the provisional order shall—

(*a*) be in Form 29D; and

(*b*) specify the date and place at which the court will hear argument on the confirmation of the provisional order; and

(*c*) specify the manner in which the provisional order is to be published and, where appropriate, the persons on whom copies of the provisional order, together with all supporting documents, are to be served.

[Subrule inserted by s.i. 120 of 1995]

(4) Rules 238 to 240 shall apply, *mutatis mutandis*, to the hearing of a matter consequent upon the issue of a provisional order referred to in subrule (3).

[Subrule inserted by s.i. 120 of 1995]

## E. DECEASED ESTATES, PERSONS UNDER A DISABILITY, MINORS ETC.

### *248. Applications involving Deceased Estates, Liquidators or Trustees*

(1) In the case of any application in connection with—

(*a*) the estate of a deceased person; or

(*b*) the appointment or substitution of a provisional trustee in insolvency or of a provisional liquidator of a company or of a trustee of other trust funds;

a copy of the application shall be served on the Master not less than ten days before the date of set down for his consideration, and for report by him if he considers it necessary or the court requires such a report.

(2) In any application referred to in subrule (1), where the name of any person is to be suggested to the court as curator of the property, such name shall be referred to in the application or otherwise submitted to the Master for his approval.

### *249. Applications involving persons under disability or minors*

(1) In the case of any application in connection with—

(*a*) the estate of a person alleged to be prodigal or under any disability, mental or otherwise; or

(*b*) a minor;

a chamber application, annexing the written consent of the person proposed to be so appointed, shall first be made for the appointment of a curator *ad litem*.

(2) A copy of a chamber application in terms of subrule (1) shall be served on the Master, who shall make a written report to the judge.

(3) After the appointment of a curator *ad litem* following a chamber application in terms of subrule (1), a copy of the substantive application shall be served on him and, after he has conducted such investigation as may be necessary, he shall prepare a written report which shall be filed with the registrar and a copy served on the applicant and all other interested parties.

(4) The time within which a respondent shall be required in terms of subrule (1) or rule 233 to file a notice of opposition to an application in terms of subrule (1) shall commence to run from the date of service upon him of the report of the curator *ad litem* in terms of subrule (3).

### Applications involving Deeds Registry

250. In the case of any application in connection with the performance of any act in a deeds registry, a copy of the application shall be served on the Registrar of Deeds concerned not less than ten days before the date of set down for his consideration, and for report by him if he considers it necessary or the court requires such report.

[Order substituted by s.i. 43 of 1992]

## ORDER 33

REVIEWS

### *256. Review proceedings by notice of motion*

Save where any law otherwise provides, any proceedings to bring under review the decision or proceedings of any inferior court or of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions, shall be by way of court application directed and delivered by the party seeking to review such decision

or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected.

[Rule amended by s.i. 43 of 1992]

### *257. Contents of notice of motion*

The court application shall state shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected and the exact relief prayed for.

[Rule amended by s.i. 43 of 1992]

### *258. Provisions of Order 32 to apply*

Order 32 shall apply to any application made in terms of this Order.

[Rule substituted by s.i. 43 of 1992]

### *259. Time within which proceedings to be instituted*

Any proceedings by way of review shall be instituted within eight weeks of the termination of the suit, action or proceeding in which the irregularity or illegality complained of is alleged to have occurred:

Provided that the court may for good cause shown extend the time.

### *260. Preparation and lodging of record and fees*

(1) The clerk of the inferior court whose proceedings are being brought on review, or the tribunal, board or officer whose proceedings are being brought on review, shall, within twelve days of the date of service of the application for review, lodge with the registrar the original record, together with two typed copies, which copies shall be certified as true and correct copies. The parties to the review requiring copies of the record for their own use shall obtain them from the official who prepared the record.

[Subrule substituted by s.i. 142 of 1981]

(2) …...

[Repealed by s.i. 142 of 1981]

(3) The copies of the record shall be clearly typed on A4 size double spaced in black record ink and on one side of the paper only. The copies of the record shall be paginated from the first to the last page whether the pages contain evidence or not, and at the top of each page containing evidence the name of the witness giving such evidence shall appear.

[Subrule amended by s.i. 43 of 1992]

(4) Every tenth line of each page of the copies of the record shall be numbered in the left hand margin.

(5) The evidence in the original record shall be paginated from the first to the last page.

(6) Every record shall contain a complete and correct index of the evidence and of all documents and exhibits in the case, the nature of the exhibits being briefly stated in the index.

(7) Every record shall be securely bound in stout covers disclosing the names of the parties, the court or public body whose proceedings are being brought on review and the names of the attorneys of the parties.

(8) Bulky records shall be divided into separate conveniently sized volumes numbered consecutively.

(9) Merely formal documents shall be omitted, and no document shall be set forth more than once.

(10) Any fees or charges incurred in obtaining copies of the record under subrule (1) of this rule shall form part of the costs of review.

[Subrule substituted by s.i. 142 of 1981]

(11) The registrar may refuse to accept copies of records which do not in his opinion comply with the provisions of this rule.

### *261. Omission of exhibits and portions of documents by consent*

By consent of parties exhibits having no bearing on the point at issue in the appeal or review and the immaterial portions of lengthy documents may be omitted. Such consent, setting out that part of documents have been omitted, shall be signed by the parties or their attorneys and filed with the registrar at the time of the filing of the aforesaid copies.

## ORDER 34

## APPLICATIONS FOR LEAVE TO APPEAL TO THE SUPREME COURT

### *262. Criminal trial: oral application after sentence passed*

Subject to the provisions of rule 263, in a criminal trial in which leave to appeal is necessary, application for leave to appeal shall be made orally immediately after sentence has been passed. The applicant's grounds for the application shall be stated and recorded as part of the record. The judge who presided at the trial shall grant or refuse the application as he thinks fit.

### *263. Criminal trial: application in writing filed with registrar*

Where application has not been made in terms of rule 262, an application in writing may in special circumstances be filed with the registrar within twelve days of the date of the sentence. The application shall state

the reason why application was not made in terms of rule 262, the proposed grounds of appeal and the grounds upon which it is contended that leave to appeal should be granted.

***264. Service of written application on Attorney-General: written submissions by Attorney-General***

A copy of the application shall be served on the Attorney-General immediately after the application is filed with the registrar. The Attorney-General may file with the registrar written submissions on the application within two days of the date of service on him.

***265. Consideration of application and submissions by presiding judge***

Upon receipt of the application and the submissions of the Attorney-General, if any, the registrar shall place the matter before the presiding judge, in chambers, who shall grant or refuse the application as he thinks fit. The presiding judge may in his discretion require oral argument on any particular point or points raised and he may hear any such argument in chambers or in court.

***266. Application for condonation of failure to apply timeously***

Where an application has not been made within the said period of twelve days, an application for condonation may be filed with the registrar and served forthwith on the Attorney-General, together with an application for leave to appeal. The Attorney-General may, within three days of the date of the said service, file with the registrar submissions on both applications. The provisions of rule 265 shall apply to both such applications and submissions, if any.

***267. Limitation of time for application for condonation***

No application in terms of rule 266 may be made after the expiry of twenty-four days from the date on which the sentence was passed, unless the judge otherwise orders.

***268. Where presiding judge not available to deal with application***

If the presiding judge is not available to deal with any application hereinbefore referred to, it may be dealt with by any other judge.

***269. Application for leave to appeal in proceedings described in section 26 (1) ( c ) (ii) and (d) of Act No. 22 of 1994***

In a case in which leave to appeal is necessary in respect of a judgement of the court given in such proceedings as are described in subparagraph (ii) of paragraph (*c*) and in paragraph (*d*) of subsection (2) of section 43 of the High Court Act [*Chapter 7:06*], the provisions of rules 262 to 268 shall apply to an application for leave to appeal and to an application for condonation as if for the words "Attorney-General" there were substituted the word "respondent", and in addition the following provisions shall apply—

(*a*) if two or more judges sat together for the hearing of the matter in which leave to appeal is applied for, then both or all such judges shall hear the application, if they are available, and if one of them considers that leave to appeal should be granted, such leave shall be granted;

(*b*) in the case of an application by way of review which is deemed to have been dismissed in terms of paragraph (*a*) of subsection (1) of section 30 of the High Court Act, 1964, leave to appeal shall be granted on application for leave to appeal being made.

## ORDER 35

MATRIMONIAL CAUSES

***269A. Summons commencing action***

The summons commencing an action mentioned in this Order may, at the option of the plaintiff, be issued in Form No. 30A, to which a copy of the plaintiff's declaration shall be annexed, in which case the provisions of rule 272 shall not apply to such an action.

[Rule inserted by s.i. 142 of 1981and amended by s.i. 80 of 2000]

***270. Action for restitution of conjugal rights***

(1) In an action for the restitution of conjugal rights the plaintiff may also claim a decree of divorce as well as other relief.

(2) Upon the hearing of the case the court may order the restitution of conjugal rights and direct the defendant to show cause on a day to be named in such order, not being less than seven days after the day fixed for compliance with the order of restitution, why a decree of divorce or other relief desired should not be granted.

(3) If upon such return day it is proved by affidavit or otherwise that the defendant has failed to comply with the order for restitution of conjugal rights, the court may grant a decree of divorce or make such other order as to it may seem meet.

***271. Malicious desertion: order to restore conjugal rights to be brought to personal notice of defendant***

Save where otherwise provided in the order, on the return day of an order calling upon the defendant in an action for malicious desertion to restore conjugal rights the court shall not make a final order for divorce unless it

is satisfied that the personal notice of the defendant has been drawn to such order or that for good and sufficient reason the giving of personal notice is impracticable.

### *272. Action for restitution of conjugal rights, divorce, judicial separation or nullity of marriage: procedure where defendant fails to enter appearance*

(1) In an action for restitution of conjugal rights, divorce, judicial separation or nullity of marriage where the defendant has failed to enter appearance—

(*a*) if the declaration has not been served with the summons the plaintiff wishing to obtain judgment shall file and deliver his declaration and either simultaneously or subsequently a notice in accordance with Form No. 30 calling upon the defendant if he wishes to defend, to purge his failure to enter appearance and to plead, answer or except, or make claim in reconvention within twelve days of the date of delivery of the notice, and informing him that in default thereof judgment will be prayed against him;

(*b*) if the declaration has been served with the summons, the plaintiff wishing to obtain judgment shall file and deliver the aforesaid notice to the defendant after the expiry of the *dies induciae*, as calculated in the proviso to rule 119.

(2) Thereafter the plaintiff may—

(*a*) in the case of an action for conjugal rights set the case down for trial without notice to the defendant;

(*b*) in the case of a claim for a final order of divorce, for judicial separation or for nullity of marriage, set the case down for trial but shall serve personal notice of set down upon the defendant, and in such case the court shall not proceed to trial unless it is satisfied that the personal notice of the defendant has been drawn to the fact that the matter has been set down for trial or that for good and sufficient reason the giving of personal notice is impracticable.

### *273. Allegation in pleadings etc., of adultery with named person: service of pleading or document on named person*

(1) In every case where the plaintiff's claim is for a decree of divorce and adultery or other misconduct is alleged and the name of the person with whom the defendant is alleged to have committed adultery or the misconduct is given in the summons or declaration, whether or not such person is joined in the suit as a co-defendant, a copy of such summons or declaration shall be served on such person in the manner prescribed in Order 5. The court shall not proceed to trial unless it is satisfied either that this rule has been complied with or that for good and sufficient reason compliance therewith is impracticable.

[Subrules amended by s.i. 43 of 1992]

(2) Where in any proceedings other than those mentioned in subrule (1) of this rule, an act of adultery is alleged in any document filed in such proceedings, and the name of the person with whom such adultery is alleged to have been committed is named in such document, the provisions of subrule (1) shall *mutatis mutandis* apply.

### *274. Divorce or judicial separation: application for contribution towards costs and maintenance pendente lite*

(1) When a spouse is without means to prosecute or defend an action for divorce or judicial separation, the court may on application order the other spouse to contribute to his or her costs, and where necessary, to his or her maintenance *pendente lite*, such sums as it deems reasonable and just.

[Subrule amended by s.i. 43 of 1992]

(2) Such an application must be supported by an affidavit stating shortly the grounds of the action or defence and that the applicant has insufficient means with which to prosecute or defend the action, as the case may be, and insufficient means to support himself or herself *pendente lite*, and whatever information is available respecting the spouse's financial position.

### *275. Matrimonial matter: judge may interview parties in chambers*

In a matrimonial matter the judge hearing the case 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.

### *276. Judge may interview children in chambers in case affecting custody*

In a case which affects the custody of a child the judge hearing the case may, if he thinks fit, interview the child concerned privately in his chambers.

### *277. Court may order proceedings be held in camera in matrimonial case or case affecting custody of child*

In a matrimonial case, or in a case affecting the custody of a child, the court hearing the case may order that the proceedings be held *in camera* if such a course appears to be desirable.

### *277A. Matrimonial matter: suit may be heard in chambers*

[Rule inserted by R.G.N. 1093 of 1975]

In a matrimonial matter, the judge may, in his discretion, hear the case in his chambers or in any other suitable room:

Provided that the hearing shall be open to members of the public.

### *277B. Matrimonial matters: when oral evidence unnecessary*

[Rule inserted by s.i. 126 of 1989]

In an unopposed matrimonial case, it shall not be necessary for the plaintiff to give oral evidence if, not later than ten o'clock in the morning—

(*a*) where the case is set down for hearing in Harare, on the Friday immediately preceding the Wednesday on which the case is set down;

(*b*) where the case is set down for hearing in Bulawayo, on the Wednesday immediately preceding the Friday on which the case is set down;

the plaintiff files with the registrar an affidavit setting out the evidence on which he relies, to which he shall annexe his marriage certificate, the original consent paper, if any, and any other documentary evidence needing to be adduced:

Provided that the court may require the plaintiff to give oral evidence and may postpone the matter for that purpose.

## ORDER 36

ARREST OF DEFENDANT

### *Writ of arrest: conditions precedent to issue*

278. (1) Where a plaintiff proves to the satisfaction of a judge or the registrar that—

(*a*) he has a good cause of action against a defendant to the amount of five thousand dollars or more; and

[Paragraph amended by s.i. 43 of 1992]

(*b*) there is good ground for believing that the defendant is about to remove from Zimbabwe; and

(*c*) the absence of the defendant from Zimbabwe will materially prejudice the plaintiff in the prosecution of his claim;

the judge or the registrar, as the case may be, may issue a writ of arrest directing the defendant to be arrested and holden to bail to answer the plaintiff's claim.

[Subrule amended by s.i. 251 of 1993]

(2) Before the issue of any such writ, the plaintiff shall file with his application or, where the writ is to issued by the registrar, shall lodge with the registrar an affidavit sworn to by the plaintiff, or his agent, or his servant, in which shall be set forth all facts which would justify with the judge or the registrar, as the case may be, in issuing or refusing to issue the said writ, and in particular the following—

(*a*) the sum alleged to be due to the plaintiff by the defendant, when it became due and the cause thereof;

(*b*) whether or not the plaintiff holds any security for the alleged debt, and, if he does, the nature and value thereof;

(*c*) that the deponent believes that the defendant is about to remove from Zimbabwe, and the grounds of such belief;

(*d*) the steps, if any, which the plaintiff has already taken to enforce his claim.

[Subrule amended by s.i. 251 of 1993]

### *279. Registrar may require security for damages*

The judge or the registrar shall before issuing a writ of arrest require the plaintiff to give security for any damages which may be caused by such writ of arrest and may require such additional evidence as he may think fit.

[Rule amended by s.i. 251 of 1993]

### *280. Writ of arrest: form and matters to be stated*

A writ of arrest shall, before delivery to the sheriff or his deputy be endorsed with the plaintiff's address for service as required by rule 15. The sum of money or other thing demanded shall be set out in the writ.

[Rule amended by s.i. 251 of 1993]

### *281. Writ of arrest: execution*

A writ of arrest may be executed on any day and at any hour and at any place:

Provided that such a writ shall not be executed against—

(*a*) a member of Parliament or an officer of Parliament as defined in section 2 of the Privileges, Immunities and Powers of Parliament Act [*Chapter 10*] while such member or officer is in actual attendance on Parliament or any committee thereof; or

(*b*) a person entitled to immunity from personal attachment under the Privileges and Immunities Act [*Chapter 28*]; or

(*c*) a person upon whom immunity from personal attachment is conferred by any other law.

[Rule amended by s.i. 251 of 1993]

### *282. Service of documents on arrest*

The sheriff or his deputy shall upon any arrest made by virtue of any such writ serve on the defendant a true copy thereof and of the documents on which the claim is founded.

### *283. Defendant may be permitted to go at large*

(1) On arrest of the defendant the sheriff or his deputy shall permit the defendant to go at large and free of the writ of arrest if—

(*a*) the defendant pays or delivers to the sheriff or his deputy the sum of money or thing mentioned in the writ together with a deposit in respect of costs in the sum of fifty dollars; or

(*b*) the defendant or anyone on his behalf gives to the sheriff or his deputy reasonable security by bond or obligation of the defendant or of another person residing and having sufficient means within Zimbabwe, that the defendant shall appear according to the exigency of the writ and shall stand to abide and perform the judgment of the court thereon or shall surrender himself to prison in execution of the same.

(2) The bond or obligation to be given to the sheriff or his deputy under this rule shall be in Form No. 32.

### *284. When defendant entitled to immediate discharge from arrest*

If the defendant at any time after his arrest satisfies the claim contained in the writ, including the costs and charges of the writ and the costs of the arrest, or if he gives a bond or obligation in terms of rule 283 of this Order, he shall be entitled to immediate discharge from such arrest.

### *285. Procedure where bond or obligation given*

If a bond or obligation has been given by a defendant or by anyone on his behalf in terms of rule 283 the plaintiff shall proceed with his action precisely as if there had been no arrest, and the writ of arrest shall in that case stand as a summons in the action.

### *286. Costs of writ*

Unless otherwise ordered, the costs of, and incidental to, a writ of arrest shall be costs in the cause.

### *287. Person arrested may anticipate day of appearance*

A person arrested shall be entitled to anticipate the day of appearance and to apply to the court in term time or to a judge in vacation for the discharge of the said arrest, upon giving twenty-four hours' notice to the legal practitioner for the plaintiff, or to the plaintiff, if he is not represented by a legal practitioner.

### *288. Where sheriff takes bond or obligation*

If the sheriff or his deputy takes a bond or obligation by virtue of a writ or attachment, then the sheriff or his deputy shall as soon as practicable and on being required by the plaintiff or his legal practitioner, deliver to the plaintiff or his legal practitioner such bond or obligation by an endorsement thereon to be made by the sheriff or his deputy under his hand, which endorsement shall be in Form No. 33.

### *289. Where sheriff takes money or thing*

If the sheriff or his deputy takes from the party arrested any money or thing for the plaintiff, then the sheriff or his deputy shall hold the money or thing on behalf of the plaintiff against the defendant's giving of security or surrendering himself.

### *290. Return day of writ: claim admitted: judgment*

If the defendant on the return day or on the day of the anticipation of the same as aforesaid admits the claim contained in the process, final judgment shall be given against him and he shall be discharged from such arrest.

### *291. Return day of writ: claim not admitted or satisfied: procedure*

If the defendant has not satisfied or admitted the claim contained in the writ, and has not given security as aforesaid, the plaintiff shall on the return day or on the day of the anticipation of the same as aforesaid, apply for confirmation of arrest, and the court or judge, unless sufficient cause to the contrary is shown, shall confirm such arrest and order the return of the defendant to prison, but shall make such further order as to it or him seems meet so as to provide for the speedy termination of the proceedings between the parties, the writ standing as a summons in the case.

### *292. Discharge from arrest: where judgment given against defendant*

If in any such proceedings judgment is given against the defendant, he shall be entitled to his discharge from such arrest:

Provided that such discharge shall not free him from his liability under the judgment or from subsequent proceedings thereunder.

## ORDER 37

## RECIPROCAL ENFORCEMENT OF JUDGMENTS

### *Application for registration*

293. An application under section 3 of the Reciprocal Enforcement of Judgments Act [*Chapter 51*] for leave to have a judgment obtained in a superior court in Great Britain registered in the High Court shall be made by a chamber application.

[Rule amended by s.i. 43 of 1992]

### *294. Evidence in support of application*

The chamber application shall be verified by an affidavit and shall exhibit the judgment or a verified or certified or otherwise duly authenticated copy thereof, and state that to the best of the information and belief of the deponent the judgment has not been satisfied in Great Britain or has only been satisfied in part by levy in execution or by other means, and the judgment creditor is entitled to enforce the judgment or so much thereof as remains unsatisfied, and the judgment does not fall within any of the cases in which under section 3 (2) of the Act a judgment cannot properly be ordered to be registered. The affidavit shall also, so far as the deponent can, give the full name, title, trade or business and usual or last known place of abode or business of the judgment creditor and judgment debtor respectively.

[Rule amended by s.i. 43 of 1992]

### *295. Title of petition*

[Rule repealed by s.i. 43 of 1992]

### *296. Service of notice of registration on judgment debtor*

Notice in writing of the registration of the judgment must be served on the judgment debtor within a reasonable time after such registration. Such notice shall (in the absence of an order by the judge as to the mode of service thereof) be served on the judgment debtor by personal service as in the case of summons, but the judge may at any stage of the proceedings authorize or direct some other mode of service, and if he does so the service shall be effected in accordance with such authority or direction.

### *297. Contents of notice of registration*

The notice of registration shall contain full particulars of the judgment registered and of the order for such registration, and shall state the name and address of the judgment creditor or of his attorney or agent on whom and at which service of any court application issued by the judgment debtor may be served. The notice shall state that the defendant is entitled, if he has grounds for doing so, to apply to set aside the registration, and shall also state the number of days for applying to set aside the registration limited by the order giving leave to register.

[Rule amended by s.i. 43 of 1992]

### *298. Endorsement by party serving of date etc. on notice of registration*

The party serving the notice shall, within three days at the most after such service, endorse on the notice or a copy or duplicate thereof the day of the month and week of the service thereof, otherwise the judgment creditor shall not be at liberty to issue execution on the judgment; and every affidavit of service of such notice shall mention the day on which such endorsement was made. This rule shall apply to substituted as well as other service. The three days limited by this rule may under special circumstances be extended by order of a judge.

### *299. Judgment debtor: application to set aside registration or suspend execution on judgment*

The judgment debtor may, at any time within the time limited by the order of court giving leave to register after service on him of the notice of the registration of the judgment, make a court application to set aside the registration or to suspend execution on the judgment, and the court, on such application, if satisfied that the case comes within one of the cases in which under section 3 (2) of the Act no judgment shall be order to be registered or that it is not just or convenient that the judgment should be enforced in Zimbabwe, or for other sufficient reason, may order that the registration be set aside or execution of the judgment suspended either unconditionally or on such terms as he thinks fit, and either altogether or until such time as he shall direct:

Provided that the court may allow the application to be made at any time after the expiration of the time herein mentioned.

[Rule amended by s.i. 43 of 1992]

### *300. Title of notice of application*

[Rule repealed by s.i. 43 of 1992]

### *301. Register of judgments ordered to be registered*

The register of judgments ordered to be registered under the Act shall be kept at the office of the Registrar of the High Court in Harare. The judgment shall be registered therein in accordance with the order giving leave to register.

### *302. Arrangement of and particulars to be entered in registers*

The registers shall be arranged in alphabetical order in the surname of the judgment creditor and debtor, and there shall be entered in the register the date of the order for registration and of the registration, the name, title, trade or business and the usual or last known place of abode or business of the judgment debtor and the judgment creditor, and the amount for which the judgment is registered and any special directions in the order for registration as to such registration and for execution thereon and the particulars of any execution issued thereon.

### *303. Issue of execution*

(1) No execution shall issue on a judgment registered under the Act until after the expiration of the time limited by the order giving leave to register:

Provided that the court which orders the registration or a judge in chambers may at any time order that execution shall be suspended for a longer time.

(2) A party desirous of issuing execution on a judgment registered under the Act shall file with the proper officer an affidavit of the service of the notice of registration.

### *304. Certified copy of High Court judgment*

(1) An application under section 4 of the Act for a certified copy of the judgment obtained in the court shall be made to a registrar on an affidavit made by the judgment creditor or his legal practitioner, giving the particulars of the judgment and stating that it has not been satisfied or only satisfied in part, and if the latter, to what extent, and showing that the judgment debtor is resident in Great Britain, and stating to the best of his information and belief the title, trade, business or occupation of the judgment creditor and judgment debtor respectively and their respective usual or last known places of abode or business.

(2) The certified copy of the judgment shall be an office copy and shall be sealed with the seal of the High Court, and shall be certified by a registrar as follows—

"I certify that the above copy judgment is a true copy of a judgment obtained in the High Court of Zimbabwe, and this copy is issued in accordance with section 4 of the Reciprocal Enforcement of Judgments Act [*Chapter 51*]

Signed
REGISTRAR".

### *305. Extension of application of rules in this Order*

If the President extends the operation of the Reciprocal Enforcement of Judgments Act [*Chapter 51*] to any part of the dominions outside Great Britain the rules contained in this Order shall apply *mutatis mutandis* to a judgment of a superior court in that part of the dominions of the British Sovereign to which the operation of the said Act is extended.

## ORDER 38

## TAXATION OF COSTS AND REVIEW OF TAXATION

### *306. Taxing officers*

(1) Every registrar shall be a taxing officer for the purpose of taxing costs and may designate such persons as he deems fit and for whom he shall be responsible as assistant taxing officers and any reference in this order to a taxing officer shall include an assistant taxing officer so designated.

(2) Every taxing officer in his taxation shall act in accordance with such instructions as may from time to time be given by the court for that purpose.

### *307. Costs allowed*

With a view to affording the party who has been awarded an order for costs a full indemnity for all costs reasonably incurred by him in relation to his claim or defence and to ensure that all costs shall be borne by the party against whom such order has been awarded, the taxing officer shall on every taxation allow all such costs, charges and expenses as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same, no costs shall be allowed which appear to the taxing officer to have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee to another legal practitioner, or special charges and expenses to witnesses or other persons or by other unusual expenses.

[Rule amended by s.i. 277 of 1981]

### *308. Services rendered, work done and disbursements*

(1) A taxing officer may tax all bills of costs for services (other than conveyancing) actually rendered by a legal practitioner or by a notary public in his capacity as such, including disbursements made, whether in connexion with litigation or not, and whether the work was done before or after the date on which the rules came into operation.

(2) In the taxation of costs as between party and party in respect of work done in connexion with judicial proceedings, a taxing officer shall be guided as far as possible by the tariff of legal practitioners' fees prescribed in the High Court (Fees and Allowances) Rules:

[Subrule amended by s.i. 101 of 1994]

Provided that no regard shall be paid to any amendment to the said tariff of fees if the work concerned was done before the said amendment came into operation.

[Proviso substituted by R.G.N. 359 of 1978]

(3) In the taxation of costs in respect of work done in connection with any matter not referred to in subrule (2), including the taxation of costs as between a legal practitioner and his own client in respect of work done in connection with judicial proceedings, a taxing officer shall be guided as far as possible by any tariff by the Law Society of Zimbabwe or recommended by the Council of the Society under the Legal Practitioners Act, 1981.

[Subrule substituted by s.i. 101 of 1994]

(4) In taxing any costs under this rule, a taxing officer shall—

(*a*) allow disbursements made when they are reasonable, and reasonably incurred; and

(*b*) take into account any tax or duty payable by the legal practitioner concerned in respect of any fee or charge.

[Subrule substituted by s.i. 101 of 1994]

### *309. Charges for witnesses and qualifying expenses*

(1) The charges for witnesses as fixed in the High Court (Fees and Allowances) Rules, 2000 are to be considered as payable to the witness by the party who summoned or produced him, and in the event of any such party being awarded his costs against any other party, the said charges shall be allowed against such other party in the taxation of costs.

[Subrule amended by s.i. 101 of 1994]

(2) In the taxation of costs between party and party no amount shall be allowed for any witness whether for attendance or travelling expenses unless there is produced to the taxing officer proof that such amount has already been paid or tendered to or claimed by such witness.

(3) In the taxation of costs between party and party nothing shall be allowed for any witness not examined unless upon proof that his evidence might reasonably have been believed to be material and necessary.

(4) If a number of witnesses manifestly greater than was reasonably necessary have been summoned by any party there shall only be allowed against the other party the charges for such witnesses as were reasonably necessary.

(5) In the taxation of costs between party and party no amount shall be allowed for any witness in respect of personal attendance or travelling expenses if the fact or facts which such witness is subpoenaed to prove have before the issue of such subpoena been admitted to the party taking out the subpoena by the opposite party and such admission shall be in writing, signed by the party making it or his lawful attorney.

(6) When one person is a witness in more than one case heard on the same day, he shall be entitled to no more than one fee for personal attendance and one allowance for travelling expenses, which shall be equally divided between such cases.

(7) Qualifying expenses shall only be allowed under an order of court.

### *310. Notice of taxation*

(1) Notice of taxation to the party against whom any order for costs has been awarded shall be necessary in every case except where the party against whom costs have been awarded has either not entered an appearance to defend or has failed to appear before the court either in person or by legal practitioner.

(2) In all cases where a notice of taxation is necessary three days' notice together with a copy of the bill of costs shall be given by the legal practitioner of the party whose costs are to be taxed to the other party or his legal practitioner.

(3) When the dwelling-house or place of business of the party against whom costs are to be taxed is more than two hundred kilometres from the seat of the court, the time for the service of such notice shall be regulated by the periods laid down by rule 17.

[Subrule amended by s.i. 142 of 1981]

(4) In the taxation of costs, where the circumstances warrant the same, the notice of taxation with a copy of the bill of costs may be transmitted to the party appearing in person by registered post.

(5) Except where notice of taxation is unnecessary under this Order, the taxing officer shall not proceed to the taxation of any bill unless he is satisfied that the party liable to pay the same has been given due notice as to the time and place of such taxation and notice that he is entitled to be present thereat.

### *311. Party and party costs*

The taxing officer shall, unless the court when awarding costs orders otherwise, allow as party and party costs—

(*a*) in any matter another legal practitioner is employed, the reasonable fee consequent upon such employment:

Provided that he—

(*a*) may disallow the fee of another legal practitioner in unopposed matters and in matters in which a legal practitioner has not appeared on the other side, and in matters in which no award of costs has been made by the court; and

(*b*) shall give due consideration to—

(i) the volume of evidence (oral or written) dealt with by another legal practitioner or which he could reasonably have expected to be called upon to deal with;

(ii) the complexity of the facts or the law relevant to the case;

(iii) the presence or absence of scientific or technical problems, and their difficulty if they were present;

(iv) any difficulties or obscurities in the relevant legal principles or in their application to the facts of the case;

(v) the importance of the matter in issue, in so far as that importance may have added to the burden of responsibility undertaken by that legal practitioner.

[Paragraph substituted by s.i. 273 of 1983 and proviso substituted by s.i. 356 of 1984]

(*b*) in any manner which does not conclude upon the first day, reasonable refreshers for each day subsequent to the first, except in the case of a review from a magistrate's court.

### *312. Departure from tariff*

In the taxing of any party and party bill of costs, the court may authorize departures from the tariff for good cause.

### *313. Taxing officer may refer point to judge in chambers*

The taxing officer may, without filing any formal documents, submit any point arising at a taxation for decision by a judge in chambers, and it shall be competent for the taxing officer and for the legal practitioners who appeared at the taxation to appear before the judge respecting such point.

### *314. Review of taxation*

(1) A party aggrieved by the decision of a taxing officer may apply to court within four weeks after the taxation to review such taxation. The application shall be by court application to the taxing officer and to the opposite party, if such opposite party was present at the taxation or if the court decides that such opposite party should be represented.

[Subrules amended by s.i. 43 of 1992]

(2) The court application shall specify the items forming the subject of the grievance.

[Subrule as amended by s.i. 43 of 1992]

## ORDER 39

## DUTIES OF REGISTRARS AND DISTRICT REGISTRARS

### *315. Duties of registrars*

In addition to the duties and obligations referred to in other Orders, registrars and district registrars shall carry out the duties specified in this Order.

### *316. Civil record book*

The registrar at Harare and Bulawayo shall each keep an indexed book to be called the civil record book, in which the following particulars shall be recorded—

(*a*) the number of the action;

(*b*) the names of the parties;

(*c*) the plaint or cause of action;

(*d*) the day and place of hearing the case;

(*e*) the names of legal practitioners;

(*f*) the judgment of the court;

(*g*) any subsequent proceedings and remarks.

### *317. Filing and handling of documents*

(1) As soon as summons is issued, the registrar shall prepare a cover in which every pleading as received shall be filed and on the front page of which shall be recorded the date on which each pleading is received. A separate cover shall be kept for each matter to be presented to court.

[Subrule as amended by s.i. 43 of 1992]

(2) The summons or other first document in any matter shall be numbered by the registrar before issue with a consecutive number for the year; and the matter shall, at the time of issue, be entered by him in the civil record book under that number. Where the summons or other first document is issued by a district registrar the document shall be numbered by the registrar at Harare or Bulawayo on receipt thereof in terms of rule 321.

[Subrule as amended by s.i. 43 of 1992]

(3) Every document afterwards served, delivered or filed in such matter shall be marked with such number by the party delivering it, and shall not be received by the registrar until so marked.

[Subrule as amended by s.i. 43 of 1992]

### *318. Stamp fees*

A registrar shall not accept and file any document or issue any summons, subpoena or other process or order of court unless the prescribed stamp fee has been attached and cancelled, except where a party has been granted leave to proceed *in forma pauperis.*

### *319. Documents confidential until adjudication*

All documents filed with the registrar in any matter shall be confidential until the court has adjudicated thereon, save that such documents shall be open for the inspection of parties to the suit or matter. Thereafter all documents shall be regarded as court records and shall be available to the inspection of the public on payment of the prescribed search fee.

### *320. Exhibits*

(1) No exhibit forming part of the record of any civil proceedings may be withdrawn from the record of such proceedings without the permission of the registrar of the court. Such permission may be granted upon such terms and conditions as the registrar may deem fit, and as may be calculated to avoid as far as possible the incurring of any expense therewith.

(2) The person desirous of withdrawing any exhibit shall state the capacity in which he makes the request.

(3) The registrar in any case may require the substitution for any exhibit to be withdrawn of such copy of the whole or portion thereof as he may deem necessary; and shall so require it in the case of any exhibit which has been incorporated in the court's order save in cases where such exhibit is filed in the office of the Registrar of Deeds, the Master or the Surveyor General as one of the permanent records thereof.

(4) The person desirous of withdrawing any exhibit may, if such permission is refused, or if he is not satisfied with the terms and conditions imposed, require the matter to be referred to the judge or judges before whom the proceedings were heard, or failing him or them, to the Judge President for final determination.

[Subrule amended by s.i. 43 of 1992]

(5) A receipt in such form as may be required by the registrar shall be given by the person removing any document. Such receipt shall be filed with the record.

### *321. District registrars*

For the purpose of issuing summonses and subpoenas and writs of arrest under Order 36 in districts other than Harare or Bulawayo, magistrates shall within their respective districts be district registrars of the High Court. A district registrar shall, after issuing any summons or writ of arrest, forthwith transmit the original thereof to the registrar at Harare or Bulawayo, according to the place where appearance is required to be entered, for the purpose of record in his office.

[Subrule amended by s.i. 43 of 1992 and s.i. 25 of 1993]

## ORDER 40

## EXECUTION

## A GENERAL

### *322. Process for execution of judgment: writ of execution*

The process for the execution of any judgment for the payment of money, for the delivery up of goods or premises, or for ejectment, shall be by writ of execution signed by the registrar and addressed to the sheriff or his deputy, in accordance with one or other of Forms Nos. 34 to 41.

### *323. When writ may be sued out*

One or more writs of execution may be sued out at his own risk by any person in whose favour any such judgment has been pronounced if such judgment is not then satisfied, stayed or suspended.

### *324. Duration of writ*

No writ of execution shall be issued after the judgment has become superannuated, unless the said judgment has first been revived, but a writ of execution once issued shall remain of force until such time as the judgment has been satisfied.

### *325. Process of execution for costs awarded*

No process of execution shall issue for the levying and raising of any costs awarded by the court to any party until they have been taxed by a taxing officer or agreed to in writing by the party concerned in a fixed sum:

Provided that—

(i) it shall be competent to include in a writ of execution a claim in an unspecified amount for the costs of such writ and the execution thereof, subject to due taxation thereafter;

(ii) if such costs shall not have been taxed and the original bill of costs, duly allocated, not lodged with the sheriff or his deputy before the day of any sale under such writ, such costs shall be excluded from the account and plan of distribution.

### *326. Attachment of immovable property*

It shall not be necessary to obtain an order of court declaring a judgment debtor's immovable property executable or to sue out a separate writ of execution in order to attach and take in execution the immovable property of any judgment debtor, but where so desired the judgment creditor may sue out one writ of execution for the attachment of both movable and immovable property:

Provided that the sheriff or his deputy shall not proceed to attach in execution the immovable property of the judgment debtor unless and until he has by due inquiry and diligent search satisfied himself that there is no or insufficient movable property belonging to the judgment debtor to satisfy the amount due under the writ.

### *326A. Notice to be given before removal of goods or ejectment from premises*

[Rule inserted by s.i. 120 of 1995]

The Sheriff or his deputy shall not—

(*a*) eject a judgment debtor from any premises pursuant to a writ of execution; or

(*b*) remove any goods from a judgment debtor's premises following their attachment in terms of rule 335;

unless he has delivered to the debtor a notice in Form 41A giving him not less than forty-eight hours' notice of the proposed ejectment or removal:

Provided that—

(i) the sheriff or his deputy may remove goods from a debtor's premises if he has reasonable grounds for believing that their immediate removal is necessary in order to prevent the debtor from concealing or disposing of any property in order to prevent its removal;

(ii) an inadvertent failure by the sheriff or his deputy to deliver or leave a notice in terms of this rule shall not invalidate any attachment, sale in execution or ejectment effected in accordance with a writ of execution.

### *327. Writ may be withdrawn or suspended*

(1) A writ of execution may, on payment of the fees incurred, be withdrawn or suspended at any time by notice to the sheriff or his deputy by the party who has sued out such writ.

(2) Where more than one writ has been lodged with the sheriff in respect of any property to be sold in execution, the sheriff shall not cancel or consent to the cancellation of the sale in execution unless all the writs have been withdrawn or suspended in terms of subrule (1).

[Subrule inserted by s.i. 126 of 1989]

(3) Where an order or provisional order has been issued under rule 348A in regard to the sale of a dwelling as defined in that rule, the writ of execution may be withdrawn under subrule (1) at any time while the order or provisional order, as the case may be, remains in force.

[Subrule inserted by s.i. 120 of 1995]

### *328. Process invalid if wrong person named*

Any process shall be invalid if a wrong person is named therein as a party; but no process shall be invalid merely by reason of the misspelling of any name therein or of any error as to date.

### *329. When sheriff may require security*

Where the sheriff or his deputy is in doubt as to the validity of an attachment or contemplated attachment he may require that the party suing out the process shall give him security to indemnify him.

### *330. Taxed costs and expenses of execution a first charge*

Unless otherwise ordered by the court, the taxed costs and expenses of issuing and levying execution shall be a first charge on the proceeds of the property sold in execution and may, so far as such proceeds are insufficient, be recovered from the execution debtor as costs awarded by the court.

### *331. Proceeds of sale in execution: participation and ranking of writs*

(1) Where immovable property is to be sold in execution a judgment creditor wishing to participate in the proceeds of the sale shall lodge his writ with the sheriff, and where other property is to be sold in execution he shall lodge his writ with the sheriff's deputy.

(2) No judgment creditor lodging a writ of execution with the sheriff or his deputy, as the case may be, shall be entitled to share in or receive any part of the proceeds levied under any writ or writs of execution previously lodged unless such creditor has lodged his said writ by not later than the day immediately preceding the date of the sale in execution.

(3) Subject to any hypothec existing prior to attachment, all writs of execution lodged with the sheriff or his deputy, as the case may be, in accordance with the provisions of subrule (2) of this rule shall rank *pro rata* in the distribution of the proceeds of the property or goods sold in execution.

### *332. Procedure where property taken in execution claimed by third party*

(1) If any property taken in execution is claimed by any third party as his property, the sheriff or his deputy shall, on receipt of the claim, forthwith give notice to the execution creditor.

(2) If the execution creditor gives the sheriff or his deputy notice within two days thereafter that he admits the claim, he shall not be liable for any costs, fees or expenses afterwards incurred, and the sheriff or his deputy may withdraw from possession of the property claimed.

### *333. Procedure where sheriff unable to make demand etc.*

Where the sheriff or his deputy is unable to make any demand, serve any warrant or deliver or exhibit any other document in accordance with these rules he shall make a chamber application for directions as to the procedure to be followed.

[Rule amended by s.i. 43 of 1992]

## B. MOVABLES

### *334. Movable property that may be seized in execution*

(1) Subject to section 21 of the Act and subrule (2), the sheriff or his deputy may by virtue of a writ of execution seize all kinds of movable property, including money and bank-notes.

(2) The amount prescribed for the purposes of—

(*a*) paragraph (*b*) of section 21 of the Act, being the value of the execution debtor's household utensils that may not be seized in execution, is five thousand dollars;

(*b*) paragraph (*c*) of section 21 of the Act, being the value of the execution debtor's stock, tools and implements that may not be seized in execution, is five thousand dollars;

(*c*) paragraph (*e*) of section 21 of the Act, being the value of the execution debtor's professional books, documents and instruments that may not be seized in execution, is five thousand dollars.

[Rule substituted by s.i. 120 of 1995]

### *335. Procedure for levying execution on movable property: inventory and valuation*

(1) The sheriff or his deputy shall, upon receiving a writ directing him to levy execution on movable property forthwith go to the house or place of business of the execution debtor (unless the judgment creditor shall give different instructions regarding the situation of the assets to be attached) and there demand satisfaction of the writ, or else require that so much movable property be pointed out as the said sheriff or his deputy may deem sufficient to satisfy the exigency of the writ, and if such last mentioned request is complied with, the said sheriff or his deputy shall make an inventory and valuation of such movable property; but if the debtor does not point out such property, the said sheriff or his deputy shall immediately make an inventory and valuation of so much of the movable property belonging to the debtor as he may deem sufficient to satisfy the writ.

(2) So far as may be necessary to the execution of any such writ, the sheriff or his deputy may open any door of or in any premises, or of any piece of furniture in any premises, if opening is refused or if there is no person there who represents the execution debtor; and the sheriff or his deputy may, if necessary, use force to that end.

(3) Any such writ may be served in any of the manners provided for by rules 37 and 38:

Provided that if satisfaction of the writ was not demanded from the execution debtor personally, the sheriff or his deputy shall give to the execution debtor written notice of the attachment and a copy of the inventory made by him, unless his whereabouts is unknown.

(4) When the foregoing requirements of this rule have been complied with by the sheriff or his deputy, the goods so inventoried by him shall become and be judicially attached.

(5) The sheriff or his deputy shall deliver a copy of the said inventory and a notice of attachment to the debtor, subject to the provisions of subrule (3), or leave the same on the premises.

(6) Where specie is found and attached the number and kinds thereof shall be specified in the inventory, and where any documents are attached they shall also be specified; and such specie or documents shall be sealed up and conveyed to the office of the sheriff or his deputy.

### *336. Undertaking by debtor to produce property on day of sale*

Where any person whose movable property has been so attached undertakes in writing, together with some sufficient surety, that the same shall be produced on the day appointed for the sale thereof, if the judgment creditor is not sooner satisfied in respect of his judgment debt, then the sheriff or his deputy shall leave the said property so attached and inventoried as aforesaid, other than specie or documents, upon the premises where the same was found. The said security shall be in Form No. 42.

### *337. Procedure where no undertaking by debtor to produce property*

Subject to rule 326A, if the debtor will not so undertake, together with a sufficient surety, to produce the said goods—

(*a*) the sheriff or his deputy shall either remove the same to some convenient place of security, or, if the same are cattle or such property as it may be inconvenient to remove, may leave the same upon the premises in the charge and custody of some person for him until the day appointed for the sale thereof;

(*b*) where the sheriff or his deputy is instructed by the judgment creditor to remove the goods attached, he shall do so within forty-eight hours after the attachment; and he shall in the meantime leave the same in the charge and custody of some person for him;

(*c*) such a custodian may not use, let or lend the attached goods, nor permit them to be used, let or lent, nor may he in any way do anything which will decrease their value, and, if the goods attached have produced any profit or increase, the custodian shall be responsible for any such profit or increase in like manner as he is responsible for the goods originally attached;

(*d*) if such a custodian makes a default in his duty, he shall not be entitled to recover any remuneration for his charge and custody.

[Rules amended by s.i. 120 of 1995]

### *338. Conditions regarding sale of movable property*

Unless the court or a judge otherwise directs, or the parties agree to the contrary, any movable property sold in execution shall be sold publicly and for ready money by the sheriff or his deputy to the highest bidder at or near to the place where the same was taken or to which the same has been removed as aforesaid as may be advantageous for the sale thereof; and the said sheriff or his deputy shall publish notice of the sale in a newspaper circulating in the district.

### *339. Appointment of day for sale*

The day appointed for the sale shall be not less than twelve days after the time of seizure or attachment:

Provided that where perishables are attached, they may with the consent of the execution debtor or upon the execution creditor indemnifying the sheriff or his deputy against any claim for damages which may arise from such sale, be sold immediately by the sheriff or his deputy in such manner as to him seems expedient.

### *340. When sale to be stopped*

A sale in execution shall be stopped as soon as sufficient money has been raised to satisfy the said warrant and the costs of the sale.

### *341. Disposal of any balance in hand*

If the sheriff or his deputy has a balance in hand after payment of the judgment creditor's claim and costs he shall pay the same to the judgment debtor if he can be found; otherwise he shall pay such balance into the sheriff's account to be held for one year and thereafter to be paid into the Guardian's Fund if unclaimed.

### *342. Interest in partnership and partnership property*

(1) Where a judgment debtor is a partner in a firm and the judgment is against him for a separate debt, the court may, after notice to the judgment debtor and to his firm, appoint the sheriff or his deputy as receiver to receive any moneys payable to the judgment debtor in respect of his interest in the partnership.

(2) Such appointment shall, until the judgment debt is satisfied, operate as an attachment of the interest of the judgment debtor in the partnership assets.

(3) Where the judgment is against a firm, the partnership property shall first be exhausted, so far as it is known to the judgment creditor, before the judgment is executed against the separate property of the partners.

### *343. Attachment of incorporeal property*

(1) If incorporeal property, whether movable or immovable, is available for attachment, it may be attached in the manner hereafter provided without the necessity of a prior application to court:

Provided that a debt due or accruing due for salary or wages shall not be so attached.

(2) Where the property or right to be attached is a lease or a bill of exchange, promissory note, bond or other security for the payment of money, the attachment shall be complete only when—

(*a*) notice has been given by the sheriff or his deputy to the lessor and lessee, mortgagor and mortgagee or person liable on the bill of exchange or promissory note or security, as the case may be; and

(*b*) the sheriff or his deputy shall have taken possession of the writing (if any) evidencing the lease, or of the bill of exchange or promissory note, bond or other security, as the case may be; and

(*c*) in the case of a registered lease or any registered right, notice has been given to the Registrar of Deeds.

(3) Where movable property sought to be attached is the interest of the execution debtor in property pledged, leased or sold under a suspensive condition to or by a third person, the attachment shall be complete only when the sheriff or his deputy has served on the execution debtor and on the third person notice of the attachment with a copy of the warrant of execution. The sheriff or his deputy may upon exhibiting the original of such warrant of execution to the pledgee, lessor, lessee, purchaser or seller enter upon the premises where such property is and make an inventory and valuation of the said interest.

(4) In the case of the attachment of all other incorporeal property or incorporeal rights in property as aforesaid—

(*a*) the attachment shall only be complete when—

(i) notice of the attachment has been given in writing by the sheriff or his deputy to all interested parties and where the asset consists of incorporeal immovable property or an incorporeal right in immovable property, notice shall also have been given to the Registrar of Deeds in whose deeds registry the property or right is registered; and

(ii) the sheriff or his deputy shall have taken possession of the writing or document evidencing the ownership of such property or right, or shall have certified that he has been unable, despite diligent search, to obtain possession of the writing or document;

(*b*) the sheriff or his deputy may upon exhibiting the original of the warrant of execution to the person having possession of property in which incorporeal rights exist, enter upon the premises where such property is and make an inventory and valuation of the right attached.

### *344. Attachment of property subject to lien*

Attachment of property subject to a lien shall be effected *mutatis mutandis* in accordance with the provisions of subparagraph (*b*) of subrule (4) of rule 343.

### *345. Sale of property subject to real right of third person*

Where property subject to a real right of any third person is sold in execution such sale shall be subject to the rights of such third person unless he otherwise agrees.

C. IMMOVABLE PROPERTY

### *346. Writ against immovable property and mining claims: identification: form*

A writ of execution against immovable property and mining claims shall state the situation and nature of the property or claims sought to be attached sufficiently to enable it to be identified, and shall be in Form No. 36.

### *347. Mode of attachment of immovable property*

(1) The method of attachment of immovable property, including a mining claim, shall be by notice by the Sheriff or his deputy served, together with a copy of the writ of execution, upon—

(*a*) the owner of the property; and

(*b*) the Registrar of Deeds or officer charged with the registration of such property.

(2) In the notice referred to in subrule (1), the Sheriff or his deputy may require the execution debtor to deliver to him all documents that relate to the execution debtor's title to the property under attachment.

(3) If the immovable property concerned is occupied by a person other than the owner, notice of the attachment shall also be served on the occupier.

(4) The notices referred to in subrules (1) and (3) shall be in Form No. 43 or 44, as may be appropriate, and may be served in any of the ways provided in Order 5.

[Rule substituted by s.i. 80 of 00]

### *348. Procedure following attachment*

[Rule substituted by s.i. 192 of 1997]

(1) Where immovable property has been attached, the party at whose instance the attachment was made shall deliver to the notice and writ of execution by which the attachment was made.

(2) Subject to rule 348A, upon receiving the documents referred to in subrule (1) the sheriff shall ascertain the particulars of all mortgages and other real rights registered against the immovable property concerned, as well as the particulars of any caveat lodged in respect of the property:

Provided that the sheriff may require the party at whose instance the property was attached to ascertain those particulars and to report to him in writing therein.

[Subrule amended by s.i. 80 of 2000]

(3) If the Sheriff finds that a caveat has been lodged in respect of the immovable property concerned, he shall notify the person at whose instance it was lodged that the immovable property has been attached:

Provided that the Sheriff may require the party at whose instance the property was attached to give the notification required by this subrule.

[Subrule inserted by s.i. 80 of 2000]

### *348A. Stopping of sale to facilitate settlement of claims*

[Rule inserted by s.i. 120 of 1995]

(1) In this rule—

"dwelling" means a building or part of a building including a flat, designed as a dwelling for a single family and includes the usual appurtenances and outbuildings associated with such a building.

"Secretary" means the Secretary for the Ministry responsible for the administration of the Housing and Building Act [*Chapter 22:07*].

[Definition amended by s.i. 80 of 2000]

(2) Upon receiving documents and particulars in terms of rule 348 relating to the attachment of a dwelling, the sheriff shall forthwith send the Secretary—

(*a*) written notification that the dwelling has been attached in terms of this Order and is to be sold in execution; and

(*b*) copies of all documents and particulars relating to and shall take no further steps in regard to the sale of the dwelling or the eviction of the occupants for a period of ten days.

[Subrule amended by s.i. 80 of 2000]

(3) If, within ten days after being sent notification in terms of subrule (2), the Secretary notifies the sheriff in writing that he proposes to satisfy or settle the execution creditor's claim from the National Housing Fund established by section 14 of the Housing and Building Act [*Chapter 22:07*], the Sheriff shall—

(*a*) inform the execution creditor of the Secretary's proposal; and

(*b*) take no further steps in regard to the sale of the dwelling concerned until a period of thirty days has elapsed from the date on which he sent written notification to the Secretary in terms of subrule (2).

[Subrule amended by s.i. 80 of 2000]

(4) Within the thirty-day period referred to in subrule (3), the Secretary may make a chamber application to a judge for an order staying the sale of the dwelling concerned and, if the judge is satisfied that there is a reasonable probability that the execution creditor's claim will be satisfied or settled from the National Housing Fund established by section 14 of the Housing and Building Act [*Chapter 22:07*], the judge may issue a provisional order directing that the sale shall not take place for a period of three months or such shorter period as may be specified in the order, pending confirmation of the order.

[Subrule amended by s.i. 80 of 2000]

(5) A provisional order issued under subrule (4) shall—

(*a*) be served on all interested parties and additionally, or alternatively, be published in such manner as the judge may direct; and

(*b*) call upon any interested party who wishes to oppose confirmation of the order to file a notice of opposition within such period as is specified int eh provisional order; and

(*c*) not be confirmed unless—

(i) the execution creditor's claim has been satisfied; or

(ii) there is an undertaking from the Secretary that the claim will be settled within three months from the National Housing Fund established by section 14 of the Housing and Building Act [*Chapter 22:07*].

[Subrule amended by s.i. 80 of 2000]

(5a) Without derogation from subrules (3) to (5), where the dwelling that has been attached is occupied by the execution debtor or members of his family, the execution debtor may, within ten days after the service upon him of the notice in terms of rule 347, make a chamber application in accordance with subrule (5b) for the postponement or suspension of—

(*a*) the sale of the dwelling concerned; or

(*b*) the eviction of its occupants.

[Subrule inserted by s.i. 80 of 2000]

(5b) An application in terms of subrule (5a) shall be made in Form No. 45b and filed with the Registrar.

[Subrule inserted by s.i. 80 of 2000]

(5c) Upon the filing of an application in terms of subrule (5a), the Registrar shall without delay—

(*a*) notify the sheriff or his deputy that the application has been filed; and

(*b*) serve a copy of the application on the execution creditor; and

(*c*) set the application down for hearing and notify the execution creditor and the applicant of the setting down date.

[Subrule inserted by s.i. 80 of 2000]

(5d) Upon being notified of an application in terms of paragraph (*a*) of subrule (5c), the Sheriff or his deputy shall take no further steps in regard to the sale of the dwelling concerned or the eviction of its occupants, as the case may be, pending the determination of the application.

[Subrule inserted by s.i. 80 of 2000]

(5e) If, on the hearing of an application in terms of subrule (5a), the judge is satisfied—

(*a*) that the dwelling concerned is occupied by the execution debtor or his family and it is likely that he or they will suffer great hardship if the dwelling is sold or they are evicted from it, as the case may be; and

(*b*) that—

(i) the execution debtor has made a reasonable offer to settle the judgment debt; or

(ii) the occupants of the dwelling concerned require a reasonable period in which to find other accommodation; or

(iii) there is some other good ground for postponing or suspending the sale of the dwelling concerned or the eviction of its occupants, as the case may be;

the judge may order the postponement or suspension of the sale of the dwelling concerned or the eviction of its occupants, subject to such terms and conditions as he may specify.

[Subrule inserted by s.i. 80 of 2000]

(6) An application under subrule (4) or (5a), and any proceedings for enrolment and hearing consequent upon the issue of a provisional order under subrule (4), shall be treated as urgent, and rule 244 and the proviso to subrule (2) of rule 247, as the case may be, shall apply accordingly.

[Subrule amended by s.i. 80 of 2000]

(7) Notwithstanding any other provision of this Order, the sheriff shall take all necessary steps to comply with any order issued pursuant to this rule.

(8) For the purpose of calculating any time limit under this Order—

(*a*) any period during which the Sheriff is required by subrule (2), (3) or (5b) to take no steps in regard to the sale of any dwelling; and

[Paragraph amended by s.i. 80 of 2000]

(*b*) the period during which an order issued in terms of this rule is in force;

shall be disregarded.

### *349 Delivery to sheriff of documents relating to title*

(1) The sheriff may, by notice served by means of a registered letter, require the execution debtor, or any other person in possession of documents relating to the title in the property attached, to deliver up to him forthwith all such documents.

(2) Should any person so required to deliver up such documents fail to do so within a reasonable time the sheriff may, on notice to such person, apply to the court for an order compelling such person to deliver the documents.

### *350. Deposit with sheriff on account of costs*

(1) The party instructing the sheriff to sell immovable property in execution shall provide the sheriff with such deposit on account of costs as the sheriff may require and shall comply with such further requests as the sheriff may make.

[Subrule amended by s.i. 192 of 1997]

(2) The deposit so made shall be reimbursed to the party concerned out of the first proceeds of the sale, if these are sufficient.

### *350A. Nomination of auctioneer*

[Rule inserted by s.i. 192 of 1997]

Upon receipt of a deposit in terms of rule 350, the sheriff shall nominate an auctioneer to conduct the sale of the immovable property concerned:

Provided that, if the party instructing the sheriff to sell the property informs the sheriff that he wants a particular auctioneer to conduct the sale and satisfies the sheriff that he will meet any additional costs incurred through engaging that auctioneer, the sheriff shall nominate that auctioneer.

### *351. Valuation of property*

The sheriff may, if he deems it expedient, appoint some fit and proper person, not being interested in the immovable property, to value the same and to report on oath to him for his guidance such estimated value, and any party interested may, at his own expense, in like manner furnish the sheriff with an independent valuation of the property.

### *352. Day and place for sale: appointment: advertisement: notice to holders of mortgage*

The sheriff shall appoint a day and place for the sale of property, such day being, except by special leave of the court, not less than one month after service of the notice of attachment upon the execution debtor; and he shall cause the sale to be advertised at least once in the *Gazette* and in a newspaper circulating in the district in which the property is situated and in such other manner as he may deem to be necessary. The sheriff shall also send to each holder of a mortgage over the property, by registered letter addressed to his last known address, or to his attorney, notice of the date and venue of the sale.

### *353. Conditions of sale*

The conditions of sale shall be prepared by the sheriff, but it shall be competent for the execution debtor or any other person having an interest in the sale to apply to a judge in chambers, after due notice to the sheriff, for amendment of such conditions.

### *354. Sale by auction without reserve*

The sale shall be by public auction without reserve, and shall be held at such place as the sheriff shall determine as being the most convenient for prospective buyers.

### *355. Appointment of commissioner and his duties*

The public auction shall be held in the presence of a commissioner appointed by the sheriff, who shall certify to the sheriff, if such is the case, that the public auction was duly and properly conducted. In his certificate the commissioner shall state the name of the execution debtor, the amount of the purchase price, the name of the purchaser and the conditions of the sale.

### *356. Declaration of purchaser by sheriff*

If the sheriff is satisfied that the highest price offered is reasonable, having regard to the circumstances of time and place and to the state of the property market and that the sale was properly conducted, he shall declare the highest bidder to be the purchaser, subject to confirmation as hereinafter prescribed.

[Subrule amended by s.i. 80 of 2000]

### *357. Where purchaser fails to carry out obligations under conditions of sale*

(1) If the purchaser fails to carry out any of his obligations under the conditions of sale, the sale may be cancelled by the sheriff after due notice to the purchaser, and the property may again be put up for sale.

[Subrules amended by s.i. 25 of 1993]

(2) Such purchaser shall be responsible for any loss sustained by reason of his default, which loss may, on the application of any aggrieved creditor whose name appears on the sheriff's plan of distribution, be recovered from him under judgment of a judge pronounced summarily on a written report by the sheriff, after such purchaser shall have received notice in writing that such report will be laid before the judge for such purpose.

[Subrule amended by s.i. 25 of 1993]

(3) If he is already in possession of the property, the sheriff may make a chamber application for an order ejecting him or any person claiming to hold under him therefrom.

[Subrules amended by s.i. 43 of 1992]

### *358. Sale otherwise than by public auction*

(1) Where all persons interested including the judgment debtor consent thereto, or otherwise with the consent of a judge, the sheriff may sell immovable property attached in execution otherwise than by public auction, if he is satisfied that the price offered is fair and reasonable and that the property is unlikely to realize a larger sum by a sale at public auction.

(2) If, after a sale by public auction has taken place the sheriff is not satisfied that the highest price offered is reasonable as provided by rule 356, the sheriff may sell the property by private treaty subject to the conditions of sale for such price, being greater than the highest offer made at the public auction, as he deems fair and reasonable. If the sheriff is unable to sell the property by private treaty at such price, it may again be offered for sale by public auction.

### *359. Confirmation or setting aside sale*

[Rule substituted by s.i. 80 of 00]

(1) Subject to this rule, any person who has an interest in a sale in terms of this Order may request the Sheriff to set it aside on the ground that—

(*a*) the sale was improperly conducted; or

(*b*) the property was sold for an unreasonably low price;

or on any other good ground.

(2) A request in terms of subrule (1) shall be in writing and lodged with the Sheriff within fifteen days from the date on which the highest bidder was declared to be the purchaser in terms of rule 356 or the date of the sale in terms of rule 358, as the case may be:

Provided that the Sheriff may accept a request made after that fifteen-day period but before the sale is confirmed, if he is satisfied that there is good cause for the request being made late.

(3) A request in terms of subrule (1) shall—

(*a*) set out the grounds on which, according to the person making the request, the sale concerned should be set aside; and

(*b*) be supported by one or more affidavits setting out any facts relied on by the person making the request;

and copies of the request shall be served without delay on all other interested parties.

(4) A person on whom a copy of a request has been served in terms of subrule (3) may, within ten days after it was served on him, lodge with the Sheriff written notice that he opposes the setting aside of the sale concerned.

(5) A notice in terms of subrule (4) shall—

(*a*) set out grounds on which the person who gives it opposes the setting aside of the sale concerned; and

(*b*) be supported by one or more affidavits setting out any facts relied on by the person who gives it;

and copies of the notice shall be served without delay on the person making the request and on such other persons as the Sheriff may direct.

(6) Within ten days after a copy of a notice has been served on him in terms of subrule (5), the person making the request may lodge with the Sheriff a written reply and, if he does so, shall without delay serve a copy

of his reply, together with any supporting documents, on the person opposing the request and on such other persons as the Sheriff may direct.

(7) On receipt of a request in terms of subrule (1) and any opposing or replying papers filed in terms of this rule, the Sheriff shall advise the parties when he will hear them and, after giving them or their legal representatives, if any, an opportunity to make their submissions, he shall either—

(*a*) confirm the sale; or

(*b*) cancel the sale and make such order as he considers appropriate in the circumstances;

and shall without delay notify the parties in writing of his decision.

(8) Any person who is aggrieved by the Sheriff's decision in terms of subrule (7) may, within one month after he was notified of it, apply to the Court by way of a court application to have the decision set aside.

(9) In an application in terms of subrule (8), the Court may confirm, vary or set aside the Sheriff's decision or make such other order as the Court considers appropriate in the circumstances.

(10) Where no request has been lodged with the Sheriff in terms of subrule (1) within fifteen days from date on which the highest bidder was declared to be the purchaser in terms of rule 356 or the date of the sale in terms of rule 358, as the case may be, he shall, subject to the proviso to subrule (2), confirm the sale.

### *360. Confirmation of sale*

[Rule repealed by s.i. 80 of 2000]

### *361. Transfer of property sold*

Immediately after the sale has been confirmed and the conditions of sale complied with, the sheriff shall proceed to give transfer of the property to the purchaser against payment of the purchase money.

### *362. Order of preference of claims and plan of distribution*

As soon as practicable after the sale the sheriff shall proceed to determine the several claims to the purchase money and shall state them in the order of their preference in a plan of distribution thereof:

Provided that where the purchase money is payable in instalments the sheriff may frame such interim plans of distribution as to him may seem advisable to enable him to effect without delay the distribution of any such instalment or instalments.

### *363. Plan of distribution to lie for inspection*

The plan of distribution shall lie in the office of the sheriff for the inspection of parties interested for fourteen days from a date to be notified by the sheriff by advertisement in the *Gazette*. When the property sold is situated in any magisterial province other than Harare, a copy of the plan of distribution shall also lie for a like period—

(*a*) in the case of the Bulawayo magisterial province, in the office of the Registrar of the General Division, Bulawayo; and

(*b*) in the case of any other magisterial province, in the office of the provincial magistrate for that province.

[Rule amended by s.i. 277 of 1981]

### *364. Application to set aside or amend plan of distribution*

Any person having an interest in the proceeds of the sale and objecting to the plan of distribution may make a court application to have it set aside or amended. Any such person shall give due notice of the application to the sheriff and other parties interested stating the grounds of his objection, and on the hearing of the application the court may make such order as it deems just.

[Rule amended by s.i. 43 of 1992]

### *365. Confirmation of plan*

If no objection is made to the plan of distribution within the time provided for that purpose, the said plan shall be confirmed by the sheriff.

### *366. Distribution of purchase money*

After the plan of distribution has been confirmed the sheriff shall proceed forthwith to distribute the said purchase money accordingly, and shall pay over the surplus, if any, to the debtor, taking proper receipts for all money so paid by him.

### *367. Powers of sheriff to effect transfer of property to purchaser*

(1) Whenever, if the sale had not been in execution, it would have been necessary for the execution debtor to endorse a document or to execute a cession in order to pass the property to a purchaser, the sheriff may so endorse the document or execute the cession, as to any property sold by him in execution.

(2) The sheriff may also, as to immovable property sold by him in execution, do anything necessary to effect registration of transfer.

(3) Anything done by the sheriff under this rule shall be as valid and effectual as if he were the execution debtor.

## ORDER 41

IMPRISONMENT FOR DEBT

### *368. Issue of judgment summons*

(1) Where the sheriff or his deputy has made a return of nulla bona or not sufficient goods on a writ of execution the judgment creditor may cause to be issued a summons commanding the judgment debtor to pay the amount of the judgment and, unless he does so, to show cause at a time and place stated why an order for personal attachment shall not be decreed against him

(2) The summons shall be in Form No. 46.

### *369. Return day of judgment summons*

(1) If on the return day of the summons or any adjournment thereof the court is satisfied that the judgment debtor has not paid the amount due, the court shall inquire, in accordance with rule 370 and in the presence of the judgment debtor or his legal practitioner, into the question of the judgment debtor's failure to pay the amount due:

Provided that, if the judgment debtor has failed to appear, either in person or represented by a legal practitioner, the court may grant an order for his personal attachment and imprisonment, if the court is satisfied that the summons was served upon him personally.

[Rule substituted by s.i. 251 of 1993]

### *370. Conduct of inquiry*

In an inquiry in terms of rule 369, the court shall—

(*a*) call upon the judgment debtor to adduce evidence as to his financial position; and

(*b*) receive any evidence that may be adduced by or on behalf of the judgment debtor or the judgment creditor in regard to the judgment debtor's financial position and his ability to pay the amount due, whether such evidence is adduced orally or by affidavit or in any other manner that the court considers appropriate; and

(*c*) where evidence is adduced orally, permit the cross-examination of the witness concerned.

[Rule substituted by s.i. 251 of 1993]

### *370A. Powers of court after inquiry*

[Rule inserted by s.i. 251 of 1993]

(1) After an inquiry in terms of rule 369—

(*a*) subject to section 16 of the Act and rule 370B, if the court is satisfied, having taken into account the matters referred to in subrule (2), that the debtor has the means to pay or the ability to earn the amount due, and that his failure or refusal to pay the amount due is wilful, the court may issue an order for the personal attachment and imprisonment of the judgment debtor;

(*b*) if the court is not satisfied as provided in paragraph (*a*), the court shall refuse to make an order referred to in that paragraph.

(2) In determining the ability of a judgment debtor to pay the amount due, the court shall take into account the following matters:

(*a*) the nature and extent of his income and assets; and

(*b*) the amounts needed by him for his necessary expenses and those of his dependants; and

(*c*) any amounts needed by him to make payments in terms of any court order or agreement; and

(*d*) if he is unemployed, the reason therefor; and

(*e*) if he is employed, whether a garnishee order would be appropriate, in which event the court may adjourn the inquiry to enable proceedings for such an order to be instituted in terms of Order 42.

### *370B. Maximum period of imprisonment*

[Rule inserted by s.i. 251 of 1993]

The court shall not order the imprisonment of a judgment debtor for a period exceeding three months unless the court considers that there are special circumstances which justify imprisonment for a longer period.

### *370C. Additional powers of court*

[Rule inserted by s.i. 251 of 1993]

In proceedings under this Order, the court may—

(*a*) suspend, on such terms and conditions as the court thinks fit, the execution of an order for the personal attachment and imprisonment of a judgment debtor;

(*b*) direct that the order may be reviewed on a specified date or after a specified period;

(*c*) grant such order, including an order as to costs, and give such directions, as the court thinks appropriate.

### *371. Order suspended: payment of instalments: failure of debtor to pay: affidavit*

Where an order has been made for the personal attachment of a judgment debtor, and its execution suspended so long as certain instalments are paid, the registrar shall, before issuing a writ, require the party applying therefor to satisfy him by affidavit that the debtor has failed in due payment of any such instalment.

### *372. Two or more orders: imprisonment to be cumulative in effect*

Where there are two or more orders of personal attachment and imprisonment against the same debtor such orders shall be cumulative, with effect according to priority of issue of the respective writs of personal attachment, unless otherwise directed by the court.

### *373. Writ for personal attachment: form*

A writ for the personal attachment of a judgment debtor shall be signed by the registrar and addressed to the sheriff or his deputy, and shall be in Form No. 47.

[Rule amended by s.i. 101 of 1994]

### *374. Execution of writ for personal attachment*

[Rule substituted by s.i. 25 of 1999 and amended by s.i. 251 of 1993]

(1) A writ for the personal attachment of a judgment debtor may be executed at any hour on any day at any place:

Provided that such a writ shall not be executed against—

(*a*) a member of Parliament or an officer of Parliament as defined in section 2 of the Privileges, Immunities and Powers of Parliament Act [*Chapter 10*] while such member or officer is in actual attendance on Parliament or any committee thereof;

(*b*) a person entitled to immunity from personal attachment under the Privileges, Immunities and Powers of Parliament Act [*Chapter 10*] or

(*c*) a person upon whom immunity from personal attachment is conferred by any other law.

(2) When executing a writ for the personal attachment of a judgment debtor, the sheriff or deputy sheriff shall ensure that the judgment debtor is given a copy of the writ.

[Subrule inserted by s.i. 101 of 1994]

### *375. Registrar may release debtor from prison in certain circumstances*

The registrar may release a judgment debtor from prison whenever it is shown to his satisfaction that the judgment debtor has paid the judgment debt and all the costs which he has been ordered to pay, or where the judgment creditor has failed to pay for the judgment debtor's maintenance, or where the judgment creditor consents to his release.

### *376. Release of debtor by court*

[Rule amended by s.i. 251 of 1993]

(1) The court may grant the release of a judgment debtor for good cause shown by him in a chamber application.

(2) The registrar and the officer in charge of the prison in which a judgment debtor is kept shall afford the judgment debtor every facility to enable him to make an application under subrule (1), including where necessary, providing, preparing and delivering documents and serving process on his behalf.

[Subrule substituted by s.i. 120 of 1995]

## ORDER 42

ATTACHMENT OF DEBTS

### *377. Court Application for attachment of debt due to judgment debtor*

A judgment creditor who has obtained a judgment or order for the recovery or payment of money, which judgment or order is unsatisfied, may make a court application for an order that any money at present due or becoming due in the future to the judgment debtor by a third party within the jurisdiction (hereinafter called "the garnishee") shall be attached.

[Rule amended by s.i. 43 of 1992]

### *377A. Preliminary notice of application where State is garnishee*

(1) No sooner than fourteen days before applying for a garnishee order against the State for the attachment of salary or wages owed by the State to a judgement debtor, the applicant shall cause written notice of the application, together with the supporting documents that will be filed with the application, including a copy of the judgment or order which created the judgment debt concerned and the judgment creditor's affidavit setting forth the amounts still due to him in terms of the judgment or order, to be served on—

(*a*) the Director of the Salary Service Bureau and the head of the Ministry, department or force in which the judgment debtor is employed, where the judgment debtor is employed by the State otherwise than in the Zimbabwe National Army or in Parliament; or

(*b*) the Chief Paymaster of the Zimbabwe National Army and the Commander of the Army, where the judgment debtor is employed in the Zimbabwe National Army; or

(*c*) the Director of the Salary Service Bureau and the Secretary to Parliament, where the judgment debtor is a member of the staff of Parliament or is a Senator or a member of the House of Assembly.

(2) A notice in terms of subrule (1) shall set forth the date on which the application for the garnishee order is to be made and sufficient information to identify the judgment debtor, including—

(*a*) his full names; and

(*b*) his employee code number or force number; and

(*c*) the Ministry, department, force or institution in which he is employed, as appropriate.

(3) As soon as possible after receiving a notice in terms of subrule (1), the Director of the Salary Service Bureau or the Chief Paymaster of the Zimbabwe National Army, as the case may be, shall send the applicant for the garnishee order and the judgment debtor a notice setting forth—

(*a*) the amount of any money that is or will be payable to the judgment debtor by way of salary or wages; and

(*b*) the amount and nature of any deductions required to be made from such salary or wages by the Director or Chief Paymaster; and

(*c*) the earliest date from which any payment may be made in terms of a garnishee order.

[Rule inserted by s.i. 144 of 1985]

### *378. Contents of notice and supporting affidavit*

(1) The court application shall call upon the garnishee and the judgment debtor to show cause why the debt sought to be attached should not be attached, and shall be supported by an affidavit by the judgment creditor or by his attorney stating that judgment has been recovered or the order made, and that it is still unsatisfied, and the grounds for the knowledge or belief of the deponent that the garnishee is or will be indebted to the judgment debtor.

[Subrule amended by s.i. 43 of 1992]

(2) Where an application for a garnishee order is made against the State for the attachment of salary or wages owed by the State to a judgment debtor, there shall be annexed to the supporting affidavit referred to in subrule (1) a copy of the notice sent by the Director of the Salary Service Bureau or the Chief Paymaster of the Army, as the case may be, in terms of subrule (3) of rule 377A.

[Subrule inserted by s.i. 144 of 1985]

### *379. Service of notice and procedure*

(1) The court application shall be served on the garnishee and on the judgment debtor and the procedure laid down by Order 32 shall be followed.

[Subrule amended by s.i. 43 of 1992]

(2) In the case of a garnishee order against the State for the attachment of salary or wages owed by the State to a judgment debtor, the court application shall be served upon the judgment debtor and the persons specified in paragraph (*a*) (*b*) or (*c*), as the case may be, of subrule (1) of rule 377.

[Subrule inserted by s.i. 144 of 1985 and as amended by s.i. 43 of 1992]

### *380. Mode of service: judgment debtor: garnishee*

Service on the judgment debtor may be made either at the address for service, if the judgment debtor has appeared in the action and given an address for service, or if there has been no appearance, then at his usual residence or place of business. Personal service shall be effected on the garnishee.

### *381. Effect of service on garnishee in regard to debt due or becoming due*

Subject to the court's order on the application, due service of the court application on the garnishee shall bind in his hands all debts then due or subsequently becoming due to the judgment debtor, and any assignment or payment subsequent to such service made with the object of defeating the proceedings hereunder may be declared by the court to be invalid.

Provided that, in the case of a garnishee order against the State for the attachment of salary or wages owed by the State to the judgment debtor service of the court application shall not bind such debts in the hands of the garnishee until the date specified by the Director of the Salary Service Bureau or the Chief Paymaster of the Army, as the case may be, in terms of paragraph (*c*) of subrule (3) of rule 377A.

[Proviso inserted by s.i. 144 of 1985 Rule as amended by s.i. 43 of 1992]

### *382. Admission of debt by garnishee*

If the garnishee admits the debt he may pay the amount thereof into court to await the judgment of the court on the application.

### *383. Dispute of liability by garnishee*

If the garnishee disputes his liability, or admits his liability but has good cause for non-payment, the court may order that any issue or question necessary for determining his liability be tried or determined in any manner in which any issue or question in an action may be tried or determined.

### *384. Claims of third persons on debt*

(1) Whenever in any proceedings to obtain an attachment of debts it is alleged by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the court may order such third person to appear, and state the nature and particulars of his claim upon such debt.

After hearing the allegations of any third person under such order, as in subrule (1) mentioned, and of any other person who by the same or subsequent order the court may have ordered to appear, or in case of such third person not appearing when ordered, the court may order execution to issue to levy the amount due from such garnishee, together with the costs of the garnishee proceedings, or any issue or question to be tried or determined according to the preceding rules of this Order, and may bar the claim of such third person or make such other order as the court thinks fit, upon such terms, in all cases, with respect to the lien or charge, if any, of such third person, and to costs, as the court thinks just and reasonable.

### *385. Court may order payment by instalments where attachment relates to salary of judgment debtor*

Where the attachment relates to the salary or wages of the judgment debtor and he shows that the attachment will not leave him and those dependent upon him a sufficient amount for their maintenance, the court may make an order for payment by instalments of such sum periodically as it decides will leave sufficient for the judgment debtor to maintain himself and those dependent upon him, and in awarding the costs of the proceedings the court may take into consideration the reasonableness or otherwise of any offer made by the judgment debtor to pay by instalments out of his salary or wages.

### *386. Effect of payment made by or levied upon garnishee*

Payment made by or execution levied upon the garnishee under proceedings under this Order shall be a valid discharge to him as against the judgment debtor, to the amount paid or levied, although such proceeding may be set aside, or the judgment or order reversed.

### *387. Garnishee entitled to costs*

Save where the court decides that any opposition or other action by the garnishee has been unreasonable, the garnishee shall be entitled to his taxed costs in any proceedings under this Order, which shall include the costs of obtaining legal advice as to the appropriate action he should take in the proceedings. Such costs shall be paid by the judgment creditor, who, if the court so orders, shall be entitled to recover them from the judgment debtor. Other costs in the proceedings or incidental thereto shall be in the discretion of the court, subject to the provisions of rule 385.

## ORDER 43

CONTEMPT OF COURT

### *388. Proceedings by court application*

The institution by a party of proceedings for contempt of court shall be made by court application.

[Rule amended by s.i. 43 of 1992]

### *389. Contents of notice and supporting affidavit*

Such court application shall set forth distinctly the grounds of complaint and shall be supported by an affidavit of the facts. Where proceedings are instituted at the instance of the court mero moto the notice shall be issued by the registrar and no affidavit of the facts shall be necessary.

[Rule amended by s.i. 43 of 1992]

### *390. Saving of power of court: contempt in facie curiae*

Nothing in the preceding rules shall affect the power of the court to deal summarily with a contempt of court committed in its presence without any written charge or notice to the offender.

### *391. Procedure where fine imposed*

Where the court or a judge has imposed a fine for contempt of court the registrar shall furnish the sheriff or his deputy with the particulars of such fine and deliver to him a writ in Form No. 48. Immediately on the delivery of such writ the sheriff or his deputy shall execute the same in terms thereof.

### *392. Procedure where committal to gaol ordered*

Where the court or a judge orders a person to be committed to gaol, or imposes a sentence of imprisonment for contempt of court, the registrar shall furnish the sheriff or his deputy, or a constable or other peace officer, with a writ of personal attachment and committal to prison in Form No. 49. Immediately on delivery of such writ the sheriff or his deputy, or any constable or other peace officer to whom it is delivered, shall execute the same.

## ORDER 44

*IN FORMA PAUPERIS* PROCEEDINGS

[Order as substituted by s.i. 142 of 1981]

### *393. Initial consultation with registrar*

(1) A person normally resident within the jurisdiction of the court who desires to bring or defend proceedings *in forma pauperis* may apply to the registrar, who, if it appears to him that the applicant may be a person such as is contemplated by paragraph (*a*) of subrule (1) of rule 394, shall refer the applicant to a legal practitioner selected from a roster of names furnished to him by the Law Society.

(2) If the registrar is in doubt as to whether or not an applicant may qualify in terms of paragraph (*a*) of subrule (1) of rule 394, he may refer the matter to a district officer of the Department of Social Services for a report on the means of the applicant.

(3) A legal practitioner to whom an applicant is referred in terms of subrule (1) shall inquire into such person's means and the merits of his cause, and, upon being satisfied that the matter is one in which he may properly act *in forma pauperis*, he shall proceed to take instructions from the applicant.

[Rule amended by s.i. 227 of 1981]

### *394. Instituting and defending proceedings*

(1) If the applicant lodges with the registrar—

(*a*) an affidavit setting forth fully such person's financial position and stating that, excepting household goods, wearing apparel, tools of trade, he is not possessed of property to the value of five thousand dollars and will not be able, within a reasonable time, to provide such sum from his earnings;

[Paragraph as amended by s.i. 25 of 1993 and s.i. 80 of 00]

(*b*) a statement signed by the legal practitioner concerned that he is acting for that person gratuitously in the proceedings;

(*c*) ….

[Paragraph repealed by s.i. 277 of 1981]

the applicant shall be entitled to proceed *in forma pauperis*, and the registrar shall issue all documents in the proceedings for the person concerned without fee of office.

[Subrule amended by s.i. 277 of 1981]

(2) All pleadings, process and documents filed of record by a party proceeding *in forma pauperis* shall be headed accordingly.

### *395. Fees and costs*

(1) An attorney who is acting for a person in terms of this Order shall act gratuitously for that person in the proceedings, and shall not be at liberty to withdraw, settle or compromise such proceedings, or to discontinue his assistance, without the leave of a judge, who may, in the latter event, give directions as to the appointment of a substitute.

[Subrule amended by s.i. 277 of 1981]

(2) If the person bringing or defending proceedings in terms of this Order is awarded costs against his opponent, his legal practitioner shall be subrogated to, and vested with, such person's right to such costs, which shall include such fees and disbursements to which such person would ordinarily have been entitled and to the right to recover such costs; and, upon recovery thereof, his legal practitioner shall pay out therefrom such fees and charges as would ordinarily have been due to the registrar, and the legal practitioner, *pro rata* to the respective amounts thereof, if the sum recovered is insufficient to pay such fees and charges in full.

[Subrule amended by s.i. 277 of 1981]

(3) Where, in terms of these rules, any process issued on behalf of a person who is proceeding *in forma pauperis* is required to be served by a deputy sheriff, or where substituted service is to be effected, such person shall, prior to the institution or proceedings, deposit with the legal practitioner acting for him a sum sufficient to cover the costs of such service.

### *396. Rights of opponent*

When a person sues or defends *in forma pauperis* under process issued in terms of this Order, his opponent shall, in addition to any other right which he may have, have the right at any time to make a court application for an order debarring such person from continuing *in forma pauperis*; and upon the hearing of such application, the court may make such order thereupon, including any order as to costs, as to it seems just.

[Rule amended by s.i. 43 of 1992]

### *397. Cause within jurisdiction of inferior court*

Where the cause of action is within the jurisdiction of a court other than the High Court, proceedings shall not be instituted *in forma pauperis* in the High Court, unless, upon a chamber application, a judge grants leave for the proceedings to be instituted in the High Court.

[Rule as amended by s.i. 43 of 1992]

## ORDER 45

EVIDENCE AND SERVICE OF PROCESS BEHALF OF A FOREIGN COURT

### *407. Application under Witnesses Compulsory Attendance Act [Chapter 55] – taking evidence: letters of request - service of process*

(1) Where in relation to any civil or criminal proceedings pending before a court of law of competent jurisdiction outside Zimbabwe, an application is made under subsection (1) of section 3 of the Witnesses Compulsory Attendance Act [*Chapter 55*], for obtaining the evidence of a witness within Zimbabwe, the application and any supporting documents as to the subject matter and the evidence required shall be transmitted to the registrar, together with two copies thereof, and if the application and documents are not in the English language, an original translation thereof in the English language and two copies of such translation.

(2) An order made under the said subsection shall be in Form No. 51.

(3) Upon receipt of the evidence in terms of subsection (4) of section 5 of the Witnesses Compulsory Attendance Act [*Chapter 55*], the registrar shall append thereto a certificate in Form No. 52 and shall forward the evidence so certified together with the order of the court to the Minister of Justice for transmission to the court of law outside Zimbabwe before which the proceedings in question are pending.

(4) Where in relation to any civil or commercial matter pending before a court or tribunal of a foreign country, a letter of request from such court or tribunal for service on any person in Zimbabwe of any process or citation in such matter is transmitted to the court by the Minister of Justice, with an intimation that it is desirable that effect should be given to the same, the following procedure shall be adopted—

(*a*) the letter of request for service shall be accompanied by a translation thereof in the English language, and by two copies of the process or citation to be served, and two copies thereof in the English language;

(*b*) service of the process or citation shall be effected by the sheriff or his deputy or his authorized agent;

(*c*) such service shall be effected by delivering to and leaving with the person to be served one copy of the process to be served, and one copy of the translation thereof, in accordance with the rules and practice of court regulating service of process;

(*d*) after service has been effected, the process server shall return to the registrar one copy of the process, together with the evidence of service by affidavit of the person effecting the service, and particulars of charges for the costs of effecting such service;

(*e*) the particulars of charges for the costs of effecting service shall be submitted to a taxing master of the court, who shall certify the correctness of the charges, or such other amount as shall be properly payable for the costs of effecting service. A copy of such charges and certificate shall be forwarded to the Minister of Justice;

(*f*) the registrar shall transmit to the Minister of Justice the letter of request for service received from the foreign country, together with the evidence of service, with a certificate appended thereto duly sealed with the seal of the court for use out of the jurisdiction. Such certificate shall be in Form No. 53.

(5) Upon the application of the Minister of Justice, the court or a judge may make all such orders for substituted service or otherwise as may be necessary to give effect to subrule (4).

## ORDER 46

EVIDENCE GENERALLY AND COMMISSIONS *DE BENE ESSE*

### *408. Witnesses to be examined viva voce in open court: evidence on affidavit: evidence before a commissioner*

In the absence of any agreement in writing, between the attorney of all parties, and subject to these rules, the witnesses at the trial of any action shall be examined viva voce and in open court, but the court may at any time for sufficient reasons order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the court may think reasonable, or that any witness, whose attendance in court ought for some sufficient cause to be dispensed with, be examined by interrogatories or otherwise before a commissioner or examiner;

Provided that where it appears to the court that the other party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

### *409. Court may order examination on oath of any person, etc.*

The court or a judge may, in any cause or matter where it appears necessary for the purpose of justice, make an order for the examination upon oath before the court or judge or an officer of the court, or any other person, and at any place, of any witness or person, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the court or a judge may direct.

### *410. Application for evidence of witness to be taken before commissioner*

A party desiring to have the evidence of a witness taken before a commissioner or examiner make a court application. Such application shall be supported by affidavit setting forth the particular circumstances in which the application is made. Where the defendant is in default of appearance and the plaintiff desires to take the evidence of any witness before a commissioner or examiner, he may apply by way of a chamber application.

[Rule amended by s.i. 43 of 1992]

### *411. Court may grant order for examination of witness or for issue of request for commission: forms*

Where the court deems it just and expedient it may grant an order for the examination of witnesses or for the issue of a request for a commission, and may make such order as to costs as justice requires. Forms Nos. 54, 55 and 56 shall be used for such order or request.

### *412. Preparation and submission of request for commission*

Where the request for a commission is necessary, and an order for its issue has been granted, the party to whom it has been granted shall prepare and submit to the registrar the form of request for the signature of the Chief Justice or a judge. Form No. 57 shall be used.

### *413. Procedure for examination of witness before officer of court*

Where any witness or person is ordered to be examined before an officer of the court, or before a person appointed for the purpose, the person taking the examination shall be furnished by the party on whose application the order was made with a copy of the summons and pleadings, if any, or with a copy of the documents necessary to inform the person taking the examination of the questions at issue between the parties.

### *414. Examination of witness before officer of court: how conducted*

The examination shall take place in the presence of the parties, their legal practitioners or agents, and the witnesses shall be subject to cross-examination and re-examination.

### *415. Depositions taken before officer of court*

The depositions taken before an officer of the court, or before any other person appointed to take the examination, shall be taken down in writing or in the presence of the examiner. If arrangements have been made for a shorthand writer to record the evidence, this shall be recorded *verbatim* but if not, it shall not ordinarily be necessary to record the evidence by question and answer, but the evidence shall be recorded so as to represent as nearly as possible the statement of the witness, and when completed, or transcribed (where the statement has been recorded by a shorthand writer), shall be read over to the witness and signed by him in the presence of the parties unless they otherwise agree, or such of them as may think fit to attend. If the witness refuses to sign the depositions, the examiner shall sign the same. The examiner may put down any particular question or answer if there should appear any special reason for doing so, and may put any question to the witness as to the meaning of any answer, or as to any matter arising in the course of examination. Any questions which may be objected to shall be taken down by the examiner in the depositions, and he shall state his opinion thereon to the legal practitioners or parties and shall refer to such statement in the depositions, but he shall not have power to decide upon the materiality or relevancy of any question.

### *416. Refusal of person to attend for examination, etc.*

If any person duly summoned by subpoena to attend for examination refuses to attend, or if, having attended, he refuses to be sworn or to answer any lawful question, a certificate of such refusal, signed by the examiner, shall be filed with the registrar, and thereupon the party requiring the attendance of the witness may make a chamber application for an order directing the witness to attend, or to be sworn, or to answer any question, as the case may be.

[Rule amended by s.i. 43 of 1992]

### *417. Objection by witness to question*

If a witness objects to any question which may be put to him before an examiner, the question so put, and the objection of the witness thereto, shall be taken down by the examiner and transmitted by him to the registrar, and the validity of the objection shall be decided by the court or a judge.

### *418. Costs occasioned by refusal or objection of witness*

In any case under the last two preceding rules, the court shall have power to order the witness to pay any costs occasioned by his refusal or objection.

### *419. Power of officer of court etc. to administer oath*

An officer of the court, or other person directed to take the examination of any witness or person, or any person nominated or appointed to take the examination of any witness or person pursuant to the provisions of any convention now made or which may hereafter be made with any foreign country, may administer oaths.

### *420. Subpoena ad testificandum or duces tecum*

A party in any cause or matter may by subpoena *ad testificandum* or *duces tecum* require the attendance of a witness before an officer of the court or other person appointed to take the examination, or for the purpose of using his evidence upon any proceeding in the cause or matter in like manner as such witness would be bound to attend and be examined at the hearing or trial; and a party or witness having made an affidavit to be used or which is used in any proceeding in the case or matter shall be bound on being served with such subpoena to attend before such officer or person for cross-examination.

### *421. Evidence taken subsequent to hearing*

Evidence taken subsequent to the hearing or trial of any cause or matter shall be taken as nearly as may be in the same manner as evidence taken at or with a view to a trial.

### *422. Magistrate a commissioner of court for examining witnesses*

Every magistrate shall be a commissioner of court for the purpose of examining witnesses.

### *423. Court may appoint person as commissioner to take affidavits outside Zimbabwe*

The court may appoint a person as a commissioner of the High Court to take affidavits or examine witnesses in any place outside Zimbabwe.

### *424. Application for appointment as commissioner of High Court*

Every application for appointment as a commissioner of the High Court shall be by petition to the court or to a judge in chambers.

### *425. Appointment of commissioner to be under seal*

The appointment of a commissioner shall be by a commission to be issued under the seal of the High Court and shall be in Form No. 58

## ORDER 47

SUBPOENAS

### *426. Issue and form of subpoena: number of names which may be included*

(1) A party desiring the attendance of any person to give evidence may take out from the office of the registrar one or more subpoenas for that purpose.

(2) A subpoena shall be in one of the Forms Nos. 59 to 61 and shall be prepared by the party desiring to issue it.

(3) Every subpoena other than a subpoena *duces tecum* may contain four names where necessary or required.

(4) Not more than three persons shall be included in one subpoena *duces tecum* and the party suing out the same shall be at liberty to sue out a *duces tecum* for each person if it is necessary or desirable.

### *427. Service of subpoena*

(1) The service of a subpoena shall be effected by delivering a copy to the person named therein and at the same time showing him the original and informing him of the exigency thereof, and may be effected in any manner provided in subrule (2) of rule 37.

(2) The service of a subpoena may be effected by a legal practitioner or his clerk or by a deputy sheriff:

Provided that where the service has been effected by a legal practitioner or his clerk the proof of service shall be in the form of a certificate completed in one or other of the Forms Nos. 6 or 7 and no affidavit of service shall be necessary.

### *428. Enforcement of subpoena*

Any person having been duly served with a subpoena a reasonable time before the date on which he is required by it to attend at the place named, and his reasonable expenses having been paid or tendered to him and not having any lawful impediment, will on his default be liable to be attached, fined and imprisoned for his contempt of the process of the court, without prejudice to any other claim or remedy the party aggrieved by his default may by law have against him on that account.

### *429. Deposit by person suing in person before issue of subpoena*

Where a party is suing in person he shall at the request of the registrar and before the issue of the subpoena deposit with the registrar such sum as the registrar shall fix as being calculated to cover the reasonable expenses of all persons named in the subpoena.

### *430. Issue of subpoenas in particular circumstances: opinion evidence only on foreign law: refusal to make affidavit in motion proceedings.*

(1) It shall not be competent for a party to compel the attendance of any witness for the purpose of giving evidence of his opinion only on any question of foreign law, usage or custom without the consent in writing of a judge having been first had and obtained.

(2) A judge to whom an application for his consent in terms of this rule is made may withhold such consent or grant it on such terms, as to the payment or tender of allowances to the witness and as to the amount of such allowances, as to such judge seems fit and reasonable.

(3) Where in proceedings on motion a person has refused to make an affidavit of facts within his knowledge, the party desiring such person's evidence may sue out a subpoena compelling such person to appear on the day of the hearing to give evidence viva voce.

## ORDER 48

RECORDS

### *431. Recording of oral evidence at trial*

According to the direction of the judge, the oral evidence at the trial of any civil action may be recorded in longhand or shorthand or by such mechanical writing or recording device as the judge may approve.

### *432. Oath to be taken by person recording evidence*

Every shorthand writer and every operator of an approved mechanical writing or recording device shall be deemed to be an officer of the court and shall, before entering on his duties, take before a judge an oath in the following form—

"I,..... do swear that I will faithfully, accurately and to the best of my ability take down in shorthand/by machine, as directed by the judge, a record of the proceedings in any case in which I may be employed as an officer of the court and that I will similarly, when required to do so, transcribe such record or any other record taken down by any other officer of the court. So help me God."

### *433. Record to be filed*

The record of evidence made shall be filed in accordance with the instructions of the registrar.

### *434. Transcription of record*

(1) It shall not be necessary to transcribe any record, unless a judge or the registrar, acting under the authority of a judge, so directs.

(2) If and when the record is transcribed, the transcriber shall annex a certificate to the transcript indicating the extent of the accuracy of the record from which the transcript was made and of the transcript.

(3) If the transcriber is a person other than the original recorder, such original recorder, if available, shall annex a certificate to the transcript indicating the extent of the accuracy of the transcript.

(4) If the original recorder is unavailable that fact shall be mentioned in the transcriber's certificate.

### *435. Certified transcript deemed to be accurate*

A transcript certified in terms of rule 434 shall be deemed to be an accurate record of the proceedings subject to any reservation made in the certificate annexed thereto:

Provided that the court may make such order as it deems fit concerning the accuracy of a transcribed record.

### *436. Fees for transcript of record*

(1) Any person with an interest in any matter in respect of which there exists a record may apply to the registrar to have that record transcribed or, if the record has already been transcribed, for a copy of such transcript.

(2) The registrar shall supply such an applicant with a transcript of the record upon payment of such fees as may be prescribed.

[Subrule substituted by R.G.N. 1016 of 1972]

## ORDER 49

CIVIL TRIALS, PROCEEDINGS AND JUDGMENTS

### *437. The burden of proof and the right or duty to begin*

(1) If on the pleadings the burden of proof is on the plaintiff, he shall first adduce his evidence, and if absolution from the instance is not then decreed, the defendant shall then adduce his evidence.

(2) When such burden of proof is on the defendant, the defendant shall first adduce his evidence, and the plaintiff shall thereafter adduce his evidence.

(3) Where the burden of proving one or more of the issues is on the plaintiff and that of proving others is on the defendant, the plaintiff shall first call his evidence on any issues proof whereof is upon him, and may then close his case, and the defendant shall then call his evidence on all the issues.

(4) If the plaintiff has not called any evidence, other than that necessitated by his evidence on the issues, proof whereof is upon him, on any issues, proof whereof is on the defendant, he shall have the right to do so after the defendant has closed his case. If he has called any such evidence, he shall have no such right.

(5) In case of any doubt or dispute arising, the court shall have discretion to determine which party shall begin. Either party may, with the leave of the court, adduce further evidence at any time before the judgment; but

such leave shall not be granted if it appears to the court that such evidence was intentionally withheld out of its proper order.

### *438. The hearing of legal practitioners and the calling and examination of witnesses*

(1) On a question as to the onus of proof and the right or obligation to begin, only one legal practitioner on each side shall be heard.

(2) One legal practitioner only on behalf of the plaintiff shall be entitled to open the case. Thereafter the plaintiff's witnesses shall be called and may be examined, cross-examined and re-examined.

(3) When all the evidence for the plaintiff has been given and the defendant intends to call witnesses, one legal practitioner only shall be entitled to open the defendant's case. Thereafter the defendant's witnesses shall be called and may be examined, cross-examined and re-examined.

(4) One and the same counsel for either party shall examine or cross-examine or re-examine each witness. Re-examination need not be conducted by the same legal practitioner who examined the witness.

### *439. Order of addresses after evidence given*

After the evidence on both sides has been given, plaintiff's legal practitioner shall have the right to observe generally on the whole case. Thereafter legal practitioner for the defendant shall have a similar right, and finally legal practitioner for the plaintiff shall be entitled to reply to any matters raised by legal practitioner for the defendant. If in such reply plaintiff's legal practitioner cites new cases, the court may allow one legal practitioner for the opposite side to observe on those cases.

### *440. Question of law or scientific or technical evidence: number of legal practitioners who may be heard*

Where a case involves questions of law, or scientific or technical evidence, the court may hear not more than two legal practitioners on each side. In the final reply only one legal practitioner shall be heard.

### *441. Order of procedure where right or obligation to begin lies with defendant*

When the right or obligation to begin lies on the defendant, the order of procedure under the aforegoing rules shall be read as if the defendant were the plaintiff and the plaintiff were the defendant.

### *442. Legal practitioner for co-plaintiff*

Co-plaintiffs shall appear by the same legal practitioner and shall not sever their case.

### *443. Legal practitioner for co-defendants: cross-examination: order of addresses*

Co-defendants may be represented by different legal practitioners. Where the interests of the defendants are the same, the case shall proceed as though the defence were joint and not separate. Where the interests of the defendants are different, the legal practitioner for each defendant shall be allowed to cross-examine plaintiff's witnesses and to address the court in such order as the court shall decide.

### *444. Procedure where co-defendants are opposed in interest to each other*

Where co-defendants are opposed in interest to each other, permission may be given to each defendant or set of defendants to open and prove their cases separately as well as to cross-examine each other's witnesses.

### *445. Postponement or adjournment of hearing*

A postponement or an adjournment of the hearing of any matter may be granted by the court on such terms as it deems just respecting costs and safeguards against any prejudice which may otherwise be caused thereby.

### *446. Judge may order matter to be referred to hearing or decision by two or more judges*

A judge before whom any matter is being heard may, with the approval of the Chief Justice or the Judge President, order that such matter be referred for hearing or decision by two or more judges. It shall be competent for the court to which such a reference is made to direct that any witness be recalled and to order further argument.

[Rule amended by s.i. 80 of 2000]

### *446A. . . .*

[Rule repealed by s.i. 80 of 2000]

### *447 Court may vary rules of procedure*

[Rule repealed by s.i. 43 of 1992]

### *448. Superannuation of judgment and revival*

[Rule repealed by s.i. 80 of 2000]

### *449. Correction, variation and rescission of judgments and orders*

(1) The court or a judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind, or vary any judgment or order—

(*a*) that was erroneously sought or erroneously granted in the absence of any party affected thereby; or

(*b*) in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission; or

(*c*) that was granted as the result of a mistake common to the parties.

(2) The court or a judge shall not make any order correcting, rescinding or varying a judgment or order unless satisfied that all parties whose interests may be affected have had notice of the order proposed.

[Rule substituted by s.i. 25 of 1993]

## ORDER 50

SHERIFF AND DEPUTY SHERIFF

### *450. Appointment and removal of deputy sheriffs*

(1) The sheriff shall notify the registrar of the appointment and removal of every deputy sheriff and the registrar shall register such appointments and removals in a book kept for the purpose.

(2) The sheriff shall, by publication in the *Gazette*, advertise the appointment and removal of every deputy sheriff, and the appointment of every acting deputy sheriff and the period of such acting appointment.

### *451. Deputy sheriff to provide security*

(1) Every deputy sheriff shall, upon appointment and before entering upon the duties of his office, provide security, to the satisfaction of the sheriff, for the due and faithful execution of his duties, and indemnifying the sheriff against any loss occasioned by any act or omission of such deputy sheriff.

(2) The security bond to be provided by a deputy sheriff shall be in Form No. 62.

### *452. Deputy sheriff: restriction on movement: removal*

(1) A deputy sheriff or acting deputy sheriff shall not, in the execution of his duties, leave the area to which he is appointed, nor for any purpose depart from Zimbabwe without the authority first had and obtained of the sheriff.

(2) When a deputy sheriff requires leave of absence for a longer period than two months, he shall submit to the sheriff for approval the name of a person willing to act for him during his absence, and when the nomination has been approved by the sheriff, either the deputy sheriff shall, together with his sureties, enter into a further bond, in Form No. 63, or such person shall provide security, to the satisfaction of the sheriff, for the due and faithful execution of his duties as acting deputy sheriff, and the sheriff shall thereupon appoint such person to act as a deputy sheriff during the absence of such deputy sheriff.

(3) The sheriff may remove any acting deputy sheriff from office for good cause, and in such event shall make arrangements as to him seem proper for the discharge of the duties of office of such deputy sheriff.

### *453. Deputy sheriff: arrangements for substitute*

A deputy sheriff, when he expects to be absent from his duties, for any purpose, for any period not exceeding two months, shall make proper arrangements for the execution of his duties by a substitute, and shall also make such arrangements in regard to the furnishing of security as the sheriff may direct.

### *454. Duty of sheriff and deputy to notify party suing out process of result of service*

The sheriff and his deputy shall as soon as may be, notify by post or otherwise in writing the party who sued out the process entrusted to them for service, that the service has been duly effected and the manner and date thereof or that they have been unable to effect service.

### *455. Rescue or escape of person out of custody of sheriff or deputy*

(1) The sheriff or a deputy sheriff shall not be responsible for the rescue or escape of any person out of his custody on his way to a public prison when such rescue or escape has happened without the default or connivance of such sheriff or deputy.

(2) In case of any such rescue or escape, the sheriff or deputy responsible shall use all lawful means for the pursuit, apprehension and security of any such person without any further warrant or authority.

### *456. Prescription of action against sheriff or deputy.*

[Rule repealed by s.i. 25 of 1993]

### *457. Tariff of fees allowed to deputy sheriff and related matters*

(1) The charges allowed by the sheriff to deputy sheriffs for the execution of the process of the court shall be according to the tariff of fees set out in the High Court (Fees and Charges) Rules, 1994.

[Subrule amended by s.i. 101 of 1994]

(2) The sheriff shall be entitled to tax any disbursements made to or liability incurred with a deputy sheriff by a legal practitioner or party to any action or proceeding in such court, for the execution of the process of the court, and may call for the production of receipts or accounts showing that such disbursements have actually been made or liability incurred.

(3) Necessary charges and allowances for all work necessarily done for which no provision is contained in such tariff, and every question arising under and relative to the tariff, shall be determined by the sheriff.

(4) ….

[Subrule repealed by s.i. 142 of 1981]

The fees and charges authorized by such tariff shall be payable although the summons or other process has not been actually served, if the sheriff certifies that in his opinion reasonable attempts to effect service at the appointed place have been made, and that the failure was not due to any want of diligence on the part of the deputy or other officer charged with the duty of effecting service.

## ORDER 51

INTERPRETERS

### *458. Interpreter to be approved by court or judge*

When at the hearing of any civil case the services of an interpreter are necessary, the parties to the action shall by arrangement between themselves supply a properly qualified interpreter approved by the court or judge to interpret in the proceedings.

### *459. Oath to be taken by interpreter*

Such interpreter shall, before entering upon his duties, take an oath to be administered by the registrar in the following form—

"I swear that I will faithfully and truly interpret the evidence in the case before this court to the best of my skill and ability. So help me God.".

### *460. Expenses of interpretation*

The expenses of interpretation shall be costs in the cause, unless the court or judge otherwise orders, but the party or legal practitioner engaging the interpreter shall be responsible to such interpreter for the due payment of his fees calculated in accordance with the High Court (Fees and Charges) Rules, 1994.

[Subrule amended by s.i. 101 of 1994]

## ORDER 52

REPEAL OF EXISTING RULES

### *Repeals*

461 The Rules of the High Court contained in the Schedule to the High Court Practice and Procedure Act (*Chapter 9 of 1939*) and the rules specified in the Sixth Schedule are repealed.