HIGH COURT RULES

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DRAFT HIGH COURT RULES, 2016

RULES REGULATING THE CONDUCT OF ALL THE PROCEEDINGS OF THE HIGH COURT OF ZIMBABWE

PART 1

PRELIMINARY

1. Title

These rules may be cited as the High Court Rules, 2016

2. Date of commencement

These rules shall come into operation on the date of publication and shall regulate the conduct of all proceedings in the High Court including, so far as practicable, proceedings pending on that date.

3. Interpretation

In these rules and attached forms, unless the context otherwise indicates—

"Act" means the High Court Act [Chapter 7:06];

"action" means a proceeding commenced by summons;

"chamber application" means an application to a judge other than a judge sitting in open court;

"court" means the High Court;

"court application" means an application to the court in terms of these rules;

"court day" means any day other than a Saturday, Sunday or Public Holiday, and only court days shall be included in the computation of any time expressed in days prescribed by these rules or fixed by any order of court;

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

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

"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 or assistant registrar who has been designated as a registrar of the court;

"sheriff" means –

(a) a sheriff of the court;
(b) an assistant sheriff who has been designated as such

4. Sittings of the court, vacations and office hours

(1) Notice of the terms and sessions of the court prescribed by the Chief Justice in terms of s47 of the Act shall be published in the Government Gazette and a copy thereof shall be affixed to the public notice at the office of the registrar.

(2) If the day prescribed 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 court day, the term, session or circuit sitting shall commence on the next succeeding court day and, if the day prescribed for the end of a term, session or circuit sitting is not a court day, the term, session or circuit sitting shall end on the court day preceding.

(3) The periods between the said terms shall be vacations, during which, subject to the provisions of subrule (4), the ordinary business of the court shall be suspended, but at least one judge or judges shall be available on such days to perform such duties as the Judge-President may direct.

(4) During vacations such judges shall sit on such days for the discharge of such urgent business as the Judge-President may direct.

(5) If it appears convenient to the presiding judge, the court or a judge as the case may be, may sit at any place or at a time other than a time prescribed in terms of these rules and may sit at any time during vacation.

(6) Where the time limited by any rule for the doing of anything in the office of the registrar, for example entering an 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 court day.

5. Registrar's office hours

The offices of the registrar at any station of the court shall be open from 08:00 to 13:00 and from 14:00 to 16:00 hours for the purpose of transacting business on each court day.

Provided that, the registrar may, in exceptional circumstances issue process and accept documents at any time and on any day when directed by a judge.

6. Forms

(1) The forms set out 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 shall be used *mutatis mutandis* when drawing up documents for filing in the court.

7. 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.

8. Departure from the rules

The court or a judge may, in relation to any particular case before it or him or her, 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 or she, as the case may be, is satisfied that the departure is required in the interest of justice;
(b) give such directions as to procedure in respect of any matter not expressly provided for in these rules as appears to it or him or her, to be just and expedient.

9. Certain Proceedings to be by way of application

Where in any law reference is made to proceedings in the court by way of petition, notice of motion or application, such proceedings shall be taken by way of application in terms of the rule providing for applications.

10. Representation of parties

(1) If a legal practitioner acts on behalf of any party in any proceedings, he shall notify all other parties, by notice of assumption of agency, of his or her name and address.

(2) Any party represented by a legal practitioner in any proceedings shall be at liberty to terminate such legal practitioner's mandate to act for him or her and thereafter act in person or appoint another legal practitioner to act on his or her behalf. Whereupon he or she shall forthwith give notice to the registrar and all other parties of the termination and if he has appointed a further legal practitioner of the latter's name and address.

(3) A party who has terminated a legal practitioner's mandate in terms of subrule (2) but has not appointed another legal practitioner, shall in the notice of termination give an address, to be called an address for service, within the five kilometer radius from the office of the registrar, for the service on him of all documents in such proceedings.

(4) Upon receipt of a notice in terms of subrule (1) or (2) or (3) the address of the legal practitioner or of the party, as the case may be, shall become the address of service of such party in such proceedings.

Provided that any service duly effected elsewhere before receipt of such notice shall, notwithstanding such change, for all purposes be valid, unless the court orders otherwise.

(5) (a) A legal practitioner acting in any proceedings for a party may renounce his or her agency by giving reasonable notice to the party, the registrar and all other parties in the proceedings.

Provided that the notice to the party for whom he or she acted may be given by registered post or by email.

(b) Where a notice given in terms of paragraph (a) –

(i) 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.

(ii) does not specify a new address for service in terms of these rules but provides the party'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.

(iii) does not specify a new address for service or the party'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.

11. *Amicus curiae*

(1)(a) Any person raising a constitutional issue in an application or action shall give notice thereof to the registrar at the time of filing the application or pleading.

(b) Such notice shall contain a clear and succinct description of the constitutional issue concerned.

(c) The registrar shall, upon receipt of such notice, forthwith place it on a notice board designated for that purpose duly stamped by the registrar to indicate the date upon which it was placed on the notice board where it shall remain for a period of 15 days.

(2) Subject to the provisions of an Act of Parliament enacted in terms of s171(2) of the Constitution of Zimbabwe and these rules, any interested party in a constitutional issue raised in proceedings before a court may, with the written consent of the parties to the proceedings, given no later than 15 days after the filing of the application or pleading in which the constitutional issue was first raised, shall be admitted therein as *amicus curiae* upon such terms and conditions as may be agreed upon in writing by the parties.

(3) The written consent contemplated by subrule (2) shall, within five days of its being obtained, be lodged with the registrar and the *amicus curiae* shall, in addition to any other provision, comply with the times provided for the lodging of written argument.

(4) If the interested party contemplated in subrule (2) is unable to obtain the written consent as contemplated therein, he or she may, within two days of the expiry of the 15 day period prescribed in subrule (2) apply to the court to be admitted as an *amicus curiae* in the proceedings.

(5) An application in terms of subrule (4) shall –

(a) briefly describe the interest of the *amicus curiae* in the proceedings;

(b) clearly and succinctly set out the submissions which will be advanced by the *amicus curiae*, the relevance thereof to the proceedings and the reasons for believing that the submissions will assist the court and are different from those of the other parties; and

(c) be served upon all parties to the proceedings.

(6)(a) Any party wishing to oppose an application for admission by an *amicus curiae* shall file an opposing affidavit within two days of the service of such application upon the party.

(b) The opposing affidavit shall set out in clear and succinct terms the grounds of such opposition.

(7) The court hearing an application for admission as an *amicus curiae* may refuse or grant the application upon such terms and conditions it deems fit.

(8) The court may dispense with any of the requirements of this rule if it is in the interests of justice to do so.

PART II

ISSUING AND SERVICE OF PROCESS

12. Proceedings by or against Firms and Associations

(1) In this rule—

"associate" in relation to –

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

"association" means any unincorporated body of persons, and includes a partnership, a syndicate, a club or any other association of persons.

"firm" means a business including a business carried on by a body corporate, carried on by the sole proprietor under a name other than his or her own.

"plaintiff" and "defendant" include applicant and respondent.

"sue" and "sued" are used in relation to actions and applications.

(2) A firm or an association may sue or be sued in its name.

(3) A plaintiff suing a firm or association need not allege the names of the proprietor or associates. If he or she does, any error of omission or inclusion shall not afford a defence to the association.

(4) Subrule (3) shall apply *mutatis mutandis* to a plaintiff suing a firm.

(5) In any proceedings in which an association is a party, any other party may, by written notice to the association delivered before or after judgment, call for particulars as to the full name and residential address of the proprietor or of each associate, as the case may be, at the time the cause of action arose.

(6) A person who receives a notice in terms of subrule (5) shall, within five days of receiving it—

(a) furnish the party 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 flow, as if the proprietor or associates had been named in the summons or notice commencing the proceedings;

Provided that the proceedings shall continue in the name of the firm or association except where a writ of civil imprisonment, subject to s49 (2) of the Constitution, is sought against an associate shall be specifically named in the civil imprisonment proceedings.

(7)(a) A plaintiff suing a firm or association and alleging in the summons or notice that any person was at the relevant date the proprietor or an associate, shall notify such person accordingly by serving the process upon such person.

(b) Any person served with notice in terms of paragraph (a) shall be deemed to be a party to the proceedings, with the rights and duties of a defendant.

(c) Any party to such proceedings may aver in the pleadings or affidavit that such person was at the relevant date the proprietor or an associate, or that he or she is estopped from denying such status.

(d) If any party to such proceedings disputes such status, the court may at the hearing decide that issue *in limine*.

(e) Execution in respect of a judgment against an association shall first be levied against the assets of the association and, after such execution, against the private assets of any person held to be or held to be estopped from denying his or her status, as an associate, as if judgment had been entered against him or her.

(8) If a firm or association is sued and it appears that since the relevant date it has been dissolved, the proceedings shall nevertheless continue against the persons alleged by the plaintiff or stated by the firm or association to be the proprietor or associates as if sued individually.

(9) Subrule (8) shall apply *mutatis mutandis* where it appears that an association has been discontinued.

(10) This rule shall not be construed as affecting—

(a) the entitlement of an associate to institutes proceedings on behalf of his firm or 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.

13. Summons

(1) Every action shall be commenced by way of a summons addressed to the defendant and signed by the registrar who issues it.

(2) A person making a claim against any other person may, through the office of the registrar, sue out a summons or a combined summons and declaration addressed to the sheriff directing him to serve a copy of the summons and declaration on the defendant and to return a copy, with the 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 for in these rules, as may be appropriate.

(3)(a) The summons shall call upon the defendant, if he disputes the claim and wishes to defend it, to give notice of his intention to defend with the registrar within the time specified therein.

(b) Thereafter, if the summons is a combined summons and declaration, the defendant shall, within a further 10 days after giving such notice to defend, deliver a plea (with or without a claim in re-convention), an exception or an application to strike out.

(4) Before issue, every summons shall set forth –

(a) the surname and first names or initials of the defendant by which the defendant is known to the plaintiff, the defendant's residence or place of business and, where known, the defendant's occupation and employment address and, if the defendant is sued in any representative capacity, the capacity in which the defendant is sued;

(b) the full names, gender (if the plaintiff is a natural person), occupation and the residence or place of business of the plaintiff, and if the plaintiff sues in a representative capacity, the capacity in which the plaintiff is suing.

(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; and

(d) the date of issue.

(5) The summons shall be in Form No. 2 or, in matrimonial causes, in Form No 30A and shall be filed in hardcopy in triplicate and in soft copy with the registrar at the time of issue.

(6)(a) 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, in addition to an endorsement in terms of subrule (4) (c) have attached the particulars of the claim setting out truly and concisely the nature, extent and grounds of the cause of action, which particulars shall take the place of a declaration.

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

(7) Subject to subrule (8), where the amount claimed includes capital and interest on the capital, the particulars attached to the summons in terms of subrule (6)(a) shall state clearly—

(a) the capital amount claimed; and

(b) the total amount in interest claimed on the capital at 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 paragraphs (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.

(8) Where the claim relates to a bank overdraft, the particulars attached to the summons in terms of subrule (6)(a) 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 sub-paragraph (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.

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

(10)(a) A summons shall be prepared by the plaintiff or his or her legal practitioner and shall be written or printed or partly printed and partly written on foolscap paper of good quality.

(b) Every summons shall be signed by the legal practitioner acting for the plaintiff and shall bear the legal practitioner's physical address called "the address for service" where notices, pleadings, orders and other documents may be left by the defendant for the plaintiff. The address for service shall be within a radius of five kilometres from the registry where the defendant is required to enter appearance to defend.

(c) In addition to the physical address, his or her postal address and, where available his or her facsimile address and electronic mail address, shall be endorsed.

(d) If no legal practitioner is acting, the summons shall be signed by the plaintiff who shall in addition append an address for service within a radius of five kilometres from the registry at which the plaintiff will accept service of all subsequent documents in the suit, the plaintiff's postal address and, where available, the plaintiff's facsimile address and electronic mail address.

(e) After paragraphs (b), (c) and (d) have been complied with, the summons shall be signed and issued by the registrar who shall affix a case number for it on the top right corner and it shall be made returnable by the sheriff to the court through the registrar.

(f) The plaintiff may indicate in a summons whether the plaintiff is prepared to accept service of all subsequent documents and notices in the suit through any manner other than the physical or postal addresses and if so, shall state such preferred manner of service.

(g) If an action is defended the defendant may, at the written request of the plaintiff, deliver a consent in writing to the exchange or service by both parties of subsequent documents and notices in the suit by way of facsimile or electronic mail.

(h) If the defendant refuses or fails to deliver the consent in writing as provided for in paragraph (g), the court or a judge may, on application by the plaintiff, grant such consent, on such terms as to costs and otherwise as may be just and appropriate in the circumstances.

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

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

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

14. Declaration

(1) In every case in which the claim is not for a debt or liquidated demand the summons shall have annexed to it a statement of the material facts relied upon by the plaintiff in support of his or her claim, to be called a declaration which shall state truly and concisely;

(a) the name and description of the party suing and his place of residence or place of business; and

(b) if the plaintiff sues in a representative capacity, the capacity in which he sues; and

(c) the name of the defendant and his place or residence or place of business; and

(d) if the defendant is sued in a representative capacity, the capacity in which he is sued; and

(e) the nature, extent and grounds of the cause of action, complaint or demand;

(2) 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.

(3) Where the claim is 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 (7) and (8) of rule 13 as may be relevant to the claim.

(4) 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.

(5) The provisions of subrule (9) of rule 13 relating to amendment of summons shall apply *mutatis mutandis* to amendment of a declaration.

15. Provisional Sentence

(1) Where the plaintiff is the holder of a valid acknowledgment of debt, commonly called a liquid document, the plaintiff may cause a summons to be issued claiming provisional sentence on the said document.

(2) A summons for provisional sentence shall be in Forms No. 4 or 5 and 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 pay the amount claimed or, failing such payment, to appear personally or by counsel on the floor of the court at the hour and on the day not being less than 10 days after service and at the place stated in the summons to admit or deny his or her liability.

(3) A summons for provisional sentence shall be issued by the registrar and the provisions of rule 13 shall *mutatis mutandis* apply to a summons for provisional sentence.

(4) Copies of all documents upon which the claim is founded shall be annexed to the summons and served with it.

(5) 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.

(6) Matters for provisional sentence shall be set down on a roll assigned for such matters not being a day assigned for unopposed matters and shall be disposed of as expeditiously as possible having regard to the nature of the remedy of provisional sentence.

(7) 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 in which event the provisions of these rules shall apply, *mutatis mutandis* to the service of a notice of opposition in terms of this subrule and to the filing and service of any answering affidavits or further affidavits by the parties.

(8) If at the hearing the defendant admits his liability or if he has previously filed with the registrar an admission of liability signed by himself and witnessed by a legal practitioner acting for him or, if not witnessed, verified by affidavit, the court may give final judgment against him.

(9) The court may hear oral evidence as to the authenticity of the defendant's signature, or that of his or her agent, to the document upon which claim for provisional sentence is founded or as to the authority of the defendant's agent.

(10) Any person against whom provisional sentence has been granted may enter appearance to defend the principal case but only if he or she shall have satisfied the amount of the judgment of provisional sentence and taxed costs or the plaintiff has issued a writ of execution against the defendant and executed against such property.

(11) A defendant entitled to and wishing to defend the principal case, shall, within one month of the grant of provisional sentence, enter a notice of appearance to defend, in which event the summons shall stand as a summons in an ordinary action and the defendant shall file a plea within ten days after entry of appearance and thereafter the matter shall proceed as an ordinary action. Failing such appearance or such plea the provisional sentence shall *ipso facto* become a final judgment.

(12) Where provisional sentence has been granted and the defendant is entitled to and desires to defend the principal case, the plaintiff shall, on demand, furnish the defendant with security *de restituendo* to the satisfaction of the registrar, against payment of the amount due under the judgment.

(13) In considering the amount of security *de restituendo* to be furnished by the plaintiff the registrar shall have regard to the value of the judgment and all the circumstances of the case, but shall not necessarily fix security which is the equivalent of the judgment.

(14) Where provisional sentence has been refused, the case shall be 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 of procedure in an ordinary action shall apply unless the court gives other directions.

16. Service of Process

(1)(a) In this rule "process" means any document which is required to be served on any person in terms of these rules.

(b) 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 rule shall be construed as a reference to his or her guardian, tutor, curator or the like of such minor or person under disability.

(c) This rule shall apply to the service of all process within Zimbabwe except to the extent that it is inconsistent with –

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

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

(2)(a) Service of a summons, all notices of set down, writ, warrant or court order shall be effected by the sheriff or his deputy.

Provided that the court or a judge may, in deserving cases authorize service of a notice of set down, or court order to be effected by a party or his or her representative.

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

(c) 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 copies as there are persons to be served.

(d) Service of process shall be effected as near as possible between the hours of 07:00 and 2100 on any day which is not a Sunday except for process for the arrest of any person and process served by post, telegraph, telefacsimile, email, or courier which shall be validly served at any time.

(e) At any time of filing an appeal, application or pre-trial conference request, as the case may be, a party shall deposit with the sheriff an amount as determined by the sheriff for costs of service of all notices of set down.

(ii) A copy of the receipt of such deposit shall be furnished to the registrar by the party within five (5) days of filing the appeal, application or pre-trial conference request.

(iii) When a matter is ready for set down, the registrar shall submit the notice of set down to the sheriff for service to be effected.

(iv) Every notice of set down shall be made returnable to the court from which it was issued, and the sheriff shall submit the return of service to the registrar within five (5) days after service has been effected and at least five (5) days before the date of hearing.

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

(4) Service of any other process of the court may be effected in one or other of the following manners:

(a) by delivering a copy thereof to that person or his duly authorized agent;

(b)(i) by delivering a copy thereof on a responsible person at the place of residence or business or employment of that person, who shall be apparently in charge of the premises at the time of delivery being a person apparently not less than sixteen years of age;

(ii) For the purposes of this paragraph when a building, other than an hotel, boarding house, hostel or similar residential building, is occupied by more than one person or family, ‘residence’ or ‘place of business’ means that portion of the building occupied by the person upon whom service is to be effected.

(c) by delivering a copy thereof to the agent who is duly authorized in writing to accept service on behalf of the person upon whom service is to be effected;

(d) if the person to be served has chosen a *domicilium citandi*, by delivering or leaving a copy thereof at the *domicilium* chosen;

(e) in the case of a body corporate, by delivering a copy to a responsible employee thereof at its registered office or its principal place of business within the court's jurisdiction, or if there is no employee willing to accept service, by affixing a copy to the main door of such office or place of business, or by delivering a copy to a director or to the secretary or public officer of the body corporate;

(f) where any syndicate, club, society, church, firm or voluntary association is to be served, service shall be effected in a manner referred to in paragraph (b) at the place of business of it and if it has no place of business on a partner, the proprietor, chairperson or secretary of the committee or other managing body of such association as the case may be or a responsible person at its place of business;

(g) where a local authority or statutory body is to be served, service shall be effected by delivering a copy to the town clerk or assistant town clerk or mayor of such local authority or to the secretary or similar officer or member of the board or committee of such body, or in any manner provided by law;

(h) where two or more persons are sued in their joint capacity as trustees, liquidators, executors, administrators, curators or guardians, or in any other joint representative capacity, service shall be effected upon each of them in any manner provided for in this rule except in the case of 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;

(i) where any process is to be served, including process in which the only relief claimed, apart from costs, is an order for ejectment from premises or judgment for rent thereof, and –

(i) the person upon whom it is to be served prevents service by keeping his residence, place of business or employment, address for service or registered office closed, or

(ii) the person seeking to effect service of the 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 this rule;

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;

(j) where the person to be served with any process initiating proceedings is already represented by a legal practitioner of record, such process may be served upon such legal practitioner by the party initiating such proceedings.

(5) No service of any civil summons, order or notice and proceedings or act required in any civil action, except the issue of a warrant of arrest, shall be validly effected on a Sunday unless the court or a judge directs otherwise.

(6) It shall be the duty of the sheriff or other person serving the process to explain the nature and contents thereof to the person upon whom service is being effected and to state in the return or affidavit that he has done so.

(7)(a) Any process, other than process referred to in subrule (3) may be served by registered post or by electronic mail in accordance with this subrule;

(b) where –

(i) the party requiring service of any process, other than process referred to in subrule (3), has given written instructions to the sheriff or his deputy to serve the process by registered post or by electronic mail; or

(ii) the registrar has directed the sheriff or his deputy that any process, other than process referred to in subrule (3) shall be served by registered post or by electronic mail;

the sheriff or his deputy, as the case may be, shall serve the process by registered post or by electronic mail in accordance with this subrule;

(c)(i) where registered post is used, process shall be served in accordance with this subrule 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;

(ii) an acknowledgment of receipt of an envelope posted in terms of this subrule, 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 or her;

(d)(i) Where electronic mail is used, the process shall be scanned and sent to the electronic mail address of the party upon whom process is to be served;

(ii) Proof of delivery of the electronic mail at that address shall be *prima facie* proof of service of the process upon the party to be served.

(8) 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;

(b) a legal practitioner or a responsible person in his or her 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 subrule (7c), proof of service shall be by signed acknowledgment referred to therein.

(e) electronic mail, in accordance with subrule (7d) proof of service shall be by copy of the mail in question showing date and time of delivery.

(9) Where the process has been served on a responsible person in terms of subrule (4) (b), (c), (e), (f), (g), and (h), the name of that person shall be stated on the return of service, endorsement, certificate or affidavit referred to in subrule (8).

(10) 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 rule at the new address.

(11) Any process for service may be transmitted by telegraph, telefacsimile or electronic mail and a telegraphic, telefacsimile or email copy that is served in accordance with this rule shall be of the same effect as if the original had been served.

(12) 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.

(13) If it is not possible to effect service of process in any manner provided for in this rule, the court or a judge may, upon the application of the person wishing to cause service to be effected, give directions in regard thereto. Where such directions are sought in regard to service upon a person known or believed to be within Zimbabwe, but whose whereabouts therein are unknown, the provisions of rule 18 shall, *mutatis mutandis* apply.

17. Service of Process in Proceedings Against the State

(1) This rule 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 instituted against –

(i) the State; or

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

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

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

(a) the notice of intention to bring the proceedings required by the State Liabilities Act [Chapter 8:14]; 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.

(3) Where process instituting proceedings to which this rule 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 the State Liabilities Act [Chapter 8:14].

(4) Nothing in this rule 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.

18. Edictal Citation

(1) Save by leave of the court or as provided for in rule 19 or in any Act, no process or document whereby proceedings are instituted shall be served outside Zimbabwe.

(2) Any person desiring to obtain leave shall make application to the court or a judge setting out concisely—

(a) the nature and extent of his or her claim;

(b) the grounds upon which the claim is based;

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

(d) the manner of service which the court or judge is asked to authorize; and

(e) if such manner of service be other than personal service, the last-known whereabouts of the person to be served and the inquiries made to ascertain his or her present whereabouts.

(3) Upon such application the court or judge may make such order as to the manner of service as to the court or judge seems fit and shall further order the time within which notice of intention to defend is to be given or any other step that is to be taken by the person to be served.

(4) Where service by publication is directed, it shall not be necessary to publish the document or documents *in extenso* but in a short form thereof to be approved and signed by the registrar.

(5) 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.

(6) Any person wishing to obtain leave to effect service outside Zimbabwe of any document other than one through which proceedings are instituted, may either make application for such leave in terms of subrule (2) or request such leave at any hearing at which the court or judge is dealing with the matter, in which latter event no papers need to be filed in support of such request, and the court or judge may act upon such information as may be given from the bar or in chambers or given in such other manner as the court or judge may require, and may make such order as it, he or she deem fit.

19. Service of summons or application in Republic of South Africa, Namibia, Lesotho, Swaziland or Botswana

(1) Where it is necessary to serve any summons or application on any person in a province of the Republic of South Africa or 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.

(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 in the province or country in which such service is effected.

(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 or application proposed to be issued and a sworn statement setting out concisely the matters mentioned in subrule (2) of rule 17.

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

20. Substituted service

(1) Whenever it is necessary to effect service of any process or document whereby proceedings are instituted, on any person within the jurisdiction who cannot be served in any of the ways provided for in rule 16, the leave of a judge shall be obtained by chamber application made in terms of the rule relating to the making of such applications.

(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 nature and extent of the claim and the grounds upon which it is based;

(b) the reason why service cannot be effected in any of the ways provided in rule 16;

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

(3) On such application a judge shall, by his or her order, give such directions in the premises as he or she 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 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.

PART III

JUDGMENT

21 Appearance to Defend

(1) There shall be maintained in the office of the registrar at Harare, Bulawayo, Masvingo and any other station, a book called an appearance book.

(2) Subject to the provisions of the Act or any other law, the defendant in every civil action shall be allowed ten days after service of summons on him or her within which to deliver a notice of intention to defend, either personally or through his legal practitioner.

(3) Entry of appearance to defend shall be effected by the defendant or his or her legal practitioner who shall record in the appearance book at the registry where he or she 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 for service on the defendant thereat of all documents in such action and service thereof at the address for service shall be valid and effectual, except where by order or practice of the court personal service is required.

(d) a full residential or business address;

(e) postal address and where available, facsimile address and electronic mail address

(f) the date of entry;

and shall sign the entry thus made.

(4)(a) The defendant may indicate in the notice of appearance to defend whether the defendant is prepared to accept service of all subsequent documents and notices in the suit through any other manner than the physical delivery at the address for service and if so, shall state such preferred manner of service.

(b) The plaintiff may, at the request of the defendant, deliver a consent in writing to the exchange or service by both parties of subsequent documents and notices in the suit by way of facsimile or electronic mail.

(c) If the plaintiff refuses or fails to deliver the consent in writing as provided for in paragraph (b) the court or a judge may, on application by the defendant, grant such

consent, on such terms as to costs and otherwise as may be just and appropriate in the circumstances.

(5) A party shall not by reason of his or her delivery of a notice of appearance to defend be deemed to have waived any right to object to the jurisdiction of the court or to any irregularity or impropriety in the proceedings.

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

(7) A defendant who has failed to enter appearance shall be barred.

(8)(a) Where the defendant has entered appearance the plaintiff shall not be entitled, save with the defendants 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 the registrar. Such undertaking shall be incorporated in the notice of withdrawal.

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

22. Judgment by Consent

(1)(a) Save in actions for relief affecting status, at any time after service of summons a defendant may consent, in whole or in part to judgment without appearing in court.

(b) A consent to judgment shall be in writing and signed by the defendant personally or by a legal practitioner who has entered appearance to defend on his or her behalf.

(c) Where the defendant has personally signed a consent to judgment, his or her signature shall either be witnessed by a legal practitioner acting for such defendant and not for the plaintiff or be verified by affidavit.

(d) Upon filing a consent to judgment with the registrar the plaintiff may make a chamber application for judgment and thereafter a judge may give judgment according to the consent.

(2) 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 the plaintiff to prosecute the 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.

23. Judgment in Default-claim for debt or liquidated demand only.

(1)(a) 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 barred for default of plea, the plaintiff may, without notice to the defendant, file with the registrar a written application for judgment against such defendant

(b) The registrar may—

(i) enter judgment as requested;

(ii) enter judgment for part of the claim only or on amended terms;

(iii) refuse to enter judgment wholly or in part;

(iv) postpone the application for judgment on such terms as he or she may consider just;

(v) request or receive oral or written submissions;

(vi) require that the matter be set down for hearing in open court; or

(vii) refer the application to a judge in chambers;

Provided that if the application is for an order declaring residential property specially executable, the registrar shall refer such an application to the court.

(c) The registrar shall record any judgment entered or direction given by him or her.

(d) The registrar shall enter judgment for costs in an amount, unless the application for default judgment requires costs to be taxed or the registrar requires a decision on costs to be made by the court, not exceeding $200-00 plus the sheriff's fees.

24. Judgment in default- claim other than for debt or liquidated demand

(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 set down the case for judgment on an appropriate day specified in these rules relating to set down of unopposed matters, without notice to the defendant, and thereupon, subject to rule 26, the court may grant judgment or make such order as it considers the plaintiff is entitled to upon the summons and declaration.

(2) 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 bared in default of plea, the plaintiff may without notice to the defendant set down the case for judgment on an appropriate day specified in these rules relating to set down of unopposed matters, and thereupon, subject to rule 26, the court may grant judgment or make such order as it considers the plaintiff is entitled to upon the summons and declaration.

(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.

25. 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 or her counsel, and the other party is in default, the court may, subject to rule 26, 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) When on the calling of any case the defendant appears personally, or by his or her 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.

(3) The court shall determine the plaintiff's claim at the trial and shall not refer a case where the defendant is in default at trial the unopposed roll.

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

26. When court may enter judgment without hearing evidence

(1) The court may grant judgment or make an order under rule 23 or 24 or 25 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 Monday immediately preceding the Thursday on which the case is set down for hearing, where the case is set down for hearing in Bulawayo or Masvingo;

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.

(2) A judgment that has been entered in default shall be served upon the defendant as soon as reasonably possible after it has been granted even where the plaintiff does not execute it.

27. 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 or she thinks fit.

28. 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, and thereafter the rules of court relating to the filing of opposition, heads of argument and the set down of opposed matters, if opposed, shall apply.

(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 the action, on such terms as to costs and otherwise as the court considers just.

29. Setting aside of default judgment by Consent

(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.

30. Correction, Variation and Rescission of Judgments and Orders

(1) The court or a judge may, in addition to any other powers it or he or she may have, *mero motu* or upon the application of any affected party, correct, rescind or vary:

(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby; or

(b) an order or judgment 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) an order or judgment granted as a result of a mistake common to the parties.

(2) Any party desiring any relief under this rule may make a court application on notice to all parties whose interests may be affected by any variation sought, within one month after becoming aware of the existence of the order or judgment.

(3) The court or a judge shall not make any order correcting, rescinding or varying an order of judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.

31. Summary judgment

(1) Where the defendant has entered appearance to a summons, the plaintiff may, at any time before a pretrial 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.

(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 and that appearance to defend has been entered solely for purposes of delay.

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

(4) These rules relating to the form and service of the application and any opposition to it shall apply.

(5) Upon the hearing of an application for summary judgment the defendant may—

(a) give security to the plaintiff 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 herself or any other person who can swear positively to the facts that he or she has a *bona fide* defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon by the defendant.

(6) A person who—

(a) deposes to an affidavit filed in terms of subrule (5) (b); or

(b) gives oral evidence in terms of that subrule;

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

(7) 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 or her affidavit with a further affidavit dealing with either or both of the following –

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

or

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

(8) If the defendant does not find security or satisfy the court as provided for in subrule (5) 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.

(9) If at the hearing of an application made in terms of this rule it appears –

(a) that the defendant is entitled to defend and any other defendant is not so entitled; or

(b) that the defendant is entitled to defend as to part of the claim, the court shall—

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

(ii) grant leave to defend to the defendant as to a part of the claim and enter judgment against the defendant as to the balance of the claim, unless such balance has been paid to the plaintiff; or

(iii) make both orders mentioned in subparagraphs (i) and (ii).

(10) If the defendant finds security or satisfies the court as provided for in subrule (5), the court shall give leave to defend and the action shall proceed as if no application for summary judgment had been made.

(11)(a) 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.

(b) 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 this subrule.

(12)(a) The court may at the hearing of such application make such order as to costs as it deems fit:

Provided that where –

(i) the plaintiff makes an application under this rule, and the case is not within the rule;
or

(ii) in the opinion of the court, the plaintiff 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 further order that such costs be taxed as between legal practitioner and client;

(b) In any case in which summary judgment was refused and in which the court after trial gives judgment for the plaintiff substantially prayed, and the court finds that summary judgment should have been granted had the defendant not raised a defence which in its opinion was unreasonable, the court may order the plaintiff's costs of action to be taxed as between legal practitioner and client.

PART IV

INTERLOCUTORY APPLICATIONS AND ANCILLIARY MATTERS

32. Application for dismissal of action

(1)(a) Where a defendant has filed a plea, he or she may make a court application for the dismissal of the action on the ground that it is frivolous or vexatious.

(b) A court application in terms of this subrule 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 such belief.

(c) A deponent may attach to his or her affidavit filed in terms of paragraph (b) documents which verify his belief that the action is frivolous or vexatious.

(d) On an application in terms of this subrule, the court may—

(i) grant the application in which event it shall dismiss the action and enter judgment of absolution from the instance; or

(ii) dismiss the application in which event the action shall proceed as if no application was made; and

(iii) make such order as to costs including costs as between legal practitioner and client, as it deems necessary in the circumstances.

(2) Where on the hearing of an application made under this rule 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.

(3) Where the defendant has filed a plea and the plaintiff has not, after 1 month of the filing of such plea, taken any further step to prosecute the action, the defendant may, on notice to the applicant, make a court application for the dismissal of the action for want of prosecution.

(b) A court application in terms of this subrule shall be supported by affidavit made by the defendant or a person who can swear positively to the facts or averments set out therein, setting out the grounds for seeking that relief.

(c) On an application in terms of this subrule, the court may either grant the application or dismiss it and make such order as to costs as it deems necessary in the circumstances.

(4) Subject this rule, the rules relating to the filing of court applications, shall apply to an application under this rule and to any opposition thereto.

33. Joinder of Parties and Causes of Action

(1) Subject to subrule (4) any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, may join as plaintiffs in one action against the same defendant 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.

(2) A plaintiff may join several causes of action in the same action.

(3)(a) In any action in which any causes of action or parties have been joined in accordance with this rule, the court at the conclusion of the trial shall –

(i) give such judgment in favour of such of the parties as shall be entitled to relief; or

(ii) grant absolution from the instance in respect of any of the parties where such is the appropriate decision; and

(iii) make such order as to costs as it shall deem fit;

Provided that, without limiting the discretion of the court in any way, the court may order that any plaintiff who is unsuccessful shall be liable to any other party, whether plaintiff or defendant, for any costs occasioned by his joining in the action as plaintiff;

(b) If judgment is given in favour of any defendant or if any defendant is absolved from the instance, the court may order –

(i) the plaintiff to pay the defendant's costs; or

(ii) the unsuccessful defendants to pay the costs of the successful defendant jointly and severally, the one paying the other to be absolved; and

(iii) that if one of the unsuccessful defendants pays more than his *pro rata* share of the costs of the successful defendant, he shall be entitled to recover from the other unsuccessful defendants the *pro rata* share of such excess; and

(iv) that if the successful defendant is unable to recover the whole or any part of his or her costs from the unsuccessful defendants, he or she shall be entitled to recover from the plaintiff such part of his or her costs as cannot be recovered from the unsuccessful defendants.

(c) If judgment is given in favour of the plaintiff against more than one of the defendants, the court may order—

(i) those defendants against whom it gives judgment to pay the plaintiffs costs jointly and severally, the one paying the other to be absolved; and

(ii) that if one of the unsuccessful defendants pays more than his or her *pro rata* share of the costs of the plaintiff he or she shall be entitled to recover from the other unsuccessful defendants their *pro rata* share of such excess.

(4) Where there has been a joinder of causes of action, the court may—

(a) on application by any party at anytime, order that separate trials be held either in respect of some or all the causes of action or some or all of the parties, as the case may be, if it appears to the court that the joinder may embarrass or delay the trial or is otherwise inconvenient;

(b) on application by any party against whom a claim in reconvention is made, if it appears that the subject matter of such claim ought, for any reason, to be disposed of by a separate action, order the claim in reconvention to be struck out or to be tried separately; or

(c) make such order as may appear expedient.

(d) A judge may make an order referred to in paragraphs (a) or (b) where the parties to the action consent to the order.

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

(b) If, as a result of an event referred to in paragraph (a), 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 paragraph (d), the proceedings shall continue with the person so joined or substituted, as the case may be, as if he or she 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.

(c) Where a party to any proceedings dies or ceases to be capable of acting as such, his or her 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 paragraph (d), he or she shall be deemed to have been so substituted in his or her capacity as curator, trustee, or legal representative, as the case may be.

(6) A judge may, on chamber application being made to him or her within fifteen days after service of notice in terms of paragraph (b) or (c), set aside or vary any joinder or substitution of a party effected in terms of paragraphs (b) and (c) as the case may be.

(7)(a) No cause or matter shall be defeated by reason of the misjoinder or non joinder 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.

(b) At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either *mero motu* or on application –

(i) 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;

(ii) 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;

Provided that no person shall be added as a plaintiff without his or her consent signified in writing or in such other manner as may be authorized.

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

(8)(a) Where an order is made under subrule (7), the summons by which the action in question was begun shall be amended accordingly and shall be endorsed with –

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

(ii) 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.

(b) Where, by an order under subrule (7), 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 or her, but before serving the summons on him or her the person on his or her application the order was made shall procure the order to be noted in the registry.

(c) Where, by an order made under subrule (7) a person is to be made a defendant, the rules as to entry of appearance shall apply accordingly to entry of appearance by him or her.

(d) Where, by an order under subrule (7), 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 or her under this subrule and, if he or she is a defendant, has been served on him or her.

(9)(a) 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 anyone or more of them as representing all or as representing all except one or more of them.

(b) At any stage of proceedings under this subrule, 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 subrule, the court appoints a person not named as a defendant, it shall make an order under subrule (7) adding that person as a defendant.

(c) A judgment or order given in proceedings under this subrule 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.

(d) An application for the grant of leave under paragraph (c) 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.

(e) 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 or her on the ground that by reason of the facts and matters particular to his or her case he is entitled to be exempted from such liability.

(f) The court hearing an application for the grant of leave under paragraph (c) 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 and determined.

(10) 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.

(11) Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or as a defendant and the court may, upon such application, make such order, including any order as to costs, and give such directions as to further procedure in the action as it deems fit.

34. Joinder where validity of law is challenged

(a) Where in any proceedings before the court, the validity of a law is challenged, whether in whole or in part and whether on constitutional grounds or not, the party challenging the validity of the law shall join the local or national executive authorities responsible for the administration of the law in the proceedings.

(b) Where a challenge referred to in paragraph (a) is made against a rule of court, the party challenging the rule shall, in addition to serving the challenge upon the responsible Minister or Executive at the time when the challenge is made, also serve the Judicial Service Commission, a notice setting out the basis of the challenge, together with copies of all documents in which the challenge is referred to.

35. 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 provisions of subrule (11) of rule 33 shall *mutatis mutandis* apply with regard to the action so consolidated; and

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

36. Third Party Procedure

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

(a) that he or she is entitled, in respect of any relief claimed against him or her, to a contribution or indemnity from such third party;

(b) that he or she 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;

(c) that any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue which has arisen or will arise 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; 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.

(2)(a) 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.

(b) 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.

(3) Where the defendant has failed to make the application within the time provided for in paragraph (b), he or she shall seek the leave of the court to make such application.

(4) 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.

(5) Where the third party has been given liberty to defend the action, he or she may plead or except to the action as if he were a defendant to the action. He or she may also file a plea or other proper pleading contesting liability.

(6)(a) 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 who has applied for joinder of the third party, 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 or her by the defendant;

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

(b) 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 seeking joinder against or for the third party.

(7) 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.

(8)(a) Where a defendant claims against another defendant –

(i) that he or she is entitled to contribution or indemnity;

(ii) 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

(iii) 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 or she does so shall apply for directions in terms of the rules providing for applications for directions.

(b) On such application the court or judge may exercise any of the powers *mutatis mutandis* contained in subrule (4).

(c) 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 subrules (6) and (7) shall apply *mutatis mutandis*.

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

PART V

PLEADINGS GENERALLY

37. Form and Contents of Pleadings

(1) Every pleading shall –

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

(b) state the title of the action describing the parties thereto, the case number assigned thereto by the registrar at the head:

Provided that where the parties are numerous or the title lengthy and abbreviation is reasonably possible, it shall be so abbreviated; and

(c) give the description of the pleading; and

(d) contains a clear and concise statement of the material facts upon which the party pleading relies for his or her claim or defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto, but not the evidence by which they are to be proved; and

(e) be divided into paragraphs (including sub-paragraphs) which shall be consecutively numbered with each paragraph containing wherever possible a separate averment; and

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

(g) be signed by the party concerned or by his or her legal practitioner:

Provided that where it is drafted by an advocate, it shall be signed by both the advocate and the legal practitioner instructing him or her; and

(h) give the party's address for service and electronic mail address, if any.

(2) Every pleading shall be filed in hard and soft copy 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 or parties to the action.

(3) 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 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.

(4) Neither party need in any pleading allege any matter of fact which the law presumes in his or her 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.

(5) A party who in a pleading is relying on a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and where the contract is written, a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading.

(6) It shall not be necessary in any pleading to state the circumstances from which an implied term can be inferred.

(7)(a) 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 a 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.

(b) 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.

(8) A plaintiff suing for damages shall set them out in such a manner as will enable the defendant reasonably to assess the quantum of such damages:

Provided that a plaintiff suing for damages for personal injury shall specify his date of birth, the nature and extent of the injuries, and the nature, effects and duration of the disability alleged to give rise to such damages, and shall as far as practicable state separately what amount; if any, is claimed for—

(a) medical costs and hospital and other similar expenses and how these costs and expenses are made up;

(b) pain and suffering, stating whether temporary or permanent and which injuries caused it;

(c) disability in respect of—

(i) the earning of income (stating the earnings lost to date and how the amount is made up and the estimated future loss and the nature of the work the plaintiff will in future be able to do);

(ii) the enjoyment of amenities of life (giving particulars); and stating whether the disability concerned is temporary or permanent; and

(d) disfigurement, with a full description thereof and stating whether it is temporary or permanent.

(9) A plaintiff suing for damages resulting from the death of another shall state the date of birth of the deceased as well as that of any person claiming damages as a result of the death

(10)(a) The defendant or plaintiff, as the case may be, shall raise by his or her 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.

(b) Except as provided for in subrule (6) of rule 38, every allegation in a declaration or claim in reconvention shall be dealt with by the opposite party specifically. He or she shall admit or deny every allegation, or state that he or she 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.

(c) Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his or her 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.

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

(e) 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.

(f) 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 or hers.

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

(11) If a party fails to comply with any of the provisions of this rule, such pleading shall be deemed to be an irregular step and the opposite party shall be entitled to apply to court to set it aside as provided for in these rules.

38. Plea

(1)(a) The defendant's answer to the plaintiff's declaration shall be called his or her plea, and it shall set forth concisely the nature of his defence, and deal with the allegations in the declaration as provided for in subrule (10) (b) of rule 37.

(b) 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 possible separately and distinctly.

(2) Where the defendant has delivered notice of appearance to defend, he or she shall within ten days after filing such appearance, deliver a plea with or without a claim in reconvention, or an exception with or without application to strike out or special plea.

(3) The defendant shall in his or her plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he or she relies.

(4) Every allegation of fact in the combined summons and declaration which is not stated in the plea to be denied or to be admitted, shall be deemed to be admitted. If any explanation or qualification of any denial is necessary, it shall be stated in the plea.

(5)(a) If by reason of any claim in reconvention, the defendant claims that on the giving of judgment on such claim, the plaintiff's claim will be extinguished either in whole or in part, the defendant may in his or her plea refer to the fact of such claim in reconvention and request, that judgment in respect of the claim or any portion of it which would be extinguished by such claim in reconvention, be postponed until judgment on the claim in reconvention.

(b) Where a request has been made in the plea in terms of paragraph (a) judgment on the claim shall, either in whole or in part, be postponed unless the court, upon the application of any interested party, otherwise orders.

(6) 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.

(7) 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

justified with respect to any extra costs occasioned by their having been denied or not admitted.

39. Claim in Reconvention

(1) A defendant who counterclaims shall, together with his or her plea, deliver a claim in reconvention setting out the material facts thereof in accordance with rules 14 and 37.

Provided that with the consent of the plaintiff or if no such consent is given, with the leave of the court, a claim in reconvention may be filed and delivered at a later stage.

(2) The claim in reconvention shall be set out either in a separate document or in a portion of the document containing the plea, but headed 'Claim in Reconvention' and it shall not be necessary to repeat therein the names or descriptions of the parties to the proceedings in convention.

(3) The claim in reconvention may set out any right or claim the defendant in an action may have against the plaintiff and such claim in reconvention shall have the same effect as a cross-action, enabling the court to pronounce a final judgment in the same action both on the original claim and on the claim in reconvention.

(4) 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.

(5) A claim in reconvention may incorporate the facts and allegations already set forth in the plea, or in the declaration and admitted in the plea, by reference to the relevant paragraphs of the plea or declaration as the case may be.

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

(7) Where the defendant who has filed a claim in reconvention makes default at the trial, the plaintiff shall be entitled to an order of absolution from the instance in respect of the claim in reconvention.

(8) If the defendant is entitled to take action against any other person and the plaintiff, whether jointly, jointly and severally, separately or in the alternative, he may with the leave of the court proceed in such action by way of a claim in reconvention against the

plaintiff and such other persons, in such manner and on such terms as the court may direct.

(9) A defendant who has been given leave to counter claim in terms of subrule (8) shall add to the title of his or her plea a further title corresponding with what would be the title of any action instituted against the parties against whom he or she makes claim in reconvention, and all further pleadings in the action shall bear such title subject to the proviso to rule 37 (1) (b).

(10) A defendant may counter claim conditionally upon the claim or defence in convention failing.

(11) If the defendant fails to comply with any of the provisions of this rule, the claim in reconvention shall be deemed to be an irregular step and the other party shall be entitled to act in accordance with these rules providing for action against an irregular step.

40. Procedure for Barring

(1) A party shall be entitled to give five days' notice of intention to bar to any other party to the action who has failed to file his or her 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.

(2) 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 or her legal practitioner.

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

(4) 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 purposes of applying for the removal of the bar.

(4)(a) A party who has been barred may—

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

(ii) 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 she or it, as the case may be, thinks fit.

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

41. Replication and Plea in Reconvention

(1) Within twelve days after service upon him or her of a plea and subject to subrule (2), the plaintiff shall where necessary file a reply thereto to be called the plaintiff's replication which shall comply with rule 38.

(2) No replication or subsequent pleading which would be a mere joinder of issue or bare denial of allegations in the previous pleading shall be necessary and issue shall be deemed to be joined and pleadings closed in terms of rule 45.

(3)(a) Where a party's only answer to a plea or to any subsequent pleading is a joinder of issue, he or she shall by letter notify his or her opponent of that fact within twelve days of the delivery to him of the last pleading filed and such joinder of issue shall operate as a denial of every material allegation of fact in the pleading upon which issue is joined except those facts the party is willing to admit.

(b) The costs of any such letter and of any matters incidental to it, including any necessary conference with counsel, shall be allowed on taxation.

(4) Where the plaintiff desires to meet the allegations in the plea by confession and avoidance he or she must do so in a replication, and he or she must raise by his or her 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 trial.

(5) The plaintiff's answer to a claim in reconvention shall be called "the plaintiff's plea –

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

(6) 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.

(7) Where an answer to allegations in a replication is made it shall be called a Rejoinder and shall be filed within twelve days of the service of the replication which it answers.

(8) Any party who fails to file and deliver a replication or subsequent pleading within the time stated in this rule shall be *ipso facto* barred.

42. Amendment of Pleadings and Matters Arising Pending Action

(1) Any party wishing to amend a pleading or document other than a sworn statement, filed in connection with any proceedings shall, notify all other parties of his intention to amend and shall furnish particulars of the amendment.

(2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is filed and delivered within ten days of delivery of the notice, the amendment will be effected.

(3) An objection to a proposed amendment shall state clearly and concisely the grounds upon which the objection is based.

(4) If an objection which complies with subrule (3) is filed within the period set out in subrule (2), the party desiring to amend may, within ten days, lodge an application for leave to amend.

(5) Where no objection contemplated in subrule (4) is filed, every party who received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice of the proposed amendment may, within ten days after the expiration of the period mentioned in subrule (2) effect the amendment as contemplated in subrule (7).

(6) Unless the court otherwise directs, an amendment authorized by an order of the court may not be effected later than 10 days after such authorization.

(7) Unless the court otherwise directs, a party who is entitled to amend shall effect the amendment by filing each relevant page in its amended form:

Provided that, 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.

(8) Any party affected by an amendment may, within twelve days after the amendment has been effected or within such other period as the court may determine, make any consequential adjustment to the documents filed by him or her, and may also take the steps contemplated by rules 44 and 45.

(9) A party giving notice of amendment in terms of subrule (1) shall, unless the court or judge otherwise directs, be liable for the costs thereby incurred by any other party.

(10) The court or a judge may, notwithstanding anything to the contrary in this rule, at any stage of the proceedings before judgment, allow either party to alter or amend any pleading or document, 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.

(11)(a) A summons or declaration may with the leave of the court or 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.

(b) A court or 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.

(12)(a) 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.

(b) 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.

(c) 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.

(d) 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.

(13)(a) Whenever any defendant in his or her 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 pleadings 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.

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

43. Exceptions, Special Pleas, Applications to Strike Out and Applications for Particulars

(1) As an alternative to pleading to the merits, a party may within the period allowed for filing any subsequent pleading—

(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 where the pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be;

(c) apply to strike out any paragraphs of the pleading which should properly be struck out or which contain averments which are scandalous, vexatious, or irrelevant.

Provided that the court shall not grant the application unless it is satisfied that the applicant will be prejudiced in the conduct of his or her claim or defence if it is not granted;

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

(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.

(3)(a) Before filing any exception to a pleading or making a court application to strike out any portion of a pleading on any grounds, the party complaining of any pleading shall, within the time allowed for filing a subsequent pleading, by written letter to his or her opponent state the nature of his or her complaint and call upon the other party to remove the cause of the complaint within twelve days of the complaint.

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

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

(4) Wherever an exception or plea in bar or abatement is taken to any pleading the grounds upon which it is founded shall be clearly and concisely stated and a party shall state all his exceptions, special pleas and make all his applications to strike out at one time.

(5) Wherever any exception is taken to any pleading or an application to strike out is made, until it has been determined, no plea, replication or other pleading over shall be necessary except as provided for in subrule (6).

(6)(a) A party filing an exception, special plea or an application to strike out shall, at the time of filing it, file heads of argument in support of the exception, special plea or application to strike out.

(b) Where the other party is represented by a legal practitioner, he or she within ten days of receipt of the exception, special plea or application to strike out and the heads of argument accompanying it, file his or her heads of argument.

(c) Upon receipt of the heads of argument filed in terms of paragraph (b) herein or, where the other party is unrepresented, at the expiration of 10 days of the filing of heads of argument in terms of paragraph (a), the registrar shall forthwith place the matter before a judge for set down.

Provided that, in all circumstances, an exception, special plea or application to strike out shall be set down for hearing within a month from the date of filing.

(7) Where the exception, special plea or application to strike out is not set down within a month, the party excepting, pleading specially or applying shall within a further period of four days plead over to the merits if he or she has not already done so and the exception, special plea or application shall not be set down for hearing before the trial.

Provided that 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.

(8) At any stage of the proceedings the court may—

(a) order to be struck out or amended—

(i) any argumentative or irrelevant or superflous 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 any pleading, notice or written proceeding requiring particulars.

(9) 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 were 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.

Provided that it shall not be competent to request further particulars where the party has been served with a notice of intention to bar, at which such a party shall plead to the merits.

(10)(a) After the close of pleadings; any party may, not less than twelve days before trial, deliver a notice in accordance with Form No. 13 requesting only such further particulars as are strictly necessary to enable him or her to prepare for trial. The party so requested shall reply thereto within ten days of delivery of the notice.

(b) If the party requested to furnish any particulars in terms of paragraph (a) fails to deliver them timeously or sufficiently, the party requesting the same may apply to court for an order for their delivery or for the dismissal of the action or the striking out of the defence, whereupon the court may make such order as it deems fit.

44. Irregular Proceedings

(1) A party to a cause in which an irregular step has been taken by the other party may apply to court to set it aside.

(2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if –

(a) the applicant has not himself or herself taken a further step in the cause with knowledge of the irregularity;

(b) the applicant has, within ten days of becoming aware of the step, by written notice afforded the other party the opportunity of removing the cause of complaint within ten days;

(c) the application is filed within twelve days after the expiry of the second period mentioned in paragraph (b) of this subrule.

(3) If at the hearing of such application the court is of the opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as it deems fit.

(4) Until a party has complied with any order of court made against it in terms of this rule, it shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.

45. Close of Pleadings

(1) The pleadings shall be considered closed if –

(a) one of the parties is barred;

(b) either party has joined issue upon any pleading of the opposite party without alleging any new matter, and without adding any further pleading;

(c) the parties agree in writing that the pleadings are closed and such agreement is filed with the registrar;

(d) the last day allowed for filing a replication or subsequent pleading has elapsed and it has not been filed;

(e) the parties are unable to agree as to the close of pleadings, and the judge or court upon the application of a party declares them closed.

PART VI

MISCELLANEOUS ISSUES BEFORE TRIAL

46. Offers and Tenders in settlement

(1) In any proceedings in which a sum of money is claimed, whether alone or 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 unconditionally or without prejudice, make a written offer to settle the whole or any party 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 either unconditionally or without prejudice, by way of an offer of settlement—

(a) make a written offer to that other person to contribute either a specific sum or in a specific proportion towards the amount to which the plaintiff may be held entitled in the proceedings; or

(b) give a written indemnity to such other person, the conditions of which shall be set out in the offer of settlement.

(3) 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 or her 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.

(4)(a) 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 unconditionally or without prejudice make a written tender to perform such act, either wholly or in part.

(b) Unless such act is such that it can only be performed by the person making the tender, a person who tenders performance of an act in terms of paragraph (a) of this subrule, shall execute and deliver to the registrar together with the tender, an irrevocable power of attorney authorizing its performance by the person who claims performance.

(5) A tender made in terms of subrule (4) shall –

(a) be signed by the person making it or by his or her 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.

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

(i) whether or not the offer or tender is made unconditionally or without prejudice; and

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

(iii) 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.

(b) where the person making an offer or tender in terms of this rule disclaims liability for the payment of costs or any part thereof, the notice given in terms of paragraph (a) shall state his reasons for such disclaimer.

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

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

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

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

(c) As soon as possible after filing a notice of acceptance in terms of subrule (1), the person who files 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 these rules.

(d) Where a power of attorney has been delivered to the registrar in terms of subrule (4) (b) of this rule, 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.

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

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

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

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

(8) If a person who has made an offer or tender that has been accepted in terms of subrule (7)(a) 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.

(9) Where an offer or tender is made in terms of this rule 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 or her even if he or she is successful in the proceedings.

(10)(a) The fact that an offer or tender referred to in this rule has been made 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.

(b) 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 rule, 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 in light of the offer or tender.

Provided that nothing in this subrule contained shall affect the court's discretion as to an award of costs.

47. Application for Directions

(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.

(2) The party applying for directions shall in his or her affidavit state the matters in respect of which he or she 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 argument 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, examinations of witnesses, place and date of trial.

(3)(a) 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 subrule (2) of this rule.

(b) If such party intends to apply for directions it 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.

(4) 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.

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

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

(b) 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.

(7) On the hearing of an application under this rule the judge may—

(a) make an order –

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

(ii) by consent of the 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 or she thinks fit for the speedy determination of the questions really in issue between the parties, and particularly he or she 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.

(8) 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 in expensive determination of the matters in issue.

48. Discovery, Inspection and Production of Documents

(1) 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 and tape recordings relating to any matter in question in such cause or matter which are or have at anytime 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.

(2) 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 and tape recordings in his or her possession or that of his or her agent other than the documents and tape recordings mentioned in paragraph (b);

(b) such documents and tape recordings in respect of which he or she has a valid objection to produce;

(c) such documents and tape recordings which he or she or his or her agent had but have not in his or her possession at the date of the affidavit.

A document shall be deemed to be sufficiently specified if it is described as being one of a bundle of documents of a special nature, which have been consecutively numbered.

Statements of witnesses taken for the purpose of proceedings, communications between legal practitioner and client, legal practitioner and advocate, pleadings, affidavits and notices in the action shall be omitted from the schedules.

(3) If a party believes that there are, in addition to documents and tape recordings as disclosed aforesaid, documents (including copies thereof) or tape recordings 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 or her to make the same available for inspection in accordance with subrule (5) or to state on oath within six days that such documents or tape recordings are not in his or her possession, in which event he or she shall, if known to him or her, state their whereabouts.

(4) A document or tape recording 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 or tape recording.

(5)(a) Where a party has made discovery, any other party may require him or her, by notice in accordance with Form No. 19, to make available for inspection any documents or tape recordings he or she has disclosed in terms of subrules (2) and (3) of this rule.

(b) A notice in terms of subrule (5)(a) shall require the party who has discovered the documents or tape recordings to deliver to the party who wishes to inspect them within five days, a notice in accordance with Form No. 20 specifying—

(i) subject to paragraph (5) a place where the documents or tape recordings may be inspected; and

(ii) 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

(iii) any documents or tape recordings which the party concerned refuses to produce for inspection.

(c) The place for such inspection shall be—

(i) if the person called upon is represented by a legal practitioner, the office of that legal practitioner;

(ii) 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;

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

(d) The party receiving the latter notice referred to in paragraph (b) shall be entitled, during normal business hours in one or more of the days within the period specified in the notice, to inspect any documents or tape recordings that are specified in the notice as being available for inspection and to make copies of same.

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

(6)(a) If a party fails to make discovery under this rule or, having been served with a notice under subrule (5) fails to give notice of a time for inspection or fails to permit inspection as required by that subrule, 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.

(b) If a party fails to comply with an order made in terms of paragraph (a), 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 or her 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 these rules.

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

(b) 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.

(c) 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 or tape recording in court and shall be entitled, without calling any witness, to hand in the said document or tape recording, 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.

(8) The court may, during the course of any action or proceedings, order the production by any party thereto under oath of such documents or tape recordings 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 or tape recordings, when produced, as it thinks just.

(9) If a party, having been served with a notice under subrule (7) or having been ordered to produce any documents or tape recordings in terms of subrule (8), fails to produce any document or tape recording as required in terms of the two said subrules, 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 these rules.

(10)(a) 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 or tape recording to produce such document or tape recording for his or her inspection within ten days and to permit him or her to make a copy or transcription thereof.

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

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

(d) If a party fails to comply with an order under paragraph (c), 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 these rules

11(a) A party to an action or proceeding may after the close of pleadings give notice to any other party to specify in writing particulars of dates and parties of or to any document or tape recording intended to be used at the trial of the action on behalf of the party to whom notice is given.

(b) The party receiving such notice shall, not less than (10) ten days before the date of trial deliver a notice –

(i) specifying the dates of and parties to and the general nature of any such document or tape recording which is in his or her possession; or

(ii) specifying such particulars as he or she may have to identify any such document or tape recording not in his or her possession, at the same time furnishing the name and address of the person in whose possession such document or tape recordings.

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

12(a) A party proposing to prove documents or tape recordings at a trial may give notice to any other party requiring him or her within ten days after the receipt of such notice to admit that those documents or tape recordings were properly executed and are what they purport to be.

(b) If the party receiving the said notice does not within the said period so admit, then as against such party the party giving the notice shall be entitled to produce the documents or tape recordings specified at the trial without proof other than proof (if it disputed) that the documents or tape recordings referred to in the notice and that the notice was duly given.

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

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

(15) A legal practitioner upon whom an order is served or to whom notice is given under the last preceding subrule who neglects, without reasonable excuse, to give notice thereof to his or her client, shall be liable to attachment.

(16) For the purposes of this rule a tape recording includes a sound track, film, magnetic material on which visual images, sound or other information can recorded.

(17) The application of this rule shall extend to plaintiffs and defendants who are minors and to *curators ad litem*.

49. Inspection, Examination and Expert Testimony

(1) Subject to the provisions of this rule 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.

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

(i) the person or persons by whom;

(ii) the place being within the jurisdiction where;

(iii) the date not being less than twelve days from the date of such notice;

(iv) the time when;

it is desired that such examination shall be conducted and requiring such other party to submit himself or herself for examination then and there.

(b) 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—

(i) if such other party is immobile, the amount to be paid to him or her shall include the cost of his or her travelling by motor vehicle and, where required, the reasonable cost of a person attending upon him or her.

(ii) where such other party will actually lose his or her salary, wage or other remuneration during the period of his or her absence from work, he or she shall in addition to his or her 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 or she will actually lose;

(iii) any amount paid by a party as aforesaid shall be costs in the cause unless the court otherwise directs.

(2)(a) 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 or she may have in relation to—

(i) the nature of the proposed examination;

(ii) the person or persons by whom the examination is to be conducted;

(iii) the place, date or time of the examination;

(iv) the amount of the expenses tendered to him or her and shall further –

(A) in the case of his or her objection being to the place, date and time of the examination furnish an alternative place, date, or time as the case may be.

(B) In the case of the objection being to the amount of the expenses tendered furnish particulars of such increased amount as may be required.

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

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

(3) Any 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 or she is able to do so to such party within ten days any medical reports, hospital records, X-ray photographs, or other documentary information of the like nature relevant to the assessment of such damages and to provide copies thereof upon request.

(4) If it appears from any medical examination carried out either by agreement between the parties or in terms of this rule or by order of a judge, that any further 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 rule.

(5) If a party claims damages resulting from the death of another person, he or she shall undergo a medical examination as prescribed in this rule if this is requested and it is alleged that his or her own state of health is relevant in determining the damages.

(6) If it appears that the state or condition of anything 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 or her control to make it available for inspection or examination in terms of this subrule, and may in such notice require him or her 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.

(7) 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 subrule. In considering any such dispute the judge may make such order as to him or her seems meet.

(8) Any party causing an examination to be made in terms of subrules (1) and (6) shall—

(a) cause the person making the examination to give a full report in writing of the results of his or her examination and the opinions that he or she 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.

(9) No person shall, save with the leave of the court or the consent of all parties to the suit, be entitled to call as a witness any person to give evidence as an expert upon any matter upon which the evidence of expert witnesses may be received unless he or she shall—

(a) not less than twelve days before the hearing, have delivered notice of his or her intention to do so, and

(b) not less than ten days before the trial, have delivered a summary of such expert's opinion and his or her reasons therefor.

(10)(a) No person shall, save with the leave of the court or the consent of all the parties to the suit, be entitled to tender in evidence any plan, diagram, model or photograph unless he or she shall not less than twelve days before the hearing have delivered a notice stating his or her intention to do so, offering inspection thereof and requiring the party receiving notice to admit the same within ten days after receipt of the notice.

(b) If the party receiving the notice fails within the said period so to admit, the said plan, diagram, model or photograph shall be received in evidence upon its mere production and without further proof thereof.

(c) If such party states that he or she does not admit them, the said plan, diagram model or photograph may be proved at the hearing and the party receiving the notice may be ordered to pay the costs of their proof.

50. Curtailment of Proceedings: Pretrial conference

(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 and tape recordings;

(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 and tape recordings 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.

(3) 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 which shall be signed by the parties or their legal practitioners and the following shall appear on it;

(a) the place, date and duration of the conference and the names of the persons present;

(b) if a party feels prejudiced because another party has not complied with the rules of court, the nature of such non-compliance and prejudice;

(c) that every party claiming relief has requested the other party to make a settlement proposal and that such party has reacted to the request;

(d) the admissions sought and made by each party;

(e) any dispute regarding the duty to begin or the onus of proof;

(f) any agreement regarding the production of proof by way of an affidavit in terms of these rules;

(g) which party shall be responsible for the copying and other preparation of documents;

(h) which documents or copies of documents shall, without further proof, serve as evidence of what they purport to be, which extracts may be proved without proving the whole document or any other agreement regarding the proof of documents,

And the minute shall be filed with the registrar not later than two days prior to the pretrial conference before a judge referred to in subrule (8).

(4) Where—

(a) a party does not accede to a request for the holding of a pre-trial conference in terms of subrule (1); or

(b) 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 apply to the registrar for a pre-trial conference to be held before a judge giving reasons why a pre-trial conference could not be held between the parties.

(5)(a) Where the parties have held a pre-trial conference in terms of subrule (1) either party shall apply to the registrar for a further pre-trial conference to be held before a judge in chambers at a date and time fixed by the registrar.

(b) The application for a pre-trial conference before a judge shall be accompanied by that party's proposed pre-trial conference minute and summary of evidence all of which shall be served as soon as possible after filing upon all the other parties to the action.

(c) The parties receiving the documents referred to in paragraph (b) shall, no later than five days before the date set for the pretrial conference before a judge, file their own proposed minutes of pre-trial conference and summaries of evidence.

(6) 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, who need not be the judge presiding at the trial, 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.

(7) 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.

(8) Upon the conclusion of a pre-trial conference held before a judge, the judge—

(a) shall record any decisions taken at the pre-trial 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.

(9) The judge may, with the consent of the parties and without any formal application, at such conference or thereafter give any direction which might promote the effective conclusion of the matter including the granting of condonation in respect of this or any other rule.

(10) 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 subrules (6); (8) and (9) or with a notice given in terms of subrule (6); 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.

(11) Unless the judge determines otherwise, the party wishing to have the action brought to trial shall prepare the minutes of the conference held before a judge and file them, duly signed, with the registrar within five days or within such longer period as the judge may determine.

(12) 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.

(13) When giving judgment, the court shall take into consideration the provisions of this rule and anything done there under 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 (2) 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.

51 Admissions

(1) A party to a cause or matter may give notice, by his or her pleading, or otherwise in writing, that he or she admits the truth of the whole or any part of the case of any other party.

(2)(a) 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—

(i) call on any other party to admit for the purposes of the cause, matter or issue only, the facts mentioned in such notice;

(ii) call on any other party to admit, saving all just exceptions, that any document was properly executed or is what it purports to be.

(b) 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.

(3)(a) 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.

(b) 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.

(4)(a) In the case of failure by the party to reply within ten days when called upon to admit that any document was properly executed or is what it purports to be, then as against such party the party giving 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.

(b) 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 or she is entitled to use them at the trial but the party not admitting them may be ordered to pay the costs of their proof.

(5) The court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

(6) If a notice to admit includes unnecessary facts or documents, the extra costs occasioned thereby shall be borne by the party giving such notice.

52. Interrogatories

(1)(a) A party to a cause or matter may make a chamber application for directions for an order—

(i) giving him or her 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

(ii) requiring that other party to answer the interrogatories on affidavit within such period as may be specified in the order.

(b) 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.

(c) On the hearing of an application under this rule, the judge shall give leave as to such only of the interrogatories as he or she 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.

(d) A proposed interrogatory which does not relate to such a matter as is mentioned in paragraph (a) shall be disallowed notwithstanding that it might be admissible in oral cross-examination of a witness.

(2) 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 or her to serve interrogatories on such officer or member of the body as may be specified in the order.

(3) 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.

(4) Where a person objects to answering any interrogatory on the ground of privilege he or she may take the objection in his affidavit in answer.

(5) If a person on whom interrogatories have been served answers any of them insufficiently, a judge on a chamber application being made to him or her for directions may make an order requiring him or her to make a further answer, and either by affidavit or on oral examination as the judge may direct.

(6) If a party against whom an order is made under subrules (1) paragraphs (a) and (c) or subrule (5) 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.

(7) 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 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.

(8) Any order made under this Rule, 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 connection with which the original order was made.

53. Special Cases

(1) The parties to any civil action or suit may, after summons has been issued, agree upon a written statement of facts and/or the questions of law arising therein in the form of a special case for the adjudication and/or opinion of the court.

(2)(a) Such statement shall set out the facts agreed upon, the questions of law in dispute between the parties and their contentions thereon.

(b) 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.

(c) 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.

(d) Such special case may be set down for hearing in the manner provided for trial or opposed applications whichever may be more convenient.

(e) 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.

(2) If, in any cause or matter it appears to the court *mero motu* that there is 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.

(3) 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.

(4) When giving its decision upon any question in terms of this Rule, the court may give 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.

(5) 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 evidence.

54. Procuring Evidence for Trial

(1)(a) A party desiring the attendance of any person to give evidence may, as of right, without any prior proceedings whatsoever, sue out from the office of the registrar one or more subpoenas for that purpose.

(b) A subpoena shall be in one of the Forms Nos. 59 to 61 and shall be prepared by the party desiring to issue it.

(c) Every subpoena other than a subpoena *duces tecum* may contain four names where necessary or required.

(d) 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.

(2)(a) If any witness has in his or her possession or control any deed, instrument, writing or thing which the party requiring his or her attendance desires to be produced in evidence, the subpoena shall specify such document, or thing and require him to produce it to the court at the trial.

(b) Any witness who has been required to produce any deed, document, writing or tape recording at the trial shall hand it over to the registrar as soon as possible, unless the

witness claims that the deed, document, writing or tape recording is privileged. Thereafter the parties may inspect such deed, document, or tape recording and make copies or transcriptions thereof, after which the witness is entitled to its return.

(3)(a) The service of a subpoena shall be effected by delivering to the person named therein and at the same time showing him or her the original and informing him or her of the exigency thereof, and may be effected in any manner provided for in rule 16(2)(b).

(b) The service of a subpoena may be effected by a legal practitioner or his or her clerk or by the sheriff or his or her deputy: 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.

(4) Any person having been duly served with a subpoena a reasonable time before the date on which he or she is required by it to attend at the place named, and his or her reasonable expenses having been paid or tendered to him or her and not having any lawful impediment, will on his or her default be liable to be attached, fined and imprisoned for his or her contempt of the process of the court, without prejudice to any other claim or remedy the party aggrieved by his or her default may by law have against him or her on that account.

(5) Where a party is suing in person he or she 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.

(6)(a) 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 or obtained.

(b) A judge to whom application for his or her consent in terms of this subrule 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.

(c) Where in proceedings on motion a person has refused to make an affidavit of facts within his or her 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*.

(7)(a) In the absence of any agreement in writing, between the legal practitioners of all the parties, and subject to these rules, the witness 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, 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.

(b) 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.

(8) A party desiring to have the evidence of a witness taken before a commissioner of the court or examiner may 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 in default of appearance and the plaintiff desires to take the evidence of any witness before a commissioner of the court or examiner, he or she may apply by way of a chamber application.

(9) 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.

(10) 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 in Form No. 57.

(11) Where any witness or person is ordered to be examined before an officer of the court, or before a person appointed for the purpose, 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.

(12) Unless the court ordering the examination otherwise directs the examination shall take place in the presence of the parties, the legal practitioners or agents, and the witnesses shall be subject to cross examination and re-examination.

(13) The examiner shall not have the power to decide upon the admissibility of evidence tendered, but shall note any objections made and such objections shall be decided by the court hearing the matter.

(14) Evidence taken by an officer of the court or examiner shall be recorded in such manner as evidence is recorded when taken before a court and the transcript of any shorthand record or record taken by mechanical means only certified by the person transcribing the same and by the officer of the court or examiner shall constitute the record of the examination:

Provided that the evidence taken before the officer of the court or examiner may be taken in narrative form.

(15) Where the evidence is recorded in narrative form or as to represent as nearly as possible the statement of the witness, it shall be signed by him or her 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 or she shall state his or her opinion thereon to the legal practitioners or parties and shall refer to such statements in the depositions, but he or she shall not have power to decide upon the materiality or relevance of any question.

(16) The record of the evidence shall be returned by the officer of the court or examiner to the registrar with a certificate to the effect that it is the record of the evidence given before him or her, and shall thereupon become part of the record in the case.

(17) If any person duly summoned by subpoena to attend for examination refuses to attend, or if, having attended, he or she 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.

(18) If a witness objects to any question which may be put to him or her 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 or her to the registrar, and the validity of the objection shall be decided by the court or a judge.

(19) In any case under subrules (16) and (17), the court shall have the power to order the witness to pay any costs occasioned by his or her refusal or objection.

(20) 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.

(21) 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 proceedings 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.

(22) 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.

(23)(a) Every magistrate shall be a commissioner of court for the purpose of examining witnesses.

(b) The court may appoint a person as a commissioner of the High Court to take affidavits or examine witnesses in any place outside Zimbabwe.

(c) Every application for appointment as a commissioner of the High Court shall be by application to the court or a judge in chambers.

(d) 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.

PART VII

SETTING DOWN OF CIVIL TRIALS AND CIVIL TRIALS

55. Set Down of Defended Trial Cases

(1) For the purposes of this Rule the pleadings shall be deemed to be closed—

(a) where there is no claim in reconvention, when the plaintiff has filed his or her replication or if a replication is unnecessary, when the plea has been filed;

(b) where the defendant has filed a claim in reconvention, where the plaintiff has filed his plea to the claim in reconvention.

(2) The fact that pleadings are deemed to be closed for purposes of this rule shall not preclude the defendant from filing any further pleadings within the time limited for the purpose, nor relieve him or her of the obligation to do so where it is necessary.

(3)(a) 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 50, the plaintiff or the defendant may require 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 subrule (11) of rule 50. The party making the request shall forthwith notify the other party that he or she has done so.

(b) At the time of filing a request in terms of paragraph (a) of this subrule, the party requesting the registrar to place the case on the cause list shall deposit with the sheriff an amount as determined by the sheriff as security for costs of service of a notice of set down for trial.

(c) A copy of the receipt for such deposit shall be furnished to the Registrar by the party within five days of filing the request for placement of the case on the cause list.

(4)(a) Once a date becomes available for the hearing of a case placed on the list in terms of subrule (3)(a), the registrar shall, in consultation with the judge to whom such matter has been allocated, allocate a date for the case to be heard and shall give the notice of set down.

(b) The notice of set down given by the registrar in terms of paragraph (a) of this subrule—

(a) shall be delivered by the sheriff to each party's legal practitioner; or

(b) in the case of a party who is not represented by a legal practitioner, shall be delivered by the sheriff to such party at the address for service where he or she accepts service in terms of these Rules within a radius of five kilometres from the Registry.

(c) Every notice of set down for trial shall be made returnable to the court and the sheriff shall submit the return of service to the registrar within five days after service has been effected and at least five days before the date of hearing.

(d) At the request of one or more of the parties, the registrar may, in consultation with the judge assigned to hear the case, allocate a fixed date for the hearing of the case whether in or out of term.

(5) Where a case has been set down for trial or argument any party may apply to the court or judge to have the set down set aside and for good cause shown the court or judge may set it aside and fix another date for the trial or argument or make such other order as it or he or her, 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.

56. Records

(1) The oral evidence at the trial of any civil action shall be recorded in long hand or short hand or by such mechanical writing or recording device as the judge may approve.

(2) Such record shall be kept by such means as to the court seems appropriate and shall be filed in accordance with the instructions of the registrar.

(3) 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 her 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."

(4)(a) It shall not be necessary to transcribe any record, unless a judge or the registrar, acting under the authority of a judge, so directs.

(b) 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.

(c) 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.

(d) If the original recorder is unavailable that fact shall be mentioned in the transcriber's certificate.

(5) A transcript certified in terms of subrule (4) shall be deemed to be an accurate record of the proceedings subject to any reservation made in the certificate thereto:

Provided that the court may make such order as it deems fit concerning the accuracy of a transcribed record.

(6)(a) 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.

(b) The registrar shall supply an applicant with a transcript of the record upon payment of such fees as may be prescribed.

57. Civil Trial Proceedings

(1)(a) If, when a trial is called, the plaintiff appears and the defendant does not appear, the plaintiff may prove his or her claim so far as the burden of proof lies upon him or her and judgment may be given accordingly, in so far as the plaintiff has discharged such burden.

Provided that where the claim is for a debt or liquidated demand, no evidence shall be necessary unless the court otherwise orders.

(b) When the defendant has by his or her default been barred from pleading, and the case has been set down for hearing, and the default has been proved, the defendant shall not, save where the court in the interests of justice may otherwise order, be permitted, either in person or by counsel, to appear at the hearing.

(c) If, when a trial is called, the defendant appears and the plaintiff does not appear, the defendant shall be entitled to an order granting absolution from the instance with costs, but may lead evidence with a view to satisfying the court that final judgment should be granted in his favour and the court, if so satisfied may grant such judgment.

(d) The provisions of paragraphs (a) and (b) of this subrule shall apply to any person making any claim (whether by way of claim in reconvention or third party, notice or by any other means as if he or she were a plaintiff, and the provisions of paragraph (c) of this subrule shall apply to any person against whom such a claim is made as if he or she were a defendant.

(2)(a) If on the pleadings the burden of proof is on the plaintiff, he or she or his or her counsel, may briefly outline the facts intended to be proved and the plaintiff shall first adduce his or her evidence.

(b) At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which event the defendant or his or her counsel on his or her behalf may address the court and the plaintiff or his or her counsel on his or her behalf may reply. The defendant or his or her counsel may thereupon reply on any matter arising out of the address of the plaintiff or his or her counsel.

(c) If absolution from the instance is not applied for or has been refused and the defendant has not closed his or her case, the defendant or his or her counsel on his behalf may briefly outline the facts intended to be proved and the defendant shall then adduce his or her evidence.

(d) When the burden of proof is on the defendant, the defendant shall first adduce his or her evidence, and the plaintiff shall thereafter adduce his or her evidence.

(e) 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 or her evidence on any issues proof whereof is upon him or her, and may then close his or her case, and the defendant shall then call his or her evidence on all the issues.

(f) If the plaintiff has not called any evidence, other than that necessitated by his or her evidence on the issues, proof whereof is upon him or her, on any issues, proof whereof is on the defendant, he or she shall have the right to do so after the defendant has closed his case. If he or she has called any such evidence, he or she shall have no such right.

(g) 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 that such evidence was intentionally withheld out of its proper order.

(3)(a) 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.

(b) 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.

(c) 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.

(d) 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.

(4) After the evidence on both sides has been given, the plaintiff's legal practitioner shall have the right to observe generally on the whole case. Thereafter the legal practitioner for the defendant shall have a similar right, and finally the legal practitioner for the plaintiff shall be entitled to reply to any matters raised by the legal practitioner for the defendant. If in such reply the plaintiff's legal practitioner cites new cases, the court may allow one legal practitioner for the opposite side to observe on those cases.

(5)(a) If there is one or more third parties or if there are defendants to a claim in reconvention who are not plaintiffs in the action, any such party shall be entitled to address the court in opening his or her case and shall be entitled to lead his or her evidence after the evidence

of the plaintiff and of the defendant has been conducted and before any address at the conclusion of such evidence.

(b) Save in so far as the court may otherwise direct, the defendants to any counter-claim who are not plaintiffs shall first lead their evidence and thereafter any third parties shall lead their evidence in the order in which they became third parties.

(c) If the burden of adducing evidence is on the claimant against the third party or on the defendant to any claim in reconvention, the court may make such order as may be convenient with regard to the order in which the parties shall conduct their cases and address the court and in respect to their respective rights of reply.

(6) 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.

(7) Where the right or obligation to begin lies on the defendant, the order of procedure under the aforegoing subrules shall be read as if the defendant were the plaintiff and the plaintiff were the defendant.

(8) Co-plaintiffs shall appear by the same legal practitioner and shall not sever their case.

(9) 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 the plaintiff's witnesses and to address the court in such order as the court shall decide.

(10) 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.

(11) 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.

(12) 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 reference is made to direct that any witness be recalled and to order further argument.

(13) Notwithstanding anything contained in this rule relating to closing addresses, the judge may, at the conclusion of evidence in a trial action, confer with the parties or their legal

practitioners in his or her chambers as to the form and duration of the addresses to be submitted.

(14) Where the court considers that the proceedings have been unduly prolonged by the successful party by the calling of unnecessary witnesses or by excessive examination or cross examination in argument, it may penalize such a party in the matter of costs.

PART VIII

APPLICATION PROCEDURE

58. Nature of applications: - Preliminary

(1) Subject to this subrule, all applications made for whatever purpose in terms of these rules or any other law, other than applicants 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

(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 interest party is a party to the application; or

(e) there are special circumstances which are set out in the application justifying the application.

59. General Provisions For All Applications

(1)(a) Every written application, notice of opposition and supporting and answering affidavit shall—

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

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

(iii) 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.

(b) every written application and notice of opposition shall—

(i) state the title of the matter and a description of the document concerned; and

(ii) be signed by the applicant or respondent, as the case may be, or by his or her legal practitioner; and

(iii) give an address for service which shall be within a radius of five kilometres from the registry in which the document is filed; and

(iv) 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.

(c) Every written application shall contain a draft of the order sought.

(d) An affidavit filed with a written application—

(i) 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 therein; and

(ii) may be accompanied by documents verifying the facts or averments set out in the affidavit and any reference in this Part to an affidavit shall be construed as including such documents.

(e) 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.

(2) 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

or her affidavits, the court or a judge may make such order in respect of those costs as it or he or she thinks fit.

(3) Where a party desires an extension of any of the time fixed by or in terms of this Part 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 or she thinks just.

(4)(a) Where a respondent files a notice of opposition and opposing affidavit, he or she 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.

(b) This rule shall apply, *mutatis mutandis*, to a counter-application under paragraph (a) as though it were a court application or a chamber application, as the case may be, and subject to paragraphs (c) and (d) it shall be dealt with at the same time as the principal application unless the court or a judge orders otherwise.

(c) If, in any application in which the respondent files a counter-application under paragraph (a) the application is stayed, discontinued or dismissed, the counter-application may nevertheless be proceeded with.

(d) The court or a judge may for good cause shown order an application and a counter application filed under paragraph (a) to be heard separately.

(5) 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.

(6) Without derogation from rule 8 but subject to any other enactment, the fact that an applicant has instituted—

(a) a court application when he or she should have proceeded by way of chamber application; or

(b) a chamber application when he or she 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.

60. Court Application

(1) 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.

(2)(a) A copy of a court application and of every affidavit by which it is supported shall be served upon every respondent.

(b) Except as otherwise provided in this Part, 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.

(c) 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.

(d) As soon as possible after service of a court application and supporting documents, the applicant shall file with the registrar proof of such service in accordance with rule 16.

(3) 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 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.

(4)(a) The respondent shall be entitled, within the time given in the court application in accordance with subrule (3), to file a notice of opposition in Form No. 29A, together with one or more opposing affidavits.

(b) As soon as possible after filing a notice of opposition and opposing affidavit in terms of paragraph (a), 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 subrule (8) of rule 16.

(c) A respondent who has failed to file a notice of opposition and opposing affidavit in terms of paragraph (a) of this subrule shall be barred.

(5)(a) Subject to paragraphs (c) and (d) of subrule (7), 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 days before the hearing of the application.

(b) As soon as possible after filing an answering affidavit in terms of paragraph (a), 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 subrule (8) of rule 16.

(6) After an answering affidavit has been filed, no further affidavits may be filed without the leave of the court or a judge.

(7)(a) Where the respondent is barred in terms of paragraph (c) of subrule (4), the applicant may, without notice to him or her, set the matter down for hearing in terms of subrule (1) of rule 65.

(b) Where the respondent has filed a notice of opposition and an opposing affidavit and the applicant has not filed any answering affidavit he may wish to file the applicant may apply for a set down of the matter down for hearing in terms of subrule (1) of rule 66.

(c) 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—

(i) apply for the set down of the matter down for hearing in terms of subrule (1) of rule 66; or

(ii) 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 or she thinks fit.

(d) Where the applicant has filed an answering affidavit in response to the respondent's opposing affidavit but has not, within a month thereafter, applied for the set down of the matter for hearing, the respondent, on notice to the applicant, may either—

(i) apply for the set down of the matter for hearing in terms of subrule (1) of rule 66; or

(ii) 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 such terms as he or she thinks fit.

(8) Where an application has been set down for hearing in terms of subrule (1) of rule 65 or subrule (1) of rule 66 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 or she thinks fit:

Provided that, with the consent of all parties, a set down may be altered to another day in accordance with rule 66 without such application.

(9)(a) 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—

(i) before the matter is set down for hearing, the legal practitioner shall file with the registrar heads of argument clearly outlining the submissions he or she intends to rely on and setting out the authorities, if any, which he or she intends to cite; and

(ii) immediately after awards, he or she shall deliver a copy of the heads of argument to every other party and file with the registrar proof of such delivery.

(b) An application, exception or application to strike out to which paragraph (a) of this subrule applies shall not be set down for hearing at the instance of the applicant or excipients, as the case may be, unless—

(i) his or her legal practitioner has filed with the registrar in accordance with paragraph (a)—

A. heads of argument; and

B. proof that a copy of the heads of argument has been delivered to every other party; and

(ii) in the case of an application, the pages have been numbered in accordance with paragraph (a) (iii) of subrule (1) of rule 59.

(c) Where an application, exception or application to strike out has been set down for hearing in terms of subrule (1) of rule 66 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 paragraph (d) heads of argument clearly outlining the submissions relied upon by him or her and setting out the authorities, if any, which he or she intends to cite, and immediately thereafter he or she shall deliver a copy of the heads of argument to every other party.

(d) Heads of argument referred to in paragraph (c) 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 paragraph (a);

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 as long as the respondent shall not have been barred in terms of paragraphs (e) of this subrule.

(e) Where heads of argument that are required to be filed in terms of paragraph (c) of this subrule are not filed within the period specified in paragraph (d), the respondent

concerned shall be barred and the court or judge may deal with the matter as unopposed or direct that it be set down for hearing on the unopposed roll.

(f) 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 paragraph (c) unless the court or judge hearing the matter considers that—

(i) the submission or authority was omitted from the heads of argument with the intention of misleading the other party; or

(ii) 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.

(g) In relation to any application, exception or application to strike out which has been set down by a respondent, any reference—

(i) in paragraph (a) to the applicant or excipient, shall be construed as a reference to the respondent;

(ii) in paragraphs (c), (d) or (e) to a respondent, shall be construed as a reference to the applicant or excipients.

(h) Where an applicant, excipient or respondent is not to be represented at the hearing by a legal practitioner, he or she may, if he or she so wishes, file heads of argument, in which event he or she shall comply with paragraphs (a) or (c) as the case may be.

(10) At the hearing of the 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.

(11)(a) 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.

(b) Where the court grants a provisional order under subrule (11), subrule (7) of rule 61 shall apply, *mutatis mutandis*, to the provisional order as though it were granted following a chamber application.

61. Chamber Application

(1)(a) A chamber application shall be made by means of an entry in the chamber book and shall be accompanied by Form No 29B duly completed and, except as is provided in paragraph (b), 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.

(b) Where a chamber application is for default judgment in terms of rule 23 or for other relief where the facts are evident from the record, it shall not be necessary to annex a supporting affidavit.

(2)(a) 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—

(i) 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;

(ii) that the order sought is—

A. a request for directions; or

B. to enforce any other provision of these rules in circumstances where no other person is likely to object; or

(iii) 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;

(iv) 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;

(v) that there is any other reason, acceptable to the judge, why such notice should not be given.

(b) Where an applicant has not served a chamber application on another party because he or she reasonably believes one or more of the matters referred to in items (i) to (v) of paragraph (a)—

(i) he or she shall set out the grounds for his or her belief fully in his or her affidavit; and

(ii) unless the applicant is not legally represented, the application shall be accompanied by a certificate from a legal practitioner setting out, with reasons, his or her belief that the matter is uncontentious, likely to attract perverse conduct or urgent for one or more of the reasons set out in terms (i), (ii), (iii), (iv) or (v) of paragraph (a).

(3) 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.

(4) Where a chamber application is accompanied by a certificate from a legal practitioner in terms of item (ii) of paragraph (b) of subrule (2) 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.

(5) Where a chamber application is not accompanied by a certificate referred to in subrule (4), the registrar shall in the normal course of events, but without undue day, submit it to a judge who shall consider the papers without undue delay.

(6)(a) A judge to whom papers are submitted in terms of subrules (4) or (5) may—

(i) require the applicant or the deponent of any affidavit or any other person who may, in his or her opinion, be able to assist in the resolution of the matter to appear before him or her in chambers or in court as may to him or her seem convenient and provide, on oath or otherwise as the judge may consider necessary, such further information as the judge may require;

(ii) require either party's legal practitioner to appear before him or her to present such further argument as the judge may require.

(b) Where in an application for a provisional order the judge is satisfied that the papers establish a *prima facie* case he or she shall grant a provisional order either in terms of the draft filed or as varied.

(c) 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 or she thinks fit.

(7)(a) Subject to paragraph (c), a provisional order shall—

(i) be in Form No 29C; and

(ii) 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

(iii) specify the time within which the respondent shall file a notice of opposition if he or she opposes the relief sought.

(b) Subrules (2) and (11) of rule 60 shall apply *mutatis mutandis* to the enrolment and hearing of a matter consequent upon the issue of a provisional order referred to in paragraph (a):

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 anytime 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.

(c) 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—

(i) be in Form No. 29D; and

(ii) specify the date and place at which the court will hear argument on the confirmation of the provisional order; and

(iii) 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.

(d) Subrules (9) to (11) of rule 60 shall apply, *mutatis mutandis*, to the hearing of a matter consequent upon the issue of a provisional order referred to in paragraph (c).

62. Deceased Estates, Persons Under A Disability, Minors ETC

(1)(a) In the case of an application in connection with—

(i) the estate of a deceased person; or

(ii) 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 or her consideration, and for report by him or her if he or she considers it necessary or the court requires such a report.

(b) In any application referred to in paragraph (a), 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 or her approval.

(2)(a) In the case of any application in connection with—

(i) the estate of a person alleged to be prodigal or under any disability, mental or otherwise, or

(ii) a minor;

a chamber application, annexing the written consent of the person proposed to be appointed, shall first be made for the appointment of a *curator ad litem*.

(b) A copy of a chamber application in terms of paragraph (a) shall be served on the Master, who shall make a written report to the judge.

(c) 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 or her and, after he or she has conducted such investigation as may be necessary, he or she shall prepare a written report which shall be filed with the registrar and a copy served on the applicant and all other interested parties.

(d) The time within which a respondent shall be required in terms of paragraph (a) of subrule (4) of rule 60 to file a notice of opposition to an application in terms of paragraph (a) shall commence to run from the date of service upon him or her of the report of the *curator ad litem* in terms of paragraph (c).

(3) 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 or her consideration, and for report by him or her if he or she considers it necessary or the court requires such report.

63. Reviews

(1) 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 chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected.

(2) The court application shall state shortly and clearly the ground upon which the applicant seeks to have the proceedings set aside or corrected and the exact relief prayed for all of which shall appear on the face of the court application.

(3) Rules 58, 59, 60, 61 and 62 shall apply to any application made in terms of this rule.

(4) Any proceedings by way of review shall be instituted within eight weeks of the termination of the suit, action or proceedings 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.

(5)(a) 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:

Provided that it shall be the responsibility of the party seeking review to ensure compliance with this subrule.

(b) 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.

(c) Every tenth line of each page of the copies of the record shall be numbered in the left hand margin

(d) The evidence in the original record shall be paginated from the first to the last page.

(e) 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.

(f) 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 legal practitioners of the parties.

(g) Bulky records shall be divided into separate conveniently sized volumes numbered consecutively.

(h) Merely formal documents shall be omitted, and no document shall be set forth more than once.

(i) Any fees or charges incurred in obtaining copies of the record under paragraph (a) of this subrule shall form part of the costs of review.

(j) The registrar may refuse to accept copies of records which do not, in his or her opinion, comply with the provisions of this subrule.

(6) 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 legal practitioners and filed with the registrar at the time of the filing of the aforesaid copies.

64. Interpleader

(1) In this rule—

"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 subrule (2).

(2)(a) Where any person alleges he or she holds any property or is under any liability in respect of which he or she is or expects to be sued by two or more persons making adverse claims in respect of the property or liability, he or she may deliver to the claimants a notice and an affidavit setting out the matters referred to in subrules (4) and (5) respectively.

(b) 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.

(3)(a) Where the claims relate to money the applicant shall be required, on delivering the notice mentioned in subrule (2), to pay the money to the registrar who shall hold it until the conflicting claims have been decided.

(b) 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.

(c) Where the conflicting claims relate to immovable property the applicant shall place the title deeds thereof, if available to him or her, 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.

(4) 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 subrule (3) of rule 60; and

(c) state that the applicant is applying for the court's decision as to his or her liability or the validity of the respective claims.

(5) 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.

(6) Where a claimant does not deliver particulars of his or her claim in terms of paragraph (b) of subrule (4) he or she shall be barred.

(7) Rules 58, 59, 60 and 61 shall apply to any application made in terms of this rule.

(8)(a) 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 subrule (3) of rule 60 or is in default of appearance at any hearing of the matter, the court may make an order declaring him or her and all persons claiming under him or her barred as against the applicant from making any claim on the subject matter of the dispute.

(b) At the hearing of any matter in terms of this rule, the court may—

(i) adjudicate upon the claim after hearing such evidence as it thinks fit;

(ii) 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;

(iii) 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;

(iv) if it considers the matter is not a proper matter for relief by way of interpleader notice, dismiss the application;

(v) make such order as to costs and any expenses incurred in terms of paragraph (b) of subrule (3) as it thinks fit.

(9) 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.

PART IX

SETTING DOWN OF MATTERS

65. Setting down of matters on notice

(1) In this Part of the rules "business day" means any day which is not a Saturday, Sunday or a Public Holiday.

(2) Subject to subrule (4) of rule 66—

(i) uncontested cases for provisional sentence; and

(ii) summons for civil imprisonment; and

(iii) uncontested actions for divorce, judicial separation or nullity of marriage; and

(iv) cases set down for judgment in terms of subrules (1) and (2) of rule 24; and

(v) applications in which a notice of opposition and opposing affidavit have not been filed; may be set down for hearing—

A. in Harare and Masvingo, on any Wednesday, by filing a notice of set down with the registrar not later than the Thursday preceding the Wednesday of set down;

B. in Bulawayo; on any Thursday, by filing a notice of set down with the registrar not later than the Monday preceding the Thursday of set down.

66. Setting Down of Opposed Matters

(1)(a) Subject to subrule (9) of rule 60 a party seeking a set down of an exception, application to strike out and an application which is opposed shall submit to the registrar a request for a set down date and immediately notify the other party that he or she has done so.

(b) At the time of filing a request in terms of paragraph (a) of this subrule, the party requesting set down shall deposit with the sheriff an amount as determined by the sheriff as security for costs of service of a notice of set down for hearing.

(c) A copy of the receipt for such deposit shall be furnished to the registrar by the party within five days of filing the request for a set down date.

(d) Once a date becomes available for the hearing of the matter, the registrar shall in consultation with the judge to whom such matter has been allocated; allocate a date on any business day for the matter to be heard and shall give the notice of set down.

(e) The notice if set down given by the registrar in terms of paragraph (d) of this subrule shall be delivered by the sheriff in terms of rule 55.

(2) Subject to subrule (5) of this rule without the consent of the respondent, no application in which a notice of opposition and 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.

(3) 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.

(4) With the consent of the parties and after consultation with the Judge President, or the judge to whom the matter has been allocated, the registrar may set a matter down for hearing on a day other than a day specified in this Part.

(5) 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 set down for hearing at any time and additionally, or alternatively, may hear the matter at any time or place, and in such event this Part shall not apply or shall apply with such modifications as the court or judge may direct.

(6) 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.

(7) No effect shall be given by the registrar to any request for a set down in terms of this Part in respect of any matter if the papers are incomplete or have not been bound and paginated except in cases set down in terms of subrule (5).

Provided that this subrule shall not apply in the case of a return day of a rule *nisi*.

PART X

MATRIMONIAL CAUSES

67. Miscellaneous matters

(1) This rule shall apply whenever a spouse seeks relief from the court in respect of the following matters:

(a) maintenance *pendente lite*; or

(b) a contribution towards the costs of a pending matrimonial action.

(2)(a) When a spouse is without means to prosecute or defend an action for divorce, judicial separation or nullity of marriage, 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.

(b) 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.

(3) At the hearing of the application the court may hear oral evidence if it considers it necessary and may dismiss the application or make such order as it thinks fit to ensure a just and expeditious resolution of the matrimonial matter.

(4) The court may, on the same procedure, vary its order made under this subrule in the event of a material change taking place in the circumstances of either party or the contribution towards costs proving inadequate.

68. Divorce, Judicial Separation or Nullity of Marriage.

(1) The summons commencing an action mentioned in this Rule 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 subrule (4) shall not apply to such an action.

(2) A summons and declaration in which a decree of divorce, judicial separation or nullity of marriage is claimed shall be served personally on the person against whom the relief is sought, unless service other than personal service has been authorized by the court or a judge.

(3)(a) In an action for divorce, judicial separation or nullity of marriage where the defendant has failed to enter appearance within the *dies inducae* provided for in the summons the plaintiff wishing to obtain judgment shall file and deliver a notice in accordance with Form No 30 calling upon the defendant if he or she wishes to defend, to purge his or her 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 or her that in default thereof judgment will be prayed for against him or her.

(b) Thereafter the plaintiff may 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 defendant has been given personal notice and is aware of 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.

(4)(a) 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 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 the summons and declaration shall be served on such person in the manner prescribed in Rule 16. The court shall not proceed to trial unless it is satisfied either that this subrule has been complied with or that for good and sufficient reason compliance therewith is impracticable.

(b) Where in any proceedings other than those mention in paragraph (a) of this subrule, 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 paragraph (a) of this subrule shall *mutatis mutandis* apply.

(5) In a matrimonial matter the judge hearing the case may if the parties agree, interview them privately in his or her 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 proceedings.

(6) In a case which affects custody of a child the judge hearing the case may, if he or she thinks fit, interview the child concerned privately in his or her chambers.

(7) 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.

(8) In a matrimonial matter, the judge may, in his or her discretion, hear the case in his or her chambers or in any other suitable room;

Provided that the hearing shall be open to members of the public.

(9) 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 or Masvingo, 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 Tuesday immediately preceding the Thursday on which the case is set down;

the plaintiff files with the registrar an affidavit setting out the evidence on which he or she relies, to which he or she shall annex his or her 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.

PART XI

EXECUTION OF JUDGMENTS

69. Writ of Execution –General

(1) The process for the execution of any judgment for the payment of money, for the delivery 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.

(2) One or more writs of execution may be sued out at his or her own risk by any person in whose favour any such judgment has been pronounced if such judgment is not then satisfied or suspended.

(3) 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 in force until such time as the judgment has been satisfied.

(4) 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.

(5)(a) 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 or her deputy shall not proceed to attach in execution the immovable property of the judgment debtor unless and until he or she has by due inquiry and diligent search satisfied himself or herself that there is no or insufficient movable property belonging to the judgment debtor to satisfy the amount due under the writ.

(b) The proviso to paragraph (a) shall not apply where execution is levied against mortgaged property or where by order of the court or a judge, the immovable property in question has been declared executable.

(6) The sheriff or his or her 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 subrule (4); unless he or she has delivered to the debtor a notice in Form No. 41A giving him or her 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 or she 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 in accordance with a writ of execution.

(7)(a) 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.

(b) 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 paragraph (a).

(c) Where an order or provisional order has been issued under subrule (4) of rule 71 in regard to the sale of a dwelling as defined in that subrule, the writ of execution may be withdrawn under paragraph (a) at any time while the order or provisional order, as the case may be, remains in force.

(8) 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.

(9) Where the sheriff or his or her deputy is in doubt as to the validity of an attachment or contemplated attachment he or she may require that the party suing out the process shall give him or her security to indemnify him.

(10) 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, to be recovered from the execution debtor as costs awarded by the court.

(11)(a) Where immovable property is to be sold in execution a judgment creditor wishing to participate in the proceeds of the sale shall lodge his or her writ with the sheriff, and where other property is to be sold in execution he or she shall lodge his or her writ with the sheriff's deputy.

(b) No judgment creditor lodging a writ of execution with the sheriff or his or her 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 or her said writ by not later than the day immediately preceding the date of the sale in execution.

(c) Subject to any hypothec existing prior to attachment, all writs of execution lodged with the sheriff or his or her deputy, as the case may be, in accordance with paragraph (b) of this subrule shall rank *pro rata* in the distribution of the proceeds of the property or goods sold in execution.

(12)(a) If any property taken in execution is claimed by a third party as his or her property, the sheriff or his or her deputy shall, on receipt of the claim, forthwith give notice to the execution creditor.

(b) If the execution creditor gives the sheriff or his or her deputy notice within two days thereafter that he admits the claim, he or she shall not be liable for any costs, fees or

expenses afterwards incurred, and the sheriff or his or her deputy may withdraw from possession of the property claimed.

(13) Where the sheriff or his or her deputy is unable to make any demand, serve any warrant or deliver or exhibit any other document he or she shall make a chamber application for directions as to the procedure to be followed.

70. Execution against movable property

(i)(a) Subject to section 21 of the Act and paragraph (b), the sheriff or his deputy may by virtue of a writ of execution seize all kinds of movable property, including money and bank-notes.

(b) The amount prescribed for the purposes of—

(i) paragraph (b) of section 21 of the Act, being the value of the execution debtor's household utensils that may not be seized, is level 4

(ii) 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 level 4

(iii) 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 level 4

(2)(a) The sheriff or his or her deputy shall, upon receiving a writ directing him or her to levy execution on movable property forthwith proceed to the dwelling 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 sheriff or his or her 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 or her 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 or her deputy shall immediately make an inventory and valuation of so much of the movable property belonging to the debtor as he or she may deem sufficient to satisfy the writ.

(b) So far as may be necessary to the execution of any such writ, the sheriff or his or her deputy may open any door of or in any premises, if opening is refused or if there is no person there who represents the execution debtor, the sheriff or his or her deputy may, if necessary, use force to that end.

(c) Any such writ may be served in any of the manners provided for by subrule (2) of rule 16:

Provided that if satisfaction of the writ was not demanded from the execution debtor personally, the sheriff or his or her deputy shall give the execution debtor written notice of the attachment and a copy of the inventory made by him or her, unless his or her whereabouts is unknown.

(d) When the foregoing requirements of this subrule have been complied with by the sheriff or his or her deputy, the goods so inventoried by him or her shall become and be judicially attached.

(e) The sheriff or his or her deputy shall deliver a copy of the said inventory and a notice of attachment to the debtor, subject to the provisions of paragraph (c), or leave the same on the premises.

(f) 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 or her deputy.

(3) 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 or her judgment debt, then the sheriff or his or her 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.

(4) Subject to subrule (6) of rule 69, if the debtor will not so undertake, together with a sufficient surety, to produce the said goods—

(a) the sheriff or his or her 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 or her until the day appointed for the sale thereof;

(b) where the sheriff or his or her deputy is instructed by the judgment creditor to remove the goods attached, he or she shall do so within forty-eight hours after the attachment; and shall in the meantime leave the same in the charge and custody of some person for him or her.

(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 or she 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 or she is responsible for the goods originally attached;

(d) if such a custodian makes a default in his or her duty, he or she shall not be entitled to recover any remuneration for his or her charge and custody.

(5) 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 or her 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 shall publish notice of the sale in a newspaper circulating in the district.

(6) The day appointed for the sale shall not be 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 or her deputy against any claim for damages which may arise from such sale, be sold immediately by the sheriff or his or her deputy in such manner as to him or her seems expedient.

(7) 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.

(8) If the sheriff or his or her deputy has a balance in hand after payment of the judgment creditor's claim and costs he or she shall pay the same to the judgment debtor if he or she can be found; otherwise he or she 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.

(9)(a) Where a judgment debtor is a partner in a firm and the judgment is against him or her for a separate debt, the court may, after notice to the judgment debtor and to his or her firm, appoint the sheriff or his or her deputy as receiver to receive any moneys payable to the judgment debtor in respect of his interest in the partnership.

(b) Such appointment shall, until the judgment debt is satisfied, operate as an attachment of the interest of the judgment debtor in the partnership assets.

(c) 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.

(10)(a) 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.

(b) 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—

(i) notice has been given by the sheriff or his or her deputy to the lessor and lessee, mortgagor or mortgagee or person liable on the bill of exchange or promissory note or security, as the case may be; and

(ii) the sheriff or his or her 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

(iii) in the case of a registered lease or any registered right, notice has been given to the Registrar of Deeds.

(c) 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 or her 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 or her 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.

(d) In the case of the attachment of all other incorporeal property or incorporeal rights in property as aforesaid—

(i) the attachment shall only be complete when—

A. notice of the attachment has been given in writing by the sheriff or his or her deputy to all interested parties and where the asset consists of incorporeal immovable property or an incorporeal right in immovable property, notice shall also be given to the Registrar of Deeds in whose deeds registry the property or right is registered; and

B. the sheriff or his or her deputy shall have taken possession of the writing or document evidencing the ownership of such property or right, or shall have

certified that he or she has been unable, despite diligent search, to obtain possession of the writing or document.

(ii) the sheriff or his or her 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.

(11) Attachment of property subject to alien shall be effected *mutatis mutandis* in accordance with the provisions of item (ii) of paragraph (d) of subrule (10).

(12) Where property subject to a real right of any third person is sold in execution such sale shall be subject to the right of such third person unless he or she otherwise agrees.

71. Execution Against Immovable Property

(1)(a) No writ of execution against the immovable property of any judgment debtor shall issue until—

(i) a return shall have been made of any process which may have been issued against the movable property of the judgment debtor from which it appears that the judgment debtor has not sufficient movable property to satisfy the writ; or

(ii) such immovable property has been declared to be specially executable by the court or, in the case of a judgment granted in terms of rule 23, by the registrar.

(b) A writ of execution against immovable property and mining claims shall state the full description of the nature and situation (including the address) of the property and claims sought to be attached sufficiently to enable it to be identified, and shall be in Form No. 36.

(2)(a) The method of attachment of immovable property, including a mining claim, shall be by notice by the sheriff or his or her deputy served, together with a copy of the writ of execution, upon—

(i) the owner of the property; and

(ii) the Registrar of Deeds or officer charged with the registration of such property.

(b) In the notice referred to in paragraph (a), the sheriff or his or her deputy may require the execution debtor to deliver to him or her all documents that relate to the execution debtor's title to the property under attachment.

(c) 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.

(d) The notices referred to in paragraphs (a) and (c) shall be in Form No. 43 or 44, as may be appropriate, and may be served in any of the ways provided for in Rule 16.

(3)(a) Where immovable property has been attached, the party at whose instance the attachment was made shall deliver to the sheriff the notice and writ of execution by which attachment was made.

(b) Subject to subrule (4), upon receiving the documents referred to in paragraph (a) the sheriff shall ascertain and record 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 or her in writing therein.

(c) If the sheriff finds that a caveat has been lodged in respect of the immovable property concerned, he or she 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 paragraph.

(d) No immovable property which is subject to any claim preferent to that of the execution creditor shall be sold in execution unless—

(i) the execution creditor has caused notice, in writing, of the intended sale to be served upon the preferent creditor if his or her address is known and if, the property is rateable, upon the local authority concerned calling upon them to stipulate within ten days of the date to be stated, a reasonable reserve price or to agree in writing to a sale without reserve; and has provided proof to the sheriff that the preferent creditor has so stipulated or agreed; or

(ii) the sheriff is satisfied that it is impossible to notify any preferent creditor, in terms of this subrule, of the proposed sale, or such creditor, having been notified, has failed or neglected to stipulate a reserve price or to agree in writing to a sale without reserve as provided for in subparagraph (i) of this paragraph within the time stated in such notice.

(e) Not less than 10 days prior to the sale, the sheriff conducting the sale shall forward by registered post a copy of the notice of sale to every judgment or execution creditor who had caused the said immovable property to be attached and to every mortgagee thereof

whose address is known and simultaneously furnish a copy of the notice of sale to all other sheriffs.

(f) Not less than ten days prior to the date of the sale, the sheriff conducting the sale shall affix a copy of the notice on the noticeboard of the magistrates court of the district in which the property is situate, or if the property be situate in the district in which the court out of which the writ issued is situate, then on the notice-board of such court.

(4)(a) In this subrule—

"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 out buildings 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].

(b) Upon receiving documents and particulars in terms of subrule (3) relating to the attachment of a dwelling the sheriff shall forthwith send the Secretary—

(i) written notification that the dwelling has been attached in terms of this rule and is to be sold in execution; and

(ii) 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.

(c) If, within ten days after being sent notification in terms of paragraph (b) the Secretary notifies the sheriff in writing that he or she 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—

(i) inform the execution creditor of the Secretary's proposal; and

(ii) 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 or she sent written notification to the Secretary in terms of paragraph (b).

(d) Within the thirty-day period referred to in paragraph (c), 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.

(e) A provisional order issued under paragraph (d) shall—

(i) be served on all interested parties and additionally, or alternatively, be published in such manner as the judge may direct; and

(ii) 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 in the provisional order; and

(iii) not be confirmed unless—

A. the execution creditor's claim has been satisfied; or
B. 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].

(f) Without derogation from paragraphs (c) and (e), 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 or her of the notice in terms of subrule (2), make a chamber application in accordance with paragraph (g) for the postponement or suspension of—

(i) the sale of the dwelling concerned; or

(ii) the eviction of the occupants.

(g) An application in terms of paragraph (f) shall be made in Form No. 45b and filed with the registrar.

(h) Upon being notified of an application in terms of paragraph (f) the registrar shall without delay—

(i) notify the sheriff or his or her deputy that the application has been filed; and

(ii) serve a copy of the application on the execution creditor; and

(iii) set the application down for hearing and notify the execution creditor and the applicant of the set down date.

(i) Upon being notified of an application in terms of subparagraph (iii) of paragraph (h), the sheriff or his or her 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.

(j) If, on the hearing of an application in terms of paragraph (f), the judge is satisfied—

(i) 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

(ii) that—

A. the execution debtor has made a reasonable offer to settle the judgment debt; or
B. the occupants of the dwelling concerned require a reasonable period in which to find other accommodating; or
C. 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 or she may specify.

(k) An application under paragraph (d) or (f), and any proceedings for enrolment and hearing consequent upon the issue of a provisional order under paragraph (d), shall be treated as urgent, and subrule (4) and the proviso to paragraph (6) of subrule (7) of rule 61, as the case may be, shall apply accordingly.

(l) Notwithstanding any other provision of this rule, the sheriff shall take all necessary steps to comply with any order issued pursuant of this subrule.

(m) For the purpose of calculating any time limit under this Rule—

(a) any period during which the sheriff is required by paragraphs (b), (c) or (g) to take no steps in regard to the sale of any dwelling; and

(b) the period during which an order issued in terms of this subrule is in force; shall be disregarded.

(5)(a) 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.

(b) 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.

(6)(a) The party instructing the sheriff to sell immovable property in execution shall provide the sheriff with such deposit in account of costs as the sheriff may require and shall comply with such further requests as the sheriff may make.

(b) The deposit so made shall be reimbursed to the party concerned out of the first proceeds of the sale, if these are sufficient.

(7) Upon receipt of a deposit in terms of subrule (6), 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 or she wants a particular auctioneer to conduct the sale and satisfies the sheriff that he or she will meet any additional costs incurred through engaging that auctioneer, the sheriff shall nominate the auctioneer.

(8) The sheriff may, if he or she 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 or her for his or her guidance such estimated value, and any party interested may, at his or her own expense, in like manner furnish the sheriff with an independent valuation of the property.

(9) 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 or she 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 or she 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 or her last known address, or to his or her legal practitioner, notice of the date and venue of the sale.

(10) The conditions of sales 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.

(11) 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.

(12) 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 or her 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.

(13) If the sheriff is satisfied that the highest price offered is reasonable, having regard to the circumstances of the time and place and to the state of the property market and that the sale was properly conducted, he or she shall declare the highest bidder to be the purchaser, subject to confirmation as hereinafter prescribed.

(14)(a) If the purchaser fails to carry out any of his or her 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.

(b) Such purchaser shall be responsible for any loss sustained by reason of his or her default, which loss may, on the application of any aggrieved creditor whose name appears in the sheriff's plan of distribution, be recovered from him or her under judgment 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.

(c) If he or she is already in possession of the property, the sheriff may make a chamber application for an order ejecting him or her or any person claiming to hold under him or her therefrom.

(15)(a) 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 or she 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.

(b) If, after a sale by public auction has taken in place the sheriff is not satisfied that the highest price offered is reasonable as provided by subrule (13), 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 or she 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.

(16)(a) Subject to this subrule, any person who has an interest in a sale in terms of this rule may request the sheriff to set it aside on the ground that—

(i) the sale was improperly conducted; or

(ii) the property was sold for an unreasonably low price; or on any other good ground.

(b) A request in terms of paragraph (a) 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 subrule (13) or the date of the sale in terms of subrule (15), 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 or she is satisfied that there is good cause for the request being made late.

(c) A request in terms of paragraph (a) shall—

(i) set out the grounds on which, according to the person making the request, the sale concerned should be set aside; and

(ii) 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.

(d) A person on whom a copy of a request has been served in terms of paragraph (c) may, within ten days after it was served on him or her, lodge with the sheriff written notice that he or she opposes the setting aside of the sale concerned.

(e) A notice in terms of paragraph (d) shall—

(i) set out grounds on which the person who gives it opposes the setting aside of the sale concerned; and

(ii) be supported by one or more affidavits setting out any facts relied upon 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.

(f) Within ten days after a copy of a notice has been served on him or her in terms of paragraph (e), the person making the request may lodge with the sheriff a written reply and, if he or she does so, shall without delay serve a copy of his or her reply, together with any supporting documents, on the person opposing the request and on such other persons as the sheriff may direct.

(g) On receipt of a request in terms of paragraph (a) and any opposing or replying papers filed in terms of this subrule, the sheriff shall advice the parties when he or she will hear them and, after giving them or that legal representatives, if any, an opportunity to make their submissions, he or she shall either—

(i) confirm the sale; or

(ii) cancel the sale and make such order as he or she considers appropriate in the circumstances; and shall without delay notify the parties in writing of his or her decision.

(h) Any person who is aggrieved by the sheriff's decision in terms of paragraph (g) may, within one month after he or she was notified of it, apply to the court by way of a court application to have the decision set aside.

(i) In an application in terms of paragraph (h), 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.

(j) Where no request has been lodged with the sheriff in terms of paragraph (a) within fifteen days from the date on which the highest bidder was declared to be the purchaser, in terms of subrule (13) or the date of the sale in terms of subrule (15), as the case may be, he or she shall subject to the proviso to paragraph (b), confirm the sale.

(17) Immediately after the sale has been confirmed and the conditions of the sale complied with, the sheriff shall proceed to give transfer of the property to the purchaser against payment of the purchase money and upon performance of the conditions of sale and may for that purpose do anything necessary to effect registration or transfer, and anything so done by him or her shall be as valid and effectual as if he or she were the owner of the property.

(18) 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 or her may seem advisable to enable him or her to effect without delay the distribution of any such instalment or instalments.

(19) 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—

(i) in the case of the Bulawayo magisterial province, in the office of the registrar of the court, Bulawayo; and

(ii) in the case of the Masvingo magisterial province, in the office of the registrar of the court, Masvingo; and

(iii) in the case of any other magisterial province, in the office of the provincial magistrate for that province.

(20) 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 or her objection, and on the hearing of the application the court may make such order as it deems just.

(21) 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.

(22) 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 or her.

(23)(a) 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 the purchaser, the sheriff may so endorse the document or execute the cession, as to any property sold by him or her in execution.

(b) The sheriff may also, as to immovable property sold by him or her in execution, do anything necessary to effect registration of transfer.

(c) Anything done by the sheriff under this subrule shall be as valid and effectual as if he or she were the execution debtor.

72. Taxation of Costs and Review of Taxation

(1)(a) Every registrar shall be a taxing officer for the purpose of taxing costs and may designate such persons as he or she deems fit and for whom he or she shall be responsible as assistant taxing officers and any reference in this rule to a taxing officer shall include an assistant taxing officer so designated.

(b) Every taxing officer in his or her taxation shall act in accordance with such instructions as may from time to time be given by the court for that purpose.

(2) With a view to affording the party who has been awarded an order for costs reasonably incurred by him or her in relation to his or her 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 or her 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.

(3)(a) 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 or her capacity as such, including disbursements made, whether in connection with litigation or not, and whether the work was done before or after the date on which the rules came into operation.

(b) In the taxation of costs as between party and party in respect of work done in connection 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:

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.

(c) The tariff of legal practitioners' fees referred to in paragraph (b) shall be reviewed and, if necessary, amended and published as regularly as the exigency requires and in any event at least once every year.

(d) In the taxation of costs in respect of work done in connection with any matter not referred to in paragraph (b), including the taxation of costs as between a legal practitioner and his or her 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, [Chapter 27:07].

(e) In taxing any costs under this rule, a taxing officer shall—

(i) allow disbursements made when they are reasonable, and reasonably incurred; and

(ii) take into account any tax or duty payable by the legal practitioner concerned in respect of any fee or charge.

(4)(a) The charges for witnesses as fixed in the High Court (Fees and Allowances) Rules, 2000, as amended are to be considered as payable to the witness by the party who summoned or produced him or her, and in the event of any such party being awarded his or her costs against any other party, the said charges shall be allowed against such other party in the taxation of costs.

(b) 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.

(c) In the taxation of costs between party and party nothing shall be allowed for any witness not examined unless upon proof that his or her evidence might reasonably have been believed to be material and necessary.

(d) 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.

(e) 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 or her lawful legal practitioner.

(f) When one person is a witness in more than one case heard on the same day, he or she 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.

(g) Qualifying expenses shall only be allowed under an order of court.

(5)(a) Notice of taxation to the party against whom an 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 practitioners.

(b) 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 or her legal practitioner.

(c) 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 service of such notice shall be regulated by the periods laid by subrule (11) of rule 13.

(d) 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 mail or by electronic mail.

(e) Except where notice of taxation is unnecessary under this rule, the taxing officer shall not proceed to the taxation of any bill unless he or she 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 or she is entitled to be present thereat.

(6) 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 or she—

A. may disallow the fee of another 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 or she 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.

(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 magistrates court.

(7) In the taxing of any party and party bill of costs, the court may authorize departures from the tariff for good cause.

(8) 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.

(9)(a) 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.

(10) The court application shall—

(a) specify the items forming the subject of the grievance;

(b) contain the allegation that each such item or part thereof was objected to at the taxation by the dissatisfied party, or that it was disallowed *mero motu* by the taxing officer;

(c) contain the ground of objection relied upon by the dissatisfied party at the taxation, but not argument in support thereof; and

(d) contain any finding of fact which the dissatisfied party contends the taxing master has made and which the dissatisfied party intends to challenge, stating the ground of such challenge, but not argument in support thereof.

(11) The court deciding the matter may make such order as to costs of the case as it may deem fit, including an order that the unsuccessful party pay to the successful party the costs of review in a sum fixed by the court.

73. Imprisonment for Debt

(1) This rule is subject to the provisions of subsection (2) of section 49 of the constitution that no person may be imprisoned merely on the ground of inability to fulfill a contractual obligation.

(2)(a) Where the sheriff or his or her deputy has issued 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 or she does so, to show cause at a time and place stated why an order for personal attachment shall not be decreed against him or her.

(b) The summons shall be in Form No. 46.

(3) 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 subrule (4) and in the presence of the judgment debtor or his or her legal practitioner, into the question of the debtors' 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 or her personal attachment and imprisonment, if the court is satisfied that the summons was served upon him or her personally.

(4) In an inquiry in terms of subrule (3), the court shall—

(a) call the judgment debtor to adduce evidence as to his or her 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 or her 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.

(5)(a) After an inquiry in terms of subrule (3)—

(i) subject to section 16 of the Act and subrule (6), if the court is satisfied, having taken into account the matters referred to in paragraph (b), 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 willful, the court may issue an order for the personal attachment and imprisonment of the judgment debtor;

(ii) if the court is not satisfied as provided in subparagraph (i), the court shall refuse to make an order referred to in that subparagraph.

(b) In determining the ability of a judgment debtor to pay the amount due, the court shall take into account the following matters:

(i) the nature and extent of his or her income and assets; and

(ii) the amounts needed by him or her for his or her necessary expenses and those of his or her dependants; and

(iii) any amounts needed by him or her to make payments in terms of any court order or agreement; and

(iv) if he or she is unemployed, the reason therefor; and

(v) if he or she 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 Rule 74

(6) 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.

(7) In proceedings under this Rule, 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.

(8) 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 or her by affidavit that the debtor has failed in due payment of any such instalment.

(9) Where there are two or more orders for 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.

(10) A writ for the personal attachment of a judgment debtor shall be signed by the registrar and addressed to the sheriff or his or her deputy, and shall be in Form No. 47.

(11)(a) 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—

(i) a member of Parliament or an officer of Parliament as defined in section 2 of the Privileges, Immunities and Powers of Parliament Act [Chapter 2:08] while such member or officer is in actual attendance on Parliament or any committee thereof:

(ii) a person entitled to immunity from personal attachment under the Privileges, Immunities and Powers of Parliament Act [Chapter 2:08]; or

(iii) a person upon whom immunity from personal attachment is conferred by any other law.

(b) 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.

(12) The registrar may release a judgment debtor from prison whenever it is shown to his or her satisfaction that the judgment debtor has paid the judgment debt and all the costs which he or she 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 or her release.

(13)(a) The court may grant the release of a judgment debtor for good cause shown by him or her in a chamber application.

(b) 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 or her to make an application under paragraph (a), including where necessary, providing, preparing and delivering documents and serving process on his or her behalf.

74. Attachment of Debts

(1) 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.

(2)(a) 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 judgment 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 or her in terms of the judgment or order, to be served on—

(i) 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

(ii) the Chief Paymaster of the Zimbabwe National Army or the Commander of the Army where the judgment debtor is employed in the Zimbabwe National Army; or

(iii) 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.

(b) A notice in terms of paragraph (a) shall set forth the date on which the application for the garnishee order it to be made and sufficient information to identify the judgment debtor, including—

(i) his full names; and

(ii) his employment code number or force number; and

(iii) the ministry, department, force or institution in which he or she is employed, as appropriate.

(c) As soon as possible after receiving a notice in terms of paragraph (a) 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—

(i) the amount of any money that is or will be payable to the judgment debtor by way of salary or wages; and

(ii) the amount and nature of any deductions required to be made from such salary or wages by the Director or Chief Paymaster; and

(iii) the earliest date from which any payment may be made in terms of a garnishee order.

(3)(a) 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 or her legal practitioner 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.

(b) 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 paragraph (a) 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 paragraph (c) of subrule (2).

(4)(a) The court application shall be served on the garnishee and on the judgment debtor and the procedure laid down in Part VIII shall be followed.

(b) 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 subparagraphs (i), (ii) and (iii) of paragraph (a) of subrule (2).

(5) 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 or her usual residence or place of business. Personal service shall be effected on the garnishee.

(6) Subject to the court's order on the application, due service of the court application on the garnishee shall bind in his or her 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 subparagraph (iii) of paragraph (c) of subrule (2).

(7) If the garnishee admits the debt he or she may pay the amount thereof into court to await the judgment of the court on the application.

(8) If the garnishee disputes his or her liability, or admits his or her liability but has good cause for the non-payment, the court may order that any issue or question necessary for determining his or her liability be tried or determined in any manner in which any issue or question in an action may be tried or determined.

(9)(a) 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 or her claim upon such debt.

(b) After hearing the allegations of any third person under such order, as in paragraph (a) 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 subrules of this Rule, 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.

(10) Where the attachment relates to the salary or wages of the judgment debtor and he or she shows that the attachment will not leave him or her and those dependant upon him or her 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 or herself and those dependant upon him or her 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 or her salary or wages.

(11) Payment made by or execution levied upon the garnishee under proceedings under this Rule shall be a valid discharge to him or her as against the judgment debtor, to the amount paid or levied, although such proceedings may be set aside, or the judgment or order reversed.

(12) Save where the court decides that any opposition or other action by the garnishee has been unreasonable, the garnishee shall be entitled to his or her taxed costs in any proceedings under this Rule, which shall include the costs of obtaining legal advice as to the appropriate action he or she 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 subrule (10).

PART XII

GENERAL ON CIVIL PROCEDURE

75. Security For Costs

(1) A party entitled and desiring to demand security for costs from another shall, as soon as possible after the commencement of proceedings, deliver a notice setting forth the grounds upon which security is claimed; and the amount demanded.

(2) If the amount of security only is contested the registrar shall determine the amount to be given and his or her decision shall be final.

(3) If the party from whom security is demanded contests his or her liability to give security or if he or she fails or refuses to furnish security in the amount demanded or the amount fixed by the registrar within ten days of the demand or the registrar's decision, the other party may apply to court on notice for an order that such security be given and that the proceedings be stayed until such order is complied with.

(4) The court may, if security is not given within a reasonable time, on application dismiss any proceedings instituted or strike out any pleadings filed by the party in default, or make such other order as to it may seem fit.

(5) Any security for costs shall, unless the court otherwise directs, or the parties otherwise agree, be given in the form, amount and manner directed by the registrar.

(6) The registrar may, upon the application of the party in whose favour security is to be provided and on notice to interested parties, increase the amount thereof if he or she is satisfied that the amount originally furnished is no longer sufficient; and his or her decision shall be final.

(7) Notwithstanding anything contained in this Rule a person to whom legal aid is rendered by a statutorily established legal aid board or in terms of these Rules, is not compelled to give security for the costs of the opposing party, unless the court directs otherwise.

76. Arrest of Defendant

(1)(a) Where a plaintiff proves to the satisfaction of a judge or the registrar that—

(i) he or she has a good cause of action against a defendant to the amount of level 10 or more; and

(ii) there is good ground for believing that the defendant is about to remove from Zimbabwe; and

(iii) the absence of the defendant from Zimbabwe will materially prejudice the plaintiff in the prosecution of his or her 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.

(b) Before the issue of any such writ, the plaintiff shall file with his or her application or, where the writ is to be issued by the registrar, shall lodge with the registrar an affidavit sworn to by the plaintiff, or his or her agent, or his or her 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—

(i) the sum alleged to be due to the plaintiff by the defendant, when it became due and the cause thereof;

(ii) whether or not the plaintiff holds any security for the alleged debt, and, if he or she does, the nature and value thereof;

(iii) that the deponent believes that the defendant is about to remove from Zimbabwe, and the grounds of such belief;

(iv) the steps, if any, which the plaintiff has already taken to enforce his or her claim.

(2) 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 or she may think fit.

(3) A writ of arrest shall, before delivery to the sheriff or his or her deputy be endorsed with the plaintiff's address for service as required by paragraph (b) of subrule (10) of Rule 13. The sum of money or other thing demanded shall be set out in the writ.

(4) 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 2:08] 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 3:03]; or

(c) a person upon whom immunity from personal attachment is conferred by any other law.

(5) The sheriff or his or her 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.

(6)(a) On arrest of the defendant the sheriff or his or her deputy shall permit the defendant to go at large and free of the writ of arrest if—

(i) the defendant pays or delivers to the sheriff or his or her deputy the sum of money or thing mentioned in the writ together with a deposit of costs in the sum equivalent to level 4; or

(ii) the defendant or anyone on his or her behalf gives to the sheriff or his or her 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 or herself to prison in execution of the same.

(b) The bond or obligation to be given to the sheriff or his or her deputy under this subrule shall be in Form No. 32.

(7) If the defendant at any time after his or her arrest satisfied the claim contained in the writ, including the costs and charges of the writ and the costs of the arrest, or if he or she gives a bond or obligation in terms of subrule (6) of this Rule he or she shall be entitled to immediate discharge from such arrest.

(8) If a bond or obligation has been given by the defendant or by anyone on his or her behalf in terms of subrule (6) the plaintiff shall proceed with his or her 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.

(9) Unless otherwise ordered, the costs of, and incidental to, a writ of arrest shall be costs in the cause.

(10) 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 or she is not represented by a legal practitioner.

(11) If the sheriff or his or her deputy takes a bond or obligation by virtue of a writ or attachment, then the sheriff or his or her deputy shall as soon as practicable and on being required by the plaintiff or his or her legal practitioner, deliver to the plaintiff or his or her legal practitioner such bond or obligation by an endorsement thereon to be made by the sheriff or his or her deputy under his or her hand, which endorsement shall be in Form No. 33.

(12) If the sheriff or his or her deputy takes from the party arrested any money or thing for the plaintiff, then the sheriff or his or her deputy shall hold the money or thing on behalf of the plaintiff against the defendant's giving of security or surrendering himself or herself.

(13) 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 or her and he or she shall be discharged from such arrest.

(14) 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 or her 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.

(15) If in any such proceedings judgment is given against the defendant, he or she shall be entitled to his or her discharge from such arrest:

Provided that such discharge shall not free him or her from his or her liability under the judgment or from subsequent proceedings thereunder.

77. Reciprocal Enforcement of Judgments- application for registration

(1) 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 in the High Court shall be made by a chamber application.

(2) 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 of the judgment creditor and judgment debtor respectively.

(3) 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 authorise or direct some other mode of service, and if he or she does so the service shall be effected in accordance with such authority or direction.

(4) 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 or her legal practitioner 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 or she 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.

(5) 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 subrule shall apply to substituted as well as other service. The three days limited by this subrule may under special circumstances be extended by order of a judge.

(6) The judgment debtor may, at anytime within the time limited by the order of court giving leave to register after service on him or her 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 ordered 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 or she thinks fit, and either altogether or until such time as he or she shall direct.

Provided that the court may allow the application to be made at any time after the expiration of the time herein mentioned.

(7) 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.

(8) The registers shall be arranged in alphabetical order in the surname of the judgment creditor or 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 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.

(9)(a) 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.

(b) 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.

(10)(a) An application under section 4 of the Act for a certified copy of the judgment obtained in the court shall be made to the registrar on an affidavit made by the judgment creditor or his or her 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 or her 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.

(b) 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 the 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"

(11) 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 subrules contained in this Rule 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 Act is extended.

78. Duties Registrars and District Registrars

(1) In addition to the duties and obligations referred to in other Rules, registrars and district registrars shall carry out the duties specified in this Rule.

(2) The registrar at Harare, Bulawayo and Masvingo 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.

(3)(a) 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.

(b) 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 or her 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 or Masvingo on receipt thereof in terms of subrule (7).

(c) 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.

(d) The registrar shall keep an electronic record of every document filed in the registry and shall permit any party desirous of filing and delivering process electronically to do so:

Provided that a party filing a document electronically shall also file and deliver a hard copy of such document.

(4) 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 paid and the receipt attached, except where a party has been granted leave to proceed *in forma pauperis.*

(5) 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 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.

(6)(a) 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.

(b) The person desirous of withdrawing any exhibit shall state the capacity in which he or she makes the request.

(c) The registrar in any case may require the substitution of any exhibit to be withdrawn of such copy of the whole or portion thereof as he or she 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.

(d) The person desirous of withdrawing any exhibit may, if such permission is refused, or if he or she 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 her or them, to the Judge President for final determination.

(e) 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.

(7) For the purpose of issuing summonses and subpoenas and writs under Rule 76 in districts other than Harare or Bulawayo or Masvingo, 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 or Masvingo, according to the place where appearance is required to be entered, for the purpose of record in his or her office.

79. <u>Contempt of Court</u>

(1) The institution by a party of proceedings for contempt of court shall be made by court application.

(2) 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 motu* the notice shall be issued by the registrar and no affidavit of the facts shall be necessary.

(3) Nothing in the preceeding subrules 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.

(4) Where the court or a judge has imposed a fine for contempt of court the registrar shall furnish the sheriff or his or her deputy with the particulars of such fine and deliver to him or her a writ in Form No 48. Immediately on the delivery of such writ the sheriff or his or her deputy shall execute the same in terms thereof.

(5) 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 or her 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 or her deputy, or any constable or other peace officer to whom it is delivered, shall execute the same.

80. In *Forma Pauperis* Proceedings

(1)(a) 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 or her that the applicant may be a person such as is contemplated by subparagraph (1) of paragraph (a) of subrule (2), shall refer the applicant to a legal practitioner selected from a roaster of names furnished to him or her by the Law Society.

(b) If the registrar is in doubt as to whether or not an applicant may qualify in terms of subparagraph (i) of paragraph (a) of subrule (2), he or she may refer the matter to a district officer of the Department of Social Services for a report on the means of the applicant.

(c) A legal practitioner to whom an applicant is referred in terms of paragraph (a) shall inquire into such person's means and the merits of his or her cause, and, upon being satisfied that the matter is one in which he or she may properly act *in forma pauperis*, he or she shall proceed to take instructions from the applicant.

(2)(a) If the applicant lodges with the registrar—

(i) an affidavit setting forth fully such person's financial position and stating that, excepting household goods, wearing apparel, tools of trade, he or she is not possessed of property to the value equivalent to level 4 and will not be able, within a reasonable time, to provide such from his or her earnings;

(ii) a statement signed by the legal practitioner concerned that he or she is acting for that person gratuitously in the proceedings;

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.

(b) All pleadings, process and documents filed of record by a party proceeding *in forma pauperis* shall be headed accordingly.

(3)(a) A legal practitioner who is acting for a person in terms of this Rule 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 or her assistance, without the leave of a judge, who may, in the latter event, give directions as to the appointment of a substitute.

(b) If the person bringing or defending proceedings in terms of this Rule is awarded costs against his or her opponent, his or her 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 or her 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.

(c) 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 sheriff or 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 or her a sum sufficient to cover the costs of such service.

(4) When a person sues or defends *in forma paurperis* under process issued in terms of this Rule, his or her opponent shall, in addition to any other right which he or she may have, have the right at anytime 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 fit.

(5) 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.

81. Evidence and Service of Process on Behalf of a Foreign Court.

(1)(a) Wherein relation to any civil or criminal proceedings pending before a court of law of contempt 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.

(b) An order made under the said subsection shall be in Form No. 51.

(c) 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.

(2) 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 or her deputy or his or her 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 the 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.

(3) 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 of subrule (2).

82. Sheriff and Deputy Sheriff

(1)(a) The sheriff shall notify the registrar of the appointment and removal of every deputy sheriff and the registrar shall registrar such appointments and removals in a book kept for the purpose.

(b) 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.

(2)(a) Every deputy sheriff shall, upon appointment and before entering upon the duty of his or her office, provide security, to the satisfaction of the sheriff, for the due and faithful execution of his or her duties, and indemnifying the sheriff against any loss occasioned by any act or omission of such deputy sheriff.

(b) The security bond to be provided by a deputy sheriff shall be in Form No. 62.

(3)(a) A deputy sheriff or acting deputy sheriff shall not, in the execution of his or her duties, leave the area to which he or she is appointed, nor for any purpose depart from Zimbabwe without the authority first had and obtained of the sheriff.

(b) Where a deputy sheriff requires leave of absence for a longer period than two months, he or she shall submit to the sheriff for approval the name of a person willing to act for him or her during his or her absence, and when the nomination has been approved by the sheriff shall , together with his or her 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 or her 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.

(c) The sheriff may remove any acting deputy sheriff from office for good cause, and in such event shall make arrangements as to him or her seem proper for the discharge of the duties of the office such deputy sheriff.

(4) A deputy sheriff, when he or she expects to be absent from his or her duties, for any purpose, for any period not exceeding two months, shall make proper arrangements in regard to the furnishing of security as the sheriff may direct.

(5) The sheriff and his or her 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.

(6)(a) The sheriff or a deputy sheriff shall not be responsible for the rescue or escape of any person out of his or her custody on his or her way to a public prison when such rescue or escape has happened without the default or connivance of such sheriff or deputy.

(b) 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.

(7)(a) 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 as amended.

(b) 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 proceedings 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.

(c) 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.

(d) 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 certified that in his or her 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.

83. Interpreters

(1) 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 the proceedings.

(2) Such interpreter shall, before entering upon his or her duties, take an oath to be administered by the registrar in the following form—

> "I swear that I will faithfully and truly interpret evidence in the case before this court to the best of my skill and ability. So help me God."

(3) 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 or her fees in accordance with the High Court (Fees and Charges) Rules, 1994 as amended.

PART XIII

AUTHENTICATION

84. Authentication of Documents Executed Outside Zimbabwe For Use within Zimbabwe

(1) In this rule, unless inconsistent with the context—

"authentication" means in relation to a document, the verification of any signature thereon;

"commissioner" means a commissioner of the High Court appointed by the High Court to take affidavits or examine witnesses in any place outside Zimbabwe;

"document" means any deed, written contract, power of attorney, affidavit or other writing, but does not include an affidavit sworn before a commissioner.

(2) Any document executed in any place outside Zimbabwe shall be deemed to be sufficiently authenticated for the purpose of production or use in any court or tribunal in Zimbabwe or for the purpose of production or lodging in any public office in Zimbabwe if it is duly authenticated at such foreign place by the signature and seal of office—

(a) of a notary public, mayor or person holding judicial office; or

(b) in the case of countries or territories in which Zimbabwe, has its own diplomatic or consular representative, of the head of a Zimbabwean diplomatic mission, the deputy or acting head of such mission, a counsellor, first, second or third secretary, a consul-general or vice-consul; or

(c) of any Government authority of such foreign place charged with the authentication of documents under the law of that foreign country; or

(d) of any person in such foreign place who shall be shown by a certificate of any person referred to in paragraphs (a), (b) or (c) to be duly authorized to authenticate such document under the law of that foreign country; or

(e) of a commissioned officer of the Zimbabwe Defence Force as defined in section 2 of the Defence Act [Chapter 11:02], in the case of a document executed by any person on active service.

(3) Notwithstanding anything in this rule contained, any document authenticated in accordance with the provisions of the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents shall be deemed to be sufficiently authenticated for the purpose of use in Zimbabwe where such document emanates from a country that is a party to the convention.

(4) If any person authenticating a document in terms of subrule (2) has no seal of office, he or she shall certify thereon under his or her signature to that effect.

(5) An affidavit sworn before and attested by a commissioner outside Zimbabwe shall require no further authentication, and may be used in all cases and matters in which affidavits are admissible as freely as if it had been duly made and sworn to within Zimbabwe.

(6) Nothing contained in this rule shall prevent the acceptance as sufficiently authenticated by any court, tribunal or public office of any document which is shown, to the satisfaction of such court, tribunal or public office, to have been actually signed by the person purporting to have signed the same.

PART XIV

CRIMINAL PROCEDURE

85. Indictment

(1) In this Part unless inconsistent with the context—

"Act" means the Criminal Procedure and Evidence Act [Chapter 9:07].

"chief clerk" means the chief clerk of the Prosecutor General.

"registrar" means the registrar of the High Court or any deputy or assistant registrar appointed in terms of subsection (1) of section 56 of the High Court Act [Chapter 7:06] and, for the purpose of this rule and rule 88 shall include any judge's clerk or court usher acting on behalf of such registrar;

"sheriff" includes any additional or assistant sheriff appointed in terms of section 55 of the High Court Act [Chapter 7:06] and any deputy sheriff appointed in terms of subsection (3) of that section;

"subpoena" means the process sued out of the office of the registrar in terms of subrule (7);

"summons" means the writ sued out of the office of the registrar in terms of subrule (3);

"swear" includes make a solemn affirmation.

(2)(a) Whenever the Prosecutor- General has decided to indict any person for trial before the High Court he or she shall—

(i) issue a notice informing the magistrate of his or her decision to indict;

(ii) issue a notice informing the accused of his or her decision to indict and of the nature of the charge which it is intended to bring against him or her.

(b) The notice issued in terms of subparagraph (ii) of paragraph (a) shall be served on the accused by the magistrate or by some other person on the directions of the magistrate.

(c) The magistrate shall investigate or cause to be investigated the accused's arrangements for his or her defence in accordance with the provisions appearing on the reverse of the notice issued in terms of subparagraph (ii) of paragraph (a) and once the return of service and the section of the form relating to the accused's defence have been completed, the magistrate shall return the original notice to the Prosecutor-General.

(3) The process of summoning an accused to answer any indictment preferred against him or her shall by by writ sued out of the office of the registrar by the chief clerk and directed to the sheriff.

(4)(a) The chief clerk shall deliver or cause to be delivered to the sheriff, together with the summons, a copy of the indictment preferred against the accused and a notice of trial.

(b) The notice of trial shall specify the date of commencement of the trial and the place at which the trial will be held.

(c) If there are more than one accused, the chief clerk shall deliver or cause to be delivered to the sheriff as many copies of the indictment and notice of trial as there are accused.

(5)(a) The sheriff shall serve a copy of the indictment and the notice of trial on the accused in person and shall explain the nature and effect of each of these documents to the accused. The sheriff shall also exhibit the summons to the accused and explain to him the nature and effect thereof.

(b) The sheriff shall inquire of the accused whether he or she wishes to call any witnesses in his or her defence and, if he or she does so wish, the sheriff shall endeavour to discover the names and residential and business addresses of such witnesses and what arrangements, if any, have been made to secure their attendance at court.

(c) The sheriff shall endorse upon the summons the fact that he or she has complied with the requirements of paragraph (a) and the results of his or her inquiries in terms of paragraph (b) and shall return the summons to the registrar forthwith.

(d) The registrar shall inform the court orderly of the names and addresses of any defence witnesses referred to on the summons as endorsed by the sheriff and shall subpoena such witnesses as it is necessary for him or her to subpoena in terms of subsection (3) of section 229 of the Act.

(6) Notwithstanding the provisions of section 382 of the Act, any accused may consent to the commencement of his or her trial after the lapse of a period of less than ten days from the date of service upon him or her of the notice of trial and a copy of the indictment.

(7)(a) The process for compelling the attendance of any person to give evidence or to produce any books, papers or documents in any criminal case may be taken out of the office of the registrar by the chief clerk.

(b) The chief clerk shall deliver or cause to be delivered to the sheriff a general subpoena listing all or any number of witnesses in any particular case together with copies for each witness:

Provided that the copies of the subpoena need not bear the names and addresses of the witnesses mentioned on the general subpoena and may bear only the name and address of the witness upon whom each copy is served.

(c) Notwithstanding the provisions of paragraphs (a) and (b), if the High Court is sitting at any place other than Harare, Bulawayo or Masvingo witnesses may be subpoenaed by process taken out of the magistrate at the place where the High Court is sitting by counsel appearing for the state or by the accused or his or her counsel. Such process may be in the form used to subpoena witnesses in the magistrates court.

(d) Should the accused wish to subpoena any witness, he or she or his or her legal practitioner may do so in the manner prescribed in paragraphs (a), (b) and (c).

(8)(a) Where the witness is resident within the area under the jurisdiction of the local authority within which the court is situate, the sheriff shall serve the subpoena.

(b) Where the witness is not resident as described in paragraph (a), or where the sheriff is unable to locate a witness, the sheriff shall—

(i) deliver the relevant subpoena to a police officer of or above the rank of seargant,; or

(ii) send the relevant subpoena by registered post to the member in charge of a police station in the area of which the address for service is situated or where the witness is believed to be;

and the police officer concerned shall serve the subpoena himself or herself or cause other police officer to serve it.

(9)(a) The person serving the subpoena shall exhibit the general subpoena to the person upon whom it is served, shall hand to such person a copy of the subpoena and shall explain the nature and effect of the subpoena to that person.

(b) The subpoena shall be served on the witness either personally or by handing a copy to some person whose apparent age is not less than sixteen years and who apparently resides or is employed at the witness's residence or place of business.

(c) If the person to be served with the subpoena keeps his or her residence or place of business closed, so preventing the service of the subpoena in the manner required by paragraphs (a) and (b), it shall be sufficient to affix a copy thereof to the outer or principal door of such residence or place of business.

(d) If a witness has given security for his appearance to give evidence at any trial in accordance with the provisions of subsection (1) of section 234 of the Act, the subpoena may be served on him or her either in person or by being affixed to the principal door of the place specified in his or her recognizance as that at which the subpoena may be served.

(e) The person serving any subpoena shall endorse on or annex to the general subpoena a return of the manner of the service of the subpoena on each witness, and shall return the subpoena to the registrar so endorsed.

(f) If, within four days of the commencement of the case in respect of which a witness is required, the registrar has not received notification of the service of a subpoena on the witness, he or she shall inform the court orderly accordingly.

(10) No witness shall be bound to attend court before a period of forty-eight hours has lapsed from the time at which he or she is first served with a subpoena:

Provided that should any person be served with a subpoena requiring his or her attendance at court at some time before the date of such service or at a time within forty-eight hours of such service, he or she shall, nevertheless attend court as soon as reasonably possible after receiving the subpoena and in any case within forty-eight hours of such receipt.

(11)(a) Notwithstanding that any witness has been subpoenaed for a particular day and subject to the provisions of section 231 of the Act, such witness shall not be bound to attend court on that day if he or she has been excused attendance at court by or on behalf of the court orderly:

Provided that where any witness is so excused he or she shall inform the court orderly of the address at which, and means by which, he or she may conveniently be contacted and thereafter such witness shall not leave such address for more than twenty-four hours at a time without the consent of the court orderly.

(b) Any witness who has been excused attendance in accordance with paragraph (a) shall nevertheless be bound to attend court at any future time prior to the determination of the case in respect of which he or she has been subpoenaed on being instructed so to do by or on behalf of the court orderly provided that he or she is given reasonable notice of the necessity for him or her to attend court and of the time at which he or she is required to attend.

(12) Wherever the prosecution is at the instance of a private party, the function of the chief clerk prescribed in subrules (3), (4) and (7) shall be performed by the private party or his or her legal practitioner.

86. Records

(1)(a) The judge presiding over any trial shall make or cause to be made minutes of record of –

(i) any objection or exception to an indictment, any motion to quash an indictment, any request for particulars and any particulars supplied;

(ii) the pleas of accused persons and any statements made by them in answer to the charge;

(iii) any questions by the court concerning the nature of the accused's plea and the accused's replies thereto;

(iv) the submissions made by the prosecutor and the accused after the accused has pleaded guilty and of any participation by the court in determining the nature of the case to which the accused has pleaded guilty;

(v) the evidence orally given and admissions made by any party to the proceedings;

(vi) any objection or request made in relation to the tendering or admission of any evidence or in relation to the general conduct of proceedings.

(vii) any ruling or judgment of the court;

(viii) any other matter which the accused or counsel requests to be recorded or which the judge wishes to have recorded.

(b) According to the directions of the judge, such minutes of record may be either verbatim or in narrative form and may be recorded in long hand or shorthand or by such mechanical device as the judge may approve.

(2) Every shorthand writer and every operator of an approved mechanical device shall be deemed to be an officer of the court and shall, before entering on his or her 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, (compile 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 (compiled) by any other officer of the court. So help me God."

(3) The records made in terms of subrule (1) shall be filed in accordance with the instructions of the registrar.

(4)(a) It shall not be necessary to transcribe any shorthand or machine-made record, unless a judge or the registrar, acting under the authority of a judge, so directs.

(b) If and when the shorthand or machine-made 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.

(c) Should the transcriber be 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.

(d) If the original recorder is unavailable that fact shall be mentioned in the transcriber's certificate.

(5) Any transcript certified in terms of subrule (4) shall be deemed to be an accurate record of the proceedings subject to any reservations made in the certificate annexed thereto:

Provided that the court may make any order that fit deems for concerning the accuracy of a transcribed record.

(6)(a) Any person with an interest in any matter in respect of which there exists a shorthand or machine-made record may apply to the registrar to have that record transcribed, for a copy of such transcript.

(b) The registrar shall supply such an applicant with a transcript of the record upon payment of a fee prescribed by him or her when it has been necessary to prepare the transcript as a result of the application and any other fee prescribed by him or her when the transcript supplied is a copy of a transcript already prepared.

87. General issues of criminal procedure

(1) For the service of any process on behalf of the state or any other party, the sheriff shall be paid fees and allowances in accordance with the High Court (Fees and Allowances) Rules, 1994 as amended.

(2)(a) An application in terms of section 161 of the Act may be made to a judge of the High Court in chambers without notice.

(b) Whenever a change of venue is ordered, the applicant shall notify the other party to the proceedings of such change of venue, and the registrar shall ensure that all documents, exhibits and process, other than subpoenas, are transferred to the new venue.

(3) When placed in the dock for trial the accused may wear his own clothing and shall not be fettered unless the court orders otherwise.

(4)(a) The oath to be taken by an interpreter shall be in the following form—

> "I — do solemnly and sincerely swear that I will truly and faithfully interpret all matters requiring interpretation in (the) any case before this court to the best of my skill and ability. So help me God."

(b) The oath to be taken by an assessor shall be in the following form—

> "I — do solemnly and sincerely swear that honestly and faithfully and without fear, favour or prejudice I will try whether all accused brought before me for trial are guilty or not of the crimes laid to their charge, and that by my verdict I will the truth say thereon according to the evidence. So help me God."

(5) Whenever any exhibit is produced, the registrar shall call out the number of such exhibit and shall immediately mark or label the exhibit "H. Ct. Ex—."

(6)(a) Where the sentence of death is about to be passed the registrar shall address the prisoner in the following manner—

> "----- you have been convicted of the crime of ----. Do you know of any reason or have you anything to say as to why the sentence of death should not be passed upon you?"

(b) If no good reason is given for not passing the sentence of death, the court orderly shall call out—

> "Hear ye, hear ye, hear ye. All persons are strictly charged to keep silence in court while sentence of death is passed upon the prisoner at the bar."

(c) The judge shall then pass the sentence of death.

(7)(a) The registrar at Harare shall keep an indexed book, to be called the "Criminal Record Book," in which he or she shall enter—

(i) the number of the case;

(ii) the name and nationality of the accused;

(iii) the crime charged;

(iv) the date and place of trial;

(v) the name of the presiding judge;

(vi) the verdict;

(vii) the sentence;

(viii) any subsequent proceedings and remarks;

in respect of all cases indicted for trial at Harare, and Mutare.

(b) The registrar at Bulawayo shall keep a similar book in which he or she shall make similar entries in respect of all cases indicted for trial at Bulawayo, Gweru and Hwange.

(c) The registrar at Masvingo shall keep a similar book in which he or she shall make similar entries in respect of all cases indicted for trial at Masvingo.

(8)(a) Notwithstanding the provisions of any of these rules, a judge may for good cause shown, authorize a departure from the rules in any matter before the court provided that such departure is not likely to prejudice the accused or the State.

(b) No departure from any of these rules, whether authorized in terms of paragraph (a) or not, shall invalidate any proceedings unless such departure actually results in the accused suffering prejudice of such a nature that but for such departure the accused would not have been convicted.

(9) All documents, notices and process to be issued in terms of these rules and sections 6, 86, 280, 326 and 345 of the Act shall be in the forms prescribed in the Schedule and in particular—

(a) the notice to be issued in terms of subparagraph (i) of paragraph (a) of subrule (2) of rule 85 shall be in the form CP&E 1;

(b) the notice to be issued in terms of subparagraph (ii) of paragraph (a) of subrule (2) of rule 85 shall be in the form CP&E 2A or CP&E 2B;

(c) the summons shall be in the form CP&E 3;

(d) the notice of trial to be issued in terms of subrule (4) of rule 85 shall be in the form CP&E 4;

(e)(i) the general subpoena shall be in the form CP&E 5A;

(ii) the copies of the subpoena shall be in the form CP&E 5B;

(f) the notice to be given in terms of paragraph (b) of subrule (2) of Rule 87 shall be in the form of CP&E 6;

(g) the prosecutor's authority to prosecute in terms of section 6 of the Act shall be in the form CP&E 7;

(h) the proceedings of a preparatory examination re-opened in terms of section 86 of the Act shall be recorded in the form CP&E 8;

(i) if a notice in terms of section 280 of the Act is to be issued, it shall be in the form CP&E 10;

(j) if a notice in terms of section 326 of the Act is to be issued, it shall be in the form CP&E 11;

(k) if a notice in terms of section 345 of the Act is to be issued, it shall be in the form CP&E 11A.

PART XV

BAIL

88. Applications for Bail

(1) This Part shall apply to applications and appeals in terms of sections 106, 111, 111A or 112 of the Criminal Procedure and Evidence Act [Chapter 9:07].

(2) In this Part—

"judge" means a judge of the High Court, sitting otherwise than in open court.

"registrar" means the registrar of the High Court or any deputy or assistant registrar of the High Court.

(3) Where anything is required by these rules 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:

Provided that, in relation to the seven-day period prescribed in subrule (7) Saturdays, Sundays and public holidays shall be included unless they fall at the end of the period, in which event the period shall extend to the first following day that it not a Saturday, Sunday or public holiday.

(4) The High Court or a judge may, in relation to any particular case before it or him or her, 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 or she, 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 or her, as the case may be, to be just and expedient

(5)(a) An application to a judge for bail in terms of section 106 or 112 of the Criminal Procedure and Evidence Act [Chapter 9:07] shall be filed with the registrar and shall consist of a written statement setting out—

(i) the name of the applicant; and

(ii) the applicant's residential address; and

(iii) if the applicant is employed his or her employer's name and address and the nature of his or her employment; and

(iv) where the application is made before the applicant is convicted—

A. the offence with which the applicant is charged; and
B. the court by which and the date on which the applicant was last remanded; and
C. the criminal record book number, if that number is known to the applicant; and
D. the police criminal record book number of the case, the name of the police officer in charge of investigating the case and the police station at which he or she is stationed, if those particulars are known to the applicant; and

(v) where the application is made after the applicant has been convicted and sentenced—

A. the offence of which the applicant was convicted and the sentence that was imposed; and

B. the court or courts which convicted the applicant and imposed sentence upon him or her; and

C. the court criminal record book number, if that number is known to the applicant; and

D. the date or dates on which the applicant was convicted and sentenced; and

(vi) whether or not bail has previously been refused by a magistrate and, if it has been refused—

A. the grounds on which it was refused, if the grounds are known to the applicant; and
B. the date on which it was refused; and

(vii) the grounds on which the applicant seeks release on bail having regard to the provisions of section 50(1)(d) of the constitution.

(viii) the amount of bail which the applicant is prepared to give and the names of any persons who are prepared to stand as sureties for his or her attendance and appearance.

(b) The registrar shall set down an application for bail for hearing by a judge within forty-eight hours after the application was filed in terms of paragraph (a), and shall ensure that—

(i) a copy of the written statement referred to in paragraph (a) is served on the Prosecutor-General as soon as possible after it was filed; and

(ii) the Prosecutor-General and the applicant and his or her legal representative are notified as soon as possible of the date and time of the hearing:

Provided that:

A. if the applicant is legally represented, the registrar may require the applicant's legal representative to serve a copy of the written statement on the Prosecutor-General, and the legal practitioner shall forthwith comply with such request;
B. the forty-eight hour period may be extended—

A1. by written agreement between the applicant and the Prosecutor-General if a copy of their agreement is filed with the registrar; or
B2. if the judge so orders in terms of subrule (4)

(c) At least three hours before the hearing of an application for bail, the Prosecutor-General shall cause the following documents to be filed with the registrar—

(i) his or her response to the application; and

(ii) a copy of any comments which he or she has been able to elicit from the magistrate who is presiding or who presided over the applicant's trial, where the trial has commenced or been completed;

and, where practicable, shall cause a copy of his or her response to be served on the applicant or the applicant's legal practitioner.

(iii) where the Prosecutor-General has not filed a response in terms of paragraph (c), the court or a judge shall determine the application without any recourse to him or her:

Provided that the court or a judge may extend the time during which the Prosecutor-General is allowed to file a response on application being made either in writing or orally at the hearing of the application.

89. Appeals Against Refusal of Bail or Conditions of Recognizance

(1) An appeal in terms of section 111 of the Criminal Procedure and Evidence Act [Chapter 9:07] by a person aggrieved by the decision of a magistrate on an application relating to bail or the entering by him or her into recognizances, shall be noted by filing with the registrar a written statement setting out—

(a) the name of the appellant; and

(b) the appellants residential address; and

(c) if the appellant is employed, his employer's name and address and the nature of his or her employment; and

(d) where the appeal is brought against the decision of a magistrate before the appellant has been convicted—

(i) the offence with which the appellant is charged; and

(ii) the court by which and the date on which the appellant was last remanded; and

(iii) the court criminal record book number, if that number is known to the applicant; and

(iv) the police criminal record number of the case, the name of the police officer in charge of investigating the case and the police station at which he or she is stationed, if those particulars are known to the applicant; and

(e) where the appeal is brought against the decision of a magistrate after the appellant has been convicted and sentenced—

(i) the offence of which the appellant was convicted and the sentence that was imposed; and

(ii) the court or courts which convicted the appellant and imposed sentence upon him or her; and

(iii) the court criminal record book number, if the number is known to the appellant; and

(iv) the date or dates on which the appellant was convicted and sentenced;

(f) where the appeal is brought against a refusal by a magistrate to grant bail—

(i) the grounds on which it was refused, if the grounds are known to the appellant;

(ii) the date on which it was refused; and

(g) where the appeal is brought in relation to any recognizance or condition thereof—

(i) the terms of the recognizance or condition concerned; and

(ii) the date on which the magistrate required the recognizance to be entered into or imposed the condition, as the case may be; and

(h) the grounds on which the appellant seeks release on bail or the revocation or alteration of the recognizance or condition, as the case may be.

(2) The registrar shall set down an appeal referred to in subrule (1) within ninety-six hours after it was filed, and shall ensure that—

(a) a copy of the written statement referred to in subrule (1) is served on the Prosecutor-General as soon as possible after it was filed; and

(b) the Prosecutor-General and the appellant and his or her legal representative are notified as soon as possible of the date and time of the hearing:

Provided that—

(i) if the appellant is legally represented, the registrar may require the appellant's legal representative to serve a copy of the written statement on the Prosecutor-General, and the legal practitioner shall forthwith comply with such request;

(ii) the ninety-six hour period may be extended—

A. by written agreement between the appellant and the Prosecutor-General if a copy of their agreement is filed with the registrar; or

B. if a judge so orders in terms of subrule (4)

(3) At least three hours before the hearing of an appeal referred to in subrule (1), the Prosecutor-General shall cause the following documents to be filed with the registrar—

(a) his written response to the appeal; and

(b) a copy of any comments which he or she has been able to elicit from the magistrate whose decision is the subject of the appeal; and, where practicable, shall cause a copy of his or her response to be served on the appellant or his or her legal practitioners.

90. Appeals By Prosecutor-General Against Grant of Bail

(1) An appeal by the Prosecutor-General in terms of paragraph (b) of subsection (1) of section 111A of the Criminal Procedure and Evidence Act [Chapter 9:07] shall be noted, within seven days after the magistrate granted bail, by filing with the registrar a written statement setting out—

(a) the name of the person who was granted bail; and

(b) where the appeal is brought against the decision of a magistrate granting bail to a person before that person has been convicted—

(i) the offence with which the person is charged; and

(ii) the court by which and the date on which the person was granted bail; and

(c) where the appeal is brought against the decision of a magistrate granting bail to a person after that person has been convicted and sentenced—

(i) the offence of which the person was convicted and the sentence that was imposed; and

(ii) the court or courts which convicted the person and imposed sentence upon him or her; and

(iii) the date or dates on which the person was convicted and sentenced; and

(d) the amount of bail granted and any conditions of recognizance; and

(e) the grounds on which the Prosecutor-General seeks the revocation or alteration of bail.

(2) As soon as possible after an appeal referred to in subrule (1) has been filed—

(a) the appellant's legal practitioner, where the appellant is legally represented; or

(b) the registrar where the appellant is not legally represented;

shall cause a copy of the written statement referred to in subrule (1) to be served on the Prosecutor-General or his or her representative.

(3) Where practicable, a magistrate on whom a statement has been served in terms of subrule (2) shall file with the registrar his or her written comments on the appeal at least three hours before the appeal.

(4) The registrar shall set down an appeal referred to in subrule (1) for hearing by a judge within forty-eight hours after it was filed, and shall ensure that—

(a) the Prosecutor-General; and

(b) the person whose bail is the subject of the appeal, or any legal practitioner representing that person, as the case may be; and

(c) the magistrate whose decision is the subject of the appeal; are notified as soon as possible of the date and time of the hearing:

Provided that the forty-eight hour period may be extended—

(i) by written agreement between the Prosecutor-General and the person whose bail is the subject of the appeal, if a copy of their agreement is filed with the registrar; or

(ii) if a judge so orders in terms of subrule (4) of rule 88.

(5) Where the person whose bail is the subject of an appeal referred to in subrule (1) is legally represented, his or her legal practitioner shall cause his or her written response to the appeal to be filed with the registrar within three hours before the hearing of the appeal and, where practicable, shall cause a copy of his or her response to be served on the Prosecutor-General or his or her representative.

91. Urgency of Bail Applications and Appeals

(1) The registrar shall ensure that every application or appeal referred to in this Part is set down for hearing with the utmost urgency.

(2) Whenever it comes to the attention of a prison officer in charge of a prison that a prisoner lodged therein wishes to apply for bail or appeal against the refusal of bail in terms of this Part, the prison officer shall ensure that—

(a) the prisoner is provided with appropriate forms and adequate facilities with which to make the application or appeal; or

(b) any forms completed by the prisoner are forwarded to the registrar without any delay for filing in terms of this Part.

PART XVI

APPEALS, CONSTITUTIONAL APPLICATIONS AND REFERRALS

92. Applications for Leave to Appeal to the Supreme Court

(1) Subject to the provisions of subrule (2), 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 or she thinks fit.

(2) Where application has not been made in terms of subrule (1), 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 subrule (1), the proposed grounds of appeal and the grounds upon which it is contended that leave to appeal should be granted.

(3) A copy of the application shall be served on the Prosecutor-General immediately after the application is filed with the registrar. The Prosecutor-General may file with the registrar written submissions on the application within two days of the date of service on him or her.

(4) Upon receipt of the application and the submissions of the Prosecutor-General, if any, the registrar shall place the matter before the presiding judge, in chambers, who shall grant or refuse the application as he or she thinks fit. The presiding judge may in his or her discretion require oral argument on any particular point or points raised and he or she may hear any such argument in chambers or in court.

(5) 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 Prosecutor-General, together with an application for leave to appeal. The Prosecutor-General may, within three days of the date of the said service, file with the registrar

submissions on both applications. The provisions of subrule (4) shall apply to both such applications and submissions, if any.

(6) No application in terms of subrule (5) may be made after the expiry of twenty-four days from the date on which the sentence was passed, unless the judge otherwise orders.

(7) If the presiding judge is not available to deal with any application herein-before referred to, it may be dealt with by any other judge.

(8) In a case in which leave to appeal is necessary in respect of a judgment 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 subrules (1) to (7) of this Rule shall apply to an application for leave to appeal and to an application for condonation as if the words "Prosecutor-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 considered 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 [Chapter 7:06], leave to appeal shall be granted on application for leave to appeal being made.

93. Miscellaneous Appeals and Reviews

(1)(a) Subject to the provisions of paragraph (b) this Rule shall apply to any appeal to or any review by a judge or the court which is provided for in any enactment having the force of law in Zimbabwe.

(b) These rules shall not apply to—

(i) a review in terms of the Act; or

(ii) an automatic review or any other review not at the instance of an aggrieved person or party to the proceedings;

(iii) an appeal or review in relation to which the enactment concerned itself expressly—

A) prescribes that it shall be by notice of motion or other special procedure; or
B) provides for the making of rules or regulations governing procedure;

(iv) an appeal or review in relation to which special rules made in terms of the Act are in force;

(v) an appeal relating to bail in terms of section 112 of the Criminal Procedure and Evidence Act [Chapter 9:07] and an appeal relating to bail in terms of section 16 of the Extradiction of Offenders (Republic of South Africa) Act [Chapter 61].

(c) In relation to an appeal or review to which this rule applies the provisions of this rule shall be read subject to those provisions which prescribe aspects of the procedure for the appeal or review, as the case may be, but shall be applied to the fullest extent consistent therewith.

(2) In this rule—

"court" means the High Court;

"judge" means a judge of the court;

"notice" means a notice instituting an appeal or review as the case may be;

"registrar means—

(a) the registrar of the court; or
(b) any deputy or assistant registrar designated as a registrar of the court;

"tribunal" means any court, tribunal, council, board or other body against whose decision an appeal lies to, or whose proceedings may be reviewed by, a judge or the court.

(3) Where anything is required by this Rule to be done within a particular number of days or hours, a Saturday, Sunday or public holiday shall not be reckoned as part of that period.

(4)(a) An appeal or review shall be instituted by means of a notice directed and delivered by the appellant to the presiding officer of the tribunal or the officer whose decision or proceedings are in question, and to all other parties affected.

(b) A notice shall also be filed with the registrar.

(5) Subject to the provisions of subrule (6), a notice shall be delivered and filed in accordance with the provisions of subrule (4) within fifteen days of the decision appealed against being given or the termination of the proceedings sought to be reviewed.

(6) Save where it is expressly or by necessary implication prohibited by the enactment concerned, a judge may, if special circumstances are shown, extend the time laid down, whether by subrule (5) or by the enactment concerned, for instituting an appeal or review.

(7)(a) A notice instituting an appeal shall state—

(i) the tribunal or officer whose decision is appealed against; and

(ii) the date on which the decision was given; and

(iii) the grounds of appeal; and

(iv) the exact nature of the relief sought; and

(v) the address of the appellant or his or her legal representative.

(b) A notice instituting a review shall state—

(i) the tribunal or officer whose proceedings are brought on review; and

(ii) the date on which the proceedings terminated; and

(iii) the grounds of review; and

(iv) the exact nature of the relief sought; and

(v) the address of the appellant or his or her legal representative.

(8)(a) The tribunal or officer concerned or any other person affected thereby shall be entitled to file a reply to a notice instituting a review.

(b) A reply to a notice instituting a review shall be filed with the registrar and delivered to the other parties affected within ten days of receipt of the notice.

(9)(a) Within fifteen days of receipt of a notice, the tribunal or officer concerned shall—

(i) if a formal record of the proceedings was kept, lodge it with the registrar;

(ii) if no formal record of the proceedings was kept, lodge with the registrar reasons for the decision concerned, together with all papers relating to the matter in issue.

(b) Where a formal record is lodged, the provisions of paragraph (a) of subrule (5) of rule 63 shall, *mutatis mutandis*, apply.

(c) Where no formal record is lodged, the registrar may require to be submitted such additional copies of papers as he or she deems necessary.

(10)(a) The registrar shall send written notification to the parties as soon as he or she has received the record or other papers relating to an appeal or review and, in the case of an appeal or review in which the appellant will be legally represented at the hearing, the registrar shall call upon the legal practitioner representing the appellant or applicant, as the case may be, to file heads of argument within fifteen days after the date of such notification.

(b) Within fifteen days after being called upon to file heads of argument in terms of paragraph (a), or within such longer period as a judge may for good cause allow, the legal practitioner representing the appellant or the applicant, as the case may be, shall file with the registrar a document setting out the main heads of his or her argument together with a list of authorities to be cited in support of each head, and immediately thereafter shall deliver a copy to the respondent.

(c) Where the respondent will be represented by a legal practitioner at the hearing of the appeal or review, that legal practitioner shall, within ten days after receiving the heads of argument in terms of paragraph (b), file with the registrar a document setting out the main heads of his or her argument together with a list of authorities to be cited in support of each head, and immediately thereafter shall deliver a copy to the appellant or applicant as the case may be:

Provided that, where the appeal is set down for hearing less than fifteen days after the respondent receives the appellant's or applicant's heads of argument, the respondent shall file his or her heads of argument as soon as possible and in any event not later than four days before the hearing of the appeal or review.

(d) If the registrar does not receive heads of argument from the appellant's or applicant's legal practitioner within the period prescribed in paragraph (b), the appeal or review shall be regarded as abandoned and shall be deemed to have been dismissed.

(11)(a) Where the enactment concerned provides that the appeal or review, as the case may be, may be dealt with by a judge, the registrar, after receipt of all the papers relating thereto, shall forthwith lay them before a judge in chambers.

(b) Where—

(i) a judge has directed that an appeal or review referred to in paragraph (a) shall be—

A. set down for oral argument in chambers; or

B. dealt with by the court; or

(ii) the enactment concerned provides that the appeal or review shall be dealt with by the court;

the registrar shall subject to paragraph (c) and to subrule (10), notify the parties of the date of set down:

Provided that, unless the parties agree otherwise, at least six weeks' notice of the date of set down shall be given to all parties to the appeal or review.

(c) The registrar may send a legal practitioner representing any party to an appeal or review, other than an appeal to which subrule (10) applies, a written notice requiring him or her to file with the registrar, not later than four days before the hearing of the appeal or review, a document setting out the main heads of his or her argument together with a list of authorities to be cited in support of each head, and the legal practitioner concerned shall comply with any such requirement:

Provided that the registrar shall give the legal practitioner not less than five days' notice of any such requirement.

94. Criminal Appeals From the Magistrates Court

(1)(a) In these Rules—

"appellant" means an appellant as defined in rules 98, 99, 100 or 101.

"Chapter 7:10 means the Magistrates Court Act [Chapter 7:10]

"court" means the magistrates court;

"registrar" means the registrar of the High Court

(b) These rules shall apply in respect of any appeal relating to the decision of a court in any criminal matter in which sentence is passed on or after the 1st August 1979.

(c) Where anything is required by this rule to be done within a particular number of days or hours, a Saturday, Sunday or public holiday shall not be reckoned as part of that period.

(d) A judge or the High Court may direct a departure from this rule in any way where this is required in the interest of justice, and, additionally or alternatively, may give such directions on matters of practice or procedure as may appear to him or her to be just and expedient.

(2) The prosecution and finalization of all appeals in terms of these rules, especially any appeal, other than an appeal by the Prosecutor-General in terms of paragraph (a) of section 61 of Chapter 7:10, relating to a case in which the convicted person has received an unsuspended sentence, shall be treated by all persons concerned as a matter of urgency.

(3)(a) The Prosecutor-General or an appellant as defined in Rules 98, 99, 100 or 101 may amend his or her notice of appeal by lodging a notice in duplicate with the registrar setting out clearly and specifically the amendment to the grounds of appeal—

(i) in the case of an appeal against conviction or conviction and sentence, as soon as possible and in any event not later than twenty days after the noting of the appeal;

(ii) in the case of an appeal against sentence only, as soon as possible and in any event not later than ten days after the noting of the appeal.

(b) A copy of a notice of appeal lodged in terms of paragraph (a) shall, at the same time as the lodging of such notice, be served on the other party to the appeal.

(c) An amendment to a notice of appeal in terms of paragraph (a) shall not delay the preparation and lodging with the registrar of the record of the case to which the appeal relates.

(4)(a) Subject to this subrule, an appellant's legal practitioner may for good cause renounce his or her agency at any time before the appeal has been set down for hearing or, after it has been set down, not later than three weeks after he or she has been notified of the date of hearing of the appeal in terms of subrule (5) of rule 98; subrule (7) of rule 99; subrule (5) of rule 100; or subrule (7) of rule 101, as the case may be:

Provided that, where he or she has agreed to less than six weeks' notice of the date of hearing, he or she may not renounce his or her agency in terms of this paragraph later than one month before the date of hearing.

(b) Where an appellant's legal practitioner wishes to renounce his or her agency in terms of paragraph (a), he or she shall without delay file a notice with the registrar substantially in Form HC MC 1 and, as soon as possible thereafter, serve copies of the notice upon the appellant and upon every other party to the appeal, and shall lodge proof of such service with the registrar in accordance with Rule 16.

(c) A renunciation of agency in terms of paragraph (a) shall be effective from the date on which the notice referred to in paragraph (b) is filed with the registrar.

(d) Where an appellant's legal practitioner wishes to renounce his or her agency after the period prescribed in paragraph (a), he or she shall apply to the court or a judge for leave to do so and the court or judge, as the case may be, may grant leave if it or he or she, as the case may be, considers that the circumstances of the case justify such a course.

(e) If the appellant's legal practitioner purports to renounce his or her agency otherwise than in terms of paragraph (a) or (b) or without leave granted in terms of paragraph (d), as the case may be, the renunciation shall be ineffective, and—

(i) any process served upon him or her in relation to the appeal shall be considered good service; and

(ii) he or she shall appear on behalf of the appellant at the hearing of the appeal.

(5)(a) If the court considers that the conduct of a party to an appeal or application under these rules has been such as to warrant such a course, the court may make anyone or more of the following orders—

(i) depriving a successful party of all or part of his or her costs in the appeal or application and additionally, or alternatively , in the trial court;

(ii) ordering a successful party to pay all or part of the costs of the other party in the appeal or application and additionally, or alternatively, in the trial court;

(iii) ordering a party to pay costs on a legal practitioner and client scale or on any other appropriate scale.

(b) If the court considers that the conduct of a legal practitioner representing a party to an appeal or application under these rules has been such as to warrant such a course, the court may make any one or more of the following orders—

(i) ordering him or her personally to pay all or part of the costs of the appeal or alternatively, in the trial court;

(ii) ordering him or her to refund to his or her client all or any of the fees his or her client may have paid him or her in respect of the appeal and additionally, or alternatively, in the trial court;

(iii) ordering him or her not to charge his or her client any fee in respect of all or part of the work done by him or her in respect of the appeal or application and additionally, or alternatively, the proceedings in the trial court.

95. Appeals By Prosecutor-General Upon Power of Law

(1)(a) Where the Prosecutor-General wishes to appeal in terms of section 61 of Chapter 7:10 against the finding of the court upon a point of law in any criminal case, he or she shall—

(i) note the appeal by lodging a notice of appeal in duplicate with the clerk of the court specifying the judgment against which the appeal is brought and the point of law in issue; and

(ii) send to the last-known address of the person who was the accused person in the case to which the appeal relates a copy of such notice of appeal together with a notice in writing advising him or her that the ruling of the High Court on the appeal shall in no way affect the finality of the finding of the court in his or her case, and that he or she has the right, should he or she so desire, at his or her expense, to be represented by a legal practitioner for the purpose of arguing the point of law in issue.

(b) The clerk of the court shall, within five days of the noting of an appeal in terms of paragraph (a) send one copy of the notice of appeal to the registrar.

(2)(a) The magistrate shall, within five days of the noting of an appeal in terms of paragraph (a) of subrule (1), so far as may be necessary having regard to any judgment or statement filed of record, deliver to the clerk of court a statement in writing setting forth the facts which he or she found to be proved and his or her reasons for judgment and sentence and dealing with the grounds of appeal.

(b) The clerk of the court shall immediately dispatch to the Prosecutor-General a copy of any statement delivered in terms of paragraph (a) and such statement shall become part of the record.

(c) Within five days of receipt of the statement delivered in terms of paragraph (a) the Prosecutor-General may amend his or her grounds of appeal by lodging with the clerk of the court a written statement setting out clearly and specifically such amendments.

(d) The magistrate may, within five days of the lodging of any amendments to the grounds of appeal in terms of paragraph (c), deliver to the clerk of the court a further or amended statement as to the facts which he or she found to be proved and his or her reasons for judgment and sentence and dealing with the amended grounds of appeal.

(e) The clerk of the court shall immediately dispatch to the Prosecutor-General a copy of any statement delivered in terms of paragraph (d) and such statement shall become part of the record.

(3)(a) The clerk of the court shall, on receipt of the notice of appeal lodged in terms of subrule (1), give instructions for the preparation of the record:

Provided that those parts of the record which the Prosecutor-General indicates are unnecessary for the determination of the appeal shall be omitted therefrom.

(b) The clerk of the court shall, as soon as possible and in any event not later than twenty days after the noting of the appeal in terms of subrule (1), lodge with the registrar the original record together with five typed copies which shall be certified as true and correct copies.

(4) The registrar shall upon receiving the record and copies thereof referred to in paragraph (b) of subrule (3), set the appeal down for hearing:

Provided that, unless the persons concerned agree otherwise, at least seven days' notice shall be given to the Prosecutor-General and any representative of the person who was the accused in the case to which the appeal relates.

96. Appeals By Prosecutor-General Against Sentence where Leave to Appeal Not Required

(1)(a) Where the Prosecutor-General wishes to appeal in terms of paragraph (a) of subsection (1) of section 62 of Chapter 7:10 against sentence, he or she shall, as soon as possible and in any event not later than ten days after sentence has been passed—

(i) note the appeal by lodging a notice in duplicate with the clerk of the court specifying the sentence against which the appeal is brought and the grounds of the appeal; and

(ii) send to the last known address of the person convicted in the case to which the appeal relates a copy of such notice of appeal together with a notice in writing advising him or her of—

A. the sentence which the Prosecutor-General considers should have been imposed; and
B. the right of such convicted person to apply to the registrar for legal aid; and
C. the right of such convicted person to appear in person or to be represented at his or her own expense by a legal practitioner of his or her choice.

(b) The clerk of the court shall, as soon as possible after the noting of the appeal in terms of subrule (1), send one copy of the notice of appeal to the registrar.

(2) The magistrate shall, within five days of the lodging of a notice of appeal in terms of subrule (1), so far as may be necessary having regard to any judgment or statement already filed of record, deliver to the clerk of the court a statement in writing setting forth the facts which he or she found to be proved and his or her reasons for judgment and sentence and dealing with the grounds of appeal, and such statement shall form part of the record:

Provided that if the magistrate is not available or for any other reason unable to comply with this requirement, such statement shall not, unless a judge otherwise directs, be required, and its absence shall not delay the preparation of the record.

(3)(a) The clerk of the court shall on receipt of the notice of appeal lodged in terms of subrule (1), give instructions for the preparation of the record:

Provided that those parts of the record which the Prosecutor-General indicates are unnecessary for the determination of the appeal shall be omitted therefrom.

(b) The clerk of the court shall, as soon as possible and in any event not later than ten days after the noting of the appeal in terms of subrule (1) lodge with the registrar the original record together with five typed copies which shall be certified as true and correct copies.

(c) One copy of the record referred to in paragraph (b) shall be made available without charge to the person referred to in subparagraph (ii) of paragraph (a) of subrule (1).

(4) The registrar shall, upon receiving the record and copies thereof referred to in paragraph (b) of subrule (3), set the appeal down for hearing:

Provided that, unless the parties agree otherwise, at least seven days' notice shall be given to the Prosecutor-General and the person referred to in subparagraph (ii) of paragraph (a) of subrule (1) or his or her legal representative.

97. Appeals By Prosecutor-General Against Sentence Where Leave To Appeal is Required

(1) Where the Prosecutor-General wishes to appeal in terms of paragraph (b) of subsection (1) of section 62 of Chapter 7:10 against sentence, he or she shall, as soon as possible and in any event not later than ten days after sentence has been passed—

(a) apply for leave to appeal by lodging an application for such leave together with a draft notice of appeal with the registrar; and

(b) lodge a copy of the documents referred to in paragraph (a) with the clerk of the magistrates court concerned.

(2)(a) The documents referred to in paragraph (b) of subrule (1) shall be laid before the magistrate who passed the sentence, and the magistrate shall, within five days of the lodging of such documents, so far as may be necessary having regard to any judgment or statement already filed of record, deliver to the clerk of the court a statement in writing setting out the facts which he or she found to be proved and the reasons for judgment and sentence, and replying to the draft grounds of appeal:

Provided that, if the magistrate is unavailable, or for any other reason unable to comply with this requirement, such statement shall not, unless a judge of the High Court otherwise directs, be required.

(b) The clerk of the court shall, within five days of the lodging of the documents referred to in paragraph (b) of subrule (1), send to the registrar the record of proceedings of the case together with any statement referred to in paragraph (a):

Provided that, where any of the evidence in the case has been taken down in shorthand writing or recorded by mechanical means, it shall be sufficient compliance with the provisions of this paragraph if the clerk of the court forwards to the registrar the manuscript notes of such evidence made by the magistrate.

(3)(a) The registrar shall, on receipt of the documents referred to in paragraph (b) of subrule (2), lay them immediately before a judge of the High Court.

(b) If the judge of the High Court considers that, *prima facie*; the sentence passed in the case is manifestly inadequate, he or she shall grant leave to appeal.

(c) If the judge of the High Court considers that, *prima facie*, the sentence is not manifestly inadequate, he or she shall refuse the application, and the registrar shall notify the clerk of the court forthwith accordingly.

(d) If leave to appeal is granted, the registrar shall—

(i) notify the clerk of the court immediately and send him or her all the documents relating to the matter, and

(ii) notify the convicted person of the granting of leave to appeal against sentence and inform him or her of his or her rights to appear in person, to be represented by a legal practitioner of his or her choice, or to apply to the registrar for legal aid.

(4)(a) The clerk of the court shall, on receiving notice in terms of paragraph (d) of subrule (3), give instructions for the preparation of the record:

Provided that those parts of the record which the Prosecutor-General indicates are unnecessary for the determination of the appeal shall be omitted therefrom.

(b) The clerk of the court shall, as soon as possible and in any event not later than ten days after receiving notice in terms of paragraph (d) of subrule (3), lodge with the registrar the original record together with five typed copies which shall be certified as true and correct copies.

(c) One copy of the record referred to in paragraph (b) shall be made available without charge to the person referred to in paragraph (b) of subrule (3) or his or her legal representative.

98. <u>Appeal Against Conviction and Sentence By Convicted Person who is Legally Represented</u>

(1) The provisions of this rule shall apply in respect of an appeal by a person convicted by a court who is or intends to be legally represented at the hearing of the appeal and who appeals against conviction or both conviction and sentence (hereinafter in this rule called "the appellant")

(2)(a) The appellant shall, within ten days of the passing of sentence, or, where a request has been made in terms of subrule (1) of rule 3 of Order IV of the Magistrates Court (Criminal) Rules, 1966, within five days of the receipt of the judgment or statement referred to in that rule, whichever is the later, note his or her appeal by lodging with the

clerk of the court a notice in duplicate setting out clearly and specifically the grounds of the appeal and giving for the purpose of service the address of his or her legal representative or, if a legal representative has yet to be appointed, the address of the appellant:

Provided that, where the proceedings are sent on review in terms of subsection (1) of section 51 or section 58 of Chapter 7:10, the appellant may, by notice in writing to the clerk of the court, within four days of the passing of sentence, elect to defer the noting of the appeal until after the determination of the review proceedings, and may note his or her appeal in terms of this subrule against the conviction or conviction and sentence, as the case may be, with such alterations thereto as may have been determined on review within five days of the date on which the determination of the review proceedings is communicated to him by the clerk of the court.

(b) The appellant shall, at the time of the noting of an appeal in terms of paragraph (a) or within such period thereof, not exceeding five days as the clerk of the court may allow, deposit with the clerk of the court the costs as estimated by the clerk of the court of one certified copy of the record in the case concerned:

Provided that the clerk of the court may, in lieu of such deposit, accept a written under taking by the appellant or his or her legal representative for the payment of such costs immediately after it has been determined.

(c) Any difference between any payment of the estimated cost referred to in paragraph (b) and the actual cost of the copy of the record shall be paid to the clerk of the court by the appellant or by the clerk of the court to the appellant, as the case may be, once the cost has been determined and before the appeal is heard.

(d) Any failure to comply with the provisions of paragraph (b) or (c) or any undertaking made in terms of the proviso to paragraph (b) shall invalidate the noting of an appeal:

Provided that a judge of the High Court may give leave for a fresh appeal to be noted.

(e) A copy of the notice of an appeal noted in accordance with the provisions of this subrule shall be sent to the registrar.

(3)(a) The magistrate shall, within five days after the noting of an appeal in terms of subrule (2), so far as may be necessary having regard to any judgment or statement already filed of record, deliver to the clerk of the court a statement in writing setting for the facts which he or she found to be proved and his or her reasons for judgment and sentence and dealing with the grounds on which the appeal is based:

Provided that, if the magistrate is not available or for any other reason unable to comply with this requirement such statement shall not, unless a judge of the High Court otherwise directs, be required , and its absence shall not delay the preparation of the record.

(b) The clerk of the court shall immediately dispatch to the address given in terms of paragraph (a) of subrule (2) a copy of the statement, if any, delivered in terms of paragraph (a), and such statement shall become part of the record.

(c) Within five days after receipt of the statement delivered in terms of paragraph (b), the appellant may amend his or her grounds of appeal by lodging with the clerk of the court a written statement setting out clearly and specifically such amendments.

(d) The magistrate may, within five days of the lodging of any amendments to the grounds of appeal in terms of paragraph (c), deliver to the clerk of the court a further or amended statement as to the facts which he or she found to be proved and his or her reasons for judgment and sentence and dealing with the amended grounds of appeal:

Provided that, if the magistrate is not available or for any other reason unable to avail himself or herself of the opportunity to make a further or amended statement such statement shall not, unless a judge of the High Court otherwise orders, be required, and its absence shall not delay the preparation of the record.

(e) The clerk of the court shall immediately dispatch to the address given in terms of paragraph (a) of subrule (2) a copy of any statement delivered in terms of paragraph (d), and such statement shall become part of the record.

(f) The appellant or his or her legal representative shall be deemed to have received any statement dispatched in terms of paragraph (b) or (e) within four days of its dispatch by the clerk of the court to the address given in terms of paragraph (a) of subrule (2).

(4)(a) The clerk of the court shall on receipt of the payment or undertaking , as the case may be, referred to in paragraph (b) of subrule (2), give instructions for the preparation of the record.

(b) The clerk of the court shall, as soon as possible and in any event not later than twenty days after the noting of the appeal in terms of paragraph (a) of subrule (2), lodge with the registrar the original record together with five typed copies which shall be certified as true and correct copies, and shall deliver a further copy to the appellant or his or her legal representative.

(c) The appellant’s legal representative may uplift from the clerk of the court such further copies of the record as he or she may require, and shall pay for any such further copies at

the rate prescribed or, if no such rate has been prescribed, at the rate determined by the clerk of the court:

Provided that—

(i) notice of any additional copies of the record required by the appellant shall be given to the clerk of the court at the time when the appeal is noted or at the earliest possible time thereafter;

(ii) if the clerk of the court is unable to supply more than one copy of the record to the appellant, this shall not delay the setting down or hearing of the appeal.

(5)(a) The registrar shall send written notification to the appellant's legal practitioner as soon as he or she receives the record and copies thereof referred to in paragraph (b) of subrule (4), and shall call upon the legal practitioner to file heads of argument within fifteen days after the date of such notification.

(b) Within fifteen days after being called upon to file heads of argument in terms of paragraph (a) or within such longer period as a judge may for good cause allow, the appellant's legal practitioner shall file with the registrar a document setting out the main heads of his or her argument together with a list of authorities to be cited in support of each head, and immediately thereafter shall deliver a copy to the Prosecutor-General.

(c) Within fifteen days after receiving the appellant's heads of argument, the Prosecutor-General shall file with the registrar a document setting out the main heads of his or her argument together with a list of authorities to be cited in support of each head, and deliver a copy to the appellant's legal practitioner:

Provided that, where the appeal is set down for hearing less than twenty days after the Prosecutor-General receives the appellant's heads of argument, the Prosecutor-General shall file his or her heads of argument as soon as possible and in any event not later than four days before the hearing of the appeal.

(d) Upon receiving the appellant's heads of argument in terms of paragraph (b), the registrar shall set the appeal down for hearing:

Provided that, unless the persons concerned agree otherwise, at least six weeks' notice shall be given to the appellant and the Prosecutor-General.

(e) If the registrar does not receive heads of argument from the appellant's legal practitioner within the period prescribed in paragraph (b), the appeal shall be regarded as abandoned and shall be deemed to have been dismissed.

(f) Where an appeal is deemed to have been dismissed in terms of paragraph (e), the registrar shall forthwith send written notification of that fact to the Prosecutor-General and the trial court.

99. Appeal Against Conviction or Conviction and Sentence By Convicted Person in Person

(1) The provisions of this rule shall apply in respect of an appeal by a person convicted by a court who intends to appeal in person and who appeals against conviction or both conviction and sentence (hereinafter in this rule called "the appellant").

(2) The appellant shall, within ten days of the passing of sentence, note his or her appeal by lodging with the clerk of the court a notice in duplicate—

(a) setting out clearly and specifically the grounds of appeal and giving for the purpose of service the address of the appellant; and

(b) stating that the appellant intends to prosecute the appeal in person.

(3)(a) The magistrate may, within four days of the noting of an appeal in terms of subrule (2), deliver to the clerk of the court a statement containing any comments which he or she may wish to make on the grounds of appeal.

(b) The clerk of the court shall, as soon as he or she receives any statement referred to in paragraph (a) and in any event not later than five days after the noting of the appeal in terms of subrule (2), send to the registrar the record of the proceedings of the case together with any statement referred to in paragraph (a):

Provided that, where any evidence in the case has been taken down in shorthand writing or recorded by mechanical means, it shall be sufficient compliance with the provisions of this paragraph if the clerk of the court forwards to the registrar the manuscript notes of such evidence made by the magistrate.

(4)(a) The registrar shall, on receipt of the documents referred to in paragraph (b) of subrule (3), lay them immediately before a judge of the High Court.

(b) If the judge of the High Court grants a certificate in terms of subsection (1) of section 36 of the High Court Act [Chapter 7:06]—

(i) the registrar shall notify the clerk of the court immediately and send him or her all the documents relating to the matter; and

(ii) the clerk of the court shall notify the appellant of the granting of such certificate.

(c) If the judge of the High Court refuses to grant a certificate in terms of subsection (1) of section 36 of the High Court Act [Chapter 7:06], the registrar shall notify the appellant and the clerk of the court accordingly.

(5)(a) The magistrate shall, within five days of notification in terms of subparagraph (1) of paragraph (b) of subrule (4), so far as may be necessary having regard to any judgment or statement filed of record, deliver to the clerk of the court a statement in writing setting forth the facts which he or she found to be proved and his or her reasons for judgment and sentence and dealing with the grounds of appeal, and such statement shall become part of the record:

Provided that, if the magistrate is not available or for any other reason unable to comply within this requirement, such statement shall not unless a judge of the High Court otherwise directs, be required, and its absence shall not delay the preparation of the record.

(b) The clerk of the court shall immediately dispatch to the address given in terms of paragraph (a) of subrule (2) a copy of the statement if any, delivered in terms of paragraph (a), and such statement shall become part of the record.

(6)(a) The clerk of the court shall, on receiving notice in terms of subparagraph (1) of paragraph (b) of subrule (4), give instructions for the preparation of the record.

(b) The clerk of the court shall, as soon as possible and in any event not later than twenty days after receiving notice in terms of subparagraph (ii) of paragraph (b) of subrule (4), lodge with the registrar the original record together with five typed copies which shall be certified as true and correct copies.

(c) One copy of the record referred to in paragraph (b) shall be made available without charge to the appellant.

(7) The registrar shall, upon receiving the record and copies thereof referred to in paragraph (b) of subrule (6) set the appeal down for hearing:

Provided that, unless the persons concerned agree otherwise, at least six weeks' notice shall be given to the appellant and the Prosecutor-General.

100. Appeal Against Sentence By Convicted Person Who is Legally Represented

(1) The provisions of this Rule shall apply in respect of an appeal by a person convicted and sentenced by a court who is or intends to be legally represented at the hearing of the appeal and who appeals against sentence only (hereinafter in this Rule called "the appellant.")

(2)(a) The appellant shall, within five days of the passing of sentence, note his or her appeal by lodging with the clerk of the court a notice in duplicate setting out clearly and specifically the grounds of the appeal and giving for the purpose of service the address of his or her legal representative or, if a legal representative has yet to be appointed, the address of the appellant:

Provided that, where the proceedings are sent on review in terms of subsection (1) of section 57 or section 58 of Chapter 7:10, the appellant may, by notice in writing to the clerk of the court, within four days of the passing of sentence, elect to defer the noting of the appeal until after the determination of the review proceedings, and may note his or her appeal in terms of this subrule against the sentence, with such alterations thereto as may have been determined on review, within five days of the date on which the determination of the review proceedings is communicated to him or her by the clerk of the court.

(b) The appellant shall, at the time of the noting of an appeal in terms of paragraph (a) or within such period thereof, not exceeding five days, as the clerk of the court may allow, deposit with the clerk of the court the cost as estimated by the clerk of the court of one certified copy of the record in the case concerned:

Provided that the clerk of the court may, in lieu of such deposit, accept a written undertaking by the appellant or his or her legal representative for the payment of such cost immediately after it has been determined.

(c) Any different between any payment of the estimated cost referred to in paragraph (b) and the actual cost of the copy of the record shall be paid to the clerk of the court by the appellant or by the clerk of the court to the appellant, as the case may be, once the actual cost has been determined and before the appeal is heard.

(d) Any failure to comply with the provisions of paragraph (b) or (c) or any undertaking made in terms of the proviso to paragraph (b) shall invalidate the noting of an appeal:

Provided that a judge of the High Court may give leave for a fresh appeal to be noted.

(e) A copy of the notice of an appeal noted in accordance with the provisions of this Rule shall be sent to the registrar.

(3)(a) The magistrate shall, within five days after the noting of an appeal in terms of subrule (2), so far as may be necessary having regard to any judgment or statement already filed of record, deliver to the clerk of the court a statement in writing setting forth the facts which he or she found to be proved and his or her reasons for judgment and sentence and dealing with the grounds on which the appeal is based:

Provided that, if the magistrate is not available or for any reason unable to comply with this requirement such statement shall not, unless a judge if the High Court otherwise directs, be required, and its absence shall not delay the preparation of the record.

(b) The clerk of the court shall immediately dispatch to the address given in terms of paragraph (a) of subrule (2) a copy of the statement, if any, delivered in terms of paragraph (a) and such statement shall become part of the record.

(4)(a) Subject to the provisions of this subrule, the clerk of the court shall, on receipt of the payment or undertaking, as the case may be, referred to paragraph (b) of subrule (2), give instructions for the preparation of the record.

(b) The record prepared under the provisions of paragraph (a) shall consist of—

(i) the notice of appeal; and

(ii) any statement delivered to the clerk of the court in terms of paragraph (a) of subrule (3); and

(iii) the judgment of the magistrate and his or her reasons for sentence; and

(iv) any statement of agreed facts placed before the magistrate; and

(v) any record of previous convictions proved at the trial; and

(vi) any other part of the proceedings which—

A. the appellant, through his or her legal representative, has in terms of paragraph (c) requested to be included in the record; and
B. the Prosecutor-General has, in terms of paragraph (e), requested to be included in the record.

(c) The appellant may, at the time of the noting of the appeal, through his or her legal representative request the clerk of the court in writing to include in the record prepared under the provisions of paragraph (a) any part of the proceedings in addition to the parts referred to in subparagraphs (i) to (v) of paragraph (b).

(d) The clerk of the court shall, as soon as possible and in any event not later than six days after the noting of the appeal in terms of subrule (2), send to the Prosecutor-General a copy of the record prepared in terms of paragraphs (a) and (b).

(e) The Prosecutor-General may, within two days of the receipt of the record in terms of paragraph (d), request the clerk of the court to include in the record prepared under the provisions of paragraph (a) any part of the proceedings in addition to those included in the record.

(f) The clerk of the court shall as soon as possible and in any event not later than twenty-eight days after the noting of the appeal in terms of paragraph (a) of subrule (2), lodge with the registrar the original record together with five typed copies which shall be certified as true and correct copies, and shall deliver a further copy to the appellant or his or her legal representative.

(g) The appellant's legal representative may uplift from the clerk of the court such further certified copies of the record as he or she may require, and shall pay for any such further copies at the rate prescribed or, if no rate has been prescribed, at the rate determined by the clerk of the court:

Provided that—

(i) notice of any additional copies of the record required by the appellant shall be given to the clerk of the court at the time when the appeal is noted or at the earliest possible time thereafter;
(ii) if the clerk of the court is unable to supply more than one copy of the record to the appellant, this shall not delay the setting down or hearing of the appeal.

(5)(a) The registrar shall send written notification to the appellant's legal practitioner as soon as he or she has received the record and copies thereof referred to in paragraph (e) of subrule (4), and shall call upon the legal practitioner to file heads of argument within fifteen days after the date of such notification.

(b) Within fifteen days after being called upon to file heads of argument in terms of paragraph (a), or within such longer period as a judge may for good cause allow, the appellant's legal practitioner shall file with the registrar a document setting out the main heads of his or her argument together with a list of authorities to be cited in support of each head, and immediately thereafter shall deliver a copy to the Prosecutor-General.

(c) Within fifteen days after receiving the appellant's heads of argument, the Prosecutor-General shall file with the registrar a document setting out the main heads of his or her argument together with a list of authorities to be cited in support of each head, and immediately thereafter shall deliver a copy to the appellant's legal practitioner:

Provided that, where the appeal is set down for hearing less than twenty days after the Prosecutor-General receives the appellant's heads of argument, the Prosecutor-General shall file his or her heads of argument as soon as possible and in any event not later than four days before the hearing of the appeal.

(d) Upon receiving the appellant's heads of argument in terms of paragraph (b), the registrar shall set the appeal down for hearing:

Provided that, unless the persons concerned agree otherwise, at least six weeks' notice shall be given to the appellant and the Prosecutor-General.

(e) If the registrar does not receive heads of argument from the appellant's legal practitioner within the period prescribed in paragraph (b), the appeal shall be regarded as abandoned and shall be deemed to have been dismissed.

(f) Where an appeal is deemed to have been dismissed in terms of paragraph (e), the registrar shall forthwith send written notification of that fact to the Prosecutor-General and the trial court.

101. Appeal Against Sentence By Convicted Person In Person

(1) The provisions of this Rule shall apply in respect of an appeal by a person convicted and sentenced by a court who intends to appeal in person and who appeals against sentence only (hereinafter in this Rule called "the appellant").

(2) The appellant shall, within five days of the passing of sentence, note his or her appeal by lodging with the clerk of the court a notice in duplicate—

(a) setting out clearly and specifically the grounds of appeal and giving for the purpose of service the address of the convicted person; and

(b) stating that the appellant intends to prosecute the appeal in person

(3)(a) The magistrate may, within four days of the noting of an appeal in terms of subrule (2), deliver to the clerk of the court a statement containing any comments which he or she may wish to make on the ground of appeal.

(b) The clerk of the court shall, as soon as he or she receives any statement referred to in paragraph (a) and in any event not later than five days after the noting of the appeal in terms of subrule (2), send to the registrar the record of the proceedings of the case together with any statement referred to in paragraph (a):

Provided that, where any evidence in the case has been taken down in shorthand or recorded by mechanical means, it shall be sufficient compliance with the provisions of this paragraph if the clerk of the court forwards to the registrar the manuscript notes of such evidence made by the magistrate.

(4)(a) The registrar shall, on receipt of the documents referred to in paragraph (b) of subrule (3), lay them immediately before a judge of the High Court.

(b) If the judge of the High Court grants a certificate in terms of subsection (1) of section 36 of the High Court Act [Chapter 7:06]—

(i) the registrar shall notify the clerk of the court immediately and send to him or her documents relating to the matter; and

(ii) the clerk of the court shall notify the appellant of the granting of such certificate.

(c) If the judge of the High Court refuses to grant a certificate in terms of subsection (1) of section 36 of the High Court Act [Chapter 7:06], the registrar shall notify the appellant and the clerk of the court accordingly.

(5)(a) The magistrate shall, within five days of notification in terms of subparagraph (1) of paragraph (b) of subrule (4), so far as may be necessary having regard to any judgment or statement filed of record, deliver to the clerk of the court a statement in writing setting forth the facts which he or she found to be proved and his or her reasons for judgment and sentence and dealing with the grounds of appeal:

Provided that, if the magistrate is not available to comply with this requirement, such statement shall not, unless a judge of the High Court otherwise directs, be required, and its absence shall not delay the preparation of the record.

(b) The clerk of the court shall immediately dispatch to the address given in terms of paragraph (a) of subrule (2) a copy of the statement, if any, delivered in terms of paragraph (a), and such statement shall become part of the record.

(6)(a) Subject to the provisions of paragraph (b), the clerk of the court shall, on receiving notice in terms of subparagraph (1) of paragraph (b) of subrule (4) give instructions for the preparation of the record.

(b) The record prepared under the provisions of paragraph (a) shall only consist of—

(i) the notice of appeal; and

(ii) any comments by the judge of appeal who granted the certificate in terms of subsection (1) of section 36 of the High Court Act [Chapter 7:06]; and

(iii) any statement delivered to the clerk of the court in terms of paragraph (a) of subrule (5); and

(iv) the judgment of the magistrate and his or her reasons for sentence; and

(v) any statement of agreed facts placed before the magistrate; and

(vi) any record of previous convictions proved at the trial; and

(vii) any other part of the proceedings which the judge of appeal who granted the certificate in terms of subsection (1) of section 36 of the High Court Act [Chapter 7:06] has directed should be included in the record.

(c) The clerk of the court shall, as soon as possible and in any event not later than ten days after receiving notice in terms of subparagraph (1) of paragraph (b) of subrule (4), lodge with the registrar the original record, together with five typed copies which shall be certified as true and correct copies.

(d) One copy of the record referred to in paragraph (c) shall be made available by the clerk of the court without charge to the appellant.

(7) The registrar shall, upon receiving the record and copies thereof referred to in paragraph (c) of subrule (6), set the appeal down for hearing:

Provided that, unless the persons concerned agree otherwise, at least seven days' notice shall be given to the appellant and the Prosecutor-General.

102. Procedure Where Certificate to Prosecute Appeal In Person Is Refused.

(1) If the certificate referred to in paragraph (b) of subrule (4) of rule 99 or paragraph (b) of subrule (4) of rule 101, is refused by a judge of the High Court, the appeal shall lapse for want of prosecution unless the appellant within ten days of notification of such refusal in terms of paragraph (b) of subrule (4) of rule 99 or paragraph (b) of subrule (4) of rule 101, as the case may be—

(i) deposits with the clerk of the court the cost, as estimated by such clerk, of one certified copy of the record in the case concerned; and

(ii) give a written assurance to the clerk of the court that he or she will make arrangements for his or her legal representation at the hearing of the appeal.

(b) If the appellant complies with the provisions of subparagraphs (i) and (ii) of paragraph (a), the clerk of the court shall immediately notify the registrar accordingly, and the provisions of—

(i) in the case of an appeal against conviction or conviction and sentence, Rule 98; or

(ii) in the case of an appeal against sentence only, Rule 100;

shall thereafter, *mutatis mutandis*, apply as though the provisions of paragraphs (a) and (b) of subrule (2) of Rule 98 or paragraph (a) and (b) of subrule (2) of Rule 100, as the case may be , had been complied with:

Provided that, unless within five days of the record being lodged with the registrar the appellant satisfies the registrar that he or she has made final arrangements for his or her legal representation at the hearing of the appeal, the appeal shall lapse.

103. Procedure Where Represented Appellant Applies For Certificate to Prosecute Appeal In Person

(1) Where an appellant has noted an appeal in accordance with Rule 98 or Rule 100 he or she may—

(a) before the date on which the appeal has been set down for hearing; or

(b) with the consent of a judge of the High Court on the day on which the appeal has been set down for hearing:

Apply to the registrar for a certificate in terms of subsection (1) of section 36 of the High Court Act [Chapter 7:10].

(2) If an application in terms of subrule (1) is granted, the judge of the High Court who grants the application shall give such directions as he or she may think fit with regards to the future conduct of the appeal.

104. Lapsing of Right of Appeal and Application To Appeal Out of Time

(1) If a convicted person fails to note an appeal in terms of these rules within the time- limits prescribed thereby, his or her right to appeal against conviction and sentence shall lapse.

(2)(a) Where the right of a convicted person to appeal against conviction and sentence has lapsed in terms of subrule (1), he or she may apply to a judge of the High Court for leave to note an appeal out of time by lodging an application, together with the documents referred to in paragraph (b), with the registrar, and giving for the purpose of service the address of the applicant or his or her legal representative.

(b) An application in terms of paragraph (a) shall be accompanied by—

(i) a draft notice of appeal complying with the appropriate provisions of these rules; and

(ii) an adequate statement explaining why the appeal was not noted within the time prescribed by these rules.

(c) The registrar shall, as soon as possible, lay all the papers relating to the application in terms of paragraph (a) to the Prosecutor-General, who shall, within four days of receiving

such notice, in form the registrar whether or not he or she wishes to oppose the application.

(d) Where the Prosecutor-General wishes to oppose an application in terms of paragraph (a), he or she shall, within five days of receiving notice in terms of paragraph (c), lodge with the registrar and serve on the applicant at the address supplied in terms of paragraph (a) his or her written arguments in opposition, and may, at the same time, submit a request that the matter be set down for oral argument.

(e) The applicant may, within five days of receipt of written argument served on him or her in terms of paragraph (d), lodge with the registrar and serve on the Prosecutor-General written arguments in reply, and may, at the same time, submit a request that the matter be set down for oral argument.

(f) The registrar shall, as soon as possible, lay all the papers relating to the application in terms of paragraph (a) before a judge of the High Court, who may grant or refuse the application or order that the matter be set down for oral argument.

(g) If the judge orders in terms of paragraph (f) that the application in terms of paragraph (a) be set down for oral argument, the registrar shall notify the applicant and the Prosecutor-General of the date of hearing, and, after hearing the Prosecutor-General and the applicant, if he or she appears, or if he or she does not appear, on consideration of any written argument from the applicant, the judge may grant or refuse the application.

(h) If an application in terms of paragraph (b) is granted, the judge of the High Court who grants the application shall give directions as he or she may think fit with regard to the future conduct of the appeal.

SCHEDULE

FORMS

Form SCMC 1

NOTICE OF RENUNCIATION OF AGENCY

To …….

……..

(*Name and address of appellant)*

Renunciation of Agency

I hereby notify you that I am/my firm is" renouncing agency in the appeal you have instituted against the judgment of the magistrate in the case of …….

(set out names of parties), which was delivered on the ……..(*date).*

The effect of this renunciation is that I/my firm will no longer be representing you in the appeal.

The course of action open to you are as follows:

*You may engage another legal practitioner

*You may apply to the Registrar of the Supreme Court for a certificate to prosecute your appeal in person.

*You may apply to the Registrar of the Supreme Court for legal aid.

(Omit whichever of the above does not apply)

You must take action without delay because, if you fail to take any of these courses immediately, the appeal will lapse and be struck from the roll and the judgment appealed against will become final.

You must take action without delay because, if you fail to take any of these courses immediately, the appeal will lapse and be struck from the roll and the judgment appealed against will become final.

……
(Signature of legal practitioner)

*Omit whichever does not apply

[Rule inserted by s.i 171 of 1991]

105. Constitutional Applications

(1) A party who intends to raise a constitutional issue before the court shall do so by court application filed with the registrar which shall—

(a) be supported by an affidavit deposed to by a person who can swear positively to the facts, which details the facts and the basis on which the applicant seeks relief; together with any supporting documents which are relevant; and

(b) state a physical address at which the applicant will accept service of all process and documents in the proceedings; and

(c) be addressed to the registrar and served on all the respondents; and

(d) request the respondent to file and serve his or her notice of opposition within ten days of being served with the application; and

(e) be signed by the party making it or his or her legal practitioner; and

(f) where leave is required and has been obtained, state the date when such leave was granted.

(2)(a) The respondent shall, within the time stipulated in the application, file with the registrar and serve on the other parties a notice of opposition in Form No. 29A.

(b) The notice of opposition shall be supported by affidavit deposed by a person who can swear positively to the facts, which details the facts and the basis on which the respondent opposes the application, together with any supporting documents which are relevant.

(c) The notice shall provide an address for service which is within twenty-five kilometers of the office of the registrar.

(d) As soon as possible after filing a notice of opposition and opposing affidavit in terms of paragraphs (a) and (b), the respondent shall serve copies upon the applicant and thereafter file with the registrar proof of such service within two days after service upon the applicant.

(e) The respondent who fails to file a notice of opposition in terms of paragraphs (a) and (b) shall be barred and the registrar shall require the applicant to file heads of argument and proceed to set the matter down for hearing.

(f) The court may require the applicant to address it on the merits notwithstanding that the respondent has been barred.

(3)(a) The applicant may file with the registrar an answering affidavit together with any supporting documents, within ten days of service upon him or her of the notice of opposition.

(b) As soon as possible after filing an answering affidavit in terms of paragraph (a), the applicant shall serve a copy of it upon each respondent and file with the registrar proof of any such service within two days of the service.

(c) After an answering affidavit has been filed, no further affidavits may be filed without the leave of the court or a judge.

(4)(a) Where the respondent has been barred in terms of paragraph (e) of subrule (2), the applicant may, without notice to the respondent request the registrar, in writing, to set the matter down for hearing.

(b) Where the respondent has filed a notice of opposition and an opposing affidavit and the applicant has filed an answering affidavit, the applicant may request the registrar, in writing, to set the matter down for hearing.

(c) Where the respondent has file a notice of opposition and an opposing affidavit and, within ten days thereafter the applicant has not filed an answering affidavit, the respondent, on notice to the applicant, may either—

(i) request the registrar, in writing, to set the matter down for hearing; or

(ii) make a chamber application to dismiss the matter for want of prosecution.

(d) Where the respondent has neither requested that the application be set down nor applied for the matter to be dismissed for want of prosecution, the registrar shall set the matter down for hearing and notify the parties accordingly.

106. Referral To the Constitutional Court

(1) Where the court or a judge wishes to refer a matter to the Constitutional Court *mero motu* in terms of subsection (4) of section 175 of the Constitution, it or he or she shall—

(a) request the parties to make submissions on the constitutional issue or question to be referred for determination; and

(b) state the specific constitutional issue or question it or he or she considers should be resolved by the Constitutional Court.

(2) Where the court or a judge is requested by a party to the proceedings to refer the matter to the Constitutional Court and it or he or she is satisfied that the request is not frivolous or vexatious, it or he or she shall refer the matter to the Constitutional Court.

(3) A referral under subrule (1) or (2) shall be in Form CCZ4 and be accompanied by a copy of the record of proceedings and of affidavits or statements from the parties setting out the arguments they seek to make before the Constitutional Court.

(4) Where there are factual issues involved, the court or judge seized with the matter shall hear evidence from the parties and determine the factual issues:

Provided that where there are no disputes of fact, the parties shall prepare a statement of agreed facts.

(5) The record of proceedings referred to in subrule (3) shall contain the evidence led by both sides and where applicable, specific findings of fact by the court or judge and the issue or question for determination by the Constitutional Court.

(6) Where there is a statement of agreed facts in terms of the proviso to subrule (4), it shall suffice for the statement to be incorporated on the record in place of the evidence and the specific findings of fact.

(7) The court or judge shall direct the registrar to prepare and transmit the record so prepared to the Constitutional Court within fourteen days of the date of such direction:

Provided that, before transmission, the registrar shall ensure and certify that the record is correct and accurate and in the case of a referral in terms of subrule (2), that it contains an appropriate draft order.

(8) Where the court or a judge declares any law constitutionally invalid the registrar shall comply with the provisions of rule 31(1) of the Constitutional Court Rules, 2016.

(9) Any party who wishes to appeal against the decision of the court or judge on a constitutional matter shall comply with the procedure laid out in Part V of the Constitutional Court Rules, 2016.

107. Repeals

The High Court Rules, 1971, the High Court (Authentication of Documents) Rules, 1971, the High Court Criminal Procedure) Rules, 1964, the High Court of Zimbabwe (Bail) Rules, 1991, the High Court (Miscellaneous Appeals and review) Rules, 1975 and the Supreme Court (Magistrates Courts) (Criminal Appeals) Rules, 1979 are repealed.