



Republic of Namibia  
Annotated Statutes

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## Magistrates' Courts Act 32 of 1944 (SA)

[\(SA GG 3346\)](#)

came into force in South West Africa on 1 December 1970 when the amendments made by Act 53 of 1970 were brought into force

**APPLICABILITY TO SOUTH WEST AFRICA:** Section 1, as substituted by Act 53 of 1970, defined "territory" as "the territory of South West Africa", and "province" and "Republic" are both defined to include the territory. Section 115A, as inserted by Act 53 of 1970, states "This Act and any amendment thereof shall apply also in the territory, including the Eastern Caprivi Zipfel."

**TRANSFER TO SOUTH WEST AFRICA:** The administration of this Act was transferred to South West Africa by the Executive Powers (Justice) Transfer Proclamation, AG 33 of 1979, dated 12 November 1979. None of the amendments to the Act in South Africa after the date of transfer were made expressly applicable to South West Africa.

Section 3(1)(d) of the transfer proclamation excluded all references to the Republic in the Act from the operation of section 3(1) of the Executive Powers Transfer (General Provisions) Proclamation, AG 7 of 1977, meaning that this term retained the meaning it was given in the definition section of the Act (South Africa and South West Africa).

### as amended by

**Magistrates' Courts Amendment Act 40 of 1952 (SA)** [\(SA GG 4873\)](#)

came into force on date of publication: 27 June 1952

**Magistrates' Courts Amendment Act 14 of 1954 (SA)** [\(SA GG 5254\)](#)

came into force on date of publication: 2 April 1954

**General Law Amendment Act 62 of 1955 (SA)** [\(SA GG 5512\)](#)

came into force in relevant part on date of publication: 6 July 1955

**General Law Amendment Act 50 of 1956 (SA)** [\(SA GG 5703\)](#)

came into force on date of publication: 22 June 1956

**General Law Amendment Act 68 of 1957 (SA)** [\(SA GG 5894\)](#)

came into force in relevant part on date of publication: 28 June 1957

**Criminal Law Amendment Act 16 of 1959 (SA)** [\(SA GG 6195\)](#)

brought into force on 1 September 1959 by SA Proc. 173/1959 [\(SA GG 6274\)](#)

**Criminal Law Further Amendment Act 75 of 1959 (SA)** [\(SA GG 6262\)](#)

came into force on date of publication: 17 July 1959

**General Law Further Amendment Act 93 of 1962 (RSA)** [\(RSA GG 284\)](#)

came into force on date of publication: 4 July 1962

**Magistrates' Courts Amendment Act 19 of 1963 (RSA)** [\(RSA GG 456\)](#)

came into force on date of publication: 15 March 1962

**General Law Amendment Act 37 of 1963 (RSA)** [\(RSA GG 488\)](#)

came into force on date of publication: 2 May 1963

**General Law Further Amendment Act 93 of 1963 (RSA)** [\(RSA GG 555\)](#)

came into force on date of publication: 12 July 1963

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**Bantu Laws Amendment Act 42 of 1964 (RSA)** ([RSA GG 801](#))  
read together with section 16(1) of the Native Laws Amendment Act 46 of 1962 (RSA) ([RSA GG 240](#)); brought into force on 1 January 1965 by RSA Proc. 339/1964 ([RSA GG 967](#))

**General Law Amendment Act 80 of 1964 (RSA)** ([RSA GG 829](#))  
came into force in part on date of publication: 24 June 1964, in part with effect from 30 August 1968 in terms of RSA Proc. R.161/1968 ([RSA GG 2102](#)), issued in terms of section 8(2) of Act 80 of 1964, and in part with effect from 1 November 1970 in terms of RSA Proc. R.236/1970 ([RSA GG 2890](#)), issued in terms of section 9(2) of Act 80 of 1964; see annotations to individual sections

**Magistrates' Courts Amendment Act 48 of 1965 (RSA)** ([RSA GG 1102](#))  
came into force on date of publication: 5 May 1965

**Magistrates' Courts Amendment Act 8 of 1967 (RSA)** ([RSA GG 1664](#))  
came into force on date of publication: 17 February 1967

**General Law Amendment Act 70 of 1968 (RSA)** ([RSA GG 2106](#))  
came into force in part on date of publication: 21 June 1968, and in part with effect from 30 August 1968 in terms of RSA Proc. R.225/1968 ([RSA GG 2146](#)), issued in terms of section 63 of Act 70 of 1968; see annotations to individual sections

**Establishment of the Northern Cape Division of the Supreme Court of South Africa Act 15 of 1969 (RSA)** ([RSA GG 2315](#))

brought into force on 1 May 1969 by RSA Proc. R.92/1969 ([RSA GG 2356](#))

**Magistrates' Courts Amendment Act 17 of 1969 (RSA)** ([RSA GG 2317](#))  
came into force on date of publication: 26 March 1969

**General Law Amendment Act 101 of 1969 (RSA)** ([RSA GG 2464](#))  
came into force on date of publication: 30 June 1969

**General Law Amendment Act 17 of 1970 (RSA)** ([RSA GG 2655](#))  
came into force on date of publication: 6 March 1970

**Magistrates' Courts Amendment Act 53 of 1970 (RSA)** ([RSA GG 2826](#))  
brought into force on 1 December 1970 by RSA Proc. R.283/1969 ([RSA GG 2922](#))

**General Law Amendment Act 80 of 1971 (RSA)** ([RSA GG 3197](#))  
came into force on date of publication: 14 July 1971

**General Law Amendment Act 102 of 1972 (RSA)** ([RSA GG 3610](#))  
deemed to have come into force in relevant part on 2 July 1945  
(sections 7(2) and 8(2) of Act 102 of 1972)

**General Law Amendment Act 29 of 1974 (RSA)** ([RSA GG 4220](#))  
came into force on date of publication: 15 March 1974

**Second General Law Amendment Act 94 of 1974 (RSA)** ([RSA GG 4510](#))  
came into force in part on date of publication: 20 November 1974, in part with effect from 1 March 1975 in terms of RSA Proc. R.32/1975 ([RSA GG 4586](#)), issued in terms of section 52(2) of Act 94 of 1974, and in part on dates otherwise specified in the Act; see annotations to individual sections

**Magistrate's Courts Amendment Act 63 of 1976 (RSA)** ([RSA GG 5120](#))  
brought into force on 1 January 1979 by RSA Proc. R.286/1978 ([RSA GG 6208](#))

**Criminal Procedure Act 51 of 1977 (RSA)** ([RSA GG 5532](#))  
brought into force on 22 July 1977 by RSA Proc. R.148/1977 ([RSA GG 5654](#))

**Lower Courts Amendment Act 91 of 1977 (RSA)** ([RSA GG 5621](#))  
brought into force on 22 July 1977 by RSA Proc. R.147/1977 ([RSA GG 5654](#))

**Native Laws Amendment Proclamation, AG 3 of 1979** ([OG 3898](#))  
deemed to have come into force in relevant part on 1 August 1978 (section 5 of AG 3 of 1979)

**Magistrates' Courts Amendment Act 14 of 1981** ([OG 4565](#))  
brought into force on 1 January 1982 by AG Proc. 33/1981 ([OG 4577](#))

**Magistrates' Courts Amendment Act 11 of 1985** ([OG 5108](#))  
came into force on date of publication: 9 October 1985

**Appeals Amendment Act 29 of 1985** ([OG 5149](#))  
brought into force on 1 April 1986 by AG 19/1986 ([OG 5182](#))

**Magistrates' Courts Amendment Act 9 of 1990** ([GG 43](#))  
came into force on date of publication: 9 July 1990

**Attorneys Amendment Act 17 of 1991** ([GG 314](#))  
deemed to have come into force in relevant part  
on 29 September 1989 (section 42(2) of Act 17 of 1991);  
subsequently repealed by the Legal Practitioners Act 15 of 1995

**Married Persons' Equality Act 1 of 1996** ([GG 1316](#))

**Magistrates' Courts Act 32 of 1944 (SA)**

brought into force on 15 July 1996 by GN 154/1996 (GG 1340)  
**Magistrates' Courts Amendment Act 9 of 1997** (GG 1696)  
 brought into force on 3 November 1997 by GN 220/1997 (GG 1722)  
**Magistrates' Courts Amendment Act 1 of 1999** (GG 2058)  
 came into force on date of publication: 9 March 1999  
**Magistrates Act 3 of 2003** (GG 2996)  
 brought into force in relevant part on 30 June 2003 by GN 125/2003 (GG 3001)  
**Magistrates' Courts Amendment Act 6 of 2009** (GG 4308)  
 came into force on date of publication: 30 July 2009

Amendments to the Act were applied to Rehoboth insofar as they related to matters which fell under the Legislative Authority of Rehoboth by the Magistrates' Courts Amendment Act 5 of 1982 (Rehoboth) (*Official Gazette 79 of Rehoboth*, dated 7 October 1983):

"1. (1) Any amendment of the Magistrates' Courts Act, 1944 (Act 32 of 1944), in so far as that amendment relates to any matter in respect of which the Legislative Authority of Rehoboth is empowered to make laws and which was made for or also for the territory of South West Africa excluding Rehoboth after the commencement of the Rehoboth Self-Government Act, 1976 (Act 56 of 1976), shall, subject to the provisions of subsection (2), also apply in Rehoboth.

(2) For the purposes of sections 13 and 15 of the last-mentioned Act subsection (1) of this section shall be deemed to have been in operation immediately prior to the date on which a government for Rehoboth came into being in terms of section 11 (1) of that Act."

***Mostert v The Minister of Justice* 2002 NR 76 (HC), 2003 NR 11 (SC) declared sections 9 and 10 (on appointment and qualifications of judicial officers) unconstitutional and gave Parliament a deadline of 30 June 2003 to correct the defect; both sections were accordingly deleted by Act 3 of 2003.**

***Julius v Commanding Officer, Windhoek Prison & Others; Nel v Commanding Officer, Windhoek Prison & Others* 1996 NR 390 (HC) found several provisions on imprisonment for civil debt unconstitutional: sections 65F, 65G, 65H and 65L and parts of sections 65A, 65K and 65J; the Act amended accordingly by Act 1 of 1999.**

***Hiskia & Another v Body Corporate of Urban Space & Others* 2018 (4) NR 1067 (HC) declared section 66(1)(a) of the Act to be unconstitutional insofar as it permits the sale in execution of immovable property without judicial oversight. The Court ruled that this provision would remain in force until 31 August 2019 to give Parliament an opportunity to correct its defects, but no legislative action was taken before that deadline.**

***Ex Parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of State* 1991 NR 178 (SC) found section 92(1) on whipping unconstitutional.**

## ACT

**To consolidate and amend the law relating to Magistrates' Courts.**

*(Signed by the Officer Administering the Government in Afrikaans)  
 (Assented to 61th May, 1944)*

[The date of assent is obviously incorrect.]

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*Part I:* Courts (Chapters I to V; sections 2 to 25).

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BE IT ENACTED by the King's Most Excellent Majesty, the Senate and the House of Assembly of the Union of South Africa, as follows:-

**Definitions**

1. In this Act, except where the context otherwise indicates -

“court” means a magistrate’s court;

“court of appeal” means the Supreme Court of South West Africa;

**[definition of “court of appeal” amended by Act 29 of 1985]**

“judgment”, in civil cases, includes a decree, a rule and an order;

“judicial officer” means a magistrate appointed under the Magistrates Act, 2003;

**[definition of “judicial officer” amended by Act 3 of 2003]**

**[definition of “magistrate” deleted by Act 3 of 2003]**

“Minister” means the Minister of Justice;

**[definition of “Minister” substituted by Act 94 of 1974, amended by AG 3 of 1979 and substituted by Act 9 of 1990]**

“offence” means an act or omission punishable by law;

“practitioner” means an advocate, an attorney, an articled clerk such as is referred to in section 21 or an agent such as is referred to in section 22;

“province” includes the territory;

“Republic” includes the territory;

“territory” means the territory of South-West Africa;

“to record” means to take down in writing or in shorthand or to record by mechanical means, and “recorded” has a corresponding meaning;

“the district”, if used in relation to any court, means the district, sub-district, or area for which such court is established;

“the rules” means the rules made under section 25;

“this Act” includes the rules.

[section 1 amended by Act 42 of 1964, Act 40 of 1952 and Act 15 of 1969, and substituted by Act 53 of 1970]

## PART I – COURTS

### CHAPTER I

#### ESTABLISHMENT AND NATURE OF COURTS

#### Minister's powers relative to districts and courts

2. (1) The Minister may, by notice in the *Gazette* -
  - (a) create districts, define the local limits of each district, which may consist of various non-contiguous areas, and declare the name by which any district shall be known;
  - (aA) create district divisions consisting of a number of districts or portions of districts, and declare the name by which any district division shall be known;

[paragraph (aA) inserted by Act 11 of 1985]

- (b) create regional divisions consisting of a number of districts, or of a district together with one or more sub-districts, and declare the name by which any regional division shall be known;
- (c) increase or decrease the local limits of any district;
- (cA) increase or decrease the limits of any district division;

[paragraph (cA) inserted by Act 11 of 1985]

- (d) increase or decrease the limits of any regional division;
- (e) for all purposes or for such purposes as he may declare, annex any district or any portion thereof to another district;
- (f) establish a court for any district;
- (fA) establish a court for a district division;

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**[paragraph (fA) inserted by Act 11 of 1985]**

- (g) establish a court for any regional division for the purpose of the trial of persons accused of committing any offence, which shall have increased jurisdiction as hereinafter provided;
- (h) appoint one or more places within each district for the holding of a court for such district, and may by like notice prescribe the local limits of an area in a district, which area may include any portion of an adjoining district, and declare the name by which such area shall be known, and appoint one or more places in such area for the holding of a court for such district; of which places, if more than one is appointed, one shall be specified as the seat of magistracy;
- (hA) appoint one or more places within each district division for the holding of a court for such district division;

**[paragraph (hA) inserted by Act 11 of 1985]**

- (i) appoint one or more places in each regional division for the holding of a court for such regional division;
- (j) within any district appoint places other than the seat of magistracy for the holding of periodical courts, and prescribe the local limits within which such courts shall have jurisdiction, and include within those limits any portion of an adjoining district;
- (k) detach a portion of a district or portions of two or more adjoining districts as a sub-district to form the area of jurisdiction of a detached court, and declare the name by which such sub-district shall be known, and appoint the places where such detached court is to be held;
- (l) withdraw or vary any notice under this section and abolish any regional division, district division, district, sub-district or other area of jurisdiction and the court thereof.

**[paragraph (l) substituted by Act 11 of 1985]**

- (2) Notwithstanding anything to the contrary in this Act contained -
  - (a) the Minister of Justice, after consultation with the Minister of Plural Relations and Development, may under subsection (1) -
    - (i) include as part of an existing district administered under the control of the Minister of Justice, an area which prior to its being so included forms part of a district administered under the control of the Minister of Plural Relations and Development;
    - (ii) create a district which consists of or includes an area which prior to the creation of such district forms part of a district administered under the control of the Minister of Plural Relations and Development;
    - (iii) include as part of an existing regional division administered under the control of the Minister of Justice, a district or sub-district administered under the control of the Minister of Plural Relations and Development;

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- (iv) create a regional division which includes a district or sub-district administered under the control of the Minister of Plural Relations and Development;
- (b) the Minister of Plural Relations and Development, after consultation with the Minister of Justice, may under subsection (1) -
  - (i) include as part of an existing district administered under the control of the Minister of Plural Relations and Development, an area which prior to its being so included forms part of a district administered under the control of the Minister of Justice;
  - (ii) create a district which consists of or includes an area which prior to the creation of such district forms part of a district administered under the control of the Minister of Justice;
  - (iii) include as part of an existing regional division administered under the control of the Minister of Plural Relations and Development, a district or sub-district administered under the control of the Minister of Justice;
  - (iv) create a regional division which includes a district or sub-district administered under the control of the Minister of Justice.

[Section 2 is amended by Act 40 of 1952, Act 68 of 1957 and Act 17 of 1970, substituted by Act 17 of 1970, and amended by Act 102 of 1972 and by AG 3 of 1979. The References to Plural Relations and Development Act 10 of 1979 (OG 4023), which came into force on 1 July 1979 (section 2 of Act 10 of 1979), provides that a reference in any law to the Minister of Plural Relations and Development shall be construed as a reference to the Minister of Co-operation and Development, without technically amending any laws.]

**Existing courts and districts to continue**

3. (1) The courts and districts existing immediately before the commencement of this Act shall be deemed to have been established under this Act.

(2) All references in any other law to magistrates' court or courts of resident magistrate shall be read as referring to courts established under this Act.

(3) No new district, sub-district, district division or regional division shall be created until a report upon the proposal to create such district, sub-district or division has been obtained from the Government Service Commission.

[subsection (3) amended by Act 40 of 1952 and by Act 11 of 1985]

**Nature of the courts and force of process**

4. (1) Every court shall be a court of record.

(2)

[subsection (2) deleted by Act 40 of 1952]

(3) Every process issued out of any court shall be of force throughout the Republic.

[subsection (3) amended by Act 40 of 1952 and by Act 53 of 1970]

(4) Any process issued out of any court may be served or executed by the messenger of the court appointed for the area within which such process is to be served or executed.

[subsection (4) substituted by Act 70 of 1968, with effect from 30 August 1968]

### Courts to be open to the public, with exceptions

5. (1) Except where otherwise provided by law, the proceedings in every court in all criminal cases and the trial of all defended civil actions shall be carried on in open court, and recorded by the presiding officer or other officer appointed to record such proceedings.

(2) The court may in any case, in the interests of good order or public morals, direct that a trial shall be held in camera, or that (with such exceptions as the court may direct) minors or other categories of persons or the public generally shall not be permitted to be present thereat.

[subsection (2) substituted by Act 91 of 1977 and amended by Act 1 of 1996]

(3) If any person present at any civil proceedings in any court disturbs the peace or order of the court, the court may order that person to be removed and detained in custody until the rising of the court, or, if in the opinion of the court peace cannot be otherwise secured, may order the court room to be cleared and the doors thereof to be closed to the public.

[subsection (3) substituted by Act 91 of 1977]

(4)

[subsection (4) amended by Act 40 of 1952 and deleted by Act 91 of 1977]

### Medium to be employed in proceedings

6. (1) Either of the official languages may be used at any stage of the proceedings in any court and the evidence shall be recorded in the language so used.

[subsection (1) amended by Act 40 of 1952]

(2) If, in a criminal case, evidence is given in a language with which the accused is not in the opinion of the court sufficiently conversant, a competent interpreter shall be called by the court in order to translate such evidence into a language with which the accused professes or appears to the court to be sufficiently conversant, irrespective of whether the language in which the evidence is given, is one of the official languages or of whether the representative of the accused is conversant with the language used in the evidence or not.

[The term "official languages" refers to the period before independence when English and Afrikaans were both official languages of "South West Africa". The only official language of Namibia is English (Namibian Constitution, Art 3(1)).]

### Public access to records and custody thereof

7. (1) Subject to the rules the records of the court, other than a record with reference to which a direction has been issued under section 153(2) or 154(1) of the Criminal Procedure Act, 1977, or with reference to which the provisions of section 154(2)(a) or 154(3) of that Act apply, shall be accessible to the public under supervision of the clerk of the court at convenient times and upon payment of the fees prescribed from time to time by the Minister in consultation with the Minister of Finance, and for this purpose and for all other purposes the records of any magistrate's court which has at any time existed within the Republic, shall be deemed to be the records of the court of the district in which the place where such court was held is situated, and such records shall be preserved at the seat of magistracy of that district for such periods as the Secretary for Justice may from time to time determine: Provided that the

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said Secretary may order that the records of a court for any regional division shall be so preserved at such a place or places within that division as he may from time to time determine: Provided further that payment of such fees shall not be required from any person who satisfies the magistrate of the district where the records of the court are preserved, or any judicial officer designated by the said magistrate from among the members of his staff, that he desires access to the records of the court in connection with research for academic purposes.

[Subsection (1) is amended by Act 70 of 1968 to insert the proviso, and by Act 80 of 1971 to insert the further proviso (with a colon accordingly inserted before it). It is also amended by Act 91 of 1977.]

(2) The Secretary for Justice may order that after expiry of the periods referred to in subsection (1) the records so preserved be removed to a central place of custody or be destroyed or otherwise disposed of.

[section 7 amended by Act 93 of 1962 and by Act 80 of 1964, and substituted by Act 8 of 1967]

CHAPTER II

JUDICIAL OFFICERS

**Before whom courts to be held**

8. Every court held under this Act shall be presided over by a judicial officer.

[section 8 substituted by Act 3 of 2003]

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9.

[Section 9 is amended by Act 40 of 1952, Act 50 of 1956, Act 60 of 1958, Act 93 of 1962, Act 19 of 1963 and Act 48 of 1965; substituted by Act 8 of 1967; and amended by Act 17 of 1970, Act 102 of 1972 and Act 29 of 1974 (with the amendments made by Act 29 of 1974 coming into force in part on 1 May 1973 (section 24(2) of Act 94 of 1974) and in part on 1 March 1975 (RSA Proc. R.32/1975). It is also amended by AG 3 of 1979 and by Act 11 of 1985 and substituted by Act 1 of 1999. The case of *Mostert v The Minister of Justice* 2002 NR 76 (HC), 2003 NR 11 (SC) declared section 9 unconstitutional and gave Parliament a deadline of 30 June 2003 to correct the defect; section 9 was accordingly deleted by Act 3 of 2003.]

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9bis.

[Section 9bis is inserted by Act 48 of 1965, amended by Act 17 of 1970, and deleted by Act 3 of 2003.]

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10.

[Section 10 is amended by Act 9 of 1990. The case of *Mostert v The Minister of Justice* 2003 NR 11 (SC) declared section 10 unconstitutional and gave Parliament a deadline of 30 June 2003 to correct the defect; section 10 was accordingly deleted by Act 3 of 2003.]

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11.

[section 11 deleted by Act 3 of 2003]

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12.

[Section 12 is amended by Act 40 of 1952, Act 94 of 1974 (with effect from 1 March 1975), Act 11 of 1985 and Act 1 of 1999, and deleted by Act 3 of 2003.]

### CHAPTER III

#### OFFICERS OF THE COURT

##### Clerk of the court

13. (1) There shall be appointed for every court by the magistrate of the district in which such court is situated so many clerks of the court and assistant clerks of the court as may be necessary.

[subsection (1) substituted by Act 91 of 1977]

(2) A refusal by the clerk of the court to do any act which he is by any law empowered to do shall be subject to review by the court on application either *ex parte* or on notice, as the circumstances may require.

##### Messengers of the court

14. (1) (a) The Minister may appoint for every court a person or two or more persons as a messenger or messengers of such court subject, in the case of any such person who is not an officer of the public service, to such conditions, including the payment of remuneration and allowances, as the Minister may determine.

(b) The Minister may in a particular case or generally and subject to such directions as he may deem fit, delegate the power conferred upon him by paragraph (a) to appoint a messenger or messengers, to the Secretary or a deputy-secretary of his department, or, in respect of any court of a district, sub-district or regional division situated wholly or partly in the Transkei as defined in section 2 of the Transkei Constitution Act, 1963 (Act No. 48 of 1963), or in an area for which a legislative council has been established under the Development of Self-government for Native Nations in South-West Africa Act, 1968 (Act No. 54 of 1968), or for which a legislative assembly has been established under the Bantu Homelands Constitution Act, 1971 (Act No. 21 of 1971), to any officer of his department who holds the office of secretary or director of the department of justice of the Transkei as so defined or of the area in question, as the case may be.

[Subsection (1) is substituted by Act 40 of 1952, with effect from 2 July 1945, and substituted by Act 70 of 1968, with effect from 30 August 1968. Act 70 of 1968 provides the following transitional provision in section 28(2): "Any appointment made under section 14 (1) of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), prior to its substitution by subsection (1) of this section, shall be deemed to have been made under the said section 14(1) as so substituted." Subsection (1) is also amended by Act 29 of 1974.

In South Africa, section 17 of the Second Bantu Laws Amendment Act 102 of 1978 (RSA) (RSA GG 6095) – which was brought into force on 1 August 1978 by RSA Proclamation R.198/1978 – provided that "in any law or document", "Black states" should be substituted for "Bantu Homelands". No part of this law was made expressly applicable to South West Africa, and the law does not



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mention the Magistrates' Courts Act 32 of 1944. As a point of comparison, portions of the Bantu Laws Amendment Act 42 of 1964 (RSA) (RSA GG 801) – which was brought into force on 1 January 1965 by RSA Proc. 339/1964 (RSA GG 967) and which made similar global amendments of terminology – were made expressly applicable “in connection with any law in force in the territory of South-West Africa”. Therefore, it has been assumed that Act 102 of 1978 applied only to South African laws which had at the time of its enactment not been transferred to South West Africa.

AG 3 of 1979 provides that “there is hereby substituted for the word ‘Bantu’ wherever it occurs in any law as a reference to a person or persons, the word ‘Black’ or ‘Blacks’, as the context in question may require”. It is not clear if this directive would apply to the name of a law, and so the name “Bantu Homelands Constitution Act” has not been altered here. If AG 3 of 1979 did have the effect of altering the reference to the name of the Act to the “Black Homelands Constitution Act”, then it must be noted that AG 3 of 1979 also amended section 3A(1) of the Development of Self-government for Native Nations in South-West Africa Act 56 of 1954 to state “Any reference in any law in force in the territory, including the Eastern Caprivi Zipfel, or in any document, relating to any matter in such territory, to a Black, being a reference to a person, shall be construed as a reference to a native, and any word or expression in any such law or document connected with a Black shall be construed accordingly.”

The Development of Self-government for Native Nations in South-West Africa Act 54 of 1968 appears to remain technically in force in Namibia, although it is obviously obsolete.

None of the laws cited in paragraph (b) have any relevance to independent Namibia.]

(1A) A messenger appointed under subsection (1) or deemed to have been appointed thereunder, shall perform the duties and exercise the powers of a messenger only within the area of jurisdiction of the court for which he has been so appointed or is deemed to have been so appointed or, if the Minister or any person authorized thereto by him so directs, within the area determined by the Minister or such person, as the case may be.

[subsection (1A) inserted by Act 70 of 1968, with effect from 30 August 1968]

- (2) (a) Whenever the Minister has appointed an officer of the public service as a messenger of any court, he may appoint so many officers of the said service as deputy-messengers of that court as he may deem fit.
- (b) A messenger of any court who is not an officer of the public service may, with the prior approval of the magistrate of such court, appoint one or more deputy-messengers for whom he shall be responsible.

[subsection (2) amended by Act 70 of 1968, with effect from 30 August 1968]

(3) All fees payable to a messenger who is an officer of the public service, shall be paid into the Consolidated Revenue Fund.

(4) The State shall be liable for any loss or damage resulting from any act performed by a messenger who is an officer of the public service, within the scope of his employment as messenger, or by any deputy to such a messenger or from any neglect of duty of such a messenger or deputy-messenger, if such messenger would himself have been liable for such loss or damage had he not been an officer of such service.

(5) No person shall be appointed a messenger or deputy-messenger who is an attorney practising in the district, or who is an agent practising in the court, or is a clerk or employee of any such attorney or agent.

(6) Whenever in any matter objection is made to the service or execution of process by a messenger or his deputy by reason of the interest of such messenger or deputy in such matter or of the relation of such messenger or deputy to a party to such matter or of any other good cause of challenge, or whenever, by reason of the illness or absence of a messenger, or for any

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other good and sufficient reason, it is necessary to appoint an acting messenger, the magistrate may appoint a person so to act.

**[subsection (6) substituted by Act 40 of 1952, with effect from 2 July 1945]**

(7) A messenger receiving any process for service or execution from a practitioner or plaintiff by whom there is due and payable to the messenger any sum of money in respect of services performed more than three months previously in the execution of any duty of his office, and which notwithstanding request has not been paid, may refer such process to the magistrate of the court out of which the process was issued with particulars of the sum due and payable by the practitioner or plaintiff; and the magistrate may, if he is satisfied that a sum is due and payable by the practitioner or plaintiff to the messenger as aforesaid which notwithstanding request has not been paid, by writing under his hand authorize the messenger to refuse to serve or execute such process until the sum due and payable to the messenger has been paid.

**[subsection (7) amended by Act 40 of 1952]**

(8) A magistrate granting any such authority shall forthwith transmit a copy thereof to the practitioner or plaintiff concerned and a messenger receiving any such authority shall forthwith return to the practitioner or plaintiff the process to which such authority refers with an intimation of his refusal to serve or execute the same and of the grounds for such refusal.

**[subsection (8) amended by Act 40 of 1952]**

(9) The provisions of subsections (1) to (4) shall not affect a messenger or deputy-messenger holding office as such in the Republic, excluding the territory, on the thirteenth day of May, 1935, whose rights and obligations shall be governed by the law applicable thereto on that date.

**[subsection (9) substituted by Act 53 of 1970]**

### **Service of process by the police**

15. (1) (a) Whenever process of the court in a civil case is to be served or executed within any area for which no messenger has been appointed, and whenever process of any court in a criminal case is to be served, a member of the police force shall be as qualified to serve or execute all such process and all other documents in such a case as if he had been duly appointed messenger.

(b) The fees payable in respect of or in connection with any such service to a messenger shall in any such case be chargeable but shall be paid into the Consolidated Revenue Fund.

**[subsection (1) amended by Act 40 of 1952 and substituted by Act 70 of 1968, with effect from 30 August 1968]**

(2) Whenever under any law a public body has the right to prosecute privately in respect of any offence or whenever under any law any fine imposed on conviction in respect of any offence is to be paid into the revenue of a public body, the process of the court and all other documents in the case in which prosecution takes place for such offence, shall be served either by a person duly authorized in writing by such public body or with the consent of the Minister by a member of the police force. If the service is made by a member of the police force, fees in accordance with the scale set out in the rules shall be paid by the public body or such compounded amount in respect of all such process and other documents in any year as may be agreed between the said public body and the Minister. Such fees or such amount shall be paid into the Consolidated Revenue Fund.

[subsection (2) amended by Act 40 of 1952]

(3) An officer in the service of a province of a class defined by the administrator of that province by notice in the *Official Gazette* of the province concerned, shall be competent to serve any process of the court or any other document in a case in which a prosecution takes place for an offence in terms of any law of that province as if he had been appointed as a deputy messenger of the court.

[subsection (3) amended by Act 19 of 1963]

(4) An officer or employee in the service of the State of a class defined by the Minister by notice in the *Gazette*, shall be competent to serve any process of the court or any other document in a case in which a prosecution takes place for an offence in terms of a provision of any law specified by the Minister in such notice, as if he had been appointed as a deputy messenger of the court.

[subsection (4) inserted by Act 94 of 1974]

#### Messengers' duties respecting detention of persons by order of court

16. The messenger shall receive and cause to be lodged in a prison all persons arrested by such messenger or committed to his custody.

[section 16 amended by Act 17 of 1969]

#### Messenger's return to be evidence

17. The return of a messenger or of any person authorized to perform any of the functions of a messenger to any civil process of the court, shall be *prima facie* evidence of the matters therein stated.

[section 17 substituted by Act 91 of 1977]

#### Suspension of messenger for misconduct

18. A messenger who is alleged to have been negligent or dilatory in the service or execution of process, or wilfully to have demanded payment of more than his proper fees or expenses, or to have made a false return, or in any other manner to have misconducted himself in connection with his duties may, pending investigation, be suspended from office and profit by the magistrate, who may appoint a person to act in his place during the period of suspension. The magistrate shall forthwith report to the Minister any action he has taken under this section and the Minister may, after investigation, set aside the order of suspension or may confirm it and may also dismiss from his office the messenger who has been so suspended.

#### Officers appointed previously to remain in office

19. Every officer of the court holding office immediately prior to the commencement of this Act shall be deemed to be duly appointed under this Act, and shall be invested with power, duties and authority accordingly.

### CHAPTER IV

### PRACTITIONERS

#### Advocates and attorneys

20. An advocate or attorney of any division of the Supreme Court may appear in any proceeding in any court.

### Candidate attorneys

21. A candidate attorney as defined in section 1 of the Attorneys Act, 1979 (Act 53 of 1979), may, subject to the provisions of that Act, appear in stead and on behalf of the attorney to whom he or she has been articled in any proceedings in any court.

[Section 21 is amended by Act 50 of 1956 and by Act 17 of 1991.  
The Attorneys' Act 53 of 1979 has been replaced by the Legal Practitioners Act 15 of 1995.]

### Agents

22. (1) A person who, immediately prior to the commencement of this Act, was entitled to practise as an agent in any court may practise in any court in which he was so entitled, and shall be entitled to be enrolled and to practise in any other court in which he would have been entitled to be enrolled if this Act had not been passed.

(2) The Supreme Court shall possess in respect of any such agent the same powers as it possesses in respect of attorneys of the Supreme Court.

(3) The law society of any Province may bring to the notice of the Supreme Court any facts regarding the conduct of any such agent which, in the opinion of the said Society, ought to be brought to the notice of the Supreme Court, in the same manner as if such agent were an attorney of the Supreme Court.

### Misconduct of practitioners

23. Whenever in the opinion of a judicial officer a practitioner has been guilty of misconduct or dishonourable practice he shall report the fact -

- (a) in the case of an advocate, to the branch of the Society of Advocates or Bar Council at the centre in which such advocate practises; and
- (b) in the case of all other practitioners, to the law society concerned.

## CHAPTER V

### RULES OF COURT

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24.

[section 24 deleted by Act 53 of 1970]

### Rules Board

25. (1) There is a Rules Board consisting of -

- (a) the Chief Magistrate as defined in the Magistrates Act, 2003 (Act No. 3 of 2003), who is the chairperson and has a casting as well as a deliberative vote;

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- (b) a staff member nominated by the Minister, on account of his or her knowledge of the law, for a period of two years; and
- (c) a legal practitioner nominated by the Law Society of Namibia for a period of two years.

[subsection (1) substituted by Act 11 of 1985 and by Act 6 of 2009]

- (2) Two members of the board shall constitute a quorum.

[subsection (2) substituted by Act 11 of 1985]

- (3) The Board shall have the power -
  - (a) to make, alter or repeal rules regulating the following matters in respect of magistrates' courts -
    - (i) practice and procedure, including procedure in appealing;
    - (i)bis the compulsory examination by one or more duly registered medical practitioners of any party to proceedings in which damages or compensation in respect of alleged bodily injury is claimed and whose state of health is relevant to the determination of such damages or compensation, and the manner, time, place and responsibility for the cost of the examination, and the making available to the opposing party of any documentary report on the examination;

[The word "practitioners" in the phrase "duly registered medical practitioners" is misspelt in the *Government Gazette*, as reproduced above.]

- (ii) fees and costs;
- (iii) appointment of assessors;
- (iv) the giving of security;
- (v) the duties of officers of the court; and
- (vi) such other matters as are necessary or useful for carrying out the purposes of this Act or the Criminal Procedure Act, 1955 (Act No. 56 of 1955), in relation to magistrates' courts ; and

[The Criminal Procedure Act 56 of 1955 was never applicable to South West Africa. The South West African equivalent was the Criminal Procedure and Evidence Proclamation 30 of 1935, which was replaced by the Criminal Procedure Ordinance 34 of 1963, which, with the exception of sections 300(3) and 370, has been replaced by the Criminal Procedure Act 51 of 1977.]

- (b)

[subsection (3) amended by Act 50 of 1956, Act 93 of 1963 and Act 53 of 1970]

- (4) Different rules may be made as to different classes of cases.
- (5) No new rule or any alteration or rescission of a rule shall take effect unless it has been confirmed by the Cabinet and published in the *Official Gazette* at least one month before the day upon which it is expressed to take effect.

[subsection (5) substituted by Act 101 of 1969 and by Act 11 of 1985]

(6) Every new rule and every alteration or rescission of a rule shall, within fourteen days after it has taken effect, be laid upon the Tables of both Houses of Parliament, if Parliament be then in session, or if it be not then in session, within fourteen days after the commencement of its next ensuing session.

PART II – CIVIL MATTERS

CHAPTER VI

CIVIL JURISDICTION

**Area of jurisdiction**

26. (1) Except where it is otherwise by law provided, the area of jurisdiction of a court shall be the district, sub-district or area for which such court is established.

(2) A court established for a district shall have no jurisdiction in a sub-district or in an area referred to in section 2(h).

(3) Nothing in subsection (2) shall affect proceedings pending in the court of a district at the time of the creation of a sub-district or an area referred to in section 2(h).

[section 26 substituted by Act 53 of 1970]

**Jurisdiction of periodical courts**

27. The jurisdiction of a periodical court within the area for which it has been appointed shall be subject to the following provisions -

- (a) The court of a district within which the said area or any part thereof is situate shall retain concurrent jurisdiction with the periodical court within such portions of such area as shall be situate within such district; and
- (b) no person shall, without his own consent, be liable to appear as a party before any periodical court to answer any claim unless he resides nearer to the place where the periodical court is held than to the seat of magistracy of the district.

**Jurisdiction in respect of persons**

28. (1) Saving any other jurisdiction assigned to a court by this Act or by any other law, the persons in respect of whom the court shall have jurisdiction shall be the following and no other - -

- (a) any person who resides, carries on business or is employed within the district;
- (b) any partnership which has business premises situated or any member whereof resides within the district;
- (c) any person whatever, in respect of any proceedings incidental to any action or proceeding instituted in the court by such person himself;

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- (d) any person, whether or not he resides, carries on business or is employed within the district, if the cause of action arose wholly within the district;
- (e) any party to interpleader proceedings, if -
  - (i) the execution creditor and every claimant to the subject matter of the proceedings reside, carry on business, or are employed within the district; or
  - (ii) the subject matter of the proceedings has been attached by process of the court; or
  - (iii) such proceedings are taken under sub-section (2) of section *sixty-nine* and the person therein referred to as the 'third party' resides, carries on business, or is employed within the district; or
  - (iv) all the parties consent to the jurisdiction of the court.
- (f) any defendant (whether in convention or reconvention) who appears and takes no objection to the jurisdiction of the court;
- (g) any person who owns immovable property within the district in actions in respect of such property or in respect of mortgage bonds thereon.

**[subsection (1) amended by Act 40 of 1952, with the amendment resulting in a double dash after the introductory phrase]**

- (2) "Person" and "defendant" in this section include the State.

**Jurisdiction in respect of causes of action**

**29.** (1) Subject to the provisions of this Act, the court, in respect of causes of action, shall have jurisdiction in -

- (a) actions in which is claimed the delivery or transfer of any property, movable or immovable, not exceeding N\$25 000 in value;
- (b) actions of ejectment against the occupier of any premises or land within the district: Provided that, where the right of occupation of any such premises or land is in dispute between the parties, such right does not exceed N\$25 000 in clear value to the occupier;
- (c) actions for the determination of a right of way, notwithstanding the provisions of section 46;
- (d) actions on or arising out of a liquid document or a mortgage bond, where the claim does not exceed N\$100 000;
- (e) actions on or arising out of any credit agreement as defined in section 1 of the Credit Agreements Act, 1980 (Act No. 75 of 1980), where the claim or the value of the property in dispute does not exceed N\$100 000;
- (f) actions other than those already mentioned in this subsection, where the claim or the value of the matter in dispute does not exceed N\$25 000.

- (2) In subsection (1) "action" includes a claim in reconvention.

[Section 29 is amended by Act 40 of 1952, Act 19 of 1963 and Act 17 of 1970; substituted by Act 94 of 1974 (with effect from 1 March); and amended by Act 11 of 1985 and by Act 9 of 1997.]

### Arrests and interdicts

**30.** (1) Subject to the limits of jurisdiction prescribed by this Act, the court may grant against persons and things orders for arrest *tanquam suspectus de fuga*, attachments, interdicts and *mandamenten van spolie*.

(2) Confirmation by the court of any such attachment or interdict in the judgment in the action shall operate as an extension of the attachment or interdict until execution or further order of the court.

- (3) No order of personal arrest *tanquam suspectus de fuga* shall be made unless -
- (a) the cause of action appears to amount, exclusive of costs, to at least forty rand;
  - (b) the applicant appears to have no security for the debt or only security falling short of the amount of the debt by at least forty rand; and
  - (c) it appears that the respondent is about to remove from the Republic.

[subsection (3) amended by Act 19 of 1963 and by Act 17 of 1970]

### Attachment to found or confirm jurisdiction

**30bis.** The court may order attachment of person or property to found or confirm jurisdiction against any person who does not reside in the Republic, in respect of an action within its jurisdiction, where the claim or the value of the matter in dispute amounts to at least forty rand, exclusive of any costs in respect of the recovery thereof, and may grant an order allowing service of any process in such action to be effected in such manner as may be stated in such order.

[section 30bis inserted by Act 80 of 1964 (with effect from 30 August 1968)]

### Automatic rent interdict

**31.** (1) When a summons is issued in which is claimed the rent of any premises, the plaintiff may include in such summons a notice prohibiting any person from removing any of the furniture or other effects thereon which are subject to the plaintiff's hypothec for rent until an order relative thereto has been made by the court.

(2) The messenger shall, if required by the plaintiff and at such plaintiff's expense, make an inventory of such furniture or effects.

(3) Such notice shall operate to interdict any person having knowledge thereof from removing any such furniture or effects.

(4) Any person affected by such notice may apply to the court to have the same set aside.

### Attachment of property in security of rent

**32.** (1) Upon an affidavit by or on behalf of the landlord of any premises situate within the district, that an amount of rent not exceeding the jurisdiction of the court is due and



in arrear in regard to the said premises, and that the said rent has been demanded in writing for the space of seven days and upwards, or, if not so demanded, that the deponent believes that the tenant is about to remove the movable property upon the said premises, in order to avoid the payment of such rent, and upon security being given to the satisfaction of the clerk to the court to pay all damages, costs and charges which the tenant of such premises, or any other person, may sustain or incur by reason of the attachment hereinafter mentioned, if the said attachment be thereafter set aside, the court may, upon application, issue an order to the messenger requiring him to attach so much of the movable property upon the premises in question and subject to the landlord's hypothec for rent as may be sufficient to satisfy the amount of such rent, together with the costs of such application and of any action for the said rent.

(2) Any person affected by such order may apply to have it set aside.

(3) A respondent whose property has been so attached may by notice in writing to the clerk of the court admit that such property is subject to the landlord's hypothec for an amount to be specified in such notice and may consent that such property (other than property protected from seizure by the provisions of section *sixty-seven*) be sold in satisfaction of such amount and costs; and such notice shall have the same effect as a consent to judgment for the amount specified.

### ***Curator ad Litem***

[The word "*litem*" should not be capitalised.]

33. The court may appoint a *curator ad litem* in any case in which such a curator is required or allowed by law for a party to any proceedings brought or to be brought before the court.

### **Assessors**

34. In any action the court may, upon the application of either party, summon to its assistance one or two persons of skill and experience in the matter to which the action relates who may be willing to sit and act as assessors in an advisory capacity.

### **Transfer from one court to another**

35. (1) An action or proceeding may, with the consent of all the parties thereto, or upon the application of any party thereto, and upon its being made to appear that the trial of such action or proceeding in the court wherein summons has been issued may result in undue expense or inconvenience to such party, be transferred by the court to any other court.

(2) An interpleader summons, if issued in the court of the district in which the property was attached, may, at the discretion of the court, be remitted for trial to the court in which the judgment was given.

(3) An action commenced in a periodical court may, at the discretion of the court, be transferred to the court of the district, or (subject to the provisions of paragraph (b) of section *twenty-seven*) *vice versa*.

### **What judgments may be rescinded**

36. The court may, upon application by any person affected thereby, or, in cases falling under paragraph (c), *suo motu* -

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- (a) rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted;
- (b) rescind or vary any judgment granted by it which was void *ab origine* or was obtained by fraud or by mistake common to the parties;
- (c) correct patent errors in any judgment in respect of which no appeal is pending;
- (d) rescind or vary any judgment in respect of which no appeal lies.

**Incidental jurisdiction**

**37.** (1) In actions wherein the sum claimed, being within the jurisdiction, is the balance of an account, the court may enquire into and take evidence if necessary upon the whole account, even though such account contains items and transactions exceeding the amount of the jurisdiction.

(2) Where the amount claimed or other relief sought is within the jurisdiction, such jurisdiction shall not be ousted merely because it is necessary for the court, in order to arrive at a decision, to give a finding upon a matter beyond the jurisdiction.

(3) In considering whether a claim is or is not within the jurisdiction, no prayer for interest on the principal sum claimed or for costs or for general or alternative relief shall be taken into account.

**Abandonment of part claim**

**38.** (1) In order to bring a claim within the jurisdiction, a plaintiff may in his summons or at any time thereafter explicitly abandon part of such claim.

(2) If any part of a claim be so abandoned it shall thereby be finally extinguished: Provided that, if the claim be upheld in part only, the abandonment shall be deemed first to take effect upon that part of the claim which is not upheld.

**Deduction of admitted debt**

**39.** In order to bring a claim within the jurisdiction a plaintiff may, in his summons or at any time after the issue thereof, deduct from his claim, whether liquidated or unliquidated, any amount admitted by him to be due by himself to the defendant.

**Splitting of claims disallowed**

**40.** A substantive claim exceeding the jurisdiction may not be split with the object of recovering the same in more than one action if the parties to all such actions would be the same and the point at issue in all such actions would also be the same.

**Joinder of plaintiffs**

**41.** (1) Any number of persons, each of whom has a separate claim against the same defendant, may join as plaintiffs in one action if their right to relief depends upon the determination of some question of law or fact which if separate actions were instituted would arise in each action: Provided that if such joint action be instituted the defendant may apply to court for an order directing that separate trials be held and the court in its discretion may make such order as it deems just and expedient.

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(2) In any joint action instituted as aforesaid judgment may be given for such one or more of the plaintiffs as may be found entitled to relief.

(3) If all the plaintiffs fail in any such action, the court may make such order as to costs as to it may seem just; in particular, it may order that the plaintiffs pay the costs of the defendant jointly and severally, the one paying the other to be absolved, and that if one plaintiff pays more than his *pro rata* share of the costs of the defendant, he shall be entitled to recover from the other plaintiffs their *pro rata* share of such excess.

(4) If some of the plaintiffs succeed and others fail, the court may make such order as to costs as it may deem just.

**Joinder of defendants**

**42.** (1) Several defendants may be sued in the alternative or both in the alternative and jointly in one action, whenever it is alleged by the plaintiff that he has suffered damages and that it is uncertain which of the defendants is in law responsible for such damages: Provided that on the application of any of the defendants the court may in its discretion order that separate trials be held, or make such other order as it may deem just and expedient.

(2) If judgment is given in favour of any defendant or if any defendant is absolved from the instance, the court may make such order as to costs as to it may seem just; in particular, it may order -

- (a) the plaintiff to pay such defendant's costs; or
- (b) the unsuccessful defendants to pay the costs of the successful defendant jointly and severally, the one paying the other to be absolved, and 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 their *pro rata* share of such excess, and the court may further order that if the successful defendant is unable to recover the whole or any part of his costs from the unsuccessful defendants, he shall be entitled to recover from the plaintiff such part of his costs as he cannot recover from the unsuccessful defendants.

(3) If judgment is given in favour of the plaintiff against more than one of the defendants the court may make such order as to costs as to it may seem just; in particular it may order those defendants against whom it gives judgment to pay the plaintiff's costs jointly and severally, the one paying the other to be absolved, and that if one of the unsuccessful defendants pays more than his *pro rata* share of the costs of the plaintiff he shall be entitled to recover from the other unsuccessful defendants their *pro rata* share of such excess.

**Jurisdiction cumulative**

**43.** (1) If two or more claims, each based upon a different cause of action, are combined in one summons, the court shall have the same jurisdiction to decide each such claim as it would have had if each claim had formed the sole subject of a separate action.

(2) If a claim for the confirmation of an interdict or arrest granted *pendente lite* be joined in the same summons with a claim for relief of any other character, the court shall have the same jurisdiction to decide each such claim as it would have had if each claim had formed the sole subject of a separate action, even though all the claims arise from the same cause of action.

**Application of sections 34, 35 and 37 to 43 inclusive to claims in reconvention**

44. In sections *thirty-four*, *thirty-five* and *thirty-seven* to *forty-three* inclusive, “action”, “claim” and “summons” include “claim in reconvention”, and “plaintiff” and “defendant” include “plaintiff in reconvention” and “defendant in reconvention” respectively.

#### Jurisdiction by consent of parties

45. (1) Subject to the provisions of section *forty-six*, the court shall have jurisdiction to determine any action or proceeding otherwise beyond the jurisdiction, if the parties consent in writing thereto: Provided that no court other than a court having jurisdiction under section *twenty-eight* shall, except where such consent is given specifically with reference to particular proceedings already instituted or about to be instituted in such court, have jurisdiction in any such matter.

(2) Any provision in a contract existing at the commencement of the Act or thereafter entered into, whereby a person undertakes that, when proceedings have been or are about to be instituted, he will give such consent to jurisdiction as is contemplated in the proviso to subsection (1), shall be null and void.

#### Matters beyond the jurisdiction

46. (1) Subject to the provisions of the Indian Immigration Law, No. 25 of 1891 of Natal, the court shall have no jurisdiction in matters in which the dissolution of a marriage or separation from bed and board or of goods of married persons is sought.

- (2) A court shall have no jurisdiction in matters -
- (a) in which the validity or interpretation of a will or other testamentary document is in question;
  - (b) in which the status of a person in respect of mental capacity is sought to be affected;
  - (c) in which is sought specific performance without an alternative of payment of damages, except in -
    - (i) the rendering of an account in respect of which the claim does not exceed N\$25 000;
    - (ii) the delivery or transfer of property, movable or immovable, not exceeding N\$25 000 in value; and
    - (iii) the delivery or transfer of property, movable or immovable, exceeding N\$25 000 in value, where the consent of the parties has been obtained in terms of section 45;
  - (d) in which is sought a decree of perpetual silence.

[Subsection (2) is amended by Act 19 of 1963, Act 94 of 1974 (with effect from 1 March 1975), Act 11 of 1985 and Act 9 of 1997.]

#### Counterclaim exceeding jurisdiction

47. (1) When in answer to a claim within the jurisdiction the defendant sets up a counterclaim exceeding the jurisdiction, the claim shall not on that account be dismissed; but

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the court may, if satisfied that the defendant has *prima facie* a reasonable prospect on his counterclaim of obtaining a judgment in excess of its jurisdiction, stay the action for a reasonable period in order to enable him to institute an action in a competent court. The plaintiff in the magistrate's court may (notwithstanding his action therein) counterclaim in such competent court and in that event all questions as to the costs incurred in the magistrate's court shall be decided by that competent court.

(2) If the period for which such action has been stayed has expired and the defendant has failed to issue and serve a summons in a competent court in relation to the matters and the subject of such counterclaim the magistrate's court shall on application either -

- (a) stay the action for a further reasonable period; or
- (b) dismiss the counterclaim (whether the defendant does or does not reduce such counterclaim to an amount within the jurisdiction of the court).

(3) If the defendant has failed to institute action within such further period or if the action instituted by the defendant be stayed, dismissed, withdrawn, or abandoned, or if the competent court has granted absolution from the instance thereon, the magistrate's court shall, upon application, dismiss the counterclaim and shall proceed to determine the claim.

**Judgment**

**48.** The court may, as a result of the trial of an action, grant -

- (a) judgment for the plaintiff in respect of his claim in so far as he has proved the same;
- (b) judgment for the defendant in respect of his defence in so far as he has proved the same;
- (c) absolution from the instance, if it appears to the court that the evidence does not justify the court in giving judgment for either party;
- (d) such judgment as to costs (including costs as between attorney and client) as may be just;

[paragraph (d) substituted by Act 48 of 1965]

- (e) an order, subject to such conditions as the court thinks fit, against the party in whose favour judgment has been given suspending wholly or in part the taking of further proceedings upon the judgment for a specified period pending arrangements by the other party for the satisfaction of the judgment.

[paragraph (e) substituted by Act 53 of 1970]

**Cession of costs**

**49.** Costs awarded in interlocutory proceedings shall not be ceded without the consent of the court awarding such costs.

**Removal of actions from court to provincial or local division**

**50.** (1) Any action in which the amount of the claim exceeds N\$5 000, exclusive of interest and costs, may, upon application to the court by the defendant, or if there is more than

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one defendant, by any defendant, be removed to the High Court, subject to the following provisions:

- (a) notice of intention to make such application shall be given to the plaintiff, and to other defendants (if any) before the date on which the action is set down for hearing;
- (b) the notice shall state that the applicant objects to the action being tried by the court or any magistrate's court;
- (c) the applicant shall give such security as the court may determine and approve, for payment of the amount claimed and such further amount to be determined by the court not exceeding two hundred rand, for costs already incurred in the action and which may be incurred in the said provincial or local division.

Upon compliance by the applicant with those provisions, all proceedings in the action in the court shall be stayed, and the action and all proceedings therein shall, if the plaintiff so requires, be as to the defendant or defendants, forthwith removed from the court into the provincial or local division aforesaid having jurisdiction. Upon the removal, the summons in the court shall, as to the defendant or defendants, stand as the summons in the division to which the action is removed, the return date thereof being the date of the order of removal in an action other than one founded on a liquid document, and, in an action founded on a liquid document, being such convenient day on which the said division sits for the hearing of provisional sentence cases, as the court may order: Provided that the plaintiff in the action may, instead of requiring the action to be so removed, issue a fresh summons against the defendant or defendants in any competent court and the costs already incurred by the parties to the action shall be costs in the cause.

[subsection (1) amended by Act 19 of 1963 and by Act 9 of 1997]

(2) If the plaintiff is successful in an action so removed to a provincial or local division, he may be awarded costs as between attorney and client.

## CHAPTER VII

### WITNESSES AND EVIDENCE

#### **Modes of procuring attendance of witnesses and penalty for non-attendance**

**51.** (1) Any party to any civil action or other proceeding where the attendance of witnesses is required may procure the attendance of any witness (whether residing or for the time being within the district or not) in the manner in the rules provided.

- (2) (a) If any person, being duly subpoenaed to give evidence or to produce any books, papers or documents in his possession or under his control, which the party requiring his attendance desires to show in evidence, fails, without lawful excuse, to attend or to give evidence or to produce those books, papers or documents according to the subpoena or, unless duly excused, fails to remain in attendance throughout the trial, the court may, upon being satisfied upon oath or by the return of the messenger that such person has been duly subpoenaed and that his reasonable expenses, calculated in accordance with the tariff prescribed under section *fifty-one bis*, have been paid or offered to him, impose upon the said person a fine not exceeding one hundred rand, and in default of payment, imprisonment for a period not exceeding three months, whether or not such person is otherwise subject to the jurisdiction of the court.

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[Paragraph (a) is amended by Act 19 of 1963, substituted by Act 80 of 1964 (with effect from 1 November 1970), and amended by Act 91 of 1977.]

- (b) If any person so subpoenaed fails to appear or, unless duly excused, to remain in attendance throughout the trial the court may also, upon being satisfied as aforesaid and in case no lawful excuse for such failure seems to the court to exist, issue a warrant for his apprehension in order that he may be brought up to give his evidence and to be otherwise dealt with according to law, whether or not such person is otherwise subject to the jurisdiction of the court.
- (c) The court may, on cause shown, remit the whole or any part of any fine or imprisonment which it has imposed under this sub-section.
- (d) The court may order the costs of any postponement or adjournment occasioned by the default of a witness or any portion of such costs to be paid out of any fine imposed upon such witness.

(3) Notwithstanding anything in this section contained, when a subpoena is issued to procure the attendance of a judicial officer to give evidence or to produce any book, paper or document in a criminal case, civil action or other proceeding, if it appears -

- (i) that he is unable to give any evidence or to produce any book, paper or document which would be relevant to any issue in such case, action or proceedings; or
- (ii) that such book, paper or document could properly be produced by some other person; or
- (iii) that the compelling of his attendance would be an abuse of the process of the court,

the court may, after reasonable notice to the party suing out the subpoena, make an order cancelling such subpoena.

[The paragraphs in subsection (3) are numbered with Roman numerals rather than letters; this is inconsistent with other provisions in the Act.]

**Witness fees**

**51bis.** (1) The Minister may in consultation with the Minister of Finance from time to time by notice in the *Gazette* prescribe a tariff of allowances which shall be paid to a witness in civil proceedings or to any person necessarily required to accompany any such witness on account of his youth or infirmity due to old age or any other infirmity.

(2) Such notice may differentiate between persons according to the distances which they have to travel to attend the court to which they are summoned or subpoenaed or according to their professions, callings or occupations or between different classes of persons, and may empower such officers in the service of the State as may be specified therein, in cases where payment of allowances in accordance with the tariffs so prescribed may cause undue hardship, to order payment of allowances in accordance with a higher tariff than the tariff so prescribed.

(3) Notwithstanding anything to the contrary in any law contained, the court may order that no allowances or only a portion of the allowances prescribed shall be paid to any witness.

[section 51bis inserted by Act 80 of 1964]

**Interrogatories**

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**52.** (1) Whenever a witness resides or is in a district other than that wherein the case is being heard, the court may, if it appears to be consistent with the ends of justice, upon the application of either party approve of such interrogatories as either party shall desire to have put to such witness and shall transmit the same, together with any further interrogatories framed by the court, to the court of the district within which such witness resides or is.

(2) The last-mentioned court shall thereupon subpoena such witness to appear and upon his appearance shall take his evidence in manner and form as if he were a witness in a case pending before that court, and shall put to the witness the said interrogatories and such other questions as may seem to it necessary to obtain full and true answers to the interrogatories and shall record the evidence of the witness and shall transmit such record to the court in which such case is pending. The said record shall (subject to all lawful objections) be received as evidence in that case.

(3) Every witness so subpoenaed to appear shall be liable to the like penalties in case of non-attendance or failure to give evidence or to produce books, papers or documents as if he had been subpoenaed to give evidence in the court of the district in which he resides or is.

**Commissions de bene esse**

**53.** (1) The court may in any case which is pending before it, where it may be expedient and consistent with the ends of justice to do so, appoint a person to be a commissioner to take evidence of any witness, whether within the Republic or elsewhere, upon the request of one of the parties to such case and after due notice to the other party.

[subsection (1) amended by Act 53 of 1970]

(2) The person so appointed shall put to such witness such questions as have been transmitted to him on agreement between the parties, or otherwise shall allow the parties to examine such witness, and may himself examine such witness as if the witness were being examined in court, and shall record the evidence or cause it to be recorded, whereupon the evidence recorded shall be read over to the witness and shall be signed by him.

[subsection (2) amended by Act 40 of 1952]

(3) The said record shall (subject to all lawful objections) be received as evidence in the case.

**Pre-trial procedure for formulating issues**

**54.** (1) The court may at any stage in any legal proceedings in its discretion *suo motu* or upon the request in writing of either party direct the parties or their representatives to appear before it in chambers for a conference to consider -

- (a) the simplification of the issues;
- (b) the necessity or desirability of amendments to the pleadings;
- (c) the possibility of obtaining admissions of fact and of documents with a view to avoiding unnecessary proof;
- (d) the limitation of the number of expert witnesses;
- (e) such other matters as may aid in the disposal of the action in the most expeditious and least costly manner.



(2) The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of the parties or their representatives.

(3) Such order shall be binding on the parties unless altered at the trial to prevent manifest injustice.

(4) If a party refuses or neglects to appear at the conference the court may, without derogation from its power to punish for contempt of court, make such order as it considers equitable in the circumstances and upon conclusion of the proceedings may order the party who has so absented himself to pay such costs as in the opinion of the court were incurred as a result of the said absence.

(5) The Court may make such order as to the costs of any proceedings under this section as it deems fit.

## CHAPTER VIII

### RECOVERY OF DEBTS

[Chapter VIII, comprising sections 55-57, is substituted in its entirety by Act 63 of 1976.]

#### Definition

55. In this Chapter, unless the context otherwise indicates -  
“debt” means any liquidated sum of money due.

[section 55 substituted by Act 63 of 1976]

#### Recovery of costs of letter of demand

56. If any person (in this section called the debtor) pays any debt due by him to any other person (in this section called the creditor) after the creditor has caused a registered letter of demand to be sent to the debtor through an attorney demanding payment of the debt, the creditor shall be entitled to recover from the debtor the fees and costs prescribed in the rules for a registered letter of demand: Provided that the amount of such fees and costs was stated in the letter of demand.

[section 56 substituted by Act 63 of 1976]

#### Admission of liability and undertaking to pay debt in instalments or otherwise

57. (1) If any person (in this section called the defendant) has received a letter of demand or has been served with a summons demanding payment of any debt, the defendant may in writing -

- (a) admit liability to the plaintiff for the amount of the debt and costs claimed in the letter of demand or summons or for any other amount;
- (b) offer to pay the amount of the debt and costs for which he admits liability, in instalments or otherwise;

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- (c) undertake on payment of any instalment in terms of his offer to pay the collection fees for which the plaintiff is liable in respect of the recovery of such instalment; and
- (d) agree that in the event of his failure to carry out the terms of his offer the plaintiff shall, without notice to the defendant, be entitled to apply for judgment for the amount of the outstanding balance of the debt for which he admits liability, with costs, and for an order of court for payment of the judgment debt and costs in instalments or otherwise in accordance with his offer,

and if the plaintiff or his attorney accepts the said offer, he shall advise the defendant of such acceptance in writing by registered letter.

(2) If, after having been advised by the plaintiff or his attorney in writing that his offer has been accepted, the defendant fails to carry out the terms of his offer, the clerk of the court shall, upon the written request of the plaintiff or his attorney accompanied by -

- (a) if no summons has been issued, a copy of the letter of demand;
- (b) the defendant's written acknowledgment of debt and offer and a copy of the plaintiff's or his attorney's written acceptance of the offer;
- (c) an affidavit or affirmation by the plaintiff or a certificate by his attorney stating in what respects the defendant has failed to carry out the terms of his offer and, if the defendant has made any payments since the date of the letter of demand or summons, showing how the balance claimed is arrived at -
  - (i) enter judgment in favour of the plaintiff for the amount or the outstanding balance of the amount of the debt for which the defendant has admitted liability, with costs; and

[The word "plaintiff" is misspelt in the *Government Gazette*, as reproduced above.]

- (ii) order the defendant to pay the judgment debt and costs in specified instalments or otherwise in accordance with his offer, and such order shall be deemed to be an order of the court mentioned in section 65A(1).

(3) When the judgment referred to in subsection (2) has been entered and an order made, and if the judgment debtor was not present or represented when the judgment was entered by the clerk of the court and the order made, the judgment creditor or his attorney shall forthwith advise the judgment debtor by registered letter of the terms of the judgment and order and of the consequences of his failure to satisfy them.

(4) Any judgment entered in favour of the plaintiff under subsection (2) shall have the effect of a judgment by default.

[section 57 amended by Act 53 of 1970 and substituted by Act 63 of 1976]

### **Consent to judgment or to judgment and an order for payment of judgment debt in instalments**

**58.** If any person (in this section called the defendant), upon receipt of a letter of demand or service upon him of a summons demanding payment of any debt, consents in writing to judgment in favour of the creditor (in this section called the plaintiff) for the amount of the

debt and the costs claimed in the letter of demand or summons, or for any other amount, the clerk of the court shall, on the written request of the plaintiff or his attorney accompanied by -

- (a) if no summons has been issued, a copy of the letter of demand; and
- (b) the defendant's written consent to judgment,
  - (i) enter judgment in favour of the plaintiff for the amount of the debt and the costs for which the defendant has consented to judgment; and
  - (ii) if it appears from the defendant's written consent to judgment that he has also consented to an order of court for payment in specified instalments or otherwise of the amount of the debt and costs in respect of which he has consented to judgment, order the defendant to pay the judgment debt and costs in specified instalments or otherwise in accordance with his consent, and such order shall be deemed to be an order of the court mentioned in section 65A(1).

(2) The provisions of section 57(3) and (4) shall apply in respect of the judgment and court order referred to in subsection (1) of this section.

[section 58 substituted by Act 63 of 1976]

#### Written request constitutes first document in an action

59. If no summons is issued in an action the written request referred to in sections 57 (2) and 58(1) shall constitute the first document to be filed in the action and shall contain the particulars prescribed in the rules.

[section 59 amended by Act 19 of 1963 and substituted by Act 63 of 1976]

#### Prohibition of recovery of fees or remuneration by certain persons in connection with the collection of debts

60. Unless expressly otherwise provided in this Act or the rules no person other than an attorney or an agent referred to in section 22 shall be entitled to recover from the debtor any fees or remuneration in connection with the collection of any debt.

[section 60 substituted by Act 63 of 1976]

## CHAPTER IX

### EXECUTION

#### Definition

61. In this Chapter -

“emoluments “ includes -

- (i) salary, wages or any other form of remuneration; and
- (ii) any allowances,

whether expressed in money or not; and

“debts “ includes any income from whatever source other than emoluments.

#### **Power to grant or set aside a warrant**

**62.** (1) Any court which has jurisdiction to try an action shall have jurisdiction to issue against any party thereto any form of process in execution of its judgment in such action.

(2) A court (in this sub-section called a second court), other than the court which gave judgment in an action, shall have jurisdiction on good cause shown to stay any warrant of execution or arrest issued by another court against a party who is subject to the jurisdiction of the second court.

(3) Any court may, on good cause shown, stay or set aside any warrant of execution or arrest issued by itself, including an order under section *seventy-two*.

#### **Execution to be issued within three years**

**63.** Execution against property may not be issued upon a judgment after three years from the day on which it was pronounced or on which the last payment in respect thereof was made, except upon an order of the court in which judgment was pronounced or of any court having jurisdiction, in respect of the judgment debtor, on the application and at the expense of the judgment creditor, after due notice to the judgment debtor to show cause why execution should not be issued.

#### **Execution in case of judgment debt ceded**

**64.** Any person who has, either by cession or by operation of law, become entitled to the benefit of a judgment debt may, after notice to the judgment creditor, and the judgment debtor, be substituted on the record for the judgment creditor and may obtain execution in the manner provided for judgment creditors.

#### **Offer by judgment debtor after judgment**

**65.** If at any time after a court has given judgment for the payment of a sum of money and before the issue of a notice under section 65A(1), the debtor makes a written offer to the judgment creditor to pay the judgment debt in specified instalments or otherwise and such offer is accepted by the judgment creditor or his attorney, the clerk of the court shall, at the written request of the judgment creditor or his attorney, accompanied by the offer, order the judgment debtor to pay the judgment debt in specified instalments or otherwise in accordance with his offer, and such order shall be deemed to be an order of the court mentioned in section 65A(1).

[Section 65 is substituted by Act 40 of 1952; amended by Act 14 of 1954, Act 50 of 1956, Act 19 of 1963, Act 70 of 1968 and Act 17 of 1969; and substituted by Act 63 of 1976.]

#### **Notice to judgment debtor if judgment remains unsatisfied**

**65A.** (1) If a court has given judgment for the payment of a sum of money or has ordered the payment in specified instalments or otherwise of such an amount, and such judgment or order has remained unsatisfied for a period of 10 days from the date on which it was given or on which such an amount became payable or from the expiry of the period of suspension ordered in terms of section 48(e), as the case may be, the judgment creditor may issue, from the court of the district in which the judgment debtor resides, carries on business or is employed, or if the judgment debtor is a juristic person, from the court of the district in which the registered office or main place of business of the juristic person is situate, a notice calling

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upon the judgment debtor or, if the judgment debtor is a juristic person, a director or officer of the juristic person as representative of the juristic person and in his or her personal capacity, to appear before the court in chambers on a date specified in such notice in order to enable the court to inquire into the financial position of the judgment debtor and to make such order as the court deems just and equitable.

**[Section 65A(1) was declared unconstitutional by *Julius v Commanding Officer, Windhoek Prison & Others; Nel v Commanding Officer, Windhoek Prison & Others* 1996 NR 390 (HC) and amended accordingly by Act 1 of 1999.]**

(2)

**[subsection (2) deleted by Act 1 of 1999]**

(3) The court may, at any stage of the proceedings, if a director or officer mentioned in subsection (1) ceases to be a director or officer of the juristic person concerned or absconds, at the request of the judgment creditor, from time to time replace such director or officer by any other person who at the time of such replacement may be a director or officer of the juristic person, and the proceedings shall then continue as if there has been no replacement.

(4) If the court has given judgment for the payment of an amount of money in instalments, no notice under subsection (1) shall be issued unless the judgment creditor has delivered an affidavit or affirmation or his or her legal practitioner has delivered a certificate to the clerk of the court in which is mentioned the outstanding balance of the judgment debt, in what respects the judgment debtor has failed to comply with the court order, to what extent he or she is in arrears with the payment of the instalments, the accumulative costs to date, the balance owing and that the judgment debtor was advised by registered letter of the terms of the judgment.

**[subsection (4) amended by Act 1 of 1999; amendment markings incomplete]**

(5) If -

- (a) a judgment debtor fails to satisfy an order to pay the judgment debt in instalments or otherwise made at a hearing of proceedings in terms of a notice issued under subsection (1);
- (b) an emoluments attachment order has not been satisfied;
- (c) the judgment creditor wants to place proceedings postponed in terms of section 65E (1) on the roll again; or
- (d) the judgment creditor satisfies the clerk of the court that it is probable that the situation of the judgment debtor has changed to such an extent that a new enquiry should be held,

a judgment creditor may again issue a notice in terms of subsection (1) in order to enable the court to inquire into the financial position of the judgment debtor and to make an order as the court deems just and equitable.

**[subsection (5) inserted by Act 1 of 1999]**

**[section 65A inserted by Act 63 of 1976]**

### **Drawing up and service of notice on judgment debtor**

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**65B.** The notice referred to in section 65A(1) shall be drawn up by the judgment creditor or his attorney, shall be signed by the judgment creditor or his attorney and the clerk of the court and shall be served by the messenger of the court on the judgment debtor or, if the judgment debtor is a juristic person, on the director or officer summonsed as the representative of the juristic person and in his personal capacity, in the manner prescribed by the rules for the service of process in general and at least 7 days before the date specified therein for the hearing of the proceedings.

[section 65B inserted by Act 63 of 1976]

**Joiner of proceedings**

[The word "joinder" is misspelt in the *Government Gazette*, as reproduced above.]

**65C.** If, under section 65A(1), two or more notices have been served on any judgment debtor or director or officer to appear on the same day as provided in that section, the proceedings in terms of such notices may be heard concurrently.

[section 65C inserted by Act 63 of 1976 and amended by Act 1 of 1999  
(which introduces a misspelling in the heading)]

**Determination of judgment debtor's financial position**

**65D.** (1) On the appearance before the court of the judgment debtor or, if the judgment debtor is a juristic person, the director or officer of the juristic person summoned as the representative of the juristic person or in his or her personal capacity, on the return day of the notice referred to in section 65A(1) or on any date to which the proceedings have been postponed, the court in chambers shall, subject to the provisions of subsection (2) of this section, call upon him or her to give evidence under oath or affirmation on his or her financial position or the financial position of the juristic person, as the case may be, and the court shall permit the examination or cross-examination of the judgment debtor or the said director or officer on all matters relevant to the judgment debtor's financial position and his or her or the juristic person's ability to pay the judgment debt, and the court shall receive such further evidence as may be adduced either orally or by affidavit or in such other manner as the court may deem just, by or on behalf of either the judgment debtor or the judgment creditor, as is material to the determination of the judgment debtor's financial position and his or her or the juristic person's ability to pay the judgment debt, and for the purposes of such evidence witnesses may be summoned in the manner prescribed in the rules.

[subsection (1) amended by Act 1 of 1999]

(2) The court may at any time in the presence of the judgment debtor or the said director or officer postpone the proceedings to such date as the court may determine.

(3) When postponing the proceedings under subsection (2) the court -

- (a) shall inform the judgment debtor or the director or officer concerned of the provisions of section 65E(1)(c);
- (b) may order the judgment debtor or the director or officer to produce such documents as the court may specify at the hearing on the date determined by the court; and
- (c) may determine such conditions as it may deem fit.

(4) In determining the ability of the judgment debtor to pay the judgment debt in instalments or otherwise the court shall take into consideration -

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- (a) in the case of a judgment debtor who is a natural person, the nature of his income, the amounts needed by him for his necessary expenses and those of the persons dependent on him, and for the making of periodical payments which he is obliged to make in terms of an order of court, agreement or otherwise in respect of his other commitments as disclosed in the evidence presented at the hearing of the proceedings; or
- (b) in the case of a judgment debtor who is a juristic person, the amounts required by such juristic person to meet its necessary administrative expenses and for the making of periodical payments which it is obliged to make in terms of an order of court, agreement or otherwise in respect of its other commitments as disclosed in the evidence presented at the hearing of the proceedings.

[subsection (4) amended by Act 1 of 1999]

(5) In determining the ability of the judgment debtor to pay the judgment debt in instalments or otherwise the court may, in its discretion, refuse to take account of the periodical payments that a judgment debtor has undertaken to make in terms of a hire-purchase agreement for the purchase of goods which have not been exempted from seizure in terms of section 67 or which cannot, in the opinion of the court, be regarded as the judgment debtor's household requirements.

[subsection (5) amended by Act 1 of 1999]

[section 65D inserted by Act 63 of 1976]

**Postponement of proceedings pending execution**

**65E.** (1) If at the hearing of the proceedings in terms of a notice under section 65A(1) the court is satisfied -

- (a) that the judgment debtor has movable or immovable property which may be attached and sold in order to satisfy the judgment debt or any part thereof, the court may -
  - (i) authorize the issue of a warrant of execution against such movable or immovable property or such part thereof as the court may deem fit; or
  - (ii) authorize the issue of such a warrant, together with an order in terms of section 73; or
- (b) that there is a debt due to the judgment debtor which may be attached in terms of section 72 to satisfy the judgment debt and costs or a part thereof, the court may authorize the attachment of that debt in terms of that section; or
- (c) that the judgment debtor or, if the judgment debtor is a juristic person, the director or officer summoned as representative of the juristic person, at any time after receipt of a notice referred to in section 65A(1), has made an offer in writing to the judgment creditor or his attorney to pay the judgment debt and costs in specified instalments or otherwise, whether by way of an emoluments attachment order or otherwise, or, if such an offer has not been made, that the judgment debtor is able to pay the judgment debt and costs in reasonable instalments, the court may order the judgment debtor to pay the judgment debt and costs in specified instalments and, if the judgment debtor is employed by any person who resides, carries on

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business or is employed in the district, or if the judgment debtor is employed by the State in the district, in addition authorize the issue of an emoluments attachment order by virtue of section 65J(1) for the payment of the judgment debt and costs by the employer of the judgment debtor,

and postpone the further hearing of the proceedings.

(2) Any authorization under subsection (1) (a) shall, pending the execution of the warrant, serve as an interdict against the alienation of the property concerned by the judgment debtor.

(3)

[subsection (3) deleted by Act 1 of 1999]

(4) If the judgment creditor issues or causes to be issued a warrant of execution against movable property belonging to any judgment debtor before the hearing of proceedings in terms of a notice under section 65A(1) and a *nulla bona* return is made, the judgment creditor shall not be entitled to costs in connection with the issue and execution of such warrant unless the court on good cause shown orders otherwise at the hearing of the proceedings.

(5) The court may from time to time suspend, amend or rescind an order for the payment of a judgment debt and costs in specified instalments made in terms of subsection (1) (c) of this section or section 57, 58 or 65.

(6) Upon an order referred to in subsection (1)(c) of this section or section 57, 58 or 65 having been made and if the judgment debtor was not present or represented in court when the order was made, the judgment creditor or his or her legal practitioner shall forthwith by registered letter advise the judgment debtor of the terms of the order.

[subsection (6) amended by Act 1 of 1999]

[section 65E inserted by Act 63 of 1976]

### **Failure to appear or remain in attendance**

**65F.** (1) Any person who fails to appear upon a notice in terms of section 65A(1) at the place and on the date and at the time specified in the notice or who fails to remain in attendance at such proceedings, shall be guilty of an offence.

(2) The court shall, if satisfied from the return of service of the notice, that the notice was served on the judgment debtor personally within the prescribed time limit, and that the judgment debtor has failed to appear at the place and on the date and at the time specified in the notice, or if satisfied that the judgment debtor has failed to remain in attendance at the proceedings in question, issue a warrant for his or her arrest, and if he or she is brought before the court, in a summary manner inquire into his or her failure so to appear or so to remain in attendance and may, unless the judgment debtor satisfies the court that his or her failure was not due to fault on his or her part, convict him or her of the offence referred to in subsection (1), and sentence him or her to a fine not exceeding N\$1 000 or to imprisonment for a period not exceeding three months, or to both such fine and imprisonment.

(3) Subject to the provisions of any other law, a person found guilty of an offence referred to in subsection (1) may be sentenced to periodical imprisonment for a period of imprisonment of not less than 100 hours and not more than 2 000 hours.



[Section 65F is inserted by Act 63 of 1976. It was declared unconstitutional in its entirety by *Julius v Commanding Officer, Windhoek Prison & Others; Nel v Commanding Officer, Windhoek Prison & Others* 1996 NR 390 (HC) and substituted by Act 1 of 1999.]

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### 65G.

[Section 65G is inserted by Act 63 of 1976. It was declared unconstitutional in its entirety by *Julius v Commanding Officer, Windhoek Prison & Others; Nel v Commanding Officer, Windhoek Prison & Others* 1996 NR 390 (HC) and deleted by Act 1 of 1999.]

### Warrant for arrest of judgment debtor

**65H.** A warrant for the arrest of a judgment debtor for the purposes of section 65F or, if the judgment debtor is a juristic person, of the director or officer of the juristic person summoned in his or her personal capacity, shall be prepared by the clerk of the court, issued by the court, and executed by the messenger of the court.

[Section 65H is inserted by Act 63 of 1976. It was declared unconstitutional in its entirety by *Julius v Commanding Officer, Windhoek Prison & Others; Nel v Commanding Officer, Windhoek Prison & Others* 1996 NR 390 (HC), and substituted by Act 1 of 1999.]

### Application for administration order has preference

**65I.** (1) If, before or during the hearing of the proceedings in terms of a notice under section 65A(1) a judgment debtor has lodged or lodges with the court an application for an administration order for hearing on a date not later than the earliest date on which such application may be heard and it appears that he has complied with the provisions of section 74, the court shall postpone the hearing of the proceedings until the application for an administration order has been disposed of.

(2) If a judgment debtor has not lodged or does not lodge with the court an application for an administration order before or during the hearing of such proceedings and it appears at the hearing that the judgment debtor has other debts as well, the court shall consider whether all the judgment debtor's debts should be treated collectively and if it is of opinion that they should be so treated, it may, with a view to granting an administration order, postpone further hearing of the proceedings to a date determined by the court and order the judgment debtor to submit to the court a full statement of his affairs in the form prescribed in the rules, and containing the particulars for which the said rules make provision and to cause a copy thereof to be delivered by registered post to each of his creditors at least 3 days before the date appointed for the further hearing.

(3) If upon receipt of the statement referred to in subsection (2) it appears that the judgment debtor's total debts do not exceed N\$50 000, the court may grant an administration order under section 74 in respect of the judgment debtor's estate.

[subsection (3) amended by Act 9 of 1997]

(4) If the court grants an administration order in respect of the judgment debtor's estate, it shall stay the proceedings in terms of the notice under section 65A(1), but may grant the judgment creditor costs already incurred in connection with such proceedings, and such costs may be added to the judgment debt.

[section 65I inserted by Act 63 of 1976]

### Emoluments attachment orders

**Magistrates' Courts Act 32 of 1944 (SA)**

65J. (1) Whenever -

(a)

**[Paragraph (a) was declared unconstitutional by *Julius v Commanding Officer, Windhoek Prison & Others; Nel v Commanding Officer, Windhoek Prison & Others* 1996 NR 390 (HC) and deleted by Act 1 of 1999.]**

(b) a court has ordered the judgment debtor to pay the judgment debt and costs in specific instalments laid down in the order; or

(c) notwithstanding the fact that the judgment debtor has, where applicable, served before the commencement of the Magistrates' Courts Amendment Act, 1999, the term of imprisonment or periodical imprisonment imposed by the court for his or her failure to comply with the order, the judgment debt remains unpaid; or

**[Paragraph (c) was declared unconstitutional by *Julius v Commanding Officer, Windhoek Prison & Others; Nel v Commanding Officer, Windhoek Prison & Others* 1996 NR 390 (HC) and amended accordingly by Act 1 of 1999.]**

(d) the judgment debtor has consented thereto in writing; or

(e) the court has so authorized,

the judgment creditor may, subject to the provisions of subsection (2), issue an order (hereinafter called an emoluments attachment order) from the court of the district in which the employer of the judgment debtor resides, carries on business or is employed, or, if the judgment debtor is employed by the State, in which he is employed, attaching the emoluments at present or in future owing or accruing to the judgment debtor by or from such employer (in this section called the garnishee) to the amount necessary to cover the judgment and the costs of the attachment, whether such judgment was obtained in that court or in any other magistrate's court, and obliging the garnishee to pay from time to time to the judgment creditor or his attorney at the address of such judgment creditor or his attorney specific amounts out of the emoluments of the judgment debtor in accordance with the order of court laying down the specific instalments payable by the judgment debtor, until such judgment debt and costs have been paid in full.

(2) Unless the judgment debtor has consented thereto in writing, or the court has so authorized and such authorization has not been suspended, any emoluments attachment order shall not be issued unless the judgment creditor or his attorney has first -

(a) sent a registered letter to the judgment debtor at his last known address advising him of the amount of the judgment debt and costs as yet unpaid and warning him that an emoluments attachment order will be issued if the said amount is not paid within 7 days of the date on which the said registered letter was posted; and

(b) filed with the clerk of the court an affidavit or affirmation by the judgment creditor or a certificate by his attorney -

(i) setting forth the amount of the judgment debt at the date of the order laying down the specific instalments, the costs, if any, which have accumulated since that date, the payments received since that date and the balance owing, and declaring that the provisions of paragraph (a) have been complied with and giving the date of such compliance; and

(ii)

**Magistrates' Courts Act 32 of 1944 (SA)**

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**[Subparagraph (ii) was declared unconstitutional by *Julius v Commanding Officer, Windhoek Prison & Others; Nel v Commanding Officer, Windhoek Prison & Others* 1996 NR 390 (HC) and deleted by Act 1 of 1999.]**

(3) Any emoluments attachment order shall be prepared by the judgment creditor or his attorney, shall be signed by the judgment creditor or his attorney and the clerk of the court, and shall be served on the garnishee by the messenger of the court in the manner prescribed by the rules of the service of process.

**[subsection (3) substituted by Act 11 of 1985]**

(4) Deductions in terms of an emoluments attachment order shall be made, if the emoluments of the judgment debtor are paid monthly, at the end of the month following the month in which it is served on the garnishee, or, if the emoluments of the judgment debtor are paid weekly, at the end of the second week of the month following the month in which it is so served on the garnishee, and all payments thereunder to the judgment creditor or his attorney shall be made monthly with effect from the end of the month following the month in which the said order is served on the garnishee.

(5) An emoluments attachment order may be executed against the garnishee as if it were a court judgment, subject to the right of the judgment debtor, the garnishee or any other interested party to dispute the existence or validity of the order or the correctness of the balance claimed.

(6) If, after the service of such an emoluments attachment order on the garnishee, it is shown that the judgment debtor, after satisfaction of the emoluments attachment order, will not have sufficient means for his own and his dependants' maintenance, the court shall rescind the emoluments attachment order or amend it in such a way that it will affect only the balance of the emoluments of the judgment debtor over and above such sufficient means.

(7) Any emoluments attachment order may at any time on good cause shown be suspended, amended or rescinded by the court, and when suspending any such order the court may impose such conditions as it may deem just and reasonable.

(8) (a) Whenever any judgment debtor to whom an emoluments attachment order relates leaves the service of a garnishee before the judgment debt has been paid in full, such judgment debtor shall forthwith advise the judgment creditor in writing of the name and address of his new employer, and the judgment creditor may cause a certified copy of such emoluments attachment order to be served on the said new employer, together with an affidavit or affirmation by him or a certificate by his attorney specifying the payments received by him since such order was issued, the costs, if any, incurred since the date on which that order was issued and the balance outstanding.

(b) An employer on whom a certified copy referred to in paragraph (a) has been so served, shall thereupon be bound thereby and shall then be deemed to have been substituted for the original garnishee, subject to the right of the judgment debtor, the garnishee or any other interested party to dispute the existence or validity of the order and the correctness of the balance claimed.

(9) (a) Whenever any judgment debtor to whom an emoluments attachment order relates leaves the service of the garnishee before the judgment debt has been paid in full and becomes self-employed or is employed by someone else he or she shall, or shall pending the service of the emoluments attachment order on his or her new employer, again be obliged to comply with the relevant order referred to in subsection (1).

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[Paragraph (a) was declared unconstitutional in part by *Julius v Commanding Officer, Windhoek Prison & Others; Nel v Commanding Officer, Windhoek Prison & Others* 1996 NR 390 (HC) and amended accordingly by Act 1 of 1999.]

(b)

[Paragraph (b) was declared unconstitutional by *Julius v Commanding Officer, Windhoek Prison & Others; Nel v Commanding Officer, Windhoek Prison & Others* 1996 NR 390 (HC) and deleted by Act 1 of 1999.]

(10) Any garnishee may, in respect of the services rendered by him in terms of an emoluments attachment order, recover from the judgment creditor a commission of up to 5 per cent of all amounts deducted by him from the judgment debtor's emoluments by deducting such commission from the amount payable to the judgment creditor.

[section 65J inserted by Act 63 of 1976]

**Orders as to costs relating to certain proceedings**

**65K.** (1) Unless at the hearing of any proceedings in terms of a notice under section 65A(1) it appears to the court that the judgment debtor, after learning of the judgment upon which such proceedings were founded, made an offer to pay the judgment debt in instalments which the court deems reasonable, or notified the judgment creditor that he was not able to make an offer and the court finds this to be true, the court may order the judgment debtor to pay the costs of such proceedings, but if it appears that the judgment creditor refused such offer, the court may order the judgment creditor to pay such costs, including the loss of wages suffered by the judgment debtor through having to appear in court in connection with the proceedings.

(2)

[Subsection (2) was declared unconstitutional in part by *Julius v Commanding Officer, Windhoek Prison & Others; Nel v Commanding Officer, Windhoek Prison & Others* 1996 NR 390 (HC) and deleted by Act 1 of 1999.]

(3) The provisions of this section shall not preclude the court from making such order regarding costs as it may deem just in any proceedings in terms of a notice under section 65A(1).

[section 65K inserted by Act 63 of 1976]

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**65L.**

[Section 65L is inserted by Act 63 of 1976. It was declared unconstitutional in its entirety by *Julius v Commanding Officer, Windhoek Prison & Others; Nel v Commanding Officer, Windhoek Prison & Others* 1996 NR 390 (HC) and deleted by Act 1 of 1999.]

**Enforcement of certain judgments of Supreme Court**

**65M.** If a judgment for the payment of any of certain amount of money has been given by a division of the Supreme Court of South Africa, the judgment creditor may file with the clerk of the court from which the judgment creditor is required to issue a notice in terms of section 65A(1), a certified copy of such judgment and an affidavit or affirmation by the judgment creditor or a certificate by his attorney specifying the amount still owing under the judgment and how such amount is arrived at, and thereupon such judgment, whether or not the amount of such judgment would otherwise have exceeded the jurisdiction of the court, shall

have all the effects of a judgment of such court and any proceedings may be taken thereon as if it were a judgment lawfully given in such court in favour of the judgment creditor for the amount mentioned in the affidavit or affirmation or the certificate as still owing under such judgment, subject however to the right of the judgment debtor to dispute the correctness of the amount specified in the said affidavit or affirmation or certificate.

[section 65M inserted by Act 63 of 1976]

### Manner of execution

66. (1) (a) Whenever a court gives judgment for the payment of money or makes an order for the payment of money in instalments, such judgment, in case of failure to pay such money forthwith, or such order in case of failure to pay any instalment at the time and in the manner ordered by the court, shall be enforceable by execution against the movable property and, if there is not found sufficient movable property to satisfy the judgment or order, or the court, on good cause shown, so orders, then against the immovable property of the party against whom such judgment has been given or such order has been made.

[*Hiskia & Another v Body Corporate of Urban Space & Others* 2018 (4) NR 1067 (HC) declared section 66(1)(a) to be unconstitutional insofar as it permits the sale in execution of immovable property without judicial oversight. The Court ruled that this provision would remain in force until 31 August 2019 to give Parliament an opportunity to correct its defects, but no legislative action was taken before that deadline.]

- (b) Upon such failure to pay any instalment in accordance with any court order, execution may be effected in respect of the whole of the judgment debt and of costs then still unpaid, unless the court, on the application of the party that is liable, orders otherwise.

[subsection (1) amended by Act 40 of 1952 and substituted by Act 63 of 1976]

(2) No immovable property which is subject to any claim preferent to that of the judgment creditor shall be sold in execution unless -

- (a) the judgment creditor has caused such notice in writing of the intended sale in execution to be served personally upon the preferent creditor as may be prescribed by the rules; or
- (b) the magistrate of the district in which the property is situate has, upon the application of the judgment creditor and after enquiry into the circumstances of the case, directed what steps shall be taken to bring the intended sale to the notice of the preferent creditor, and those steps have been carried out,

and unless

- (c) the proceeds of the sale are sufficient to satisfy the claim of such preferent creditor, in full; or
- (d) the preferent creditor confirms the sale in writing, in which event he shall be deemed to have agreed to accept such proceeds in full settlement of his claim.

[subsection (2) amended by Act 3 of 2003]

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(3) A sale in execution of such immovable property as is referred to in sub-section (2) shall take place within such period of the date of attachment and in such manner as may be provided by the rules.

(4) If a sale referred to in subsection (3) does not take place or the immovable property concerned is not released from attachment within a period of one year from the date of attachment, such attachment shall lapse.

[subsection (4) inserted by Act 63 of 1976]

(5) The court may, upon the application and at the expense of the judgment creditor, after due notice of such application has been given to the judgment debtor, extend the period of one year referred to in subsection (4) by further periods of one year each.

[subsection (5) inserted by Act 63 of 1976]

(6) A judgment creditor (whether by virtue of a judgment given in the Supreme Court of South Africa or in a magistrate's court) desiring to attach immovable property that is already under attachment (whether made by a deputy sheriff or by a messenger) and in respect of which a sale in execution is not pending, and who has lodged a warrant of execution with the deputy sheriff or messenger of the court, may, after notifying the interested parties, apply to the court for an order to the effect that the property may be sold in terms of his warrant.

[Subsection (6) is inserted by Act 63 of 1976.

The phrase "his warrant" may have been intended to be "this warrant".]

(7) A messenger who is directed to attach immovable property, shall not be precluded merely by the absence of the execution debtor from his place of residence or business, from discharging his duties, but may discharge his duties if he is able to do so and shall endorse a return of service to the court on the warrant.

[subsection (7) inserted by Act 63 of 1976]

(8) If the execution debtor, having been requested by the messenger of the court to point out property in order to satisfy a warrant of execution against movable property, declares that he has no movable property or insufficient movable property and the messenger is unable to find sufficient movable property to satisfy the warrant, the messenger shall request the execution debtor to declare whether he has immovable property which is executable and shall enter the execution debtor's reply in his return of service endorsed on such warrant.

[subsection (8) inserted by Act 63 of 1976]

**Property exempt from execution**

**67.** In respect of any process of execution issued out of any court the following property shall be protected from seizure and shall not be attached or sold, namely:

- (a) the necessary beds, bedding and wearing apparel of the execution debtor and of his family;
- (b) the necessary furniture (other than beds) and household utensils in so far as they do not exceed in value the sum of four hundred rand;
- (c) stock, tools and agricultural implements of a farmer in so far as they do not exceed in value the sum of four hundred rand;

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- (d) the supply of food and drink in the house sufficient for the needs of such debtor and of his family during one month;
- (e) tools and implements of trade, in so far as they do not exceed in value the sum of four hundred rand;
- (f) professional books, documents or instruments necessarily used by such debtor in his profession, in so far as they do not exceed in value the sum of four hundred rand;
- (g) such arms and ammunition as such debtor is required by law, regulation or disciplinary order to have in his possession as part of his equipment:

Provided that the court shall have a discretion in exceptional circumstances and on such conditions as it may determine to increase the sums referred to in paragraphs (b), (c), (d), (e) and (f) to the extent of not more than twice such sums.

[section 67 amended by Act 93 of 1962]

**Property executable**

**68.** (1) The messenger executing any process of execution against movable property may, by virtue of such process, also seize and take any money or bank notes, and may seize, take and sell in execution cheques, bills of exchange, promissory notes, bonds, or securities for money belonging to the execution debtor.

(2) The messenger may also hold any cheques, bills of exchange, promissory notes, bonds or securities for money which have been seized or taken, as security for the benefit of the execution creditor for the amount directed to be levied by the execution so far as it is still unsatisfied; and the execution creditor may, when the time of payment has arrived, sue in the name of the execution debtor, or in the name of any person in whose name the execution debtor might have sued, for the recovery of the sum secured or made payable thereby.

[The word "still" in the phrase "so far as it is still unsatisfied" is misspelt in the *Government Gazette*, as reproduced above.]

(3) The messenger may also under any process of execution against movable property attach and sell in execution the interest of the execution debtor in any movable property belonging to him and pledged or sold under a suspensive condition to a third person, and may also sell the interest of the execution debtor in property movable or immovable leased to the execution debtor or sold to him under any hire purchase contract or under a suspensive condition.

(4) Whenever, if the sale had not been in execution, it would have been necessary for the execution debtor to endorse a document or to execute a cession in order to pass the property to a purchaser, the messenger may so endorse the document or execute the cession, as to any property sold by him in execution.

(5) The messenger may also, as to immovable property sold by him in execution, do anything necessary to effect registration of transfer. Anything done by the messenger under this sub-section or sub-section (4) shall be as valid and effectual as if he were the execution debtor.

(6) Where judgment is given against a member of a partnership or syndicate in an action in which he individually was plaintiff or defendant, his interest in the partnership or syndicate may be attached and sold in execution.

**Interpleader claims**

69. (1) (a) Where any person, not being the judgment debtor makes any claim to or in respect of any property attached or about to be attached in execution under the process of any court, or to the proceeds of such property sold in execution, his claim shall be adjudicated upon after issue of a summons in the manner provided by the rules.

(b) Upon the issue of such summons any action which may have been brought in any court whatsoever in respect of such property shall be stayed and shall abide the result of the proceedings taken upon such summons.

(2) Where two or more persons make adverse claims to any property in the custody or possession of a third party such claims shall be adjudicated upon after issue of a summons in the manner provided by the rules.

**Sale in execution gives good title**

70. A sale in execution by the messenger shall not, in the case of movable property after delivery thereof or in the case of immovable property after registration of transfer, be liable to be impeached as against a purchaser in good faith and without notice of any defect.

**Surplus after execution**

71. If, after a sale in execution, there remains any surplus in the hands of the messenger, it shall be liable to attachment for any other unsatisfied judgment debt.

**Movable property which messenger cannot dispose of in terms of this Act, shall be sold by public auction**

71A. (1) Any movable property in the custody of the messenger or any other person acting on his behalf in respect of which attachment has been withdrawn or which is released from attachment and in respect of which the owner or person from whose possession the property has been removed, cannot be traced, and which cannot be disposed of in terms of this Act, shall be sold by the messenger by public auction, and the proceeds of the sale shall, after deduction of the messenger's costs, be paid into the Consolidated Revenue Fund: Provided that such sale shall not take place unless such property has remained unclaimed for a period of fourteen days after the messenger has published, in one English and one Afrikaans newspaper circulating in the district where the last known address of the judgment debtor is situate, a notice containing the name of the judgment debtor, a description of the property and stating the intention to sell such property if it is not claimed within the period specified therein.

(2) After the public auction referred to in subsection (1), the messenger shall draw up a vendue roll as if the sale was a sale in execution of property and shall attach the roll to his return in respect of the relevant process of the court in the case together with proof that the proceeds of the sale have been paid into the Consolidated Revenue Fund.

(3) The proceeds of a sale paid into the Consolidated Revenue Fund in terms of this section, shall be refunded out of accruing revenue to any person who satisfies a judicial officer of the district in which the sale took place that he would have been entitled to receive the property referred to in this section after the attachment thereof had been withdrawn or the property had been released from attachment.



### Attachment of debts

72. (1) The court may, on *ex parte* application by the judgment creditor or under section 65E (1) (b), order the attachment of any debt at present or in future owing or accruing to a judgment debtor by or from any other person (excluding the State), residing, carrying on business or employed in the district, to an amount sufficient to satisfy the judgment and the costs of the proceedings for attachment, whether such judgment has been obtained in such court or in any other magistrate's court, and may make an order (hereinafter called a garnishee order) against such person (hereinafter called the garnishee) to pay to the judgment creditor or his attorney at the address of the judgment creditor or his attorney, so much of the debt as may be sufficient to satisfy the judgment and costs, and may enforce such garnishee order as if it were a judgment of the court.

(2) If, after any such garnishee order in respect of any debt has been granted, it is shown to the satisfaction of the court that sufficient means to maintain himself and those dependent upon him will not, after satisfaction of the garnishee order, be left to the judgment debtor, the court shall set aside the garnishee order or amend it in such manner that it will affect only the balance of the debt over and above such sufficient means.

(3) Any order under this section may at any time for good cause be suspended, amended or rescinded by the court.

(4) The court may, if it appears that there are unsatisfied claims owing to other creditors, postpone the application to enable the judgment debtor to make application for an administration order under section 74.

[Section 72 is substituted by Act 40 of 1952, amended by Act 93 of 1962 and by Act 19 of 1963, and substituted by Act 63 of 1976.]

### Order for payment by instalments

73. (1) The court may, upon the application of any judgment debtor or under section 65E(1)(a)(ii) or 65E(1)(c) and if it appears to the court that the judgment debtor is unable to satisfy the judgment debt in full at once, but is able to pay reasonable periodical instalments towards satisfaction thereof or if the judgment debtor consents to an emoluments attachment order or a garnishee order being made against him, suspend execution against that debtor either wholly or in part on such conditions as to security or otherwise as the court may determine.

[subsection (1) substituted by Act 40 of 1952 and by Act 63 of 1976]

(2) Nothing in this section contained shall be construed as authorizing the court to suspend the execution of a judgment upon any property subject to a hypothec for the judgment debt existing irrespective of attachment in execution.

(3) An order under paragraph (e) of section *forty-eight* or under this section may at any time and for good cause be varied or rescinded by the court.

### Granting of administration orders

74. (1) Where a debtor -

(a) is unable forthwith to pay the amount of any judgment obtained against him in court, or to meet his financial obligations, and has not sufficient assets capable of attachment to satisfy such judgment or obligations; and

(b) states that the total amount of all his or her debts due does not exceed N\$50 000,

such court or the court of the district in which the debtor resides or carries on business or is employed may, upon application by the debtor or under section 65I, subject to such conditions as the court may deem fit with regard to security, preservation or disposal of assets, realization of movables subject to hypothec (except movables referred to in section 34*bis* of the Land Bank Act, 1944 (Act No. 13 of 1944), or otherwise, make an order (in this Act called an administration order) providing for the administration of his estate and for the payment of his debts in instalments or otherwise.

**[Subsection (1) is amended by Act 9 of 1997. Act 13 of 1944, which was renamed the Agricultural Bank Act, has been replaced by the Agricultural Bank of Namibia Act 5 of 2003.]**

(2) An administration order shall not be invalid merely because at some time or other the total amount of the debtor's debts are found to exceed the amount referred to in paragraph (b) of subsection (1), but in such a case the court may, if it deems fit, rescind the order.

**[subsection (2) amended by Act 9 of 1997]**

**[Section 74 is amended by Act 40 of 1952, Act 14 of 1954, Act 93 of 1962, Act 19 of 1963 and Act 94 of 1974 (with effect from 1 March 1975), and substituted by Act 63 of 1976.]**

#### **Documents to be submitted with application for administration order**

**74A.** (1) With an application referred to section 74(1) the debtor shall submit a full statement of his affairs in the form prescribed in the rules.

(2) In the form referred to in subsection (1) provision shall be made for the following particulars, *inter alia*, namely -

- (a) the name and business address of the debtor's employer or, if the debtor is not employed, the reason why he is unemployed;
- (b) a detailed list of the debtor's assets and their current market values and full particulars of interests in property and claims in his favour, including moneys in a savings or other account with a bank or elsewhere;
- (c) the debtor's trade or occupation and his gross weekly or monthly income and that of his wife living with him, and particulars of all deductions from such income by stop order or otherwise, supported as far as possible by written statements by the employers of the debtor and his wife;
- (d) a detailed list of the debtor's essential weekly or monthly expenses and those of the persons dependent on him, including his own transport expenses and those of his wife to and from work, and those of his children to and from school;
- (e) a complete list of all the debtor's creditors and their addresses, and the amount owing to each creditor, in which a clear distinction shall be made between -
  - (i) debts the whole amount of which is owing, including judgment debts payable in instalments in terms of a court order, an emoluments attachment order or a garnishee order; and
  - (ii) obligations which are payable *in futuro* in periodical payments or otherwise or which will become payable under a maintenance order, agreement, stop

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order or otherwise, and in which the nature of such periodical payments is specified in each case or when the obligations will be payable and how they are then to be paid, the balance owing in each case and when, in each case, the obligation will terminate;

- (f) the security and the estimated value of the security that a creditor has or the name and address of any other person who, in addition to the debtor, is liable for any debt;
- (g) full particulars, supported as far as possible by a statement and a copy of the agreement referred to in section 9(1) of the Hire-Purchase Act, 1942 (Act No. 36 of 1942), of goods purchased under a hire-purchase agreement, the purchase price, the instalments payable, the balance owing and the date on which the purchase price will be paid in full, and the reasons adduced by the debtor why provision should be made for the payment of the remaining instalments;

**[The Hire-Purchase Act 36 of 1942 has been replaced  
by the Credit Agreements Act 75 of 1980.]**

- (h) full particulars of any mortgage bond on immovable property owned by the debtor, the instalments payable, the balance owing, the date on which the mortgage debt will be paid in full and the reasons adduced by the debtor why provision should be made for the payment of the instalments payable in terms of such mortgage bond;
- (i) full particulars of any asset purchased under a written agreement other than a hire-purchase agreement, the instalments payable, the balance owing, and the date on which the purchase price will be paid in full, and the reasons adduced by the debtor why provision should be made for the payment of the instalments that become payable under such agreement;
- (j) whether any administration order was made at any time in respect of the debtor's estate and, if so, whether such order lapsed or was set aside and, if so, when and for what reasons;
- (k) the number and ages of the persons dependent on the debtor and his wife and their kinship with them;
- (l) if an administration order is made, the amount of the weekly or monthly or other instalments which the debtor offers to pay towards settlement of the debts referred to in paragraph (e)(i).

(3) The statement referred to in subsection (1) shall be confirmed by an affidavit in which the debtor declares that to the best of his knowledge the names of all his creditors and the amounts owed by him to each of them severally are set forth in the statement and that the declarations made therein are true.

(4) The clerk of the court shall, if requested thereto by an illiterate debtor and upon payment of the fee prescribed in the rules, assist the debtor in completing the statement referred to in subsection (1).

(5) The debtor shall lodge an application for an administration order and the statement referred to in subsection (1) with the clerk of the court and shall deliver to each of his creditors, at least 3 days before the date appointed for the hearing, personally or by registered post a copy of such application and statement on which shall appear the case number under which the original application was filed.

[section 74A inserted by Act 63 of 1976]

### Hearing of application for administration order

- 74B.** (1) At the hearing of an application for an administration order -
- (a) any creditor, whether he has received notice in terms of section 74A(5) or not, may attend the hearing and provide proof of his debt and object to any debt listed by the debtor in the statement of his affairs referred to in section 74A(1);
  - (b) every debt listed by the debtor in the said statement shall be deemed to be proved, subject to any amendments made thereto by the court, unless any creditor raises objections thereto or the court rejects it or requires substantiation thereof by evidence;
  - (c) any creditor to whose debt an objection is raised by the debtor or any other creditor or who is required by the court to substantiate his debt with evidence shall provide proof of debt;
  - (d) the court may defer proof of debt and postpone consideration of the application for an administration order or proceed to deal with such application and, if an administration order is granted, the debt shall subsequently when proved be added to the debts listed;
  - (e) the debtor may be interrogated by the court and by any creditor whose debt has been acknowledged or proved, or, by leave of the court, by any creditor the proof of whose debt has been deferred, or by the legal representative of such creditor with regard to -
    - (i) his assets and liabilities;
    - (ii) his present and future income and that of his wife living with him;
    - (iii) his standard of living, and the possibility of economising; and
    - (iv) any other matter that the court may deem relevant.

(2) If at the hearing it appears to the court that any debt other than a debt on the ground of or arising from any judgment debt is a matter of contention between the debtor and the creditor or between the creditor and any other creditor of the debtor, the court may, upon inquiry into the objection, allow or reject the debt or a part thereof.

(3) Any person whose debt has been rejected in accordance with subsection (2) may, notwithstanding the provisions of section 74P, institute proceedings or proceed with an action already instituted in respect of such debt.

(4) If any person referred to in subsection (3) has obtained judgment in respect of any debt referred to in that subsection, the amount of the judgment shall be added to the list of proved debts referred to in subsection (1).

(5) No administration order shall be granted at the request of any debtor if it is proved that any administration order was rescinded within the preceding period of 6 months because of the debtor's non-compliance therewith, unless the debtor proves to the satisfaction of the court that his non-compliance with the order was not wilful.

[section 74B inserted by Act 63 of 1976]

**Contents of administration order**

- 74C. (1) An administration order shall be in the form prescribed by the rules and -
- (a) shall lay down the amount of the weekly or monthly or other payments to be made in terms thereof; and
  - (b) may specify -
    - (i) the assets, if any, of the estate under administration which may be realized by the administrator for the purpose of distributing the proceeds among the creditors: Provided that no such asset that is the subject of any agreement regulated by the Hire-Purchase Act, 1942 (Act No. 36 of 1942), shall be realized without the written permission of the seller;

[The Hire-Purchase Act 36 of 1942 has been replaced by the Credit Agreements Act 75 of 1980.]

- (ii) the assets, if any, of the estate under administration which may be returned by the administrator to the seller in terms of section 14 of the Hire-Purchase Act, 1942;
  - (iii) the debtor's obligations which the court took account of in determining the amount of the weekly or monthly or other instalments to be paid by the debtor to the administrator;
  - (iv) the assets, if any, which shall not be disposed of by the debtor except by leave of the administrator or the court;
  - (v) such other provisions or conditions as the court may deem necessary or expedient.
- (2) The amount of the weekly or monthly or other payments to be made by the debtor to the administrator in terms of the administration order shall, as nearly as possible, approximate the difference between the debtor's future income and the sum of -
- (a) the amount determined by the court as the reasonable amount required by the debtor for his necessary expenses and those of the persons dependent on him;
  - (b) the periodical payments which the debtor is obliged to make under a hire-purchase agreement: Provided that the court may in its discretion refuse to take into account the periodical payments which the debtor undertook to pay under such an agreement for the purchase of goods which are not exempt from execution in terms of section 67 or which, in the opinion of the court, cannot be regarded as the debtor's household requirements, unless the court is of opinion that in all the circumstances it is desirable to safeguard the goods concerned;
  - (c) the periodical payments to be made by the debtor in terms of an existing maintenance order;
  - (d) the periodical payments to be made by the debtor under a mortgage bond or any other written agreement for the purchase of any asset in terms of which the

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liabilities thereunder are payable in instalments, if in all the circumstances the court is of opinion that the instalments payable are reasonable in view of the judgment debtor's income and the sums of money due by him to other creditors or that it is desirable to safeguard the mortgaged property or the asset to which the written agreement relates; and

- (e) the payments to be made by the debtor by virtue of any other obligation referred to in section 74A (2) (e) (ii).
- (3) The court may take into account the income of the debtor's wife, who is living with him, in determining the amount referred to in subsection (2)(a) and, where the debtor is married in community of property, in determining the debtor's income.

[section 74C inserted by Act 63 of 1976]

**Authorizing of issue of emoluments attachment order or garnishee order**

**74D.** Where the administration order provides for the payment of instalments out of future emoluments or income, the court shall authorize the issue of an emoluments attachment order in terms of section 65J in order to attach emoluments at present or in future owing or accruing to the debtor by or from his employer, or shall authorize the issue of a garnishee order under section 72 in order to attach any debt at present or in future owing or accruing to the debtor by or from any other person (excluding the State), in so far as either of the said sections is applicable, and the court may suspend such an authorization on such conditions as the court may deem just and reasonable.

[section 74D inserted by Act 63 of 1976]

**Appointment of administrator**

**74E.** (1) When an administration order has been granted under section 74(1), the court shall appoint a person as administrator, which appointment shall become effective only after a copy of the administration order has been handed or sent to him by registered post and, in the event of his being required as administrator to give security, after he has given such security,

(2) An administrator may on good cause shown be relieved of his appointment by the court, and the court may appoint any other person in his place.

(3) An administrator who is not an officer of the court or a practitioner shall, before a copy of the administration order is handed or sent to him by registered post, give security to the satisfaction of the court and thereafter as required by the court for the due and prompt payment by him to the parties entitled thereto of all moneys which come into his possession by virtue of his appointment as an administrator.

(4) An administrator shall not be obliged to give security in respect of his appointment as an administrator of the estate of any particular debtor if he has given or gives security to the satisfaction of the court for the due and prompt payment by him to the parties entitled thereto of all moneys which may come into his possession by virtue of his appointment as administrator of the estate of any debtor, irrespective of whether such appointment was made before or after the date on which the said security was given.

[section 74E inserted by Act 63 of 1976]

**Notice of and objections to administration orders**

**74F.** (1) A copy of an administration order shall be handed or sent by registered post to the debtor and the administrator by the clerk of the court.

(2) The administrator shall forward a copy of the administration order by registered post to each creditor whose name is mentioned by the debtor in the statement of his affairs or who has given proof of a debt.

(3) A creditor who has not received notice of the application for an administration order and who wishes to object to any debt listed with the order or to the manner in which payments shall be made in terms of the order shall, within a reasonable time as laid down in the rules, give notice of his objection and the grounds therefor to the clerk of the court, the debtor and the administrator and, if he objects to the inclusion of any debt, also to the creditor concerned.

(4) In considering the objection referred to in subsection (3) the court may -

(a) uphold it;

(b) refuse it; or

(c) postpone consideration thereof for hearing after notice given to the persons concerned and on such conditions as to costs or otherwise as the court may deem fit.

[section 74F inserted by Act 63 of 1976]

#### **List of creditors and debts and additions thereto**

**74G.** (1) The administrator shall as soon as may be draw up and lodge with the clerk of the court a complete list on which shall appear the case number under which the application for an administration order has been filed, and which shall contain the names of the creditors and the amounts owing to them severally as at the date on which the administration order was granted.

(2) Any creditor who wishes to provide proof of a debt owing before the making of an administration order and not listed in such order, shall lodge his claim in writing with the administrator, who shall thereupon give the debtor notice thereof in the form prescribed in the rules.

(3) If, within the period allowed in the notice referred to in subsection (2), the debtor admits the claim or does not dispute it, the claim shall be deemed to be proved, subject to the right of any other creditor who has not received notice of the claim to object to the debt, and the administrator shall by notice lodged with the clerk of the court add the name of the creditor and the amount of the debt owing to him to the list referred to in subsection (1) and shall inform the creditor in the form prescribed in the rules that this has been done.

(4) If, within the period allowed in the notice referred to in subsection (2), the debtor gives notice in writing to the administrator that he disputes the claim, the administrator shall notify the creditor thereof and the creditor may request the clerk of the court to appoint a day and time for the hearing of the objection by the court and shall notify the debtor in writing of such day and time.

(5) At the hearing of the objection referred to in subsection (4) the court may -

(a) refuse the claim as a whole;

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- (b) allow the claim as a whole or in part;
- (c) require that the claim be supported by evidence; or
- (d) postpone the hearing on such conditions as it may deem fit.

(6) If the court allows a claim as a whole or in part under subsection (5), the debt shall, to the extent to which it has been allowed, be added to the list referred to in subsection (1).

(7) If any person who sold and delivered goods to the debtor under a hire-purchase agreement as defined in section 1 of the Hire-Purchase Act, 1942 (Act No. 36 of 1942), before the administration order was granted, is entitled or becomes entitled, by reason of the debtor's failure to fulfil any obligation under such agreement, to demand immediate payment of the sum of the purchase price then still owing, and if such person advises the administrator in writing that he elects so to do, such agreement shall be deemed to create a hypothec on the goods in favour of the seller whereby the amount still owing to him in terms of the agreement is secured, and any term or condition of the agreement with regard to the seller's right to dissolve or terminate such agreement or his right to the return of the goods to which the agreement relates shall not, in consequence of the debtor's non-compliance with any term or condition thereof, notwithstanding anything to the contrary in any law contained, be enforceable.

**[The Hire-Purchase Act 36 of 1942 has been replaced  
by the Credit Agreements Act 75 of 1980.]**

(8) The court may by order of court authorize the seller referred to in subsection (7) to take possession of the goods referred to in that subsection and to sell them by public auction by an auctioneer nominated by the court after giving the administrator and all the creditors written notice of the time and place of the sale and, if the court has so ordered, after publishing the notice or notices in the manner prescribed by the court, in one or more newspapers designated by the court or, if the seller, buyer and administrator so agree, to sell them by private treaty.

(9) Where the seller has sold the goods in terms of a court order referred to in subsection (8) he shall, if the sale was by public auction, forthwith lodge the auction list with the administrator and pay to the administrator the amount of the proceeds of the sale in excess of the amount of his debt and the costs connected with the sale or, if the net proceeds of the sale are insufficient to pay his debt in full, he may lodge a claim with the administrator in respect of the balance of the purchase price owing to him for inclusion in the list of creditors who are entitled to share in the *pro rata* distribution of funds received by the administrator.

- (10) (a) The list of creditors referred to in subsection (1) shall be open to inspection by the creditors or their attorneys in the office of the clerk of the court and the office of the administrator at any time during office hours.
- (b) Any creditor may, in the manner and within the period prescribed in the rules, object to any debt included in the list of creditors.

**[section 74G inserted by Act 63 of 1976]**

**Inclusion of creditors in list after granting of administration order**

**76H.** (1) Any person who becomes a creditor of the judgment debtor after an administration order has been granted and who is desirous of providing proof of debt, shall lodge his claim in writing with the administrator, who shall thereupon advise the debtor thereof in the form prescribed in the rules.



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(2) If the debtor admits the claim or does not dispute it within the period allowed in the notice referred to in subsection (1), the provisions of section 74G(3) shall, *mutatis mutandis*, apply, but the creditor shall not be entitled to a dividend in terms of the administration order until the creditors who were creditors on the date of the granting of the order have been paid in full.

(3) If the debtor disputes the claim within the period allowed in the notice referred to in subsection (1), the provisions of section 74G(4), (5) and (6) shall, *mutatis mutandis*, apply but if the court allows the claim as a whole or in part, such claim shall be subject to the rights referred to in subsection (2), of creditors who were creditors on the date on which the administration order was granted.

(4) The provisions of section 74G(7), (8) and (9) and of subsections (1), (2) and (3) of this section shall, *mutatis mutandis*, apply to any person who after the granting of an administration order sold and delivered goods to the debtor under a hire-purchase agreement as defined in section 1 of the Hire-Purchase Act, 1942 (Act No. 36 of 1942), and is desirous of providing proof of debt.

[The Hire-Purchase Act 36 of 1942 has been replaced by the Credit Agreements Act 75 of 1980.]

[Section 74H is inserted by Act 63 of 1976.]

**Payments by debtor in terms of administration order**

**74I.** (1) The debtor shall, subject to the provisions of this section, pay the administrator the amounts of the weekly or monthly or other payments that he is required to make in terms of the administration order.

(2) If a debtor fails to make the payments to the administrator that he is required to make in terms of the administration order, the provisions of sections 65A to 65L shall *mutatis mutandis* apply, while any reference in the said provisions to the judgment concerned, the judgment creditor or the judgment debtor shall be construed as a reference to the administration order concerned, the administrator or the debtor, respectively.

(3) If, in addition to the administration order, the court has authorized the issue of an emoluments attachment order or a garnishee order and has suspended such authorization conditionally and the debtor fails to comply with the conditions of suspension, the administrator may lodge a certificate to this effect with the clerk of the court, and the clerk of the court shall thereupon issue the emoluments attachment order or garnishee order, as the case may be.

(4) An emoluments attachment order or garnishee order referred to in subsection (3) shall be prepared by the administrator or his attorney, shall be signed by the administrator or his attorney and the clerk of the court, and shall be served on the garnishee by the messenger of the court by registered post.

(5) (a) When an emoluments attachment order or garnishee order referred to in subsection (3) has been served on the garnishee, he shall be obliged to pay to the administrator the amounts concerned as provided by the order and such payments shall constitute a first preference against the debtor's income.

(b) The provisions of section 65J(4) to (8) shall *mutatis mutandis* apply to the emoluments attachment order referred to in paragraph (a), and in such application any reference in the said provisions to the judgment creditor shall be construed as a reference to the administrator and any reference therein to the relevant order

referred to in section 65J(1)(a) or (b) shall be construed as a reference to the relevant administration order referred to in section 74(1).

[section 74I inserted by Act 63 of 1976]

### Duties of administrator

**74J.** (1) An administrator shall collect the payments to be made in terms of the administration order concerned and shall keep up to date a list (which shall be available for inspection, free of charge, by the debtor and creditors or their attorneys during office hours) of all payments and other funds received by him from or on behalf of the debtor, indicating the amount and date of each payment, and shall, subject to section 74L, distribute such payments *pro rata* among the creditors at least once every three months, unless all the creditors otherwise agree or the court otherwise orders in any particular case.

(2) If any debt or the balance of a debt be less than R10, the administrator may in his discretion pay such debt in full if such action will facilitate the distribution of funds in his possession.

(3) Claims that would enjoy preference under the laws relating to insolvency shall be paid out in the order prescribed by those laws.

(4) An administrator may, out of the moneys which he controls, pay any urgent or extraordinary medical, dental or hospital expenses incurred by the debtor after the date of the administration order.

(5) Every distribution account in respect of the periodical payments and other funds received by an administrator shall be numbered consecutively, shall bear the case number under which the administration order has been filed, shall be in the form prescribed in the rules, shall be signed by the administrator and shall be lodged at the office of the clerk of the court where it may be inspected free of charge by the debtor and the creditors or their attorneys during office hours;

(6) A distribution account referred to in subsection (5) shall at the request of any interested party be subject to review free of charge by any judicial officer whose decision shall be final.

(7) An administrator shall deposit all moneys received by him from or on behalf of debtors whose estates are under administration -

- (a) if he is not a practising attorney, in a separate trust account with any bank in the Republic, and no amount with which any such account is credited shall be deemed to be part of the administrator's assets or, in the event of his death or insolvency, of his deceased or insolvent estate;
- (b) if he is a practising attorney, in the trust account that he keeps in terms of section 33 of the Attorneys, Notaries and Conveyancers Admission Act, 1934 (Act No. 23 of 1934).

[The Attorneys, Notaries and Conveyancers Admission Act 23 of 1934 was replaced by the Attorneys Act 53 of 1979, which was replaced in turn by the Legal Practitioners Act 15 of 1995.]

(8) If a debtor should at any time, despite a registered letter of demand from the administrator, be 14 days in arrear with the payment of any instalment and if steps in terms of section 74I(3) cannot be taken or have been taken unsuccessfully, or if the debtor had

disappeared, the administrator shall forthwith notify the creditors in writing thereof and request their instructions.

(9) If within the period allowed in a notice contemplated in subsection (8) the majority of the creditors instruct him to do so, or fail to respond, the administrator shall institute legal proceedings against the debtor for his committal for contempt of court or take such steps as may be necessary to trace the debtor who has disappeared, as the circumstances may require.

(10) If within the period allowed in a notice contemplated in subsection (8) the majority of the creditors instruct him to do so, the administrator shall apply to the court for the rescission of the administration order.

(11) If an administrator fails to lodge a distribution account with the clerk of the court within one month from the time his obligation to do so commenced, any interested party may apply to the court for an order directing him to lodge a distribution account with the clerk of the court within the time laid down in the order or relieving him of his office as administrator.

(12) If an administrator has lodged a distribution account with the clerk of the court but has failed to pay any amount of money due to any creditor in terms of such account within one month thereafter, the court may upon the application of the creditor order the administrator to pay the creditor the amount concerned within such period as may be fixed in the order and furthermore to pay to the debtor's estate an amount which is double the amount which he failed so to pay.

(13) The court may order an administrator to pay the costs of an application in terms of subsection (11) or (12) *de bonis propriis*.

(14) If any debt which was due at the time of the granting of an administration order in respect of a debtor's estate is paid in full or in part to the creditor by the debtor after the granting of the order, otherwise than by way of payments in terms of the administration order, such payment shall be invalid and the administrator may recover the amount paid from the creditor, unless the creditor proves that the payment was effected without his knowledge of the administration order, and, in addition, the creditor shall forfeit his claim against the estate of the debtor if the payment was effected at the request of the creditor whilst he had knowledge of the administration order.

[section 74J inserted by Act 63 of 1976]

### Realization of assets by administrator

**74K.** (1) An administrator may, if authorized thereto by the court, realize any asset of the estate under administration or return such asset to the seller in terms of section 14 of the Hire-Purchase Act, 1942 (Act No. 36 of 1942), and in granting such authorization the court may impose such conditions as it may deem fit.

[The Hire-Purchase Act 36 of 1942 has been replaced by the Credit Agreements Act 75 of 1980.]

(2) An asset mentioned in subsection (1) that is the subject of any agreement regulated by the Hire-Purchase Act, 1942, shall not be realized except with the written permission of the seller.

(3) If an administrator returns any asset to the seller in terms of section 14 of the Hire-Purchase Act, 1942, the seller shall pay to the administrator the amount that he is required to refund to the buyer in terms of section 15 of the said Act for *pro rata* distribution among the creditors, and if the buyer is required to pay the seller any amount in terms of the said section 15

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the seller shall be entitled to lodge a claim for the said amount with the administrator for payment in terms of the relevant provisions of this Act.

(4) Whenever the court authorizes the administrator to realize any asset or to return any asset to the seller in terms of section 14 of the Hire-Purchase Act, 1942, and has, in determining the amount that the debtor shall pay each week or each month in terms of the administration order, taken account of the periodical payments to be made by the debtor in respect of such an asset, the court may amend the payments to be made in terms of the order accordingly.

[section 74K inserted by Act 63 of 1976]

**Remuneration and expenses of administrator**

**74L.** (1) An administrator may, before making a distribution -

- (a) deduct from the money collected his necessary expenses and a remuneration determined in accordance with a tariff prescribed in the rules;
- (b) retain a portion of the money collected, in the manner and up to an amount prescribed in the rules, to cover the costs that he may have to incur if the debtor is in default or disappears.

(2) The expenses and remuneration mentioned in subsection 1(a) shall not exceed 12½ per cent of the amount of collected moneys received and such expenses and remuneration shall, upon application by any interested party, be subject to taxation by the clerk of the court and review by any judicial officer.

[section 74L inserted by Act 63 of 1976]

**Furnishing of information by administrator**

**74M.** The administrator shall upon payment of the fees prescribed in the rules -

- (a) furnish any creditor applying therefor with such information about the progress made in regard to the administration as he may desire; and
- (b) furnish any person applying therefor with a copy of the debtor's application and statement of his affairs mentioned in sections 74 and 74A(1), or with a list or account mentioned in section 74G(1) or 74J, or with the debtor's statement of his affairs mentioned in section 65I(2).

[section 74M inserted by Act 63 of 1976]

**Failure by administrator to perform his duties**

**74N.** An administrator shall take the proper steps to enforce an administration order, and if he fails to do so, any creditor may, by leave of the court, take those steps, and the court may thereupon order the administrator to pay the costs of the creditor *de bonis propriis*.

[section 74N inserted by Act 63 of 1976]

**Costs of application for administration order**

**74O.** Unless the court otherwise orders or this Act otherwise provides, no costs in connection with any application in terms of section 74(1) shall be recovered from any person

other than the administrator concerned, and then as a first claim against the moneys controlled by him.

[section 74O inserted by Act 63 of 1976]

### Remedies restricted by administration order

**74P.** (1) As long as any administration order is of force and effect in respect of the estate of any debtor, no creditor shall have any remedy against the debtor or his property for collecting money owing, except in regard to any mortgage bond or any debt referred to in section 74B(3) or by leave of the court and on such conditions as the court may impose.

(2) Any court in which proceedings have been instituted against a debtor in respect of any debt except a debt due under a mortgage bond or a debt referred to in section 74B(3) shall, upon receiving notice of the administration order, suspend such proceedings but may grant costs already incurred by the creditor, and such costs may be added to the judgment debt.

[section 74P inserted by Act 63 of 1976]

### Suspension, amendment or rescission of administration order

**74Q.** (1) The court under whose supervision any administration order is being executed, may at any time upon application by the debtor or any interested party re-open the proceedings and call upon the debtor to appear for such further examination as the court may deem necessary, and the court may thereupon on good cause shown suspend, amend or rescind the administration order, and when it suspends such an order it may impose such conditions as it may deem just and reasonable.

(2) The court may at any time at the request of the administrator in writing and with the written consent of the debtor, amend any administration order.

(3) Upon any application for the rescission of an administration order the court may -

- (a) rescind the order under subsection (1); or
- (b) if it appears to the court that the debtor is unable to pay any instalment, suspend the order for such period and on such conditions as it may deem fit or amend the instalments to be paid in terms thereof and make the necessary amendments to any emoluments attachment order or garnishee order issued so as to ensure payment in terms of the administration order, or set aside the said emoluments attachment order or garnishee order; or
- (c) authorize the issue of an emoluments attachment order or garnishee order to ensure the payments in terms of the administration order; or
- (d) set aside or amend any emoluments attachment order or garnishee order issued so as to ensure payments in terms of the administration order.

(4) Any order rescinding an administration order shall be in the form prescribed in the rules and a copy thereof shall be delivered personally or sent by post by the administrator to the debtor and to each creditor, who shall also be informed of the debtor's last known address by the administrator.

(5) When an order of court for the payment of any judgment debt in instalments or any emoluments attachment order or garnishee order has lapsed in consequence of the granting of an

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administration order and such judgment debt has not been paid in full upon the rescission of the administration order, such court order, emoluments attachment order or garnishee order shall revive in respect of such judgment debt, unless the court otherwise orders.

[section 74Q inserted by Act 63 of 1976]

**Administration order no bar to sequestration**

**74R.** The granting of an order under section 74(1) shall be no bar to the sequestration of the debtor's estate.

[section 74R inserted by Act 63 of 1976]

**Incurring of debts by person subject to administration order**

**74S.** (1) Any person who is subject to an administration order and who during the currency of such order incurs any debt without disclosing that he is subject to an administration order shall be guilty of an offence and on conviction liable to imprisonment for a period not exceeding 90 days or to periodical imprisonment for a period not exceeding 2 160 hours in accordance with the laws relating to prisons and, in addition, the court may, upon application by any interested person, set aside the administration order.

(2) The provisions of the Criminal Procedure Act, 1955 (Act No. 56 of 1955), with regard to periodical imprisonment shall *mutatis mutandis* apply to periodical imprisonment imposed in terms of subsection (1).

[The Criminal Procedure Act 56 of 1955 has been replaced by the Criminal Procedure Act 51 of 1977.]

[section 74S inserted by Act 63 of 1976]

**Change of address by debtor subject to administration order**

**74T.** (1) Any debtor subject to an administration order who changes his place of residence, business or employment shall forthwith notify the clerk of the court and the administrator of his new place of residence, business or employment.

(2) When any debtor subject to an administration order moves to any other district, the court under whose supervision the administration order is being executed may transfer the proceedings to the court of that district.

[section 74T inserted by Act 63 of 1976]

**Lapsing of administration order**

**74U.** As soon as the costs of the administration and the listed creditors have been paid in full, an administrator shall lodge a certificate to that effect with the clerk of the court and send copies thereof to the creditors (who shall also be informed therein of the debtor's last known address), and thereupon the administration order shall lapse.

[section 74U inserted by Act 63 of 1976]

**Interruption of prescription**

**74V.** (1) In the case of any debt mentioned in the statement referred to in section 74A (1), prescription shall be interrupted on the date on which such statement is lodged and, in the

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case of any debt not mentioned in such statement, prescription shall be interrupted on the date on which any claim against the debtor is lodged with the court or the administrator.

(2) If the relevant prescriptive period of a debt referred to in subsection (1), had it not been for the provisions of subsection (1), would be completed on or before or within one year of, the day on which the restriction referred to in subsection 74P(1) has ceased to exist, the prescriptive period shall not be completed until a year after the said day has elapsed.

[section 74V inserted by Act 63 of 1976]

**Failure of administrator to carry out certain duty**

**74W.** Any administrator who fails to carry out the duty assigned to him by subsection 74J(7) shall be guilty of an offence and on conviction liable to a fine not exceeding R200 or in default of payment to imprisonment for a period not exceeding 6 months.

[section 74W inserted by Act 63 of 1976]

**Jurisdiction to decide disputes arising out of garnishee orders**

**75.** (1) If the garnishee disputes that the debt or emoluments sought to be attached are owing or accruing or alleges that they are subject to a set-off or belong to or are subject to a claim by some third person, the court may determine the rights and liabilities of all the parties and may declare the claim of that third person to be barred, provided that the claim or value of the matter in dispute is otherwise within the jurisdiction of the court.

(2) If it be proved that such third person neither resides nor carries on business nor is employed within the Republic and that he has a *prima facie* claim to the debt, the court shall not have jurisdiction under this section.

[subsection (2) amended by Act 53 of 1970]

**Review of conditions of sale of immovable property to be sold in execution of a Supreme Court judgment**

**75bis.** Notwithstanding anything to the contrary in any law contained, the court may, on the application of any interested party, review and confirm, modify or settle the conditions of sale in respect of any immovable property to be sold in execution of any judgment of any division of the Supreme Court of South Africa.

[section 75bis inserted by Act 80 of 1964]

**Execution or payment is discharge *pro tanto***

**76.** Payment made by or execution levied upon the garnishee under the provisions of this Act shall be valid discharge of the debt or amount of emoluments due from him to the judgment debtor to the extent of the amount paid or levied.

**Saving of existing laws prohibiting attachment**

**77.** Save where under section 65E(1) an order may be granted against the State, nothing in this Act contained shall be construed as authorizing the attachment of any debt or emoluments or any moneys or property specially declared, by any law not to be liable to attachment.

[section 77 substituted by Act 63 of 1976]

### Execution or suspension in case of appeal, etc.

78. Where an appeal has been noted or an application to rescind, correct or vary a judgment has been made, the court may direct either that the judgment shall be carried into execution or that execution thereof shall be suspended pending the decision upon the appeal or application. The direction shall be made upon such terms, if any, as the court may determine as to security for the due performance of any judgment which may be given upon the appeal or application.

### Person who has made a *nulla bona* return not to incur debts

79. Any person shall be guilty of an offence and liable to a fine not exceeding one hundred rand if after a return of *nulla bona* has been made in respect of a judgment against him and before satisfaction of the said judgment, he obtains credit to an amount exceeding one hundred rand in the aggregate without previously informing all persons from whom he so obtains credit that there is an unsatisfied judgment against him and that a return of *nulla bona* has been made in respect thereof.

[section 79 amended by Act 19 of 1963 and by Act 91 of 1977]

## CHAPTER X

### COSTS

#### Costs to be in accordance with scales and to be taxed

80. (1) The stamps, fees, costs and charges in connection with any civil proceedings in magistrates' courts shall, as between party and party, be payable in accordance with the scales prescribed by the rules.

(2) As between attorney and client, the clerk of the court may in his discretion (subject to the review hereinafter mentioned) allow costs and charges for services reasonably performed by the attorney at the request of the client for which no remuneration is recoverable as between party and party and for which no provision is made in the rules.

(3) Payment of costs awarded by the court (otherwise than by a judgment in default of the defendant's appearance to defend or on the defendant's consent to judgment before the time for such appearance has expired) may not be enforced until they have been taxed by the clerk of the court.

(4) Any person who is liable to pay or who is sued for costs of any civil proceedings in a court otherwise than under an award by the court or under a special agreement, may require that those costs shall be taxed by the clerk of the court as between attorney and client; and thereupon any action for the recovery of those costs shall be stayed pending the taxation. The costs of and incidental to such a taxation shall be borne, if not more than one-sixth of such costs is disallowed on taxation, by the person requiring the taxation, and, if more than one-sixth is so disallowed, by the person claiming the costs.

#### Review of taxation

81. Taxation by the clerk of the court shall be subject to review free of charge by a judicial officer of the district; and the decision of such judicial officer may at any time within one month thereafter be brought in review before a judge of the court of appeal in the manner prescribed by the rules.



## CHAPTER XI

## APPEAL AND REVIEW

**By consent, decision of magistrate's court may be final**

**82.** No appeal shall lie from the decision of a court if, before the hearing is commenced, the parties lodge with the court an agreement in writing that the decision of the court shall be final.

**Appeal from magistrate's court**

**83.** Subject to the provisions of section 82, a party to any civil suit or proceeding in a court may appeal to the court of appeal, against -

- (a) any judgment of the nature described in section 48;
- (b) any rule or order made in such suit or proceeding and having the effect of a final judgment, including any order under Chapter IX and any order as to costs;
- (c) any decision overruling an exception, when the parties concerned consent to such an appeal before proceeding further in an action or when it is appealed from in conjunction with the principal case, or when it includes an order as to costs.

[section 83 substituted by Act 15 of 1969 and amended by Act 29 of 1985]

**Time, manner and conditions of appeal**

**84.** Every party so appealing shall do so within the period and in the manner prescribed by the rules; but the court of appeal may in any case extend such period.

**No peremption of appeal by satisfaction of judgment**

**85.** A party shall not lose the right to appeal through satisfying or offering to satisfy the judgment in respect of which he appeals or any part thereof or by accepting any benefit from such judgment, decree or order.

**Respondent may abandon judgment**

**86.** (1) A party may by notice in writing abandon the whole or any part of a judgment in his favour.

(2) Where the party so abandoning was the plaintiff, or applicant, judgment in respect of the part abandoned shall be entered for the defendant or respondent with costs.

(3) Where the party so abandoning was the defendant or respondent, judgment in respect of the part abandoned shall be entered for the plaintiff or applicant in terms of the claim in the summons or application.

(4) A judgment so entered shall have the same effect in all respects as if it had been the judgment originally pronounced by the court in the action or matter.

**Procedure of court of appeal**

[The word "court" is misspelt in the *Government Gazette*, as reproduced above.]

87. The court of appeal may -
- (a) confirm, vary or reverse the judgment appealed from, as justice may require;
  - (b) if the record does not furnish sufficient evidence or information for the determination of the appeal, remit the matter to the court from which the appeal is brought, with instructions in regard to the taking of further evidence or the setting out of further information;
  - (c) order the parties or either of them to produce at some convenient time in the court of appeal such further proof as shall to it seem necessary or desirable; or
  - (d) take any other course which may lead to the just, speedy and as much as may be inexpensive settlement of the case; and
  - (e) make such order as to costs as justice may require.

#### Execution of judgment of court of appeal

88. The judgment of the court of appeal shall be recorded in the court appealed from, and may be enforced as if it had been given in such last-mentioned court.

### PART III – CRIMINAL MATTERS

#### CHAPTER XII

#### CRIMINAL JURISDICTION

#### Jurisdiction in respect of offences

89. (1) The court, other than the court of a regional division, shall have jurisdiction over all offences except treason, murder and rape.

(2) The court of a regional division shall have jurisdiction over all offences except treason.

[section 89 substituted by Act 75 of 1959, and amended by Act 91 of 1977 and by Act 1 of 1999]

#### Local limits of jurisdiction

90. (1) Subject to the provision of section 89, any person charged with any offence committed within any district, district division or regional division may be tried by the court or that district, district division or regional division, as the case may be.

- (2) When any person is charged with any offence -
- (a) committed within the distance of four kilometres beyond the boundary of the district, district division or regional division; or
  - (b) committed in or upon any vehicle on a journey which or part whereof was performed in, or within the distance of four kilometres of, the district, district division or regional division; or

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- (c) committed on board any vessel on journey upon any river within the Republic or forming the boundary of any portion thereof, and such journey or part thereof was performed in, or within the distance of four kilometres of, the district, district division or regional division; or
- (d) committed on board any vessel on a voyage within the territorial waters of the Republic (including the territory of South West Africa), and the said territorial waters adjoin the district, district division or regional division; or
- (e) begun or completed within the district, district division or regional division,

such person may be tried by the court of the district, district division or regional divisions, as the case may be, as if he had been charged with an offence committed within the district, district division or regional division, respectively.

(3) Where it is uncertain in which of several jurisdictions an offence has been committed, it may be tried in any of such jurisdictions.

(4) A person charged with an offence may be tried by the court of any district, district division or regional division, as the case may be, where in any act or omission or event which is an element of the offence took place.

[The two words "where in" should be the single word "wherein".]

(5) A person charged with theft of property or with obtaining property by an offence, or with an offence involves the receiving of any property by him, may also be tried by the court of any district, district division or regional division, as the case may be, wherein he has or had part of the property in his possession.

(6) A person charged with kidnapping, child-stealing or abduction may also be tried by the court of any district, district division or regional division, as the case may be, through or in which he conveyed or concealed or detained the person kidnapped, stolen or abducted.

(7) Where by any special provision of law a magistrate's court has jurisdiction in respect of an offence committed beyond the local limits of the district, district division or regional division, as the case may be, such court shall not be deprived of such jurisdiction by any of the provisions of this section.

(8) Where an accused is alleged to have committed various offences within different districts in the territory, the attorney-general may in writing direct that criminal proceedings in respect of such various offences be commenced in the court of any particular district in the territory, whereupon such court shall have jurisdiction to act with regard to any such offence as if such offence had been committed within the area of jurisdiction of that court, and the court of the district division or regional division within whose area of jurisdiction the court of such district is situated, shall likewise have jurisdiction in respect of any such offence if such offence is an offence which may be tried by the court of a district division or regional division.

(9) Notwithstanding anything contained in this section, the provisions of section 125 of the Criminal Procedure Act, 1977, shall *mutatis mutandis* apply in respect of the trial of any person by any court.

[The word "Criminal" in the phrase "Criminal Procedure Act" is misspelt in the *Government Gazette*, as reproduced above.]

[Section 90 is substituted by Act 40 of 1952; amended by Act 75 of 1959, Act 17 of 1969 and Act 91 of 1977; and substituted by Act 11 of 1985.]

### Criminal jurisdiction of periodical court

91. The jurisdiction of the periodical court in criminal matters shall be subject, *mutatis mutandis*, to the provisions contained in section *twenty-seven* and in sub-section (3) of section *thirty-five*.

### Limits of jurisdiction in the matter of punishments

92. (1) Save as otherwise in this Act or in any other law specially provided, the court, whenever it may punish a person for an offence -

- (a) by imprisonment, may impose a sentence of imprisonment for a period not exceeding five years, where the court is not the court of a regional division, or not exceeding twenty years, where the court is the court of a regional division;
- (b) by fine, may impose a fine not exceeding N\$20 000, where the court is not the court of a regional division, or not exceeding N\$100 000, where the court is the court of a regional division;
- ~~(c) by whipping, may impose a sentence of whipping with a cane only.~~

**[Subsection (1) is amended by Act 91 of 1977, Act 14 of 1981 and Act 9 of 1997. Paragraph (c) is unconstitutional in terms of *Ex Parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of State* 1991 NR 178 (SC), which declared that "the imposition of any sentence by any judicial or quasi-judicial authority, authorising or directing any corporal punishment upon any person is unlawful and in conflict with art 8 of the Namibian Constitution" and specifically cited this provision.]**

- (2) (a) The court shall have jurisdiction to impose any punishment prescribed in respect of an offence under an ordinance of a province or the territory which relates to vehicles and the regulation of traffic on public roads, notwithstanding that such punishment exceeds the jurisdiction referred to in subsection (1).
- (b) Where a person is convicted of culpable homicide arising out of the driving of a vehicle as defined in any applicable ordinance referred to in paragraph (a), the court shall have jurisdiction to impose any punishment which the court may impose under that paragraph in respect of the offence of driving a vehicle recklessly on a public road.

**[Section 92 is amended by Act 40 of 1952, substituted by Act 16 of 1959, amended by Act 19 of 1963 and substituted by Act 94 of 1974.]**

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93.

**[Section 93 is amended by Act 40 of 1952, Act 62 of 1955 and Act 80 of 1964, and deleted by Act 51 of 1977.]**

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93bis.

**[Section 93bis is inserted by Act 40 of 1952, substituted by Act 70 of 1968 and by Act 17 of 1970, and deleted by Act 51 of 1977.]**

**Magistrate may be assisted by assessors**

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**93ter.** (1) The judicial officer presiding at any trial may, before any evidence has been led, with the approval of the Minister, summon to his assistance any person who has or any two persons who have, in his opinion, experience in the administration of justice or skill in any matter which may have to be considered at the trial, to sit with him at the trial as assessor or assessors.

[subsection (1) substituted by Act 91 of 1977]

(2)

[subsection (2) amended by Act 16 of 1959 and deleted by Act 91 of 1977]

(3) Before the trial the said judicial officer shall administer an oath to the person or persons whom he has so called to his assistance that he or they will give a true verdict, according to the evidence upon the issues to be tried, and thereupon he or they shall be a member or members of the court subject to the following provisions:

- (a) any matter of law arising for decision at such trial, and any question arising thereat as to whether a matter for decision is a matter of fact or a matter of law, shall be decided by the presiding judicial officer and no assessor shall have a voice in any such decision;
- (b) the presiding judicial officer may adjourn the argument upon any such matter or question as is mentioned in paragraph (a) and may sit alone for the hearing of such argument and the decision of such matter or question;
- (c) whenever the said judicial officer shall give a decision in terms of paragraph (a) he shall give his reasons for that decision;
- (d) upon all matters of fact the decision or finding of the majority of the members of the court shall be the decision or finding of the court, except when only one assessor sits with the presiding judicial officer in which case the decision or finding of such judicial officer shall be the decision or finding of the court if there is a difference of opinion;
- (e) it shall be incumbent on the court to give reasons for its decision or finding on any matter made under paragraph (d);
- (f) in the event of a conviction the question of the punishment to be inflicted shall be deemed, for the purposes of paragraph (a), to be a question of law.

(4) If any such assessor is not a person employed in a full-time capacity in the service of the State he shall be entitled to such compensation as the Minister, in consultation with the Minister of Finance, may determine in respect of expenses incurred by him in connection with his attendance at the trial, and in respect of his services as assessor.

[subsection (4) substituted by Act 91 of 1977]

(5) The provisions of section 147 of the Criminal Procedure Act, 1977, shall *mutatis mutandis* apply where an assessor referred to in this section dies or becomes in the opinion of the presiding judicial officer incapable of continuing to act as an assessor.

[subsection (5) inserted by Act 16 of 1959 and substituted by Act 91 of 1977]

[section 93ter inserted by Act 14 of 1954]

CHAPTER XIII

REMITTAL

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94.

[section 94 substituted by Act 16 of 1959 and deleted by Act 51 of 1977]

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95.

[section 95 amended by Act 40 of 1952, Act 19 of 1963 and Act 94 of 1974, and deleted by Act 51 of 1977]

CHAPTER XIV

REVIEW

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96.

[Section 96 is amended by Act 40 of 1952, Act 62 of 1955, Act 16 of 1959, Act 19 of 1963, Act 17 of 1969 and Act 94 of 1974, and deleted by Act 51 of 1977.]

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97.

[section 97 deleted by Act 51 of 1977]

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98.

[section 98 amended by Act 68 of 1957, Act 93 of 1962 and Act 19 of 1963, and deleted by Act 51 of 1977]

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98*bis*.

[section 98*bis* inserted by Act 19 of 1963 and deleted by Act 51 of 1977]

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99.

[section 99 deleted by Act 51 of 1977]

CHAPTER XV

EXECUTION OF SENTENCES

**Magistrates' Courts Act 32 of 1944 (SA)**

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**100.**

[section 100 amended by Act 40 of 1952 and by Act 16 of 1959,  
and deleted by Act 51 of 1977]

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**101.**

[section 101 amended by Act 16 of 1959 and by Act 19 of 1963,  
substituted by Act 37 of 1963, and deleted by Act 51 of 1977]

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**102.**

[section 102 amended by Act 16 of 1959 and by Act 37 of 1963,  
and deleted by Act 51 of 1977]

CHAPTER XVI

CRIMINAL APPEALS

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**103.**

[section 103 amended by Act 16 of 1959, Act 93 of 1962  
and Act 15 of 1969, and deleted by Act 51 of 1977]

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**104.**

[section 104 amended by Act 62 of 1955 and deleted by Act 51 of 1977]

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**105.**

[section 105 amended by Act 15 of 1969 and deleted by Act 51 of 1977]

PART IV

CHAPTER XVII

OFFENCES

**Penalty for disobedience of order of court**

**106.** Any person wilfully disobeying or neglecting to comply with any order or judgment of a court or with a notice lawfully endorsed on a summons for rent prohibiting the removal of any furniture or effects, shall be guilty of contempt of court and shall, upon conviction, be liable to a fine not exceeding N\$1 000 or, in default of payment, to imprisonment

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for a period not exceeding three months or to such imprisonment without the option of a fine: Provided that for the purposes of this section the word "order" or "judgment" shall not include -

- (a) a judgment to pay a sum of money; or
- (b) an order referred to in section 65, 65E, 65I, 65J, 65K, 72, 74 or 74J, unless the court is satisfied that the person against whom the order was given -
  - (i) has persistently failed to comply with an order given under any of those sections; and
  - (ii) has the means to comply with such order.

[section 106 amended by Act 40 of 1952 and by Act 19 of 1963, substituted by Act 63 of 1976, and amended by Act 1 of 1999 (amendment markings incomplete)]

**Offence by garnishee**

**106A.** Any garnishee who, by reason of an emoluments attachment order having been served on him or her in respect of the emoluments of a judgment debtor not occupying a position of trust in which he or she handles or has at his or her disposal moneys, securities or other articles of value, dismiss or otherwise terminates the services of such judgment debtor, shall be guilty of an offence and on conviction liable to a fine not exceeding N\$1 000 or, in default of payment, to imprisonment for a period not exceeding 3 months.

[Section 106A is inserted by Act 63 of 1976 and amended by Act 1 of 1999, which includes changes not indicated by amendment markings and introduces a grammatical error; the verb "dismiss" should be "dismisses" to be grammatically correct.]

**Offence by employer**

**106B.** Any employer who, having been requested by an employee to furnish a written statement containing full particulars of such employee's emoluments, fails or neglects to do so within a reasonable time, or who wilfully, or negligently furnishes incorrect relevant particulars, shall be guilty of an offence and on conviction liable to a fine not exceeding N\$1 000 or, in default of payment, to imprisonment for a period not exceeding 3 months.

[section 106B inserted by Act 63 of 1976 and amended by Act 1 of 1999]

**Offences relating to execution**

**107.** Any person who -

- (1) obstructs a messenger or deputy-messenger in the execution of his duties;
- (2) being aware that goods have been placed under arrest, interdict or attachment by the court, makes away with or disposes of those goods in any manner not authorized by law, or knowingly permits those goods, if in his possession or under his control, to be made away with or disposed of in any such manner;
- (3) being a judgment debtor and being required by a messenger or deputy-messenger to point out property to satisfy a warrant issued in execution of judgment against such person, either -
  - (a) falsely declares to that messenger or deputy-messenger that he possesses no property or not sufficient property to satisfy the warrant; or



- (b) although owning such property neglects or refuses to point out the same; or
- (4) being a judgment debtor refuses or neglects to comply with any requirement of a messenger or deputy-messenger in regard to the delivery of documents in his possession or under his control relating to the title of the immovable property under execution,

shall be guilty of an offence and liable upon conviction to a fine not exceeding two hundred rand or, in default of payment, to imprisonment for a period not exceeding six months or to such imprisonment without the option of a fine.

[section 107 amended by Act 19 of 1963 and substituted by Act 53 of 1970]

### **Custody and punishment for contempt of court**

**108.** (1) If any person, whether in custody or not, wilfully insults a judicial officer during his sitting or a clerk or messenger or other officer during his attendance at such sitting, or wilfully interrupts the proceedings of the court or otherwise misbehaves himself in the place where such court is held, he shall (in addition to his liability to being removed and detained as in sub-section (3) of section *five* provided) be liable to be sentenced summarily or upon summons to a fine not exceeding one hundred rand or in default of payment to imprisonment for a period not exceeding three months or to such imprisonment without the option of a fine. In this sub-section the word "court" includes a preparatory examination held under the law relating to criminal procedure.

[subsection (1) amended by Act 19 of 1963]

(2) In any case in which the court commits or fines any person under the provisions of this section, the judicial officer shall without delay transmit to the registrar of the court of appeal for the consideration and review of a judge in chambers, a statement, certified by such judicial officer to be true and correct, of the grounds and reasons of his proceedings, and shall also furnish to the party committed a copy of such statement.

### **Judgment debtor to inform court of change of address**

**109.** (1) Any person against whom a court has, in a civil case, given any judgment or made any order, who has not satisfied in full such judgment or order and paid all costs for which he or she is liable in connection therewith, shall, if he or she has changed his or her place of residence, business, or employment, within 14 days from the date of every such change notify the clerk of the court which gave such judgment or made such order and the judgment creditor or the judgment creditor's legal practitioner or, if his or her estate is under administration, the administrator or his or her legal practitioner, fully and correctly in writing of his or her new place of residence, business or employment.

(2) Any judgment debtor against whom a court has given judgment or has made an order and who fails to comply with the provisions of subsection (1) shall be guilty of an offence, and liable upon conviction to a fine not exceeding N\$1 000 or in default of payment, to imprisonment for a period not exceeding three months.

[section 109 substituted by Act 40 of 1952, Act 19 of 1963, Act 63 of 1976 and Act 1 of 1999]

## PART V

### CHAPTER XVIII

## GENERAL AND SUPPLEMENTARY

**Jurisdiction as to plea of *ultra vires***

**110.** No magistrate's court shall be competent to pronounce upon the validity of a provincial ordinance or an ordinance of the Legislative Assembly of the territory or of a statutory proclamation of the State President or of the Administrator of the territory, and every such court shall assume that every such ordinance or proclamation is valid; but every such court shall be competent to pronounce upon the validity of any statutory regulation, order or bye-law.

[section 110 substituted by Act 17 of 1970]

**Amendment of proceedings**

**111.** (1) In any civil proceedings, the court may, at any time before judgment, amend any summons or other document forming part of the record: Provided that no amendment shall be made by which any party other than the party applying for such amendment may (notwithstanding adjournment) be prejudiced in the conduct of his action or defence.

(2) In civil proceedings an amendment may be made upon such terms as to costs and otherwise as the court may judge reasonable.

(3) No misnomer in regard to the name of any person or place shall vitiate any proceedings of the court if the person or place is described as commonly known, and the court may, on application, correct such misnomer at any time before or after judgment is given.

[subsection (3) substituted by Act 63 of 1976]

(4)

[subsection (4) inserted by Act 63 of 1976 and deleted by Act 1 of 1996]

**Administration of oath or affirmation**

**112.** The oath to be taken by any witness in any civil proceedings in any court shall be administered by the officer presiding at such proceedings or by the clerk of the court (or any person acting in his stead) in the presence of the said officer, or if the witness is to give his evidence through an interpreter, by the said officer through the interpreter or by the interpreter in the said officer's presence.

[section 112 substituted by Act 91 of 1977]

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**113.**

[section 113 deleted by Act 94 of 1974]

**Savings and non-application of Act**

**114.** (1) Nothing in this Act contained shall be construed as affecting the operation of the Criminal Procedure Act, 1977.

[subsection (1) substituted by Act 16 of 1959 and amended by Act 91 of 1977]

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(2) Nothing in this Act contained shall be construed as depriving any superior court of any power to review and correct the proceedings of any magistrate's court.

(3) Nothing in this Act contained shall be construed as affecting the provisions of section *one hundred and five* of the South Africa Act, 1909, relating to appeals to the Appellate Division.

(4) This Act shall not apply to the Transkeian Territories of the Province of the Cape of Good Hope, except in so far as it may be extended thereto by proclamation.

**Saving of pending proceedings**

**115.** (1) Nothing in this Act shall affect proceedings pending at the commencement of this Act and such proceedings shall be continued and concluded in every respect as if this Act had not been passed.

(2) Proceedings shall, for the purposes of this section, be deemed to be pending if, at the commencement of this Act, summons had been issued or the accused had pleaded but judgment had not been given; and to be concluded when judgment is given.

(3) At the expiration of one year from the commencement of this Act, sub-section (1) of this section shall cease to have effect; and any cases pending at the commencement of this Act and not concluded within one year thereafter shall become subject to the provisions of this Act.

**Application of Act to the territory of South-West Africa**

**115A.**(1) This Act and any amendment thereof shall apply also in the territory, including the Eastern Caprivi Zipfel.

(2)

[subsection (2) deleted by Act 91 of 1977]

(3)

[subsection (3) deleted by Act 91 of 1977]

[Section 115A is inserted by Act 17 of 1970.

Section 22 of Act 17 of 1970 provided the following additional provisions relevant to the application of the Act to South West Africa:

**Repeal of law and savings**

**22.** (1) Section 3 of the South-West Africa Affairs Act, 1922 (Act No. 24 of 1922), is hereby repealed in so far as it relates to the attendance of witnesses in any civil action in any magistrate's court in the territory of South-West Africa.

(2) Subject to the provisions of subsection (3), the laws of the territory of South-West Africa specified in the Schedule are hereby repealed to the extent set out in the third column of the Schedule.

(3) Any regulation, rule, notice, approval, authority, return, certificate, document or appointment made, issued or given, and any other act done under any provision of any law repealed by this Act, shall be deemed to have been made, issued, given or done under the corresponding provision of the principal Act.

(4) This section shall apply also in the Eastern Caprivi Zipfel."

**The Schedule referred to is as follows:**

**Schedule**

**Magistrates' Courts Act 32 of 1944 (SA)**

LAWS REPEALED

No. and year of law.	Short title.	Extent of repeal.
Ordinance No. 29 of 1963.	Magistrates' Courts Ordinance, 1963.	The whole.
Ordinance No. 36 of 1965.	General Law Amendment Ordinance, 1965.	Sections 6, 7, 8, 9, 10, 11, 12, 13 and 14.
Ordinance No. 4 of 1968.	General Law Amendment Ordinance, 1968.	Sections 2, 3 and 4.

**Laws repealed**

**116.** The laws specified in the Schedule to this Act are hereby repealed to the extent set out in the third column of that Schedule.

**Short title**

**117.** This Act may be cited for all purposes as the Magistrates' Courts Act, 1944, and shall come into operation on a date to be fixed by the Governor-General by proclamation in the *Gazette*.

[The Republic of South Africa Constitution Act 32 of 1961 provided in Article 3(b) that as from 31 May 1961, any reference to the Governor-General in any law in force in the Union of South Africa or in any other territory in respect of which Parliament is competent to legislate shall be construed as a reference to the Republic or the State President as the circumstances may require. However, by this time the Act had already come into operation on a date fixed by the Governor-General.]

**Schedule**

LAWS REPEALED

No. and Year.	Title.	Extent of Repeal.
Act No. 32 of 1917.	Magistrates' Courts Act	The whole, except the Second Schedule.
Act No. 13 of 1921.	Magistrates' Courts Act Amendment Act.	So much as remains unrepealed.
Act No. 9 of 1923.	Magistrates' Courts Act, 1917, Further Amendment Act.	So much as remains unrepealed.
Act No. 39 of 1926.	Criminal and Magistrates' Courts Procedure (Amendment) Act.	Sections <i>forty-nine</i> to <i>sixty</i> inclusive
Act No. 17 of 1932.	Magistrates' Courts Amendment Act	The whole
Act No. 46 of 1935.	General Law Amendment Act.	Sections <i>eighty-three</i> to <i>ninety-nine</i> inclusive.
Act No. 21 of 1942.	Civil Imprisonment Restriction Act.	Sections <i>one</i> , <i>two</i> and <i>three</i> .