The Right of Access to Court in Civil Litigation

by

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> *" Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."*[1]

Section 34 of the Constitution recognises for the second time[2] in South Africa's fledgling constitutional development that a right of access to the courts exists whenever there is a dispute which can be legally resolved. The inclusion of this right elevates to the level of a constitutional entitlement (and no doubt also supplements) the principle which has been taken as almost axiomatic in South Africa's common law that one whose legal rights have been infringed and/or threatened is entitled to redress through the courts, which courts will adjudicate upon his or her claim and, if successful, the legal process will be available to him or her to enforce their rights.

It would seem that section 34 has the potential to be versatile and multi-functional. On the one hand it would seem to reflect a self-contained independent right on which litigants may validly seek to rely when it is alleged that their access to court has been impeded.[3] On the other hand the provisions of section 34 can, and it is submitted ought to, have a symbiotic relationship with certain of the other rights contained in Chapter 2 of the Constitution - such as the right of equal

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1 S 34 (hereinafter referred to as "section 34") of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) (the 1996 Constitution)

2 Section 34's predecessor was section 22 of the 1993 Constitution (Act 200 of 1993) (the 1993 Constitution)

3 See generally Mohlomi v Minister of Defence 1996 (12) BCLR 1559 (CC)

protection and benefit of the law,[4] the right to property,[5] the right against self-incrimination,[6] the right of access to information,[7] the right to just administrative action,[8] and the right to privacy.[9] In many cases where section 34 is relied upon by one party in a civil action against another party, the rights to property and to equal protection and benefit of the law will, it is submitted, also play particularly important complementary roles in the adjudicatory process. The right to property will often play a role because most civil claims are about the enforcement of patrimonial rights, while the right to equal protection and benefit of the law will often play a role because all litigants are (at least theoretically) entitled to be treated on an equal footing by the court.[10] The right against self-incrimination may come into direct conflict with the right of access to court of citizen Y in circumstances where, for example, the latter seeks enforcement of an *Anton Pillar* Order.[11] The right of access to information may serve as an adjunct to the

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4 Section 9

5 Section 25

6 Section 35(3)(j)

7 Section 32

8 Section 33

9 Section 13

10 Indeed the right of equality before the law is itself accessory to other substantive rights too. See South African Law Commission Final Report on Group and Human Rights (Project 58) @ 17

11 See generally Dabelstein and others v Hildebrandt and others 1996 (3) SA 42 (C) where Farlam J dismissed an argument that the granting of an *Anton Piller* order infringed a number of constitutional rights - including the right to human dignity, the right to privacy, the right against self-incrimination and not to be a compelable witness against oneself, and the right to property

right of access to court in the discovery procedure in civil proceedings. The right to just administrative action is supplemented and strengthened by the court's powers of review and resistance to ouster clauses, while the right to the privacy of citizen X might come into conflict with the right of access to court of citizen Y when the latter seeks to lead evidence which may have been obtained through the infringement of the former's rights to privacy.

This dissertation will seek to examine the right of access to court in civil litigation in closer detail. It will briefly examine the history and development of the right and consider its counterparts in certain foreign constitutional instruments. Certain specific aspects of the application of the right will be examined (or touched upon, as the case may be) namely its effect (if any) upon the absence of a general right of appeal, the right (if any) to legal representation, the effect of the right of access to court (if any) upon certain court rules and procedures,[12] and its effect (if any) upon extinctive prescription. In so doing it will examine instances of the right's application by the courts (both foreign and local) in order to understand, in so far as it is possible to do so, the extent of its meaning and content.

1. *History and Development of the Right of Access to Court*

> *"Legal remedies can be pursued only by recourse to courts of law, whose essential function is to enable people to enforce their rights and obtain their remedies, and also to defend themselves against the claims of others, in a peaceable manner and without*

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[12] such as summary judgment

resorting to physical violence." [13]

A civil suit has traditionally been seen as a conflict between private parties in which the only role of the State is to provide the machinery for the adjudication of the dispute.[14] Having been derived from the English adversarial model, the role of the South African judge in a civil suit is a passive one, leaving the active role to the parties themselves. In keeping with Anglo-American common law-oriented systems, party control rules supreme in civil litigation.[15] Party control of civil litigation permeates all three phases of civil procedure - pleadings, pre-trial and trial.[16] Within the framework of this traditional approach to civil litigation, it appears that our courts have (with the possible exeception of certain Appellate Division decisions in the 1980's)[17] been somewhat consistent in their application of the common law maxims *ubi ius ibi remedium* and *audi alteram partem* to ensure that a plaintiff [18] is entitled to pursue his or her remedy through the courts and for a defendant[19] to be given the opportunity to tell his or her version of events before the court [20] makes a ruling.

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13 Herbstein and van Winsen, The Civil Practice of the Supreme Court of South Africa (now the High Courts and the Supreme Court of Appeal), (4th edition), at page 2

14 W le R De Vos, *"The Impact of the New Constitution upon Civil Procedural Law"* in Stell L R (1995) @ 37

15 *Idem* at page 38

16 *Loc cit*

17 See, for example Staatspresident v United Democratic Front 1988 4 SA 830 (A)

18 Or applicant, appellant or petitioner

19 Or respondent

20 Judge or magistrate

In Minister of the Interior and another v Harris and others[21] Centlivres CJ, quoting from Holt CJ in Ashby v White[22] and from Dixon v Harrison,[23] respectively, said the following :

> *" If a plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy, if he is injured in the exercise or enjoyment of it, and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal."*
>
> and
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> *"...that a man hath a right to a thing for which the law gives him no remedy; which is in truth as great an absurdity, as to say, the having of a right, in law, and having no right, are in effect the same."*

Before the advent of the 1993 Constitution it was invariably accepted that when one had a substantive right at common law one was entitled to seek the enforcement of that right through the courts. It would accordingly seem that the courts formulated their rules in such a way as to attempt to ensure fairness and, insofar as it was within their power to do so, to provide an "equality of weapons". A defendant is, for example, entitled to plead to a plaintiff's claim[24] (and to counterclaim[25]) and a respondent is entitled to answer allegations made by an

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21 1954 (4) SA 769 SA 769 (A)

22 1892 ER 126 @ 136

23 124 ER 958 @ 964

24 Eg. Uniform Rule of Court (URC) 22 made pursuant to the Supreme Court Act (Act 59 of 1959)

25 Eg. URC 24

applicant.[26] A party is entitled to have prior sight of documents which the other party might use in the trial against him or her,[27] to inspect things or medically examine persons in relation to any issue of relevance at the trial, prior to the trial, so as not to be taken by surprise. [28] At the trial each party is entitled to cross-examine the other party's witnesses and to address the court at the conclusion of the evidence. All these things, which are often taken for granted by the legal practitioner, are aspects of the common law rights of access to court and equality before the law, which a litigant has always enjoyed. There can be little doubt that our courts have long cherished maxims *ubi ius ibi remedium* and *audi alteram partem* - if not in its application of human rights entrenched in a Bill of Rights, most certainly in the context of civil litigation where the extensive real and personal rights, granted by the common law,[29] have been adjudicated upon.

On 27 April 1994 the 1993 Constitution came into force. Chapter 3 of the 1993 Constitution comprised a Bill of Rights - the first in South Africa's constitutional history. South Africa accordingly became a constitutional democracy with the Constitution replacing Parliament as the sovereign power. In practical terms this development meant that any law (whether statutory or common law) unjustifiably inconsistent with any right contained in the Bill could be declared invalid by the

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26 Eg. URC 6(5)(d)

27 Eg. through the discovery procedure provided in URC 35

28 Eg. URC 36

29 For more about the elements of the elements of the *audi alteram partem* rule see Corder, "*The content of the audi alteram partem rule in South African administrative law*", 1980 (43) THRHR 156

Constitutional Court.[30] One of the new rights entrenched in the 1993 Constitution was section 22 which effectively constitutionalised the common law right of access to court and which read as follows :

> *"Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum."*

According to Du Plessis and Corder [31] the inclusion in the Bill of section 22 as a substantive right found particular favour among the parties negotiating the 1993 Constitution mainly, it would seem, because it would prevent Parliament from enacting laws which sought to oust the jurisdiction of the courts.[32] While undoubtedly granting South Africans a substantial advantage over other countries which do not have a constitutional right of access to court in most civil matters *per se*,[33] section 22 did not expressly state that the hearing before the court of law or other independent and impartial forum had to be a fair one. This omission apparently led Ackermann J in the case of Bernstein & others v Bester N O & others, [34] in what are submitted to be

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30 A new superior court, created by s 98(1) of the 1993 Constitution, which stands at the apex of the judicial heirarchy along with the Appellate Division (now the Supreme Court of Appeal)

31 In Understanding South Africa's Transitional Bill of Rights at 13

32 There can be no doubt that one of the clearest effects of s 22 was essentially to eliminate the ouster clauses of old.

33 for example Canada, where, in the absence of a constitutional right to property, it cannot be said that a right of access to court exists in matters where proprietrary rights are at stake (see the discussion below relating to the Canadian approach)

34 1996 (2) SA 751 (CC)

obiter remarks, to conclude that an argument could be made out that the framers of the Constitution "deliberately elected not to constituionalise the right to a fair civil trial."[35] The learned justice's basis for this view was that a provision cannot be read into a clause in a statute if all the surrounding circumstances indicate that such provision was deliberately omitted, and that all indications were that the framers of the Constitution were well aware of such express provisions in other international human rights instruments and apparently chose not to include them in the 1993 Constitution.[36] Ackermann J's approach has been criticised by Chaskalson *et al*,[37] *inter alia*, because it is based on an "unduly narrow" reading of the section and because it applies the conventional rule of statutory interpretation[38] relating to implied provisions to the section rather than the rules for the interpretation of Constitutions and Bills of Rights.[39]

In its report[40] of October 1994 the South African Law Commission proposed that the Access to the Courts provision in the final Constitution ought to read thus :

> "*Every person shall have the right to have justiciable disputes settled* ***in a fair and public hearing*** *by an independent and impartial court or tribunal*

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35 *idem* at 805C

36 *idem* at 804F to 805D

37 Constitutional Law of South Africa @ 26-6 to 26-8

38 *idem* at 26-8

39 for the difference between statutory, constitutional and bills of rights interpretation see *idem* at 11-10 to 11-16

40 Final Report on Group and Human Rights (Project 58)

established by law. "[41] (my emphasis)

Section 34 of the 1996 Constitution,[42] which duly replaced section 22 of the, clearly extends the ambit of the right by endorsing the recommendation of the South African Law Commission to the extent to which the words "fair" and "public hearing" have now been added. There are two noticeable differences, however, between the wording of the Commission's recommendation (and the former section 22) on the one hand and section 34 on the other. The first is the substitution of the words "justiciable disputes" with the words "dispute that can be resolved by the application of law", which is apparently in line with the new linguistic formulation of the section.[43] The second noticeable difference is that the words "court" and "tribunal" are not qualified to the effect that they must be "established by law". Though the significance (if any) of this second difference remains to be seen, it is submitted that the new section, read as a whole, probably envisages that the right to a hearing before an independent and impartial forum is no longer necessarily confined to proceedings before courts of law or public tribunals[44] but is extended, in appropriate cases, to include the proceedings of

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41 *idem* at pg. 75

42 Set out in the opening paragraph of this dissertation

43 This particular grammatical style is not confined to section 34. On this note see L M Du Plessis, "The Bill of Rights in the working draft of the New Consitution : an evaluation of aspects of a constitutional text *sui generis*", Stell L R (1996) @ 4 to 6; and G Carpenter, "Possible amendments to the 1996 Bill of Rights - what, where and why?", in Human Rights and Constitutional Law Journal of Southern Africa (vol 1, no 4) @ 5

44 Which, on a reading of Du Plessis v De Klerk 1996 (3) SA 850 (CC) would probably have been the case if section 7(1) of the 1993 Constitution was still in force, in which event the Right of Access to Court (and indeed the entire Bill of Rights) would probably only have applied vertically and not horizontally.

certain domestic or private quasi-courts and arbitration tribunals which are not established in terms of law.[45]

Whatever the case might be with regard to the nature of the forum, there can be no question that any former doubt as to whether the Constitution entrenched the right to "fair" civil litigation has been removed by the express provision that, in addition to the forum being "independent and impartial", the hearing must also be "fair". Section 34, unlike section 35(3)[46] is, however, silent on what the precise meaning of "fair" is. The question of what constitutes a "fair" hearing before a civil court (or other tribunal or forum which is seized with a non-criminal dispute) will, in my view, therefore depend heavily on judicial interpretation. It also goes without saying that the above must also hold true in respect of the general limitation clause[47] in terms of which where a provision in a law *prima facie* infringes one's right of access to the courts, the state (or other party relying on the validity of such law or procedure) has to prove that the limitation of the right is "*reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom*", to avoid a declaration of invalidity. When considering whether the right may be limited (by

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45 The extent to which any fundamental right contained in Chapter 2 of the 1996 Constitution can be enforced in such private tribunals as between private individuals will, in terms of s 8(2) thereof, of course depend on the nature of the right (and to the extent to which it is applicable) given particular circumstances of each case. See further Cheadle and Davis, "*The Application of the 1996 Constitution in the Private Sphere*", SAJHR, (Volume 13, Part 1, 1997)

46 Which sets out in extensive detail precisely which elements are included in an accused's right to a fair criminal trial

47 S 36(1)

the law or procedure concerned) the court is expressly enjoined[48] to take all relevant factors into consideration, including: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; (d) less restrictive means to achieve the purpose.

In determining the extent of the right of access to court (including the question of what constitutes a fair hearing), and in determining whether any *prima facie* infringement of section 34 is permissible in terms of section 36(1), in a given case, the court must, moreover, promote the values underlying an open and democratic society based on human dignity, equality and freedom, must consider international law and may consider the law foreign jurisdictions.[49] It is the law in certain foreign jurisdictions (which are submitted to be "open and democratic societies") which is now to be considered.

2. *The Right of Access to Court, and to a fair hearing, in foreign jurisdictions*

A number of foreign constitutional instruments make provision for some right of access to court - whether in express terms or through the indirect application of another right (such as through a right to property or a right of equal protection of the law).

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[48] By s 36(1)

[49] ss 39(1)(a), (b) and (c)

(a) The United States of America

According to Smit[50] the Seventh Amendment to the Constitution of the United States of America, which guarantees the right to trial by jury according to the rules of the common law, is the only express provision relating to the conduct of civil litigation in a trial court. Be that as it may there can be little doubt that the most important provisions in the United States Constitution which govern a person's right of access to court in the context of civil litigation (albeit implicitly) are the Fifth Amendment[51] and the Fourteenth Amendment[52], the salient features of which read, respectively, as follows :

> *"**No person shall** be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a grand jury... [exceptions]... nor **be deprived of** life, liberty, or **property, without due process of law;** nor shall private property be taken for public use, without just compensation.";*[53] and

> *"**No State shall** make or enforce any law which shall abridge any of the privileges or immunities of citizens of the United States; nor shall any State **deprive any person of** life, liberty or **property, without due process of law; nor** deny to any person within its jurisdiction **the equal protection of the***

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50 H Smit, *"Constitutional Guarantees in Civil Litigation in the United States of America"*, in M Cappelletti's Fundamental Guarantees of the Parties in Civil Litigation @ 447

51 Of 1791, which applies to the federal government

52 Of 1868, which applies to the states

53 5th Amendment

laws. "[54] (my emphasis)

While the Fifth Amendment would, *prima facie*, appear to provide rights predominantly in the context of criminal proceedings, the Fourteenth Amendment encapsulates in one paragraph all the rights contained in sections 34, 9(1) and 25(1) of South Africa's 1996 Constitution.[55] For the purposes of the discussion under this sub-heading, the right of access to court will be referred to as the right to "due process" and the right of equal protection of and benefit of the law as the right to "equality".

It has been held in a number of old American cases that the due process clause provides a guarantee to each litigant of a "fair and adequate opportunity to be heard."[56] A variety of situations have been considered by the United States Supreme Court in which the right to due process in the context of civil litigation featured prominently. In Sniadach v Family Finance Corporation[57] a provision in a state's law which permitted the freezing of one half of the wages of a Defendant, before judgment upon a mere service of a summons, was held to violate due process. The reasons for the violation included the fact that the Defendant was a resident of the state concerned and that he was, therefore, in any event subject to the adjudicatory authority of the state court. In the case of Goldberg v Kelly,[58] the facts of

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54 14th Amendment

55 Namely the rights of access to court, equal protection of and benefit of the law, and to property, respectively.

56 See Smit (*supra*) @ 451 and the cases cited *infra* footnote 79

57 395 *U S* 337, 89 *S Ct* 1820, 23 *L Ed 2d* 349 (1969) - see further Smit @ 451

58 397 *U S* 254, 90 *S Ct* 1011, 25 *L Ed 2d* 287 (1970) - see further Smit @ 451

which concerned the right to be heard in the context of administrative proceedings where an applicant's welfare payments had been terminated, it was held that due process required that the applicant was entitled to the following : (1) timely and adequate notice,[59] (2) the right to confront and cross-examine witnesses against him, (3) the right of oral presentation, (4) the right to retain an attorney, (5) reasons (founded upon legal rules and evidence) for the decision, and (6) an impartial decision-maker. Smit submits[60] that it is "most probable" that at least most of above six requirements in Goldberg v Kelly would be applicable in litigation before ordinary civil courts.[61]

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59 The manner in which service of process takes place often raises questions about whether the defendant had adequate and proper notice of the pending proceedings and whether there was, accordingly, due process. See Smit (*supra*) @ 449 and the cases cited *infra*. It would appear that in the United States, as in South Africa, personal service is the most preferable (and constitutionally the most desirable) means of giving notice to a defendant.

60 @ 452

61 In civil trial proceedings before South African courts of law, requirements (1), (2), (3) and (6) are submitted to be inextricably bound up in the notion of what constitutes a fair trial before a judicial tribunal in terms of the common law principle of *audi alteram partem*. See, for example, Corder "*The content of the audi alteram partem rule*", (1980) 42 THRHR 156 @ 158. Requirement (5) is expressly recognised in common law maxim *nemo iudex in sua causa* - as understood in Mönning v Council of Review 1989 4 SA 866 (C), while the rules of the inferior courts (with the exception of the small claims court) and of the superior courts have expressly recognised requirement (4) for decades.

(b) The European Community

The European Convention on Human Rights,[62] sets out a number of fundamental human rights which are monitored by the European Commission and Court, the duties of which include attempting to ensure that the provisions of the Convention are not breached by member states. One of the provisions in the Convention is Article 6(1) which, *inter alia*, reads as follows :

> "***In the determination of his civil rights and obligations*** *or of any criminal charge against him,* ***everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...***" (my emphasis)

It is self-evident that there are marked similarities between the wording of the opening sentence of article 6(1) and section 34 of South Africa's Constitution. Both, for example, speak of a "*fair*" and "*public*" hearing before an "*independent and impartial tribunal.*" As is the case in South Africa's Constitution, the rights of an accused in criminal proceedings are, *ex facie* the Convention, more extensive than those of a party to civil litigation and are expressly and separately enumerated[63] An important difference between article 6(1) and section 34 is the "limitation" of the right of access (in the former) to "*the determination of...civil rights and obligations*" compared with the seemingly all-embracing application of the right to "*any dispute which can be resolved by the application of law*" (in the latter). Another difference is the express

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62 Signed in Rome in November 1950, and which came into force in September 1953

63 Compare article 6(3) of the Convention with section 35(3) of the 1996 Constitution

injunction in article 6(1) that the hearing must take place *"within a reasonable time."*[64]

According to van Dijk and van Hoof,[65] the European Court has developed certain points of departure as to the meaning of Article 6(1). These include the important finding that not only does Article 6(1) provide procedural guarantees in relation to judicial proceedings, but it also founds a right to judicial procedure - or a right of access to court. This important conclusion was reached in the Court's seminal decision Golder v United Kingdom, [66] where it stated that :

> *"Article 6(1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way, the Article embodies the 'right to a court', of which the right of access, that is* ***the right to institute proceedings before courts in civil matters,*** *constitutes one aspect only. To this are added the guarantees laid down by Article 6(1) as regards both* ***the organisation and composition of the court, and the conduct of the proceedings.*** *In sum, the whole makes up the right to a fair hearing."* (my emphasis)

The exercise of the right of access to a court is not absolute and may be subject to limitations upon the resources of both the

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64 For an extensive commentary on this last-mentioned requirement see P van Dijk and G J H van Hoof, Theory and Practice of the European Convention on Human Rights (2ed) @ 328 *et sequ*

65 *Idem @* 296 *et sequ.*

66 1 EHRR 524

community and individuals.[67] A "proportionality" test was adopted in regard to the limitation of article 6(1) in Ashingdane v UK,[68] where it was stated as follows :

> *"...the limitations ...must not restrict or reduce the access...in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."*

According to Golder,[69] the right will, furthermore, always be subject to procedural and administrative conditions such as time limits, security for costs, office hours, use of prescribed forms and so on. Parliamentary immunity has also been held to be a justifiable limitation.[70] To qualify as a "*fair hearing*" the principle known as the "equality of arms" is of paramount importance[71] According to Sieghart[72] the application of the principle means that a party should have "*a reasonable opportunity of presenting his* (or her) *case to the court under conditions which do not place him* (or her) *at a substantial*

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67 See R Beddard, Human Rights and Europe @ pg. 167

68 7 EHRR 528 @ para 57

69 *Supra*

70 See X v Austria (3374/67) CD 29, 29 and Agee v United Kingdom (7729/76) DR 7, 164

71 See Ofner and Hopfinger v Austria (524/69; 617/59) Report : 23 November 1962 and Artico v Italy 3 EHRR 1

72 P Sieghart, The International Law of Human Rights, @ § 22.4.5, p 279. See too 434/58, X v Sweden, Yearbook II (1958-1959), p 354 (370-372); X v Belgium, D & R 9 (1978), p 108 (110)

disadvantage vis-à-vis his (or her) *opponent.*" It has furthermore been held that the principle of "equality of arms" means that the parties must, at the very least, have the same records and other documents which are material to the case.[73] The principle also entails the right of the one party to be able to oppose the arguments advanced by the other,[74] the right to the admission of relevant and reliable evidence,[75] an equal opportunity to summon witnesses and experts[76] and the parties' right to be present in person.[77] This last mentioned right does not, however, mean that default judgment cannot be granted in any circumstances where a party is absent, but for it to be granted the person must have been summonsed by a procedure which provides sufficient guarantees that such person will receive notice of the proceedings.[78] In the event of a judgment by default[79] any waiver of a right granted by the Convention must be unequivocal.[80]

With regard to the requirement that the court must be an "*independent and impartial tribunal established by law*", it has been held that it is not necessary that the tribunal should be

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73 See van Dijk and van Hoof (*supra*) @ 320 and the cases cited *infra* footnote 601

74 *Loc cit* and the cases cited *infra* footnote 603

75 For a discussion of thie element see Macdonald *et al*, The European system for the protection of Human Rights @ 393 and the cases cited *infra* footnote 62

76 *Loc cit* and the judgment cited *infra* footnote 604

77 *Loc cit* and Monnell and Morris v the United Kingdom (1987) 10 EHRR 205: 209

78 See Macdonald *et al* (*supra*) @ 321 and Colozza v Italy 7 EHRR 516 (1985)

79 At least in criminal proceedings

80 See Colozza v Italy (*supra*) at pg. 524

comprised exclusively of people with legal training.[81] It has been held that the word "independent" means two things : independence from the Executive and independence from the parties.[82] According to Sieghart,[83] it is also a requirement that a court must give reasons for its decision[84], though it does not follow that the court is bound to deal with all points which a party considers essential to his or her case. Nonetheless, if on the face of a judgment it is shown that the court ignored a fundamental defence placed before it which, if successful, would have wholly or partially discharged the defendant from liability then this factor in itself would, according to Sieghart[85] be enough to rebut the presumption that the hearing was a fair one.[86]

(c) The United Kingdom

Although the United Kingdom is a party to the European Convention on Human Rights, no litigant before an English court

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81 X v Austria (1476/62) CD 11, 31; X v Austria (5481/72) CD 44, 127, Langborger v Sweden 12 EHRR 416 (1989); Sramek v Austria 7 EHRR 351 (1984); De Cubber v Belgium 7 EHRR 236 (1984); Piersack v Belgium 5 EHRR 169 (1982); Hauschildt v Denmark 12 EHRR 266 (1989)

82 See Sieghart at § 22.4.5, pg 284 and the cases cited *infra* footnote 105. With regard to the requirements of independence and impartiality see, further, the discussions in Beddard at pg 169 to 170 and in McDonald *et al* at pg. 397 to 398

83 *Op loc cit*

84 This is not, necessarily, the situation in South Africa. See, for example, the remarks of Thring J in S v Sonday and another 1994 (2) SACR 810 (C) at 821e

85 *Idem* @ 285

86 See too Firestone Tyre and Rubber Co. Ltd and International Synthetic Rubber Co Ltd v United Kingdom (5460/72) CD 43,99

can rely upon the terms of the Convention in giving him or her any rights under English common law.[87] The United Kingdom has an unwritten constitution in terms of which Parliament, and not the Constitution or a Bill of Rights, is sovereign. Though, from a technically legal point of view, there is no formal constitutional guarantee of the rights of litigants in civil proceedings, the United Kingdom has a proud history in which the common law of civil procedure has been developed, and in which there have been a number of constitutional "landmarks" granting fundamental rights to British subjects.[88] Jolowicz's submission[89] that any substantial departure from the spirit of the fundamental provisions in these landmarks would be politically difficult if not impossible, cannot be faulted. There can be little doubt that the constitutional balance of political power in the United Kingdom, which has stood the test of time, and the development of the rules of fairness and natural justice[90] by its courts over a number of centuries[91] ably qualifies that country as an "open and democracic society based on human dignity, equality and freedom". If nothing else, it is submitted that its approach to civil litigation, developed over centuries, where the "Rule of Law" has been jealously guarded, will be useful and instructive in assisting our courts in determining whether any law or procedure which is *prima facie* an infringement of section 34 is valid in terms of section 36(1) of the 1996 Constitution. It is

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87 See J A Jolowicz in Fundamental Guarantees of the Parties in Civil Litigation (*supra*)@ 124

88 *Loc cit*. These "landmarks" include the Magna Carta (1215), the "Petition of Right" (1628), the "Bill of Rights" (1688) and the Act of Settlement (1700)

89 *Loc cit*

90 Which include such treasured concepts as the Rule of Law and *Habeus Corpus*

91 As refined by its Rules of Court in the case of civil procedure

submitted that this is particularly true given the fact that South Africa's system of civil procedure is based largely on the English model.[92]

According to Jolowicz[93] the English common law, bolstered by its rules of court, has recognised the following as being elements of a right to a fair trial : the right of notice of the proceedings,[94] the right to notice of the opponent's case,[95] the right of each party to an adequate opportunity to present his or her evidence[96] and argument to the court[97], the right to the proper application of the rules of evidence,[98] the right to a public hearing[99] and the application generally of the rules of justice contained in the common law maxims - *nemo iudex in causa sua* and *audi alteram partem*.[100]

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92 See generally H Erasmus "*Historical Foundations of the South African Law of Civil Procedure*", 108 SALJ (1991)

93 @ 156 *et sequ*

94 Personal service being the most preferred means, alternatively substituted service, with the leave of the court where there have been at least two failed attempts at personal service and where it is likely that proceedings will come to the attention of the defendant. See *idem* @ 157 to 158

95 Which include the pleadings summarising the respective parties' cases and pre-trial procedures including discovery, which enable the parties to adequately prepare to meet each other's cases. See *idem* @ 158 to 160

96 Which would, of necessity, include the right to cross-examine. See *idem* at @ 163

97 Save for where the court gives judgment in favour of a party after having indicated that it was unncessary to hear argument from that party. See *idem* at @ 162

98 See *idem* @ 164 to 165

99 With certain exceptions. See *idem* @ 166 to 168

100 See *idem @ 150*

(d) Canada

Section 1(a) of the Canadian Bill of Rights[101] recognised and declared, *inter alia*, the following right :

> "***the right*** *of the individual* ***to*** *life, security of the person and* ***enjoyment of property, and*** *the right* ***not to be deprived thereof except by due process of law.***" (my emphasis)

Section 2(e) of the same Bill states, *inter alia*, that unless it is expressly declared by an Act of the Parliament of Canada to operate notwithstanding the Bill, no law of Canada shall be construed or applied so as to :

> *"deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations."*

It is clear then that while section 1(a) protects property rights through a "due process" clause, section 2(e) protects a person's right to a fair hearing when his or her rights or obligations are to be determined. As is clear from the language of section 2 for historical reasons, and though an important document, the Bill is from a legal point of view[102] simply another Act of Parliament which does not constitutionally entrench the rights which it declares.

In 1982, however, the Canadian Charter was enacted - which

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101 SC 1960, c 44

102 See G A Watson in Fundamental Guarantees of the Parties in Civil Litigation @ 210

is a constitutionally entrenched document.[103] Section 7 of the Charter reads as follows :

> *"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."*

As Hogg correctly notes[104] two guarantees in the Bill of Rights which are not "substantially replicated" in the Charter are the very sections 1(a) and 2(e) set out above. It is Hogg's view [105] that Secton 7 of the Charter neither provides an entrenched protection of property rights nor guarantees a fair hearing where only "economic interests" are in question. Apparently Canadian courts have refused to extend the meaning of liberty "beyond freedom from physical restraint" to include, for example, "economic" liberty.[106] The Bill of Rights (which only applies to federal and not provincial laws)[107] still applies, however, in Canada to the extent to which it has not been superseded by the Charter.[108] Given the fact that most litigation is about proprietrary interests of some kind (usually money), section 7 of the Charter does not protect parties in such cases while section 2(e) of the Bill does, provided the dispute is governed by federal law.[109] Though Canadian courts will continue to imply

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103 S 52(1) which provides that the Constitution is the "supreme law" and any law inconsistent therewith is invalid to the extent of such inconsistency

104 P W Hogg, Constitutional Law of Canada (3ed),@ 788

105 *Idem* @ 788

106 *Idem* @ 1027

107 See s 32 thereof

108 *Idem @* 1023

109 *Idem @* 1032

a duty to observe the rules of "natural justice", as do their British and South African counterparts, there is (at least in theory) no constitutional bar to an express provision in provincial legislation to the contrary.[110] As Watson points out[111] the rights of civil litigants in Canada are not derived, primarily, from the Constitution or Bill of Rights, but from the "*body of basic principles, usually referred to as the rules of 'natural justice,' developed by the courts as part of the common law.*" Given the unlikelihood of any drastic enactments limiting the rights of civil litigants in the light of Canada's political and constitutional history, there appears to be no valid reason why the common law rules developed in Canada regarding the right of access to court and for the conduct of fair procedure ought not, at the very least, to be viewed in the same light as the useful and instructive ones developed in the United Kingdom over the centuries.

3. *Specific instances of the application of the Right of Access to Court*

As has been seen from the above discussion, a different approach is adopted with regard to the right of access to court in the United States, the European Community, the United Kingdom and Canada. In the United States, the right is essentially enforceable through constitutionally entrenching the right not to be deprived of property without due process of law, while in the European Community a specific right of access to court (very similar to section 34 of South Africa's Constitution) is recognised. On the other hand, the United Kingdom does not have

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110 *Idem* @ 1031

111 @ 217

a constitutionally entrenched Bill of Rights at all, while Canada, while having a constitutionally-entrenched Charter, cannot be said to have a right of access to court in proprietary disputes simply because property rights are not constitutionally entrenched there. Despite the absence of contitutional protection, however, the common law of both last-mentioned countries provides a right of access to court. There are numerous procedures of, and remedies attainable through, civil litigation which raise constitutional questions. Some of these will be considered below in the light of the experiences in the four jurisdictions mentioned above.

3.1 Appeals

Like all human beings judges and magistrates are fallible creatures who can, and often do, make mistakes. Depending on a variety of circumstances, including the presence or absence of certain prescribed requirements, one of two procedural mechanisms - appeal or review - is available to an aggrieved litigant to set aside the decision of a court or tribunal *a quo*. It would seem to be settled law that the main distinction between appeal and review is that in the case of the former it is only the result of the trial which is attacked, while in the case of the latter it is the method of the proceedings. In an appeal the primary question is whether the result(in the light of all the evidence placed before the court or tribunal) was right or wrong, while in a review it is not the correctness of the decision but its validity which is assailed[112] Furthermore, in an appeal in order to determine whether or not the decision was correct or suitable

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[112] See Herbstein and Van Winsen @ 932 to 933 and the cases cited *infra* footnotes 38 and 39

the merits[113] may be considered.[114] In an appeal the appellate tribunal is confined, in reconsidering the merits, to the evidence on record and the application of the law thereto,[115] whereas in the case of a review the court may look beyond the record in order to determine whether the proceedings (or decision) can stand.

A number of common law grounds of judicial review have been recognised, and developed, by our courts.[116] Though it is not necessary for the purposes of this dissertation to mention and discuss all these grounds, it is perhaps important to note, for the purposes of the discussion which follows below, that at times the difference between appeal and review becomes somewhat blurred to define - particularly when the ground of review is an abuse by the decision-maker of the discretion conferred upon him or her with regard to the weighing up of evidence,[117] or the taking into account of irrelevant considerations and ignoring relevant

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113 ie. the facts, applicable law and, where appropriate, policy considerations

114 See South African Law Commission Report on the Investigation into the courts' powers of review of administrative acts (Project 24) @ 19 to 21

115 *Loc cit*

116 See, generally, *idem* @ 117 to 182 and, more specifically, Johannesburg Stock Exchange v Witwatersrand Nigel Ltd 1988 3 SA 132 (A) @ 152A-D

117 Namely by taking a decision supported by no evidence, supported by evidence insufficient to reasonbaly warrant the decision taken or by ignoring undisputed evidence in arriving at the decision. See Theron v Ring van Wellington van die N Sendingkerk in Suid-Afrika 1976 2 SA 1 (A) at 13 *et sequ*, W C Greyling & Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board 1982 4 SA 427 (A) and SA Freight Consolidators (Pty) Ltd v Chairman, National Transport Commission 1988 3 SA 485 (W)

ones.[118] In these circumstances, according to Jansen JA,[119] the subtle difference between appeal and review lies not in whether the court of review would have decided otherwise (which is the test in an appeal) but a narrower one - could the decision reasonably have been made. This is quite different to the test in civil litigation, namely, which version (if either) is the more probable one.

It has long been recognised in the Rules of the High Court and by South African common law that the decision of any inferior court, tribunal, board or officer performing a judicial, quasi-judicial or administrative function[120], or of any other public body[121] for that matter, is susceptible to review by the High Court. It is, furthermore, respectfully submitted that even if (and if so to the extent to which) an Act of Parliament might have been able to exclude the Court's common law powers of review prior to 27 April 1994 by means of an "ouster clause",[122] the constitutional enactment of the rights of access to the courts and to administrative justice[123] have implicitly guaranteed a

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118 See, for example, Northwest Townships (Pty) Ltd v The Administrator, Transvaal 1975 4 SA 1 (T) @ 8 F - G, Minister of Law and Order and Another v Dempsey 1988 3 SA 19 (A) and Visagie v State President 1989 3 SA 859 (A) @ 868 B - C

119 Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika (*supra*) @ 20D - F.

120 URC 53

121 See Johannesburg Consolidated Investment Co v Johannesburg Council 1903 TS 111 @ 115. See, too, generally Chapter 2 in SALC Report (Project 24) *(supra)*

122 As was found to be the case by the majority in Staatspresident v United Democratic Front 1988 4 SA 830 (A)

123 In ss 22 and 24 of the 1993 Constitution, succeeded in material respects by ss 34 and 33 of the 1996 Constitution, respectively

constitutional right of review notwithstanding legislation ousting the court's jurisdiction to scrutinise and, if appropriate, set aside irregular and *ultra vires* decisions. The same is not, however, necessarily true when it comes to appeals. Though provision is made for numerous appeals from decisions of a whole host of courts and tribunals,[124] a right of appeal in South Africa has traditionally only existed if the legislature has specifically conferred through legislation.[125] In some cases, for example an appeal from a magistrate's court to a high court, one may appeal as of right. In other cases, however, an appeal is not available as of right. Where, for example, a party wishes to appeal against the judgment of a superior court, he or she requires the leave of that court (failing which the leave of the Chief Justice) to lodge an appeal. Sometimes there is even a total denial of a right to appeal. An example is section 45 of the Small Claims Courts Act.[126] Another example is the Commission for Conciliation, Mediation and Arbitration,[127] where, according to the Labour Relations Act,[128] no right of appeal is available

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124 See SALC Report (Project 24) @ 22 to 49

125 *Idem* @ 89

126 Act 61 of 1984. S 45 provides that no appeals shall lie from decisions of the small claims court. Decisions of the small claims courts are reviewable, in terms of s 46, on the following grounds : (a) absence of jurisdiction on the court's part; (b) interest in the cause, bias, malice or corruption on the commissioner's part; (c) gross irregularity with regard to the proceedings. According to Hancke AJ in Smit v Seleka en Andere 1989 (4) SA 157 (O) @ 161H to I, the specific grounds of review set out in section 46 do not exclude the Court's common law rights of review and, in any event, with one exception reflect the grounds of review of proceedings in the lower courts set out in section 24 of the Supreme Court Act (Act 59 of 1959)

127 Hereafter referred to as the CCMA

128 Act 66 of 1995

to a party against its decisions.[129] The effect of such a denial might be that when such a forum makes a *bona fide* factual error in weighing up evidence, or in applying the law to such incorrectly found facts, or makes a *bona fide* error of law which does not constitute a "gross irregularity with regard to the proceedings", or which is otherwise unassailable according to the principles of review,[130] an erroneous judgment may stand. According to Herbstein and van Winsen [131] it is only if the judicial officer does not direct his or her mind to the issues before him or her, due to a mistake of law, and in so doing prevents the aggrieved party's case from being fully and fairly determined that such mistake amounts to a gross irregularity which is reviewable.

In the light of the above can any law which restricts or denies an appeal be allowed to stand ? Can (or, perhaps, ought) a right of appeal to be read as being implicit in, or as a natural corollary to, the right of access to the courts guaranteed by section 34 ? In attempting to answer these questions, it is submitted that regard ought to be had to the position in certain foreign jurisdictions.

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129 Though no appeal is provided for under the Act, a party may take the decision of a CCMA commissioner to the Labour Court on review in terms of s 145(1) on the limited grounds of review set out in that section, namely : (a) misconduct by the commissioner in relation to his/her duties; (b) a gross irregularity in the conduct of the proceedings; (c) the commissioner exceeding his/her powers; (d) an improper obtaining of the award.

130 See Herbstein and van Winsen @ pg. 934; Stephen v Gaius & the Magistrate of Nylstroom 1914 TPD 622 @ 625; Makalima v Gubanxa 1918 CPD 58 @ 63; and Zululand Cotton Fields Ltd v Ndumu Ltd (1926) 47 NLR 85. See too (with regard to arbitration proceedings) Hyperchemicals International (Pty) Ltd v Maybaker Agrichem (Pty) Ltd 1992 1 SA 90 (W)

131 @ 934

(a) The United States

It would seem that there is no general consitutional right in the United States to an appeal on the merits in civil litigation. It has been held that the Fourteenth Amendment, while guaranteeing due process, does not at the same time guarantee "*immunity from judicial error*".[132] In addition, even though an error has been made by a trial court, not every error which might otherwise found grounds for appeal consitutes "*a failure to observe that fundamental fairness essential to the very concept of justice.*"[133] Indeed where the parties have been fully heard (in other words where there has been procedural fairness) the fact that a court has come to an erroneous decision does not entitle the unsuccessful party to a constitutional right of appeal, since the mere coming to an erroneous decision has been held not to constitute a violation of his or her fundamental rights.[134] This principle has been applied to a number of circumstances including the following : an error in admitting evidence or entering judgment after a full hearing,[135] an erroneous interpretation by a state court of the decision of the Supreme Court,[136] a mistake as to the law of another state[137] and errors of state law in interpreting and applying the laws of that

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132 See 16A American Jurisprudence 2d @ § 819, pg. 997

133 *Idem op loc cit*

134 *Idem op loc cit* and the cases cited *infra* footnote 56

135 Jones v Buffalo Creek Coal & Coke Co., 245 **US** 328, 62 L Ed 325, 38 S Ct 261

136 Rothschild & Co v Steger & Sons Piano Manufacturing Co., 256 **Ill** 196, 99 NE 920

137 Pennsylvania Fire Insurance Co v Gold Issue Mining & Milling Co., 243 **US** 93, 61 L Ed 610, 37 S Ct 344; and Hall v Wilder Manufacturing Co., 316 **Mo** 812, 293 SW 760, 52 ALR 723

state.[138]

Though a mere error by the trial court is, in itself, insufficient to violate the due process guarantee, it would seem that there may well be a denial of due process where the error is *"gross and obvious, coming close to the boundary of arbitrary action."*[139] Unless the mistake is *"not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of man, not a denial of constitutional rights."*[140] Although there is no general constitutional right to an appeal in the United States, appellate relief is generally available in some form in both federal and state jurisdictions against the judgments of ordinary trial courts.[141] It is noteworthy, however, that in at least one jurisdiction in the United States there is no right of appeal against a decision of a small claims court.[142]

(b) The European Community

According to van Dijk and van Hoof[143] a right to appeal against a decision is neither laid down expressly in the European Convention nor is it implied in Article 6(1). This view was also

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138 Howard v Kentucky, 200 **US** 164, 50 L Ed 421, 26 S Ct 189

139 See 16A Am Jur 2d, § 819, pg. 999 and Roberts v New York City, 295 **US** 264, 79 L Ed 1429, 55 S Ct 689

140 See *idem op loc cit* and Brinkerhoff-Faris Trust & Savings Co v Hill, 281 **US** 673, 74 L Ed 1107, 50 S Ct 451 and Chicago Life Insurance Co v Cherry, 244 **US** 25, 61 L Ed 966, 37 S Ct 492

141 See F James and G C Hazard, Civil Procedure (2 ed) § 13.6, @ pg 673

142 Connecticut. See New Milford Block Co. V Ericson, 3 Conn Cir 1, 206 A2d 487

143 (*Supra*) @ 305

noted by the European Court in Delcourt v Belgium.[144]

Where an appeal has been provided in terms of the national legislation of a member state, however, and where civil rights or obligations are in dispute, the provisions of Article 6(1) (for example a "fair" hearing) do apply. These provisions do not, however, apply to applications for leave to appeal.[145] According to Beddard,[146] when an appeal is available, article 6(1) is applied to the proceedings in their entirety. This is, of course, provided the various procedures, taken together, all constitute a "determination".[147]

(c) The United Kingdom

Apart from a somewhat blanket right of appeal from some specified statutory tribunals to the courts on a point of law[148] there would appear to be no general common law right of appeal in the United Kingdom either.[149] Nonetheless it would seem that, in any event, in terms of the Rules of Court and legislation an appeal is typically available[150] from the decision of every court thoughout the court hierarchy in the United Kingdom with a final appeal to the House of Lords. It would accordingly seem that appellate procedures have become so ingrained in the British

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144 1 EHRR 355 (1970) @ 366 § 25

145 See van Dijk and van Hoof (*supra*) @ 306

146 (*Supra*) @ 164

147 See Macdonald *et al*, The European system for the protection of Human Rights, @ 371 and the case cited *infra* footnote 156

148 Tribunals and Enquiries Act 1971, s 13

149 See Jolowicz (*supra*) @ 148

150 Albeit in some cases with the leave of the court *a-quo* first having been obtained

legal system that in 1953 the Committee on Supreme Court Practice and Procedure had this to say to a suggestion that the right of appeal might be abolished to reduce costs :[151]

> " *The legal system of every civilized country recognises that judges are fallible and provides machinery for appeal in some form or another. The right of appeal in this country is too ingrained in our legal system to be capable of being uprooted* <u>*in toto*</u>*."*

Though the words "right of appeal" have, with respect to the learned Committee, perhaps been used somewhat loosely, the instances in which one cannot appeal from a court decision in the United Kingdom are indeed very few.[152]

(d) <u>Canada</u>

There is no constitutional, or general, right of appeal in Canada.[153] There will, however, be a right in most instances for at least one appeal.[154] A rare instance in Canada in which the decision of a court is final and not subject to appeal is in the case of a decision of the small claims court where the amount in dispute does not exceed C$ 200.[155]

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151 *Final Report*, 1953, Cmd. 8878 § 473, quoted in Jolowicz @ 170

152 See Jolowicz (*supra*) @ 171

153 See <u>Watson</u> (*supra*) @ 236 to 237

154 *Loc cit*. Sometimes leave to appeal is a prerequisite for the exercise of such a right. See eg. <u>Judicature Act</u> R S O 1970, c 223, ss 25 and Ontario Rule of Practice 499

155 <u>Small Claims Court Act</u> R S O 1970, c 439, s 108

(e) South Africa

The question of a right to appeal has surfaced, to some extent, in two cases before South Africa's Constitutional Court - S v Rens[156] and Besserglik v Minister of Trade, Industry and Tourism and Others (Minister of Justice Intervening)[157] The applicants in the aforementioned two cases challenged the leave to appeal procedures laid down in section 316 (read with section 315(4)) of the Criminal Procedure Act[158] and section 20(4)(b) of the Supreme Court Act[159] respectively). These sections provide, respectively, that the leave of the superior court *a quo* is necessary before a prospective appellant may appeal against judgments in criminal and civil cases. In both matters the Constitutional Court held the prescribed leave to appeal procedures not to be in conflict with the Constitution. In Besserglik, which dealt with the leave to appeal procedure in civil proceedings before the High Court, it was argued on behalf of the applicant that persons have the right to have their disputes determined fairly by a court until the *final determination* of the proceedings (which would ostensibly include a right of appeal).[160] In her judgment, with which all the other members of the court concurred, O'Regan J referred to Ackermann J's doubts in Bernstein and others v Bester and others[161] about the correctness of such a wide approach to section 22.[162] In fairly strong *obiter* remarks the learned justice furthermore

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156 1996 (2) BCLR 155 (CC)

157 1996 (6) BCLR 745 (CC)

158 Act 51 of 1977

159 *Supra*

160 @ pp 749J to 750A

161 *Supra*

162 Of the 1993 Constitution, which was then in force

stated that it was a matter of some doubt whether the applicant was correct in his argument that the scope of section 22 extended as far as he had alleged.[163] It was, however, unanimously decided by the court that whatever the scope of section 22 was, it could not be said that the leave to appeal "screening procedure", which excludes "unmeritorious appeals", in itself amounted to a denial of the right of access to court.[164] While it is now settled law that the leave to appeal procedure does not militate against the right of access to court, the question of whether the right of access to court in civil litigation includes a right of appeal *per se* is still an open one.

Unlike section 35(3)(o) of the 1996 Constitution,[165] section 34 does not expressly state that a fair hearing includes a right of appeal. Even the constitutional right of an accused in criminal proceedings is, in terms of section 35(3)(o), not an unlimited one.[166] Given this factor, in the light of the approaches mentioned above which prevail abroad (particularly in the United States and Europe) and given the fact that a right of review is, in any event, available at common law, it is unlikely that our courts will imply a right of appeal on the merits after every non-criminal hearing. This may be cold comfort for a defendant before the small claims court, or a respondent before a compulsory CCMA arbitration, where judgment has gone against him or her and where there has clearly been a factual or legal error (albeit *bona fide*) on the commissioner's part. In such circumstances an aggrieved defendant or respondent will have no

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163 At pg. 750B

164 At pg. 750C

165 Which expressly provides that the right to a fair trial of an accused person (in criminal proceedings) includes a right of appeal to, or review by, a higher court

166 It provides an appeal, *alternatively* a review.

recourse of an appeal to secure a "more correct determination" - and this is aggravated by him/her having had no choice in the forum for the proceedings. Perhaps in some such cases "unreasonableness"[167] could be further developed, as a substantive ground of review, and applied in appropriate cases before that small (but important) class of public *fora* which exercise judicial functions yet deny parties before them a right to appeal.

3.2 Legal Representation

Does the right to have disputes which can be legally resolved in a fair public hearing include the right to be represented by counsel ? Are provisions in Acts of Parliament which deny a litigant the right to be represented by a legal practitioner before a court[168] or before another tribunal or forum[169] unconstitutional? If there is a right to be legally represented (and where such right might be found to exist) does it ever include the right to have counsel appointed by the state where a litigant is of insufficient means to pay for his or her own counsel? In answering these questions the position in certain overseas countries will, once again, be considered.

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[167] Strongly implied as a ground of review in s 33(1) of the 1996 Constitution relating to the right to just administrative action

[168] For example in the small claims court (see s 7(2) of the Small Claims Courts Act (*supra*))

[169] For example in conciliation proceedings before the CCMA (see section 135(4) of the Labour Relations Act (*supra*))

(a) The United States

In the United States, requirement (4) in Goldberg v Kelly[170], namely the right to retain counsel, has been considered by the United States Supreme Court on a number of occasions, it having been quite pertinently put in Powell v Alabama[171] that :

> *"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law...He is unfamiliar with the rules of evidence...He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. "*

In Smit's opinion[172] the Goldberg v Kelly decision leaves little doubt that one has an unqualified right to "retained" legal counsel in civil cases. Detracting somewhat from Smit's opinion is the decision of Walters v National Association for Radiation Survivors,[173] which concerned a challenge on consitutional grounds to a law which effectively denied a veteran the right to paid legal counsel by limiting the fee payable to an attorney representing a veteran before the Veteran's Administration to a maximum of $ 10.00. In the Walters matter the court held that the procedure before the Veteran's Association was intended to operate on *"an informal, nonadversary basis thereby diminishing any real need for legal counsel's assistance"*

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170 *Supra*

171 287 *U S* 45, 68-69, 53 *S Ct* 55, 77 *L Ed* 158 (1932), see Smit (*supra*) @ 453

172 @ 454

173 473 *U S* 305 (1985)

and that "the fee limitation was fair because it did not prevent claimants from making a meaningful presentation pro se, with an attorney working on a pro bono basis, or with unpaid, nonlegal counsel."[174] Admittedly, the Walters matter did not deal with proceedings before a court of law which required the formal pleading and presentation of cases and detailed rules of evidence. Tribe suggests,[175] however, that restrictions to limit a litigant's choice of competent counsel to any significant degree (with the concomitant limitation on the litigant's ability to petition the courts for redress), might, in the future, be subjected to First Amendement[176] scrutiny (as opposed to being argued on the basis of a denial of due process).

A question which has been left somewhat open is whether one has a right to *assigned* counsel[177] in civil cases. Prior to 1981 this question was largely undecided, depite the decision of Boddie v Connecticut[178] which intimated that a litigant might be constitutionally entitled to assigned counsel in an appropriate case. In 1981, however, the Supreme Court provided some guidelines in Lassiter v Department of Social Services.[179] In that case it was said that there was a "presumption" that an indigent litigant had a right to assigned counsel where he or she risked deprivation of personal liberty if he or she lost the case.[180] The

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174 *Idem* @ 319 - 335. See L H Tribe, American Constitutional Law (2ed) @ 758

175 At @ 759

176 Which guarantees, *inter alia*, freedom of speech

177 Ie. The right to be provided with legal representation at public expense

178 401 *U S* 371 (1971)

179 452 *U S* 18 (1981)

180 See Tribe (*supra*) @ 739. Since the Constitutional Court decision in Coetzee v Government of the Republic

Court held, however, that the question whether a party is entitled to *assigned* counsel depends on whether the presence of counsel could make a "*determinative difference.*"[181] In determining whether counsel could make such a difference, the circumstances of each particular case have to be considered and the following factors weighed and balanced against one another : the nature of the private interests affected, the risk of error in the determination by the court, and the governmental interests in supporting the continued use of the challenged procedure.[182] Though guidelines have been set in Lassiter, the precise content of the right is, unfortunately, far from certain.

(b) The European Community

The importance of the Golder[183] decision, as has already been seen, can be found in the fact that it recognised Article 6(1) of the European Convention as embodying the right to a court. It ought not to be forgotten that the principal issues in the case centred around the refusal of the authorities of the prison(where Golder was serving a sentence) to allow him to consult a

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of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others 1995 (10) BCLR 1382 (CC) in which it was held that certain sections of the Magistrates' Courts Act (Act 32 of 1944) which effectively permitted civil imprisonment for debt were invalid, it would seem that the only circumstances in South Africa in which someone risks his or her liberty arising out of non-criminal proceedings are arrests *tanquam suspectus de fuga*, arrests *ad fundandum* and *ad confirmandam jurisdictionis*, contempt of court applications and applications for commital pursuant to the Mental Health Act (Act 18 of 1973)

181 452 *U S* at 33

182 These factors are in accordance with the forumula in Mathews v Elridge *424 **U S*** 319 (1976)

183 *Supra*

solicitor with a view to bringing a defamation suit against one of the prison officers. The basis of the refusal by the authorities was that they were of the view that Golder's proposed action had no reasonable prospect of succeeding. In that matter it was held that to contact a solicitor with regard to an intended action :

> " *was a normal preliminary step in itself and in Golder's case probably essential on account of his imprisonment. By forbidding Golder to make such contact, the Home Secretary actually impeded the launching of the contemplated action...Hindrance in fact can contravene the Convention just like a legal impediment.*"[184]

In a separte concurring judgment, it was furthermore held per Sir Gerald Fitzmaurice J that :

> "*A practice whereby contact with a solicitor about possible legal proceedings is refused because the executive authority has determined that the prisoner has no good legal ground of claim, not only cannot be justified as 'necessary'... - it cannot be justified at all, because it involves the usurpation of what is essentially a judicial function.*"[185]

By holding that Golder had a right to court, the European Court by strong implication also held that Golder had a right of access to a legal representative - if not for the purposes of appearing on his behalf at the very least for the purposes of consultation with regard to a proposed lawsuit. If there were any

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[184] At para 26, pg. 531

[185] At para 15, pg 554

doubt as to the existence of a right to counsel in civil proceedings before courts of law in the European Community, it such doubt was largely removed by the Airey[186] case. Airey concerned an Irish citizen who wished to sue for judicial separation but could not afford the costs of legal representation and no legal aid was available in Ireland. The court held that in view of the factors such as Airey's vocation and background and the complexity of High Court rules and procedures in general, and those relating to judicial separation in particular, it was "most improbable"[187] that she would have been able to effectively present her case in the High Court without legal assistance and that, in the absence of the availability of legal aid, she had, effectively, been denied the right of access to court. Admitedly the Court did not say that there was always a right to legal representation in all civil proceedings and though it was careful not to hold that there was a duty on the State to provide unlimited legal aid in all civil cases,[188] it was the State which had the choice of the means[189] to achieve the end.[190] The court nonetheless held that despite the fact that it was only in relation to criminal proeedings that the Convention gave one an express right to legal representation,[191] Article 6(1) sometimes compelled the State to provide for the assistance of a lawyer when such assistance "proves indispensable for an effective access to court" either because legal representation is rendered compulsory or because of the procedure and/or the case is

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186 Airey v Ireland 2 EHRR 305

187 At para 24, pg. 315

188 Holding (at para 26, pp 316 to 317) that in certain circumstances where a party appeared in court without a lawyer (even in the High Court) such appearance could conform with Article 6(1)

189 Ie. the procedure

190 Ie. the remedy

191 Article 6(3)(c)

complex.[192]

(c) The United Kingdom

According to Jackson[193] a right to be represented by counsel is recognised in all actions before the ordinary courts in the United Kingdom. This right is, however, still not allowed in some administrative tribunals. Though the courts have recognised the importance of legal representation in hearings before tribunals, it would seem that whether such right existed in any given case depended on the peculiar facts of that case.[194] A factor which might hold sway is whether a member of a private club had, by contract, agreed to be bound by the rules of the club which included (expressly or by necessary implication) a prohibition of legal representation at disciplinary hearings.[195] It would seem that whether a right to be represented exists, at least in domestic tribunals, will also depend on factors such as the seriousness of the charge and of the consequences.[196] It would seem that no right is recognised to have counsel appointed by the Crown under English common law. Legal aid is, however, available to the poorer members of society who meet the means test.[197] As Jolowicz points out,[198] however, the great majority of people who do not qualify for legal aid because of "insufficient poverty"

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192 At § 26, pg 317

193 P Jackson, Natural Justice (2 ed), @ 74. See too Ex parte Ramshay (1852) 18 Q B 173

194 See Enderby Town Football Club v The Football Association [1971] Ch 591

195 See for example Maynard v Osman [1977] Q B 240 @ 259

196 *Loc cit*

197 In terms of the prevailing legislation regulating legal aid in the United Kingdom

198 *Supra* @ 155

cannot afford to become involved in litigation unless the issues involved are of "overwhelming importance to them."

(d) Canada

In Canada the right to a fair trial includes the right to be represented by the counsel of one's choice.[199] With regard to the question of a right to have counsel appointed in civil litigation, in common with the situation in the United Kingdom, South Africa and many other countries, legal aid is available in Canada to civil litigants who qualify therefor.[200] There is, however, no constitutional right to have paid counsel appointed by the Crown for a civil litigant nor has such a principle been developed in Canadian common law.[201]

(e) South Africa

(i) The right generally

No reported decision could be found where the right to legal representation before the ordinary courts of law was ever cast into doubt. The likely reasons for this are simple. In the first instance our civil procedural system is English in origin and such a right is recognised in English common law. Secondly, the rules of the superior and magistrates' courts have invariably made provision for persons appearing before them to be represented by legal practictioners.[202] It would in any event

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199 Vesico v R [1949] *SCR* 139 @ 152-3 and Ruud v Taylor, 51 *W W R* 335 (QB Sask.1965)

200 See Watson @ pg. 240 to 242

201 *Idem* at pg. 241

202 See, for example, the definition of the word "*party*" in URC 1 and MCR 2

appear to be settled law that one has the right to legal representation before the ordinary courts of law. Such a right was assumed by Innes CJ in Dabner v South Africa Railways and Harbours[203] who stated[204] : "*No Roman-Dutch authority was quoted as establishing the right of legal representation before tribunals* ***other than courts of law,*** *and I know of none.*" (my emphasis). This view is confirmed by Rose Innes[205] who states[206] : "*In a court of law an accused or a litigant is entitled to bring his counsel into court to represent him. Every person is entitled to obtain for himself legal representation at his trial and should be afforded an opportunity of doing so when the opportunity is reasonably demanded.*"[207] It has, furthermore, been held "*The right of* ***access*** *to one's legal advisor*[208]*, as a corollary of the right of access to the courts, is a basic or fundamental common law right.*" (my emphasis)[209] For our purposes, however, the

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203 1920 AD 583

204 @ 598

205 L A Rose Innes, Judicial Review of Administrative Tribunals in South Africa

206 @ 171

207 See too Knight v Die Voorsittende Beampte, Onderhoudshof Schweitzer-Reineke 1978 (3) SA 732 (T) where such a right, before the maintenance court (where many of the procedural rules of the magistrate's court apply) is strongly implied

208 Which is, admittedly, not the same thing as representation by a legal representative, but which, by definition, is still a form of legal assistance. See Hosking and Another v Van Der Merwe and Another NNO 1992 (1) SA 906 (W) @ 925H - 926A

209 Mandela v Minister of Prisons 1983 (1) 938 (A) @ 957D. See too R v Slabbert and Another 1956 (4) SA 18 (T) @ 21G; Brink and Others v Commissioner of Police 1960 (3) SA 65 (T) @ 67C-E; cf S Selikowitz, "*Defence by Counsel in Criminal proceedings under South African law*", 1965/1966 Acta Juridica @ 53 *et sequ*

question remains whether (notwithstanding the apparent common law right to legal representation before ordinary courts of law) a denial of legal representation in any court of law (or for that matter in another tribunal or forum) always amounts to an infringement of one's right of access to court (construed as including a fair public hearing). Once again the situation in two such fora - the small claims court and the CCMA - will be considered.

Because the ordinary courts use the adversarial procedure which carries all the technical baggage which accompanies it (such as pleadings, exclusionary rules, the duty to begin, onuses of proof, legal argument, et cetera), it would sem to have been accepted that a person has the right to be legally represented before them. Unlike quasi-judicial administrative tribunals, there are, furthermore, the far more serious risks which are typically attendant upon litigation before the ordinary courts[210] (not the least of which include substantial legal costs - whatever the outcome - and the risk of serious pecuniary loss). The small claims court is on a different footing entirely. Its procedure is very informal - and for all practical purposes there are no pleadings. The rules of evidence are (compared with other courts of law) very relaxed and the commissioner is, in terms of the Act, enjoined to proceed "inquisitorially". All questions are asked by him or her except where he or she gives leave in rare circumstances to a party to put any questions to a witness. In effect the commissioner is meant to elicit all facts which are necessary to place him or her in a position to fairly determine the matter. One might be tempted to argue that notwithstanding the above, no overwhelmingly good reason exists why a party ought not to be entitled to have his or her legal representative present to "represent", or at least to be able to advise him or

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[210] See Knight v Die Voorsittende Beampte, Onderhoudshof Schweitzer-Reineke (*supra*)

her at the hearing. The other party need not even be prejudiced in these circumstances by a costs order if he or she loses. The fact remains, however, that whole purpose of the small claims court is to afford speedy justice in a simple and inexpensive way. Even though the small claims court is technically a "court of law",[211] performing judicial funcions, in view of the simplified procedure and commissioner's very different role to that of a judge or magistrate, the commissioner is (on pain of his or her ruling being set aside by the High Court) obliged to be impartial and fair and there is very little scope (or real need) for legal representatives.

As far as the CCMA is concerned, it is only in conciliation (and not in arbitration) proceedings that a party is deprived of the right to be legally represented. As no "finding" affecting the rights of either party is made during conciliation, there would seem to be no prejudice to either party by disallowing legal representation for a party to conciliation proceedings. In view of the above it is accordingly doubted whether the denial of legal representation, for example, in the small claims courts and in conciliation proceedings before the CCMA constitutes an infringement of one's right of access to court.

An attempt to imply an unqualified right to legal representation in s 34 in all civil procedures would, it is submitted, come up against at least two further obstacles. The first is the maxim - *inclusio unius est exclusio alterius* - apparently considered by Ackermann J in his *obiter* remarks in Bernstein and Others v Bester and Others NNO. [212] Notwithstanding the reworded Access to Court provision, when one compares the broad reference to a "fair public hearing" in section 34 with the detailed provisions of section 35(3) which set out precisely what

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[211] Though not a "court of record" see s 2 of the Act

[212] *Supra* @ 804F to 805D

a fair trial "includes" for an accused in a criminal matter, the conclusion is inescapable that the drafters of the Constitution could not have intended each and every element expressly regarded as being part of a fair criminal trial also to apply necessarily in every civil matter. This view, it would seem, is to some extent supported by the decision in Myburgh v Voorsitter van die Schoemanspark Ontspanningsklub Dissiplinêre Verhoor en 'n Ander[213] where Hancke J declined to hold that the Constitution was of any assistance to an employee who desired legal representation in proceedings before a domestic disciplinary committee. In that matter the learned judge stated (*obiter* it would appear) that the then-prevailing provision in the Constitution relating to the rights of accused persons [214] was inapplicable as it differed from the equality and access to courts provisions[215] and that accordingly it was not warranted to amend the common law by extending it to *all* disciplinary hearings before domestic tribunals.[216]

The other obstacle to an argument seeking to imply an unqualified right to legal representation is premised on the very fact that the common law rules of natural justice have not, as yet, been construed always to include a right to legal representation[217] - even in regard to proceedings before public

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213 1995 (9) BCLR 1145 (O)

214 S 25 of the 1993 Constitution

215 Then ss 8 and 22 of the 1993 Constitution, respectively

216 @ 1150E. Ultimately, it would seem, the case was decided on the grounds of the vertical application of the 1993 Bill of Rights - which, it is submitted, is not strictly-speaking the case anymore (see s 8(2) of the 1996 Constitution)

217 See J D Van der Vyver "*The private sphere in constitutional litigation*", 1994 (57) THRHR @ 393. See too Hoskins v Van Der Merwe (*supra*) @ 922E to 924E

tribunals which exercise a quasi-judicial function. [218] In many such cases it was held that the discretion to allow or disallow legal representation vested in the tribunal itself. [219] To the extent to which our courts have grappled with the question of whether in the exercise of its discretion the tribunal ought to have allowed legal assistance or representation, they have held that cirucmstances in which one is entitled to have legal assistance, or to be legally represented, include when the proceedings constitute a step in litigation hostile to the person being examined by the tribunal.[220] In Wiechers' opinion,[221] :

> *"It goes without saying that a person who finds himself (or herself) in the complexities of difficult factual and legal matters against a background of seriously difficult consequences for his (or her) personal status, position and prestige and who is not afforded the opportunity of legal representation, is not really afforded the opportunity of being able to put his (or her) case"* (my translation)

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218 See Smith v Beleggende Outoriteit, Kommandement Noord-Traansvaal 1980 (3) SA 510 (O) @ 523F - 524H (which dealt with a military tribunal) and Morali v President of the Insustrial Court 1987 (1) SA 130 (C) @ 133D (which dealt with the industrial court which, despite its title and functions, was an administrative - and not a judicial - tribunal)

219 See *idem* and Hoskins v Van Der Merwe (*supra*) (which dealt with interrogation proceedings in terms of the Insolvency Act (Act 24 of 1936))

220 Eg. Insolvency interrogations. See J & J Shamosewitz v Shamosewitz and Schatz's Trustee and Adler NO 1913 WLD 213 @ 218 - 19; S v Heyman and Another 1966 (4) SA 598 (A) @ 603A-E; Hoskins v Van Der Merwe (*supra*) @ 924E

221 M Wiechers Administratiefreg (2 ed) @ 238 - 239

Wiechers' opinion[222] is that the question of whether legal representation before a tribunal should be allowed ought not to be whether the law provides for such representation but rather whether the person has "*considering the nature and scope of the administrative enquiry and the possible consequences thereof for the subject's rights and privileges, really been given the opportunity to put his case?*"[223] It is submitted that such an approach has much to commend itself - and is the approach which ought to be applied by the High (and Constitutional) Courts in deciding whether the denial of legal representation before tribunals or fora (which are concerned with the determination of rights and obligational disputes) resulted in the denial of a "fair" hearing.

(ii) A right to civil legal aid ?

In the light of the above it is perhaps not surprising that the courts have hitherto not construed our common law to include a right to have legal representation provided for indigents before the courts - not even in criminal trials[224] where the possible consequences can affect not only one's property interests but very often one's liberty. Section 35(3)(g) of the 1996 Constitution leaves no doubt that an accused person in criminal proceedings now has the right to have a legal practitioner appointed for him or her "*by the state and at state*

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222 See too H Corder, (*supra*) in 1980 (43) THRHR @ 170

223 *Loc cit*. The salient issues should, it is submitted, include (at the very least) whether the procedure is simple or complex, inquisitorial or adversarial, whether skilled cross-examination is necessary, whether the determination of complex issues of fact and/or law are involved, and what the effect of a determination by the court, tribunal or forum will have on the parties

224 See S v Rudman and Another; S v Mthwana 1992 (1) SA 343 (A)

expense, if subtantial injustice would otherwise result. " It is submitted, in view of the complexities and technical nature of criminal proceedings, that "*substantial justice would otherwise result*" whenever an accused who faces the possibility of direct imprisonment without the option of a fine goes unrepresented. [225] It is beyond the purview of this dissertation, however, to consider this question any further.

The same obstacles set out above in relation to implying a general right to legal representation in non-criminal matters will, it is submitted, apply *mutatis mutandis* to an argument in which it is sought to imply a right in section 34 to have qualified legal representation paid for by the state for an indigent civil litigant. It has been suggested by writers such as Van Wyk *et al*,[226] that the equality aspect of a right to a fair hearing should "ideally" ensure that a party's ability to fully participate in the trial does not depend on "*irrelevant criteria*" such as "*social or economic status.*" It has also been stated that the guarantee of equality of arms has been seriously compromised by the fact that, given the adversarial system in the ordinary courts, an indigent representing himself or herself stands on a considerably weaker footing to an opponent who can afford a legal representative.[227] Nonetheless, it has also been recognised,[228] that the right to legal aid in civil matters raises difficult questions - particularly concerning the allocation of scarce financial resources.

It is doubted whether the State could be expected to provide

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225 See Selikowitz (*supra*) @ 71

226 Rights and Constitutionalism : The New South African Legal Order @ 420

227 *Loc cit*

228 *Idem* @ 423

unlimited legal aid to all indigent litigants.[229] Nonetheless, despite the obstacles refered to above, in view of the fact that the wording of section 34 is considerably similar to Article 6(1) of the European Convention on Human Rights, and notwithstanding the existence of a legal aid system with the (albeit) limited assistance to civil litigants, it is not beyond the realms of possibility that the interpretation which the European Court adopted in the Airey case[230] could be applied in certain cases where an indigent and uneducated civil litigant finds him or herself before a High or magistrates' court with little idea as to the procedure. In such cases it is submitted that the absence of a legal representative would amount to an effective denial of the litigant's right of access to court.

(iii) Juristic persons in certain superior courts

A final aspect relating to legal representation which has possible constitutional ramifications is the somewhat peculiar and anomalous situation with regard to juristic persons in the High and Constitutional courts. In terms of prevailing legislation[231] only an advocate, or an attorney who has been granted the right of appearance in the High Court in terms of section 4(2) of the Right of Appearance in Courts Act of 1995,[232] may appear in the High Court on behalf of another person.[233] While a natural person may appear on his or her own behalf in a superior court, and while a juristic person may be represented

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229 See Du Plessis (*supra*) @ 47

230 *Supra*

231 The Admission of Advocates Act (Act 74 of 1964) and the Right of Appearance in Courts Act (Act 62 of 1995)

232 Act 62 of 1995

233 This provision has been extended, by implication, to the Constitutional Court too. See Constitutional Court Rule (CCR) 7(1)

by one of its officers, directors or employees (as the case may be) in other courts, such as the magistrates' courts,[234] the labour courts,[235] and even the labour appeal court.[236] In criminal trials a juristic person's officer may also be cited in a representative capacity.[237] A juristic person may not, however, be represented in a high court by anyone other than an advocate or an attorney having right of appearance.[238]

In determining the constitutionality of the situation referred to above, it is suggested that both sections 9(1) and 34 of the 1996 Constitution may be of assistance. Firstly, in respect section 9(1) (the equality provision), it is arguable that a natural person and a juristic person are placed on a different footing as far as appearance in the high and constitutional courts is concerned. A natural person is entitled to appear in person, while a juristic person is compelled to be represented by a duly qualified legal representative (notwithstanding any financial hardship which this might occasion). Furthermore, if the juristic person is unable to afford legal representation (and in the absence of legal aid which is not available to juristic persons) such juristic person is effectively barred from having its side heard in any disupte to which it is a party (or prospective party) in the high or

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234 See Rule of Court 52(1)(b)

235 See s 161 of the Labour Relations Act (Act 66 of 1995). The labour court is, like the High court, a superior court

236 See s 178 read with s 161 of the Labour Relations Act (Act 66 of 1995)

237 And may, accordingly, effectively "represent" the juristic person in the criminal trial (and participate fully at the trial if it does not desire, or cannot afford, legal representation) See s 332 of the Criminal Procedure Act (Act 51 of 1977)

238 See Herbstein and Van Winsen at pg. 26 and the cases cited *infra* footnote 224.

constitutional court. It would also seem from Melunsky J's judgment in A K Entertainment CC v Minister of Safety and Security[239] that there would seem to be any reason why the right to equality ought not, in appropriate cases, to be enjoyed by a juristic person.

Secondly there is the right of access to court itself which, according to Erasmus,[240] is one of the rights of which a juristic person can be the bearer.[241] In the light of the above, it is somewhat regretted that Hurt J held in Hallowes v The Yacht Sweet Waters[242] that "*the right to present one's own case is a right which cannot vest in a juristic person, since it is, by nature, not a right which a juristic person can exercise,*"[243] and that, accordingly, there could be no constitutional objection to the procedural requirement that a company be represented in the high court by a legal representative.[244] It is respectfully submitted that the learned judge, in so deciding, adopted a far too restricted approach to the capacity of a juristic person to perform acts. Though it has been said that an artificial person, such as a company, has "*no body to kick and no soul to damn*",[245] an artificial person such as a company has the same capacity to enjoy proprietary rights and obligations as natural persons. It is also abundantly clear from our case law that companies can

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239 1995 (1) SA 783 (E) @ 790C-D

240 H Erasmus, Superior Court Practice pg. A2-23, footnote 2

241 In terms of s 7(3) of the 1993 Constitution, which has been replaced by (the substantially similar) s 8(4) of the 1996 Constitution

242 1995 (2) SA 270 (D&CLD)

243 @ 278C

244 @ 278D

245 Commissioner of Inland Revenue v Richmond Estates 1956 (1) SA 602 (A) @ 605

and do perform their acts, and formulate their intentions, through those officers actually in control - usually its directors.[246] Accordingly there can be no doubt that in terms of the 1996 Constitution a juristic person is, at the very least, entitled to the same right of access to court as a natural person.

There can furthermore be no justification in the anomalous and arbitrary barring of officers and directors from representing their companies in civil matters in the high court and constitutional matters in the constitutional court (on the one hand), but not barring them from appearing in a representative capacity in criminal matters (in any court) or in civil and labour matters in other courts. This anomaly is aggravated by the fact that many company directors (who have some legal or commercial background) are more intellectually skilled and educated than some laypersons - and yet it is only the former who are barred from appearing in person in the two fora referred to above. Such failure to allow an officer of a juristic person to appear on its behalf must fall foul of both s 34 and s 9(1) of the 1996 Constitution, and can, furthermore, only be described as unreasonable and unjustifiable.

3.3 Summary Judgment

The purpose of the summary judgment procedure, which is available in both the high[247] and magistrates'[248] courts, is to enable a plaintiff whose claim complies with certain

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246 Secretary for Inland Revenue v Trust Bank of Africa Ltd 1975 (2) SA 652 (A)

247 URC 32

248 URC 14

specifications[249] to obtain judgment without having to go to trial - despite the fact that the defendant has, by delivering a notice of intention to defend, indicated that he or she intends raising a defence.[250] The singular purpose of summary judgment is to enable a plaintiff who has a clear case to obtain enforcement of his or her claim against a defendant who has no real defence.[251] The procedure is a simple one - a plaintiff deposes to an affidavit confirming the cause of action and stating that in his or her view the defendant has no *bona fide* defence and has entered an appearance to defend solely for the purposes of delaying the plaintiff's claim. A defendant, if he or she wishes to resist summary judgment and cannot (or does not wish to) pay security for the judgment (inclusive of costs), is then obliged to go on his or her defence by filing an answering affidavit which must set out and fully disclose the nature and grounds of the alleged defence. There can be no doubt that summary judgment is an extraordinary and drastic procedure which, if granted, effectively closes the court's door to a defendant. The defendant's right to be heard is, furthermore, limited to his or her answering affidavit (which may be supplemented with the leave of the court by oral evidence[252] or by supplementary affidavit[253]). The question has been asked[254] whether "the procurement of a final judgment by means of summary proceedings imposes an unreasonable and unjustifiable limitation upon the right of access to the

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249 Namely, is a claim (a) based on a liquid document; (b) for a liquidated amount in money; (c) for delivery of specified movable property; or (d) for ejectment

250 See Herbstein and van Winsen (*supra*) @ 434

251 *Loc cit*

252 See URC 32(4) and MCR 14(2(c)

253 See Herbstein and van Winsen (*supra*) @ 443 and the cases cited *infra* footnote 70

254 By Erasmus (*supra*) @ A2-17

courts."

(a) The United States

United States Federal Rule of Civil Procedure 56 governs the summary judgment procedure. The procedure which is followed is also an application, launched by the plaintiff, and supported by affidavits which set out uncontested facts on which the action is based. If these facts are not disputed in the defendant's answering affidavits, or if the defendant's answering affidavits fail to divulge any facts which, if true, would exclude any basis upon which judgment might be entered for the plaintiff, the court is entitled to grant summary judgment.[255] The purpose of summary judgment is not to resolve any issues which form part of the duties of the trial court - it is rather to see whether there are such issues.[256]

There is, however, a duty on a defendant resisting an application for summary judgment to set out specific facts in his/her answering affidavit which show that there is a "genuine issue" for trial.[257] Clearly because of the procedure's drastic consequences, courts in the United States have been enjoined to be ultra cautious in granting applications for summary judgment. Judge Jerome Frank put it as follows :

> *"trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the*

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255 See James and Hazard at pp 220 - 221

256 *Idem* at pg. 221

257 *Loc cit* and *infra* footnote 4

facts...."[250]

Given the very fact that in many matters which have gone to the United States Supreme Court where summary judgment had been granted *a quo*, the granting thereof was upheld, there would appear to be no question that the procedure, where correctly and cautiously used, is constitutional.[259]

(b) The European Community

No European Court authority could be found which deal specifically with summary judgment procedures, though procedures akin to summary judgment which do exist in the legal systems of some of the Community's member states. Germany[260] and Italy[261] are but two such examples. It is submitted that these procedures would not fall foul of Article 6(1) provided they give an adequate opportunity to the defendant to be heard. If any support of this contention is necessary, it is submitted that the views of Sir Gerald Fitzmaurice J in the Golder case[262] are instructive:

> *"All normal legal systems - including most certainly the English one - have procedures whereby, at a very early stage of the proceedings, a case can...be "struck out" as frivolous or vexatious or as disclosing no cause of action (grounds roughly*

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258 Doehler Metal Furniture Co v United States, 149 F 2d 130, 135 (2d Cir 1945)

259 See, for example, Griffin v Griffin 327 **U S** 220, 236, 66 S Ct 556, 564, 90 L Ed 635, 644 (1946)

260 See Peter Gottwald Zivilprozessrecht 15 ed (1993) 992

261 See M Cappelletti and J M Perillo Civil Procedure in Italy (1965) @ 344

262 *Supra*

analogous to the 'abuse of right of petition', or 'manifestly ill founded' petition, in Human Rights terminology)."[263]

Because the purpose of summary judgment is to speedily enforce a plaintiff's rights against a defendant who has no defence and who is simply "abusing" the system to delay a plaintiff's claim, it is submitted that the above view would probably (and indeed ought) also to be taken with regard to defendants with frivilous defences or allegations which, even if true, disclose no defence.

(c) The United Kingdom

The summary judgment procedure in England is presently governed by Order 14, and the grounds for applying therefor are analogous to those which exist in South Africa.[264] As is the case in South Africa, a defendant will be granted "leave to defend" if he or she satisfies the court that there is a triable issue or question or that there ought "for some other reason" to be a trial of the claim or part thereof.[265] To so satisfy the court, the defendant has to put forward grounds for a defence which, if true, would have a reasonable prospect of success.[266] It would appear that the English courts are loath to grant summary

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263 At § 15, pg. 555

264 In terms of Order 14, rule 2(1) the deponent must state, on oath, that in his/her view the defendant has no defence or has no defence except as to the *quantum* of damages.

265 Order 14, rule 3(1)

266 In the wording used in Order 14, rule 3(1), the defendant must satisfy the court *"that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial."*

judgment unless the case is an absolutely clear one.[267] According to Erasmus[268] other countries in which the procedure is also available include Scotland[269] and Israel.[270]

(d) South Africa

Because of its drastic nature South African courts have, like their foreign counterparts, traditionally been loath to grant summary judgment other than in circumstances where the plaintiff has, in effect, an unanswerable case.[271] South African courts will only grant summary judgment when this fact is established "beyond reasonable doubt" and where it does not appear that "a reasonable possibility" exists that injustice may be done if summary judgment is granted.[272] It is doubted whether the summary judgment procedure falls foul of section 34. In the first place, though the proceedings are extraordinary, the

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267 See Jolowicz at pg. 161

268 *Supra* @ pg. A2-18

269 See Macphail "*Summary Adjudication in Civil Proceedings in Scotland*" in I R Scott (ed) International Perspectives on Civil Justice (1990) @ 67

270 See Goldstein "*Summary Judgment Proceedings in Israeli Law*" in I R Scott (ed) International Perspectives on Civil Justice (1990) @ 11

271 See Herbstein and van Winsen (*supra*) @ 435

272 See, for example, Edwards v Menezes 1973 (1) SA 299 (NC); Arend & another v Astra Furnishers (Pty) Ltd 1974 (1) SA 298 (C) @ 314B-C; Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T) @ 229-*in fine;* District Bank v Hoosain 1984 (4) SA 544 (C) @ 550. There would, furthermore, appear to be an "ever increasing reluctance" to grant summary judgment where applications therefor are opposed (see Dowson & Dobson Industrial Ltd v Van der Werf & others 1981 (4) SA 417 (C) @ 419B-E)

defendant is still given the opportunity to place his or her defence before the court by affidavit and the defendant, furthermore, has the right to appeal against the granting of summary judgment.[273] It is respectfully submitted that the procedure is "reasonable and justifiable" and, at the very least, is recognised as being acceptable in a number of "open and democratic societies".

It is furthermore submitted that the summary judgment procedure will easily survive an argument (based on the equality clause) that the procedure discriminates against defendants in that it places an *onus* on the defendant. In the first instance, the defendant hardly has to prove the truth of its defence at the summary judgment stage on a balance of probabilities (being the ordinary civil standard). All the defendant need do is to ensure that the court does not find that the plaintiff's claim is unanswerable beyond reasonable doubt and in doing so he or she need simply state in an affidavit what his or her defence is (which would have to be done, in any event, if he or she filed his or her plea). The only test is that the defence, if true, must be a legally valid one. In any event, even if the defendant could be said to bear some "*onus*", or evidentiary burden, in summary judgment proceedings, it has been stated by the Constitutional Court *per* Didcott J[274] that in civil litigation one side or other invariably has to bear the *onus* of proof, that differentiation between the parties is inevitable and that the location of the *onus* depends "not on doctrinaire considerations but on wholly pragmatic ones."[275]

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273 See Eramus (*supra*) @ A2-18 and the cases cited *infra* footnote 3

274 In Prinsloo v Van Der Linde and Another 1997 (6) BCLR 759 (CC)

275 @ 784H

Even if, notwithstanding these facts, one subscribes to the view that the procedure *prima facie*, infringes a defendant's right of access to court, such infringement, it is respectfully submitted, must be justifiable in terms of the general limitation clause.

3.4 Pre-trial judgments and orders dismissing claims or striking out defences

A number of magistrates' court, high court and even constitutional court rules visit a party's default or non-compliance with the rules with the possible sanction of dismissal of the action (in the case of a plaintiff) or striking out of a defence (in the case of a defendant). By way of illustration, there are rules allowing for the granting of default judgment in the plaintiff's favour, where the defendant has not filed a notice of intention to defend or, where having filed same, has failed to file a plea.[276] There are rules granting the court the power to dismiss a plaintiff's claim, or to strike out a defendant's defence, where the party concerned fails : to furnish trial particulars;[277] to comply with a request by the other party to remedy an irregular step timeously;[278] to comply with a court order compelling him or her to comply with a particular rule of court;[279] to make discovery or to make a specified thing available

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276 URC 31(2)(a) and MCR 12(1)(a) and 12(1)(b)(ii). In the case of default judgment where the defendant has failed to file a plea, the plaintiff must first place the defendant under "bar" in terms of URC 26, or MCR 12(1)(b)(i), as the case may be

277 URC 21(4)

278 URC 30(5)

279 MCR 60(3)

for inspection;[280] to comply with an order given at a pre-trial conference presided over by a judge;[281] and to comply with rules relating to the format of court documents.[282] The court may, furthermore, grant judgment in favour of a party if the other party fails to appear in court on the day appointed for trial, [283] and may deny a defendant who has been barred in terms of the rules from appearing on the date of the trial "unless the interests of justice" otherwise demand.[284] If the court does exercise its power to dismiss a claim, or strike out a defence, the litigant adversely affected has clearly had the court's doors closed in his or her face. Does this mean that all these provisions conflict with the right of access to court? Once again the position in certain foreign jurisdictions is examined.

(a) The United States

One of the powers which the courts in the United States have in terms of their civil procedural rules[285], is to dismiss the action of a "recalcitrant" claimant and to enter default judgment against a recalcitrant defendant. [286] It would seem that the power

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280 URC 35(7)

281 URC Cape Rule 37A(10)(g)(iv) and (v) (with effect from 01/12/1997)

202 CCR 31(3)(c)

283 URC 39(1) and (3)

284 URC 39(2)

285 apart from the wide variety of other sanctions to penalise the default or negligence of a party include prohibiting the defaulting party from introducing evidence (or specified types of evidence) and the power to strike out a claim or a defence in its entirety

286 See James and Hazard, (*supra*) @ 210 and Federal Rule of Civil Procedure 37(b)(2)(A)-(C)

to dismiss a claim and to strike out a defence has not yet been ruled unconstitutional by the United States Supreme Court *per se*, but its use has, in certain circumstances, been held to constitute a denial of due process, but not in others [287] For example in Hovey v Elliott,[288] where the defendant's defence was struck out and judgment entered against him because of his failure to obey a court order, it was held that due process had been denied. In Hammond Packing Co. v Arkansas,[289] however, where a similar order had been granted, it was held that due process had not been denied where one of the parties failed to produce evidence. The basis of distinguishing between these two cases was that in the second case the court *a quo* was justified in entering judgment as it did because it could reasonably presume that a party who refused to produce evidence lacked a meritorius defence. Similarly in Societé Internationale pour Participations Industrielles et Commerciales S A v Rogers[290] it was held to be a denial of due process where a party, who failed to comply with an order to discover, had made a *bona fide* effort to do so but could not without subjecting himself to criminal sanctions under foreign national law.[291]

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287 *Loc cit*

288 167 **U S** 409, 17 S Ct 841, 42 L Ed 217 (1897)

289 212 **U S** 409, 17 S Ct 370, 53 L Ed 530 (1909)

290 357 **U S** 197, 210, 78 S Ct 1087, 1095, 2 L Ed 2d 1255, 1266 (1958)

291 See too National Hockey League v Metropolitan Hockey League Inc 427 **U S** 639, 96 S Ct 2778, 49 L Ed 2d 747 (1976) and Link v Wabash R R 370 **U S** 626, 82 S Ct 1586, 8 L Ed 2d 734 (1962) in relation to the dismissal of an action for failure by plaintiff's counsel to attend a pretrial conference.

(b) The European Community

What has been said in the above discussion relating to the summary judgment procedure in European Community countries applies, it is submitted, equally in relation to the European approach to striking out of defences and dismissal of actions. It could perhaps be added that given that it has been accepted in principle that a party who fails to comply with prescibed court procedures, while knowing such procedures to exist, such a party can be assumed to have waived his or her Article 6(1) rights,[292] in circumstances of gross non-compliance.

(c) The United Kingdom

Under the law of the United Kingdom[293] a party may in certain circumstances apply to strike out any pleading.[294] Should the applicant party be successful in having the pleading concerned struck out, the court has the power not only to stay the action but also to dismiss it or enter judgment accordingly.[295]

Given the drastic nature of an order dismissing a claim or entering judgment for the plaintiff, the English courts tend to exercise their powers to do so with great circumspection[296] and only in cases where the cause of action is "obviously bad and

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292 Colozza v Italy (*supra*)

293 R S C Order 18, rule 19

294 Namely where it discloses no reasonable cause of action or defence, as the case may be; or is scandalous, frivilous or vexatious; or it may prejudice, embarrass or delay the fair trial of the action; or it is otherwise an abuse of the process of the Court.

295 Order 18, rule 19(1)

296 See Jolowicz at pg. 144

almost incontestably bad", "in plain and obvious cases"[297] or if the court is satisfied that the case cannot be improved by an amendment.[298] The purpose of the remedy to strike out is to prevent matters from proceeding to trial which disclose no reasonable cause of action or defence and which are clearly "doomed to failure".[299]

The courts in the United Kingdom also have powers to grant judgment in favour of a party due to default of the other party to file his or her statement of claim or defence, as the case may be.[300] The courts also have the power to proceed with a trial in the absence of one of the parties should the other party fail to appear.[301] Any judgment given in the absence of a party may, however, be set aside on application.[302] It would seem that there would have to be sufficient cause to set aside such a judgment such as an unavoidable accident preventing a party from appearing.[303] The court may, futhermore, dismiss a Plaintiff's claim for want of prosecution.[304]

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297 *Loc cit* and Dyson v Attorney-General [1911] 1 *K B* 410 @ 419 and Nagle v Feilden [1966] 2 *Q B* 633 @ 648

298 See Hubbuck v Weeks [1913] 1 Ch 438 and Republic of Peru v Peruvian Guano Co (1887) 36 Ch D 489

299 See Jolowicz at pg. 145

300 Order 19, rules 1 and 2

301 Order 35, rule 1(2)

302 Order 35, rule 2

303 See for example Re Barraclough [1967] P 1; [1965] 2 All E R 3111

304 In terms of its inherent jurisdiction, which is rarely exercised for such purposes. See Costellow v Somerset County Council [1993] 1 WLR 256; [1993] All ER 952 CA

(d) Canada

Similar procedures are available in Canada for obtaining pre-trial judgment or pre-trial dismissal of a plaintiff's claim where, for example, a plaintiff or defendant lacks a valid claim or defence[305] or where one of the parties has failed to take a prescribed procedural step.[306]

(e) South Africa

As has been the case in their approach to applications for summary judgment, the South African courts have been circumspect in exercising their punitive powers of dismissal and striking out. The rules of court themselves also provide a number of procedural safeguards - not only to the litigant who faces a possible dismissal of his or her action or striking out of their defence, but also to the litigant who has been placed under "bar" or who has had default judgment entered into against him or her. In the case of the former category of litigants, each rule which grants the court the punitive powers set out above either expressly, or by necessary implication, allows for adequate notice and warning of the possible consequences of default by the allegedly delinquent litigant. [307] In the case of the latter

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305 See, for example, Rules of Practice, Supreme Court of Ontario *R R O* 1960, Reg 396 (as amended), Rule 126. See further Rules 56 to 65

306 See Rules 36 to 42 of the aforementioned Rules of Court

307 For example : URC Rule 26, requires a party wishing to place another party under "bar" for failing to file a pleading to give the allegedly delinquent party at least five court days to do so; a party seeking dismissal of another party's action (or striking out of his/her defence, as the case may be) for failling to remedy an irregular step must, in terms or URC Rule 30(5), give the other party at least ten court days' notice. It would furthermore seem that the court invariably orders the delinquent party to comply with

category of litigants, the rules make provision for applications to be launched for the removal of bar[308] and for rescision of judgment.[309] For this second category of litigants, however, an affidavit must be included in their application setting out "good cause". Typically, South African courts will generally deem "good cause" to be present (and grant an application to remove the bar or to rescind the default judgment, as the case may be) where the applicant has provided a reasonable explanation for his or her default; has brought the application *bona fide;* has not recklessly or intentionally disregarded the rules of court; has shown that he or she has a defence which is good in law and which is not obviously without foundation, and (in the case of an application for the removal of bar) has also shown that the other party will not be prejudiced to the extent that any prejudice cannot be rectified by a suitable order as to costs.[310]

Though the provisions in the rules of court which grant the courts the powers mentioned above can, theoretically, restrict a litigant's right of access to court they are essential to ensure fair and proper adjudication of disputes. These rules furthermore serve to protect *bona fide* litigants with real claims and defences from being held to ransom by the tyranny of *mala fide* litigants and those litigants who have wanton disregard for the rights of others - and this would also seem to be the position in those countries mentioned above. It is, accordingly, highly unlikely that any attack on the constitutional validity

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the rules first and only if he/she fails to comply does it invoke its punitive powers (see, for example, Herbstein and van Winsen (*supra*) @ 612 and the wording of URC 35(7))

308 See, for example, URC 27

309 See, for example, URC 31(2)(b)

310 See generally Herbstein and van Winsen (*supra*) @ 554 - 555 and 696

of their existence, *per se*, would succeed. In addition, there can be no question that the safeguards provided by the rules themselves, and the tests employed in their interpretation by the courts, themselves provide more than adequate protection to all litigants. Should the courts fail to observe such tests, their decisions will continue to be set aside on appeal.

3.5 Extinctive prescription

> *"Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of one whose testimony can be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken."*[311]

To what extent (if at all) are provisions limiting the time period for instituting legal action unconstitutional? In answering this question the position in those two foreign jurisdictions with constitutionally-entrenched access to court provisions, namely the United States and the European Community, will be considered.

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[311] Mohlomi v Minister of Defence (*supra*) @ 1564H-1565B

(a) The United States

In the United States legislation which makes provision for extinctive prescription (more commonly known there as statutes of limitation) is always the prerogative of the legislature.[312] It has, however, been held that the legislature does not have the power to "cut off" an existing remedy entirely as this would amount to an outright denial of justice.[313] It has also been held that a legislature does not have the power to interfere with vested rights of action after a suit has begun.[314] A statute may, however, change the remedies which a party has to enforce his/her rights provided that it does not at the same time impair the obligation of contract.[315] Because of the general view that a statute of limitations "acts only on the remedy and does not extinguish the substantive right",[316] a provision limiting an action does not ordinarily impair the obligation of contract if a "reasonable time" is allowed for the enforcement of the cause(s) of action.[317] As can be seen from the above, statutes of limitation which do not destroy vested rights or impair the obligation of contract are generally permissible in the United States provided the period of limitation is reasonable. In other words a plaintiff must be given the full opportunity to sue

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312 See 51 Am Jur 2d at pg. 611

313 See *idem* at pg. 613 and the authorities cited *infra* footnote 16

314 *Loc cit* and Shaurette v Capitol Erecting Co. 23 **Wis** 2d 538, 128 NW2d 34

315 See *idem* at pg. 614

316 *Loc cit*

317 *Loc cit*

before the bar becomes effective.[318] In the United States the courts have the right to review the reasonableness of the period of limitation.[319] In considering the reasonableness of the period of limitation they are bound to consider the circumstances to which the statute applies, but will not hold the limitation provision invalid unless the period is so short as to amount to a "practical denial of the right itself."[320] Each case must, of course, be separately judged in relation to its own unique circumstances.[321] There is no "hard and fast rule" which can be set down.[322] A sub-test which would appear to have developed is that a relatively short period may be reasonable in circumstances where "prompt action" is desirable.[323]

(b) The European Community

Though no European Court case law on the subject could be found, it has been suggested by Sieghart,[324] that as is the case with immunity, prescription (like immunity) may well be acceptable grounds for a court not pronouncing on a claim. The fact that the European Covenant expressly requires the hearing to take place "*within a reasonable time*", would in any event seem

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318 See *idem* at pg. 615

319 See *idem* at pg. 616 and the cases Sohn v Waterson, 17 Wall (**US**) 596, 21 L Ed 737

320 *Idem op loc cit*

321 *Idem* @ 617

322 *Idem* @ 618 at § 35, where the authors give a number of examples - including that in certain circumstances a period of 3 months has been held to be insufficient, while in others a period of 30 days has been held to be reasonable.

323 See *idem op loc cit* and Gilfillan v Union Canal Co. 109 **US** 401, 27 L Ed 977, 3 S Ct 304

324 (*Supra*) @ § 22.4.5, pg. 272

to support a contention that a reasonable time limit for the enforcement of a claim is a justifiable limitation on the right of access to court since it protects the defendant's right not to be suddenly confronted with an ancient claim but to be brought to court and "tried" within a reasonable time of the cause of action having arisen.

(c) South Africa

The question of extinctive prescription was raised before South Africa's Constitutional Court in Mohlomi v Minister of Defence,[325] where section 113(1) of the Defence Act[326] came under judicial scrutiny. The section effectively barred civil actions relating to things done by members of the Defence Force in the course and scope of their duties if legal action was not instituted within six months of the cause of such action having arisen and if notice of such intended action was not given at least one month before its institution to the Minister of Defence. In holding the provisions of section 113(1) to constitute not only an infringement, but also an unreasonable and unjustifiable limitation, of the right of access to court[327], Didcott J gave some indication as to how courts interpreting the access to court provision might go about deciding its applicability (or non-applicability) in any given instance.

In considering whether, in the first instance, there was an infringement of the access to court provision, and having accepted that extinctive prescription served "*a purpose to which no exception in principle can cogently be taken*"[328], Didcott J

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325 1996 (12) BCLR 1559 (CC)

326 Act 44 of 1957

327 Then s 22 of the 1993 Constitution

328 @ 1564H-1565B (quoted more extensively @ pg. 68 *supra*)

held that not all time limits taken to achieve the result mentioned above were neccessarily sound and that whether there was an infringement of the right of access to court *per se* depended upon "*the sufficiency or insufficiency, the adequacy or inadequacy, of the room which the limitation leaves open in the beginning for the exercise of the right.*"[329] He held that chapter III of the Prescription Act[330] was "*a handy yardstick*"[331] against which to measure section 113(1) and that section 113(1) "*differed markedly and materially*"[332] from chapter III of the said Act.[333] The court held that many of the claimants who are hit by section 113(1) "*are not afforded an adequate and fair opportunity to seek judicial redress for wrongs allegedly done to them.*" They are, particularly due to factors such as poverty and illiteracy, "*left with too short a time within which to give the requisite notices...and to sue.*"[334] For these reasons, the court held that s 113(1) did infringe the right of access to court.

The court then turned to consider whether, notwithstanding the very short time frame, it was justified by the general limitation clause.[335] In holding section 113(1) not to constitute

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329 @ 1565E

330 Act 68 of 1969

331 @ 1565G

332 @ 1566E

333 Where the following time periods, *inter alia*, are provided : 30 years for judgment debts, debts secured by mortgage bonds, taxation or debts in respect of mineral rights owed to the state (s 11(a)); 15 years for other debts owed to the state (s 11(b)); 6 years for debts on bills of exchange or negotiable instruments (s 11(c)); 3 years for ordinary debts (including delicts)

334 @ 1566H

335 Then s 33 of the 1993 Constitution

a reasonable and justifiable limitation, Didcott J felt it not necessary to go any further than to compare section 113(1) with section 57 of the newly-enacted South African Police Service Act [336] which, unlike its predecessor and section 113(1), not only provides twelve (as opposed to six) calendar months for the institution of actions against the police (from the date of the cause of action arising) but also grants the court the discretion to dispense with, *inter alia*, the said requirement "*where the interests of justice so require.*"[337] The "*striking*" contrasts between sections 113(1) and 57 were so great as to lead the Constitutional Court to conclude that section 113(1) could not be considered either reasonable or justifiable.[338]

4. Conclusion

Space does not permit consideration also to be given to the many other instances in the context of civil litigation where constitutional questions are raised. These instances include, for example, arrests *tanquam suspectus de fuga* and *fundandam et confirmandam jurisdictionem,*[339] the incidence of *onus* in civil proceedings, [340] the admissibility (or non-admissibility) of certain types of evidence[341] and the question of security for

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336 Act 68 of 1995

337 s 57(5)

338 @ 1569C

339 See Erasmus (*supra*) @ A2-18. For the infringement of possible procedural requirements see too Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer, Port Elizabeth Prison and Others 1995 (10) BCLR 1382 (CC)

340 See Didcott J's judgment in Prinsloo v Van Der Linde and Another (*supra*)

341 See Van Wyk *et al* (*supra*) @ pg 423 *et sequ*

costs.[342]

As has been seen from the above discussions some useful hints have been forthcoming from the Constitutional Court in the very few cases where the right of access to court has been considered by that forum *per se*. It would seem[343] that in relation to measures which place a limit or restriction upon what would otherwise be an unlimited right to be heard by the court[344] one approach, before even considering the question of the general limitation clause, is to see whether the measure concerned serves "*a purpose to which no exception in principle can cogently be taken.*"[345] According to this approach it is only once the measure is shown to amount to an effective denial of an "adequate and fair opportunity to seek judicial redress"[346] that the question of compliance (or non-compliance) with the requirements of the general limitation clause comes into play. At both stages of the enquiry, however, there can be no doubt that the situation in foreign jurisdictions is particularly useful in assisting the courts in making an ultimate finding.

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342 See Mthetwa and Others v Diedericks and Others 1996 (7) BCLR 1012 (N) where Thirion J held rule 49(1) of the Magistrates' Courts Rules to be inconsistent with section 22 of the 1993 Constitution, to the extent to which it required an applicant for rescission of a default judgment to furnish security for the costs of the default judgment and those of the application for rescission.

343 From the approach adopted in Mohlomi v Minister of Defence (*supra*), for example

344 Which include, it is submitted, summary judgment; the powers of dismissal of actions and striking out of defences; and extinctive prescription

345 Mohlomi v Minister of Defence (*supra*) @ 1565B

346 *Idem* @ 1566H

On the other hand,[347] however, no clear constitutional guidelines would, as yet, seem to have emerged in South Africa with regard to determining precisely what constitutes, from a constitutional point of view, "a fair public hearing" before a court, tribunal or other forum seized with determining non-criminal legal disputes.[348] Whatever the case may be in regard to procedures which *prima facie* limit or restrict one's right to be heard, as far as the element of the "fair hearing" itself is concerned, it is highly likely that in many (if not in most) instances where this element is considered, the common law, which provides a wealth of rights relating, for example, to the rules of natural justice and grounds of review will probably constitute the yardsticks against which any alleged infringement of the right to this "fair" hearing will be measured. In determining whether these yardsticks are too short, the position in foreign jurisdictions with similar constitutionally-entrenched rights will probably be decisive.

There can be no doubt that one of the clearest effects of section 34[349] was essentially to "eliminate" the ouster clauses of old.[350] Nonetheless, the effects of section 34 are far from limited to that apparent objective. If interpreted correctly and cautiously, the section could do much both to improve and safeguard the position of the civil litigant, for example, by affording the courts an opportunity to revisit and reconsider our Rules of Court and common law principles with regard to civil

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347 With the possible exception of the *obiter* remarks quoted *supra* in the Besserglik case (*supra*)

348 For example, in determining to what extent (if any) whether there is a right of appeal and of legal representation

349 And its predecessor, s 22 of the 1993 Constitution

350 See Du Plessis and Corder (*supra*) @ 163

procedure each time the section is invoked and, where necessary, to augment the common law where it is held insufficient for the protection of a litigant's constitutional rights. At the same time the section will continue to form part of a growing human rights culture which has been absent from our society for far too long.

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