THESIS TITLE:

THE RE-ENGINEERING OF SOUTH AFRICAN SMALL CLAIMS COURTS

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DECLARATION

I, MOHAMED PALEKER, declare that *The Re-Engineering of South African Small Claims Courts* is my work and that it has not been previously submitted in whole, or in part, for the award of any degree or qualification at any university. All the sources used, referred to or quoted have been duly acknowledged.

DATED AT RONDEBOSCH ON 15 AUGUST 2018.

Signed by candidate

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LIST OF COMMON ABBREVIATIONS

List of abbreviated legislation:

SCCA	Small Claims Courts Act 61 of 1984
SCCR/SCCRs	Small Claims Court Rule/Small Claims Court Rules[1]
MCA	Magistrates' Courts Act 32 of 1944
MCR/MCRs	Magistrates' Court Rule/Magistrates' Courts Rules[2]
SCA	Superior Courts Act 10 of 2013
HCR/HCRs	High Court Rule/High Court Rules[3]
NCA	National Credit Act 34 of 2005
CPA	Consumer Protection Act 68 of 2008
PACOS	Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002

Reference to:

- 'the Constitution' means the 'Constitution of the Republic of South Africa, 1996'.
- 'the Hoexter Commission' means the Hoexter Commission 'Commission of Enquiry into the Structure and Functioning of the Courts'.
- 'Report' means the Fourth Interim Report (1982) published by the Hoexter Commission 'Commission of Enquiry into the Structure and Functioning of the Courts'.
- 'Department of Justice' means the 'Department of Justice and Constitutional Development'.[4]
- 'Minister of Justice' means the 'Minister of Justice and Correctional Services'.[5]
- 'Deputy Minister of Justice' means the 'Deputy Minister of Justice and Constitutional Development'.

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[1] A reference to the SCCRs will be to the Rules Regulating Matters in Respect of Small Claims Courts published under GN R 1893 in *GG* 9909 of 30 August 1985, as amended by GN R851 in *GG* 13178 of 19 April 1991. Where reference is made to the 'original rules' in the text, it means the rules of 30 August 1985 as un-amended.

[2] A reference to the MCRs means the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa published under GN R740 in *GG* 33487 of 23 August 2010, as amended. Where reference is made to the pre-2010 magistrates' courts rules, the reference will be qualified in the text and will draw attention to GN R 1108 *Regulation Gazette* 980 of 21 June 1968, as amended.

[3] A reference to the HCRs means the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa published under GN R48 in *GG* 999 of 12 January 1965, as amended.

[4] See n5 below.

[5] In the past, there was a Ministry of Justice and a Ministry of Correctional Services. In 2015, the Department of Justice & Constitutional Development and the Department Correctional Services were amalgamated. The Minister of Justice thus wears two hats: He or she is the Minister of Justice and Constitutional Development and also serves as the Minister of Correctional Services. When referring to the Department of Justice one refers to the 'Department of Justice and Constitutional Development'. However, the incumbent holding office is known as the 'Minister of Justice and Correctional Services'.

CHAPTER 1

THE SMALL CLAIMS COURTS AS A RESEARCH SUBJECT AND ACCESS TO JUSTICE

1.1 INTRODUCTION

In his seminal article 'The Causes of Popular Dissatisfaction with the Administration of Justice' the famous American legal scholar, Roscoe Pound, writes that every legal system has been the subject of complaint.[1] He notes that the popular lamentation is that there is one law for the rich and another for the poor.[2] This is a poignant observation in the South African context because poverty levels are high on account of unemployment, lack of education and the dire state that the vast majority of rural people find themselves in.[3] As the Nobel-winning economist, Joseph Stiglitz, has discovered, South Africa is one of the most unequal societies in the world.[4]

The rule of law is in jeopardy if the majority of the people cannot afford to litigate matters in the courts.[5] The persistent service delivery disputes, mass action in the townships, land grabs, and the state of lawlessness in the country are causes for concern.[6] Much of this is attributable to the fact that ordinary people feel powerless. The law and the legal system seem to have failed them. They cannot afford legal representation. They are unable to understand court processes and procedures. For them, civil justice is a distant luxury.

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[1] Pound 'The Causes of Popular Dissatisfaction with the Administration of Justice' (1906) 40 *American Law Review* 729 at 731.
[2] Ibid.
[3] The youth unemployment rate for persons ages 15 to 24 is 52,4%, and the national unemployment rate is 26,7%. The Eastern Cape has an unemployment rate of 46%; Mpumalanga's unemployment rate stands at 42,5% and the North West at 41,8%. These three provinces also have large rural communities. See Mkentane 'Over 52% of SA's youth jobless' *Business Report* (16 May 2018).
[4] Stiglitz *The Price of Inequality: How Today's Divided Society Endangers Our Future* 29.
[5] Cameron JA observed in *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* 2001 (4) SA 1184 (SCA) para [1]: 'The law is a scarce resource in South Africa ... justice is even harder to come by.'
[6] Peter 'Soweto's Middle Class Rises Up' *City Press* (14 May 2018).

This thesis looks at the role of small claims courts in the South African legal landscape. It argues for the retention and reform of small claims courts. The study is pertinent given the State's constitutional duty to advance access to justice for all.[7] It is also relevant because the current legislation[8] governing the small claims courts is dated and there is ample evidence to suggest that the courts are not functioning optimally.[9] Because the small claims courts have huge potential to alleviate some of the challenges that poor and middle-income people face in terms of accessing justice, a critical study is not only timely, but essential given greater public demands for transformation in the public and private sectors.

This introductory chapter covers two aspects. Part I discusses the research question of the thesis as well as the methodology for addressing the research question. Part II considers the relevance of small claims courts in the access to justice debate.

PART I

RESEARCH QUESTION AND METHODOLOGY

1.2 THE RESEARCH QUESTION

This thesis identifies the challenges that South African small claims courts face. Some of the difficulties are inherent in the legislation governing the courts and to this extent, the legislation will be critically analysed so that concrete suggestions for reform be can made.[10] Research reveals[11] that even if the legislation is amended, this will not alleviate the practical problems that small claims courts and litigants face, because many of the difficulties arise from the way in which the courts are managed. To 're-engineer' the courts, one must address logistical aspects affecting the courts. Consequently, a portion of this thesis looks at issues of

[7] Constitution, s 34.
[8] See SCCA and the SCCRs. See list of abbreviations.
[9] See chapters 3.
[10] See chapters 4 to 10.
[11] See chapter 4.

management and considers issues affecting the appointment and retention of presiding officers, and the support given to them.[12]

The aim and objective of this thesis are thus to engage with various aspects concerning small claims courts critically and to argue for reform.

1.3 METHODOLOGY

This thesis, by and large, relies on a review of small claims courts literature. Extensive research was conducted to identify the day-to-day problems that the small claims courts face. Information was *inter alia* sourced from the Department of Justice, newspaper articles, letters written by members of the legal profession to professional publications, and reports. By identifying the logistical issues facing the courts, concrete suggestions for reform are made.

For the legislative critique, this thesis relies on the common law, legislation, and academic opinion to advance reasons why the small claims court legislation is in need of reform. When making concrete suggestions for reform, comparative law is used. Because of divergent practices in different jurisdictions in the area of civil procedure, it was difficult to reconcile the positions in all jurisdictions. Consequently, this thesis relies mainly on the Kenyan Small Claims Court Act[13] and the positions in Canada and the United Kingdom. The Kenyan Small Claims Courts Act proved to be a particularly valuable resource as it is a modern legislative enactment, is forward-thinking, and reflects the legal needs of people living in a developing economy on the African continent.

To make out a case for a particular position, statistical data is used. Some of this data was sourced from the Department of Justice. Other data was sourced from official information channels such as Statistics South Africa.

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[12] See chapter 5.
[13] 2 of 2016 (hereinafter to referred to as the 'Kenyan Small Claims Court Act').

PART II

ACCESS TO JUSTICE

1.4 THE ROLE OF SMALL CLAIMS COURTS: SOME DOMINANT THEMES

(a) Small claims courts as vehicles for law reform initiatives

In the last century, civil litigation in the Anglo-American tradition was divided into two broad categories: 'small claims' and 'regular cases'. In different eras the notion of a 'small claim' has meant different things. For example, they have sometimes been characterised as 'petty debts'. Implicit in this terminology is the notion that small claims matters are low-status claims involving 'petty', inconsequential, everyday disputes by litigants who do not often litigate. At other times, the term 'small claims' is used to describe cases that involve small monetary values relative to the other courts.[14] Terminology notwithstanding, there is no doubt that 'small claims' and 'small claims courts' have recently been used as the 'vanguard of procedural reform' and 'as the crucible in which law reform experiments [are] tested and refined for later use in all the courts'.[15]

In South Africa, civil justice reform has, by and large, fallen behind. While there is an acknowledgement that there is an access to justice problem[16] and that the civil justice system is in need of revision, little has been accomplished thus far.[17] Since the advent of democracy in 1994, the legislature has done very little to interrogate the substantive issues affecting civil justice, for example, the rules of jurisdiction, the rules relating to *locus standi*, principles of evidence, and the processes and procedures of the courts as encapsulated in the empowering

[14] Steele 'The Historical Context of Small Claims Courts' (1981) 6 *American Bar Foundation Research Journal* 293 at 296.
[15] Ibid 296.
[16] Vahed 'Access to Justice: Conference Hosted by the Chief Justice 8 to 10 July 2011' (August 2011) *Advocate* 2-4; Ngcobo 'Delivery of Justice: An Agenda for Change' (2003) *SAJHR* 688ff.
[17] Former Chief Justice Sandile Ngcobo described the challenges facing the civil justice system as 'colossal and immediate': Ngcobo (n16) 689. See also Paleker 'Civil Procedure in South Africa: the Past, the Present and the Future' (2011) *ZZPInt* 343 at 361.

legislation.[18] The SCA stands as a modern monument to missed opportunity because even though the legislature had the chance to rethink the underlying premises of the adversarial legal system, the Act, by and large, follows its 1959[19] predecessor. It is startling to note that alternative dispute resolution[20] is not contemplated in the Act, when in fact ADR is a global phenomenon as borne out by the innovations introduced by the Woolf reforms in England and Wales.[21]

Given law reform experiences in other jurisdictions, small claims courts in South Africa – no matter how they are currently perceived – are a useful starting block to address the civil justice crisis. If the legislation of the small claims courts is revised and innovative processes and procedures are introduced, there is no doubt that the legislative amendments will impact on the other courts. It is submitted that commencing civil justice reform in the lowest court of the court structure is the correct approach to take. Because civil disputes are funnelled to the superior courts, legal reform in the lower courts is more urgent. As courts of first access, lower courts have to contend with a panoply of issues (often informed by social and economic circumstances on the ground) that superior courts do not. For example, lower courts have to deal with unrepresented, ill-informed litigants on a daily basis. Because lower courts operate at the coalface, there is a higher expectation that they should be more responsive to the needs of people.

[18] It must be noted that since 2010 the Rules Board for Courts of Law has been actively amending rules of court to expedite justice and to reduce costs. See Theophilopoulos 'Constitutional Transformation and Fundamental Reform of Civil Procedure' (2016) *TSAR* 68. However, the Board's powers are limited by s 6 of the Rules Board for Courts of Law Act 107 of 1985. Furthermore, the Board is constrained by the provisions of the MCA and the SCA. Unless there is progressive reform of the empowering legislation, the Board is hamstrung by the existing enactments. For more on the powers of the Board, see §3.4.
[19] Supreme Court Act 59 of 1959.
[20] Hereinafter referred to as 'ADR'.
[21] Genn 'What is Civil Justice For? Reform, ADR and Access to Justice' (2012) 24 *Yale Journal of Law and the Humanities* 397 at 401.

(b) Macro-social role of small claims courts

A particularly unfortunate aspect of the intellectual engagement with small claims courts is the perception that the courts are forums for adjudicating micro-social disputes, i.e. disputes that lack social importance and therefore have limited relevance.[22]

The macro-social importance of small claims courts in terms of providing reliable justice to the whole of society and its impact on the rule of law[23] and social cohesion is often overlooked or undermined. It is unfortunate because as the gap between the rich and poor keeps growing, and as social and economic inequality becomes more pronounced, conflicts are more likely to arise. Unless civil justice can provide reliable, expedited and less expensive modes of resolving everyday disputes between the powerless and the powerful, those living on the fringes are more likely to turn away from the rule of law and to resort to violent conflict to resolve their everyday disputes.[24] In South Africa, there is ample evidence that people are taking the law into their own hands on a daily basis.[25]

In the paradigm of the 'haves' and the 'have nots', small claims courts can make a valuable contribution, provided of course that the legislature and the legal profession recognise the macro-social status of small claims courts. The expansion of small claims courts by the government since 2003 reflects an appreciation of the importance of these courts.[26] However, the lack of engagement with the legislation, the inadequate allocation of resources, and the poor management of the courts[27] show that the important mind shift to recognise the macro-

[22] Steele (n14) 299-300.
[23] Ibid 300.
[24] Genn (n21) 397. See the caution expressed by Ackerman J in *S v Makwanyane* 1995 (3) SA 391 (CC) para [168] about what happens when the State fails to fulfil its constitutional obligations to ensure that people can vindicate their rights by lawful means. See also *Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC) paras [11]; [12], [18]; [22].
[25] Anonymous 'Service Delivery Disputes in South Africa Hit a Record High' *EWN* (10 July 2018).
[26] See §3.8.
[27] See chapters 4, 5.

transformational influence of the courts on the achievement of social hegemony has not been attained.

(c) Small claims courts as vessels for libertarian values

Since the time of the French Revolution, there was an obsession with placing the law in the hands of everyday people. Evidence of this can be found in the legal codification process in Europe and in other parts of the world.[28] With industrialisation and the birth of the affluent middle classes, there was a feeling that every person had an innate competence to handle his or her own affairs, including legal affairs. However, the complexity of both procedural and substantive law thwarted this belief. 'Law appeared to many people as a set of arbitrary constraints imposed by the outdated and rigid doctrines and structures imposed by colonial masters who used the law as an instrument of exerting dominance.'[29] Lawyers were often seen as symbols of obfuscation and repression because they traded on the complexity of the law.[30]

The birth of small claims courts was a grand symbol of the power of the people to exert direct control over their legal system. Hence they have often been referred to as the 'People's Court'.[31] The unique processes and procedures of the courts coupled with the idea that lawyers were not necessary to successfully litigate in the courts satisfied the yearning for autonomy and provided the opportunity for people to stare justice in the face without the need for an intermediary.

In South Africa, for a very long time, the law was seen by the masses as the repressive arm of the State.[32] The courts were viewed as illegitimate and discriminatory. Lawyers were regarded

[28] See J Sorabji *English Civil Justice After the Woolf and Jackson Reforms: A Critical Analysis* 79ff.
[29] Steele (n14) 302.
[30] Ibid.
[31] McGill 'Challenges in Small Claims Court Design: Does One Size Fit All?' in Trebilcock, Duggan, Sossin (eds) *Middle Income Access to Justice* 352 at 353.
[32] See the interview with Penuell Maduna (1990) 2 *Lawyers for Human Rights* 21. See also Forsyth 'Interpreting a Bill of Rights: The Future Task of a Reformed Judiciary?' (1991) 7 *SAJHR* 1; Dlamini 'The Influence of Race on the Administration of Justice in South Africa' (1988) 4 *SAJHR* 37; Dlamini 'Apartheid and the Black Judge' (1989) 5 *SAJHR* 246.

as the instruments of the law. The majority of them were white and male, and thus objectively did not represent the vast majority of people who were black and female.

One of the refreshing aspects of South African small claims courts is that they do not need lawyers to represent people. While some jurisdictions[33] allow legal representation in the small claims courts, the Hoexter Commission[34] favoured the *modus operandi* of the jurisdictions that do not.[35] The Commission felt that the absence of lawyers would reduce costs and encourage a relaxed atmosphere in the courts.[36] From a libertarian perspective, the small claims courts allow people to take charge of their own affairs. By removing lawyers from the equation, the traditional racial divide that pervaded South African courts has been significantly reduced. This is in keeping with the Hoexter Commission's recommendation that the small claims courts should be colour blind.[37] Of course, presiding officers were unrepresentative because of the demographic profile of the legal profession.[38] But, in the grander scheme of the South African court structure, the small claims court was a refreshing outlier.

There is no doubt that the libertarian values associated with the small claims courts should continue today. Even though South Africa is a democracy predicated on non-discrimination,[39] equality before the law,[40] and open access to the courts,[41] many South Africans experience a feeling of ambivalence towards the law. The law is still complex, rigid and mysterious.[42] It is also extremely expensive to activate.[43] In this context, small claims courts have a role to play. Aside from barring lawyers from appearing in the courts, the SCCA and the SCCRs simplify

[33] See McGill (n31) 358-359; and see generally Whelan *Small Claims Courts – A Comparative Study.*
[34] For discussion of the Hoexter Commission, see chapter 2.
[35] *Report* §13.9, 13.10.
[36] *Report* §13.11.
[37] *Report* §13.45.
[38] See chapter 6.
[39] Constitution, s 9.
[40] Constitution, s 9(1).
[41] Constitution, s 34. See discussion in §1.5.
[42] The South African legal system is an uncodified, mixed legal system, which has as its foundation Roman-Dutch law.
[43] See the opening statement by Navsa JA in *Oshry v Feldman* 2010 (6) SA 19 (SCA) para [1].

the processes and procedures of the courts.[44] In so doing, they demystify the experience of confronting a complex adversarial litigation process, which is prevalent in all the other civil courts.

(d) Costs and inefficacy

The quest to reduce costs and improve efficiency within the courts runs like a thread through small claims courts literature.[45] Since the 19th century people complained about the exorbitant cost of litigation. The price of litigation was regarded as the most pervasive barrier to the vindication of rights. In a liberal democracy predicated on the rule of law, the small claims court provides the essential vehicle to vindicate rights, where a cost-benefit analysis of litigation makes it unfeasible to sue for a small claim in another court.

Aside from focussing on reducing costs, the literature on small claims courts reveals an ardent desire to improve efficiency.[46] On one level small claims courts allow for efficient litigation by court users because they simplify court processes and procedures. However, on another level, the presence of small claims courts improves the overall efficiency of the civil justice system. As noted by Grevstad in 1891:

> '[L]itigation is necessary and a blessing. It keeps the fountain of justice fresh and flowing. For this reason every incipient legal controversy should be carried into court. While the force of this argument may be admitted, it offers no comfort to crowded courts, overworked judges, or parties waiting for adjudication of highly important controversies. The plain, common-sense view of the matter is that the courts are loaded down with inconsequential litigation which should be kept out of court, as its only and inevitable effect is to keep in abeyance important questions pressing for consideration, and to furnish cheap lawyers with employment. To relieve the courts from this drudgery, without depriving the people of their rights to obtain legal redress for legal wrongs, be they ever so insignificant, is the object of the court of conciliation in Norway and Denmark. It has served its purpose so well that it has become the most popular tribunal in each country.'[47]

[44] For Bentham's view on the interaction between substantive law and procedural law and for the simplification of procedural law for maximising utility, see Sorabji (n28) 80.
[45] Yngvesson, Hennessy 'Small Claims, Complex Disputes: A Review of the Small Claims Literature' (1974-1975) *Law and Society Review* 219 at 225-226.
[46] Ruhnka, Weller with Martin *Small Claims Courts: A National Examination* (1978) 2-3.
[47] Grevstad 'Courts of Conciliation in America' (1891) 68 *Atlantic Monthly* 401. See also Yngvesson, Hennessy (n45) 221-222.

The need for efficiency in South African courts cannot be understated. Many courts in different parts of the country are overcrowded with civil cases. There are never enough presiding officers to quell the constant delays in finalising matters. In addition, court resources are often stretched to capacity. Court administration cannot cope with the ever-growing backlog of cases, and court officials seem to be unable to provide the quality of service that is expected of them.[48]

(e) Small claims courts as an alternative to judicare

In 1970, Professor Mauro Cappelletti, the eminent procedural academic, embarked on his famous Access to Justice Project. In 1978-1979 he published a multi-volume series titled *Access to Justice* in which he identified 'three waves'[49] for improving access to justice. The first wave involved the reform of institutions responsible for delivering legal services to the poor. As a result of his recommendations, judicare systems became a common feature in many parts of the world to cater for the needs of those who could not afford legal services.[50]

The South African Legal Aid Board predates the work of Professor Cappelletti. It was established in 1969 and started to operate in 1971. The objective of the Board is to provide judicare for people who cannot afford legal representation. During the early years, most of its budget was spent on civil matters.[51] However, the recent trend has been to prioritise criminal

[48] According to National Assembly Parliamentary Question 4464 of 20 October 2015 which was answered by the Minister of Justice on 28 October 2015: '[The Department of Justice views] a backlog case in the Lower Courts as a case that exceeds the cycle time of 6 months from the date of first appearance in the District Court or 9 months in the Regional Court; or 12 months in the High Court. At the end of September 2015, the lower court backlog figure stood at 33 532 (21%), against a… (outstanding) court roll of 159 729. If compared to the figures at the end of June 2015, when the lower court backlog figure stood at 38 854 (23,7%), against a then current court roll of 163 986'. The Minister went on to state: 'The rising backlogs in the regional courts in particular, are, however being closely monitored.'
The Minister advanced the following reasons for the backlog: 'The problem in many areas where case backlogs are encountered, is that there are an insufficient number of courts and permanent staff, including magistrates, to attend to the normal court rolls...'

[49] The first wave involved the reform of institutions delivering legal services to the poor. The second wave sought to extend representation to diverse interests such as consumers and environmentalists. The third wave involved a shift in focus to less formal alternatives to courts and court procedures. See Cappelletti *Access to Justice and the Welfare State* 4.

[50] Cappelletti (n49) 4.

[51] Sarkin 'Promoting Access to Justice in South Africa: Should the Legal Profession have a Voluntary or Mandatory Role in Providing Legal Services to the Poor?' (2002) *SAJHR* 630 at 632.

cases.[52] Since its inception, the demand on the Board has far exceeded its available resources. The Board has always been in a state of fiscal peril.[53] It has also not helped that in the last decade the budget allocation to the Board has not kept up with inflation and the general demand for services.[54]

On 1 March 2015 under the Legal Aid South Africa Act,[55] the Legal Aid Board was restyled as Legal Aid South Africa, 'which is governed by a Board'.[56] According to regulation 27 of the Regulations[57] passed in terms of the Act, the following means test[58] is applied before a person qualifies for Legal Aid:

> '(3) An applicant who applies for legal aid for a civil case and who does not have a spouse or is not a member of a household and has a net monthly income, after deduction of income tax, of R5 500 a month, or less, may qualify for legal aid for that civil matter.
> (4) An applicant who applies for legal aid for a civil case and who has a spouse or the applicant is a member of a household and whose household has a monthly income, after deduction of income tax, of R6 000 a month or less, may qualify for legal aid for that civil matter.
> (5) A legal aid applicant or an applicant who is a member of a household who does not own immovable property and has net movable assets of less than R100 000 in value may qualify for legal aid for a civil or criminal matter.
> (6) A legal aid applicant or an applicant who is a member of a household who owns immovable property and has net immovable assets and movable assets in value of up to R500 000, may qualify for legal aid for a civil or criminal matter: Provided that the legal aid applicant or the member of a household must physically reside in the immovable property or in at least one of the immovable properties, where there is more than one, unless Legal Aid South Africa decides to the contrary.'

The threshold requirements mean that only the poorest of the poor will qualify for Legal Aid. Middle-income litigants will most certainly not qualify. What constitutes the middle class in

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[52] McQuoid-Mason 'The Delivery of Legal Aid Services in South Africa' (2000) 24 *Fordham International Law Journal* 110 at 114.
[53] Sarkin (n51) 632.
[54] See 'Legal Aid SA Remains Optimistic About the Future': http://www.legal-aid.co.za/?p=3554 (last accessed on 2 May 2018); McQuoid-Mason (n52) 114.
[55] 39 of 2014.
[56] Ibid. Section 2 provides:
> '(1) There is hereby established a national public entity as provided for in the Public Finance Management Act, to be known as Legal Aid South Africa, which is governed by a Board appointed under section 6.
> (2) The Board, of which the powers, functions and duties are set out in section 4, is represented by the chief executive officer and any director or directors as may be designated by the Board.'

[57] Legal Aid South Africa Act, 2014 (Act 39 of 2014): Regulations, published under GN R 745 in *GG* 41005 of 26 July 2017.
[58] The means test is qualified by regulation 28 which provides that a social grant is not taken into account. However, maintenance and child support are. Regulation 30 permits the means test to be relaxed if a person is subjectively judged to be indigent and 'deserves sympathetic consideration on the grounds of exceptional or other circumstances…'.

South Africa is difficult to determine as there are different sectoral stipulations. A middle-income family is said to earn a salary that ranges from R6 000 to R14 000 per month.[59] From the perspective of Legal Aid, a person who exceeds the means test is termed 'relatively affluent middle class.'[60] It is not difficult to argue, given the current cost of living relative to the cost of litigation, that even those who fall into the so-called 'middle-income' range will not be able to afford legal representation.

The Fees Must Fall Campaign in recent South African history highlighted the plight of the so-called 'missing middle'. Tertiary students across South Africa embarked on mass action to force the government to deal with the economic difficulties experienced by students from households, which according to skewed economic indicators, were deemed to be middle class and thus not entitled to student beneficiation programmes. After two years of student protests, President Ramaphosa announced at the 2018 State of the Nation Address that free higher education and training would be available to first-year students from households with a gross combined annual income of up to R350 000.[61] It is axiomatic that the government adapted its calculation of what constitutes 'middle class' by taking into account the actual cost of education.

The Fees Must Fall Campaign revealed a problem that exists not only in the area of education but also in many other areas affecting civil society. The Legal Aid means test is purposefully set low to make the Legal Aid budget stretch. However, the means test criteria for Legal Aid exclude a significant proportion of the population that can otherwise not afford legal representation.[62] In this regard, South Africa is not unique. Pleasence and Balmer after surveying 23 jurisdictions note:

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[59] Khumalo 'Feeling Confident about the Economy shouldn't be a Green Light to Spend' *Personal Finance* (5 May 2018) indicates that high-income earners have a salary of R14000 or more and middle-income earners are those with an income of R3 000 to R14 000.

[60] See Visagie 'Who are the Middle Class in South Africa? Does it Matter for Policy?', published Research Paper of the Human Sciences Research Council (April 2013); Anonymous 'How Much Money You Need to be Middle Class in South Africa' *Business Tech* (3 February 2016).

[61] See https://www.thesouthafrican.com/sona2018-read-the-full-text-of-cyril-ramaphosas-address-here/ (last accessed on 1 May 2018).

[62] See Geffen 'South Africa, a Country of Chequebook Justice' *Daily Maverick* (5 September 2013).

> 'All of the …surveys have been intended to inform access to justice policy, generally with a focus on the needs of those who are most disadvantaged or on the lowest incomes. However, there is a growing interest in the predicament of those people on middle incomes who face justiciable problems that might best be resolved with the involvement of lawyers, especially given the increasing pressure on many legal aid budgets that is seeing legal aid eligibility rates fall and scope narrow.' [63]

The government should apply the same standard to legal services as it did to education. To determine when people are entitled to legal services it should compare people's salaries to the actual cost of litigation. The difficulty, however, is that the State has limited resources, and it is unlikely that the provision of legal services will achieve the same level of recognition as education. Whereas education is acknowledged as a human necessity, unfortunately legal services are still viewed as a luxury.

If large-scale Legal Aid is not economically viable, the State should identify other means of catering for the needs of the missing middle. It is submitted that the small claims courts provide an excellent opportunity to enhance access to justice.[64] The government needs to expand the monetary and substantive jurisdiction of the small claims courts so that more people are directed to those courts.

The presence of small claims courts already directly assists the Legal Aid system to function and to provide much-needed services. To this extent regulation[65] 11(3) provides:

> 'Subject to the provisions of regulation 23(8), legal aid may not be granted for any action that can be brought in a small claims court in terms of the Small Claims Courts Act, 1984 (Act No. 61 of 1984): Provided that Legal Aid South Africa may grant legal aid for a claim that does not exceed the monetary jurisdiction of the small claims court by more than 50 percent.'

That the small claims courts operate in concert with Legal Aid is plain to see. However, the solution would be so much more effective if the jurisdictional and *locus standi* rules of the courts are further developed. By expanding the accessibility of the small claims courts, Legal Aid South Africa can divert its limited resources to cases where the claims are significant and

[63] Pleasence, Balmer 'Caught in the Middle: Justiciable Problems and the Use of Lawyers' in Trebilcock, Duggan, Sossin (n31) 29.
[64] See *Thusi v Minister of Home Affairs* 2011 (2) SA 561 (KZP) para [104] on the importance of finding creative ways of making legal services available to those who cannot afford them.
[65] See Regulations (n57) above.

complicated.[66] Like the position in other jurisdictions, South African small claims courts must do more to complement the state-sponsored Legal Aid judicare system.[67]

1.5 THE MEANING OF ACCESS TO JUSTICE AND ITS IMPACT ON PROCEDURAL REFORM

A constant mantra in small claims courts literature is that the courts promote 'access to justice'.[68] The phrase 'access to justice' thus requires analysis.

'Access to justice' has multiple meanings and depends on the context in which it is used. It is sometimes used to justify court decision-making[69] without explaining what the phrase means. In many instances, the term is symbolically employed as an expression of political correctness. It is thus unsurprising that the term is said to suffer from 'a bad case of semantic overload.'[70]

What is perhaps most disconcerting about the phrase 'access to justice' is that both the words 'access' and 'justice' are vague. In the realm of civil justice, the word 'justice' is sometimes linked to the outcome that a case yields, but in other instances 'justice' is associated with the substance of the law and its fairness.[71] But, it can also be a combination of the two.[72] Depending on the context in which 'justice' is invoked, the law might be *just* if it achieves an equitable outcome,[73] while in other instances as long as the substance of the law (its principles) is

[66] Small claims courts are precluded from hearing complicated claims. See SCCA, s 23(1).
[67] Sarkin (n51) 631.
[68] McGill (n31) 352.
[69] See for example *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* 2004 (9) BCLR 930 (SCA). In this case, the court overturned the common-law prohibition against champertous agreements. Such agreements allowed a third party to fund litigation in return for a share of the proceeds of the claim if the litigation was successful. Under the common law such agreements were considered to be against public policy because they encourage wagering and speculative litigation which amounts to an abuse of the court process. *In casu* a third party entered into a champertous agreement with the respondent. In overturning the common law, the Supreme Court of Appeal held that the law had to be informed by s 34 of the Constitution: see [43], [44].
[70] Grossma, Sarat 'Access to Justice and the Limits of Law' in Gambitta, May, Foster (eds) *Governing Through Courts* 81.
[71] McGill (n31) 354.
[72] Sorabji (n28) 67-74.
[73] Ibid 83.

defensible, even if the outcome is harsh, the law is still just.[74] Many expect that both the substance of the law and the outcome on an application of the law must be defensible and equitable (fair). This seems to be the case in the procedural context. It is for this reason that in the realm of civil procedure a court is often given the discretion to relax a procedural rule if the court feels that the substance of the procedure will lead to an inequitable (unfair) result.[75] As the 'handmaid' of justice,[76] a procedural rule will not be allowed to willy-nilly frustrate the plaintiff's claim or the defendant's defence. As the South African courts have said, procedure is made for the courts and not vice versa.[77]

'Access' traditionally refers to a courthouse or tribunal door.[78] Thus factors that impede a person's ability to have a matter decided by a court are seen to be inimical to 'justice' because they prevent a person from exercising the substance of the law (the rights entrenched therein) and from acquiring an equitable outcome in a judicial setting.[79] When commentators talk about 'access to justice', they are thus referring to barriers that must be removed for a litigant to gain access to an independent and impartial court for the vindication and restoration of rights though court-imposed remedies. At the most basic level, the State has to provide court infrastructure. After that, it has to staff the courts with competent and independent personnel (administration staff and judges). And finally, it has to establish mechanisms for the creation of procedural rules

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[74] See generally Sorabji (n28).

[75] Sorabji (n28) 67-68; Bone 'Improving Rule 1: A Master Rule for Federal Rules' 87 (2010) *Denver University Law Review* 287; (South Australia) Supreme Court Rules 1987, r 2.01; (South Australia) Supreme Court Civil Rules 2006, r 3; (Ontario) Rules of Civil Procedure (R.R.O 1990, Reg. 194) r 1.04 (1.1); Woolf *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* 216-217; Abenga 'Civil Practice and Procedure in Kenyan Courts: Does the Overriding Objective Principle Necessarily Improve Access to Justice for Litigants?' (2012), available at SSRN: https://ssrn.com/abstract=2240955 (last accessed on 25 May 2018).

[76] In *Re Coles* [1907] 1 K.B 1 at 4 Collins M.R said:

> 'Although I agree that a court cannot conduct its business without a code of procedure, I think that the relation of the rules of practice to the work of justice is intended to be that of a handmaid rather than mistress, and the court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in a particular case.'

[77] *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 (5) SA 89 (CC) para [32].

[78] Grossman, Sarat (n70) 80; Hurter 'Access to Justice: To Dream the Impossible Dream?' (2011) 44 *CILSA* 408 at 414.

[79] Smith *Justice: Redressing the Balance* (1997) 9. See also Bass, Bogart, Zemans (eds) 'Introduction' in *Access to Justice for a New Century: The Way Forward* (2005) 3.

to ensure a fair process of litigation.[80] Procedural rules are considered unfair if they unduly favour one litigant over another.[81]

Since time immemorial commentators have argued that traditional adversarial litigation models erode access to justice.[82] Adversarial litigation makes a game of litigation.[83] Consequently, it favours the rich because they can afford to hire the most experienced lawyers who use their acumen and skill to strategically over-complicate cases by relying on the technicalities of procedural and substantive law.[84] Poorer litigants are often forced to abandon their cases due to mounting legal costs, thus negating access to justice. To overcome such abuses, modern procedural reformists argue that procedural rules must be simplified and that the courts should step in to identify instances of abuse and to take action. To this extent, judicial case management systems have been implemented in many legal systems,[85] even in adversarial ones where the courts have traditionally taken a hands-off approach to the way in which cases are conducted.[86]

Some modern reformists go so far as to argue that justice is better served if the courts employ alternative dispute resolution mechanisms, such as court-connected mediation or pre-action protocols to encourage the parties to resolve a matter quickly and to forgo the conventional trial.[87] The modern conceptualisation of 'access' in 'access to justice' therefore does not refer to the courthouse or a tribunal door as the only mode of accessing justice, but takes into account other forms of court-connected dispute resolution mechanisms. In the modern sense, 'access to

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[80] Boulle 'Promoting Rights Through Court Based ADR?' (2012) *SAJHR* 1 at 10-11 states:

> '"access to justice" has never entailed merely entering the courthouse doors and demanding a judicial hearing. It has always been couched in terms of various formalities, preparatory activities and procedures required by legislation, rules of court and other regulatory measures.'

[81] *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* 2011 (3) SA 1 (CC) para [43].
[82] Sorabji (n28) 13.
[83] Pound (n1) 738.
[84] See Genn (n21) 412.
[85] Genn (n21) 401.
[86] Pound (n1) 738.
[87] Some are critical. For example, Galanter 'Access to Justice in a World of Expanding Social Capability' (2010) *Fordham Urban Law Journal* 115 suggests that ADR no longer enjoys the assumption of facilitating access to justice.

justice' thus presumes the removal of barriers that would prevent parties from vindicating their rights quickly, efficiently and cheaply.[88] Procedural law is expected to provide the mechanisms to assist the parties to resolve their disputes without necessarily turning to formal litigation.[89]

In light of the above, contemporary notions of access to justice require one to approach procedural reform in a nuanced manner: (i) procedural rules must be simple and easy to navigate; (ii) procedural rules should be logical, reasonable,[90] and not be overly formalistic or technical – where technicality is inescapable, the court should have an interventionist role to identify instances of abuse, to relax rules, and to hold the parties to account by imposing costs orders;[91] and (iii) procedural rules must be crafted in such a way as to facilitate the quick, efficient and cost-effective resolution of disputes.

In conformity with modern access to justice imperatives, the SCCA and the SCCRs must be evaluated. One has to look out for legislative provisions and common-law rules that are overly technical, formalistic, or unreasonable. While there may be a tendency to emphasise procedural law, it is necessary to be vigilant of substantive law rules as well.[92] If the application of

[88] Hurter (n78) 409.
[89] Ibid 411.
[90] See *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC).
[91] *Eke v Parsons* 2016 (3) SA 37 (CC) para [39].
[92] In *Nkala v Harmony Gold Mining Co Ltd* 2016 (5) SA 240 (GJ), the applicants sought to bring a class action on behalf of current and past underground mineworkers who contracted silicosis or tuberculosis, and on behalf of the dependants of mineworkers who died of silicosis or tuberculosis, contracted while employed in the gold mines. The mineworkers asked the court to declare that any claim for general damages that a mineworker brings, or may wish to bring, against any of the mining companies is transmissible to his estate, should he die before the litigation reaches the stage of *litis contestatio*. It was a substantive rule of the common law (Roman-Dutch law influenced by Roman law) that a claim for non-patrimonial loss was not transmissible to a deceased's estate unless the litigation had reached *litis contestatio* (i.e. close of pleadings). In this case, the miners argued that the common law violated their rights to equality, human dignity, life, freedom and security of the person, right to bodily integrity and access to courts. A full bench of the Gauteng Local Division, Johannesburg agreed that there was a violation. The court held that ss 8(3) and 39(2) of the Constitution explicitly enjoin the court to develop the common law to the extent that it is necessary to make it consistent with the values enshrined in the Constitution, especially those explicitly mentioned in the Bill of Rights. See paras [215], [217]. The court ruled that the common law had to be developed as follows: 'A plaintiff who had commenced suing for general damages, but who has died, whether arising from harm caused by a wrongful act or omission of a person or otherwise, and whose claim has yet to reach the stage of *litis contestatio*, and who would but for his/her death be entitled to maintain the action and recover the general damages in respect thereof, will be entitled to continue with such action, notwithstanding his/her death…' This case is a prime example of a situation where the application of a substantive rule would have negatively affected the outcome of a case if a mineworker died before *litis contestatio*. The court was thus correct from an access to justice perspective to strike down the common-law rule. It is interesting to note that the court did not expressly apply the s 36 limitations analysis upon finding that the common-law rule violated the Bill of

substantive law prevents the plaintiff from presenting the merits of the case, or hinders the defendant's mounting of a defence, access to justice is compromised.[93] For the SCCA and the SCCRs, it is submitted that access to justice requires a wide approach to include alternatives to formal court litigation. ADR must be explored as it promotes the settlement of disputes and reduces the time and expense of executing on court judgments.[94]

1.6 ACCESS TO JUSTICE AND THE CONSTITUTION

(a) The relevant constitutional provision

Section 34 of the Constitution provides:

> '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.'

(b) Courts and tribunals are an essential service

The peremptory framing of s 34 makes access to the courts and other tribunals and forums an essential service that must be promoted and supported by the State. The State thus has an obligation to provide funding and other logistical assistance to the courts. The State must use its fiscal and human resources to remove barriers that would otherwise prevent people from accessing the courts.

The State has done admirable work in promoting small claims courts. Between 2003 and 2018 the State has dramatically increased the number of small claims courts across the country.[95] There is a small claims court in virtually every magisterial district. However, where the State has fallen short is in the implementation and management of the courts. Chapters 3 and 4 discuss the challenges confronting the courts in the area of court management. Poor management

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Rights. It is submitted that the court should have done so. Be that as it may, it seems that even if the court had applied the limitations analysis the finding would not have been different. The court established that the common-law rule was devised with different considerations in mind and that it was illogical to apply the rule in the prevailing system of civil litigation. See paras [188]-[190].

[93] See also chapter 6, parts III and IV.

[94] See chapter 10 for further discussion.

[95] See §3.8.

affects access to the courts and undermines the steps that have been taken thus far to mainstream small claims courts.

(c) Section 34 is broadly interpreted

In a number of cases the courts have relied on s 34 to strike down, relax or uphold an aspect of procedural or substantive law. The courts thus interpret s 34 broadly and do not limit the interpretation of the section to the mere imposition on the State of the obligation to provide courts, tribunals and forums. Section 34 has been used to test both the substance of the law[96] and the outcomes[97] of court processes and procedures. Where on an application of the Bill of Rights the law is unreasonable,[98] discriminatory,[99] overly formalistic,[100] or has led to unjust outcomes by yielding ineffective remedies,[101] the courts have employed s 34 to provide effective substantive law changes or procedural remedies. It is safe to state that s 34 jurisprudence is consonant with the international 'access to justice' theory. However, where the courts have been less vocal is on the relationship between ADR and access to justice. Fortunately, however, legislation has been less equivocal. Rule 70 of Chapter 2 of the MCRs explicitly connects ADR with access to justice. The rule reads:

> 'The objectives of this Chapter are to give effect to –
>
> (1) section 34 of the Constitution of the Republic of South Africa, 1996, which guarantees everyone the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum; and
> (2) the resolution of the Access to Justice Conference held in July 2011, under the leadership of the Chief Justice, towards achieving delivery of accessible and quality justice for all, that steps be taken to

[96] In *Beinash v Ernst & Young* 1999 (2) SA 116 (CC) [17], the court upheld s 2(1)*(b)* of the Vexatious Proceedings Act 3 of 1956. The court held that restricting vexatious litigants was essential for protecting the right of access to court for good faith litigants with meritorious litigation.
[97] See *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* supra where the court held that the mechanisms to enforce eviction orders were not effective. The court found that it was unreasonable of the State to stand by and to do nothing while the respondent was attempting to evict thousands of unlawful occupiers who had nowhere to go ([48]). The conduct of the State rendered the eviction order ineffective. The court stated that the inaction of the State breached the respondent's right to an effective remedy as implied by the right of access to court and as required by the doctrine of the rule of law ([51]).
[98] See *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening* 2001 (4) SA 491 (CC). In this case, the court found a 90-day notice period for the institution of legal proceedings to be unreasonable and inconsistent with s 34 of the Constitution.
[99] See *BID Industrial Holdings (Pty) Ltd v Strang* 2008 (3) SA 355 (SCA) at [43].
[100] See *Airconditioning Design & Development (Pty) Ltd v Minister of Public Works, Gauteng Province* 2005 (4) SA 103 (T) para [19].
[101] See n92.

> introduce alternative dispute resolution mechanisms, preferably court-annexed mediation or the Commission for Conciliation, Mediation and Arbitration kind of alternative dispute resolution, into the court system.'[102]

(d) Independence and impartiality

On a reading of s 34, it is easy to appreciate that the State bears a positive obligation to provide impartial and independent venues for people to access justice. To fulfil this expectation, the State has to firstly appoint people (for example, judges and other court officials) who will dispense justice without fear, favour or prejudice. Secondly, the State has to put mechanisms in place to ensure that court processes and procedures will be free from State interference which would undermine the independence of the courts and their ability to provide a fair trial.

Currently, the Minister of Justice is solely responsible for making the processes and procedures of the small claims courts in conformity with the SCCA.[103] However, in the future the Rules Board for Courts of Law will develop the SCCRs in accordance with the SCCA, as amended.[104] This is a significant step in terms of ensuring compliance with s 34 of the Constitution because the Board is widely regarded for its integrity in maintaining impartiality and promoting the independence of the courts.[105]

The SCCA is subject to constitutional challenges. The Act predates the constitutional era and one can thus anticipate that the Act may be challenged from time to time.[106] One such challenge may relate to the appointment of presiding officers in the small claims courts. In terms of the SCCA, the Minister of Justice has the power to hire and fire presiding officers at will in the small claims courts.[107] This conflicts with the State's obligation to provide independent and impartial courts. The broad ministerial power also conflicts with s 165(2) of the Constitution,

[102] Chapter 2 of the MCRs contains the voluntary court-annexed Mediation Rules. The rules are discussed in more detail in chapter 10.
[103] SCCA, s 25.
[104] See Judicial Matters Amendment Act 8 of 2017, s 15. See also chapter 4 for further discussion.
[105] See §5.5.
[106] See also *Crish v Commissioner Small Claims Court Butterworth* [2007] ZAECHC 114. In this case the applicant unsuccessfully challenged s 45 of the SCCA. The case is discussed in §9.11.
[107] SCCA, s 9(3) read with s 9(5). See further chapter 5.

which provides: 'The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.'[108] Furthermore, s 165(3) provides that '[n]o person or organ of state may interfere with the functioning of the courts.' The issues relating to the appointment of judicial officers are addressed in more detail in chapter 5.

(e) Fair trial

In *De Beer NO v North-Central Local Council and South-Central Local Council*[109] the court stated:

> 'This s 34 fair hearing right affirms the rule of law, which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and Rules of Court, where it is reasonably possible to do so, in a way that would render the proceedings fair. It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. That reasonable opportunity can usually only be given by ensuring that reasonable steps are taken to bring the hearing to the attention of the person affected. Rules of Courts make provision for this. They are not, however, an exclusive standard of reasonableness. There is no reason why legislation should not provide for other reasonable ways of giving notice to an affected party. If it does, it meets the notice requirements of s 34.'

An important aspect of fairness in civil proceedings is the principle of *audi alteram partem.* The parties to litigation must have notice of proceedings and must be able to make representations before the court. To this extent, the SCCA and the SCCRs make provision for a notice and a summons,[110] which must be served on the defendant. Consequently, the SCCRs provide for service rules to ensure that designated officers of the court correctly serve court processes on the defendant.[111] Furthermore, the SCCA tasks the presiding officer to proceed inquisitorially at the trial and not to grant judgment unless the defendant has had the opportunity to address the court.[112] Where the defendant fails to appear after receiving notice of

[108] See also Constitution, s 165(2). It has been argued that because s 165(2) is not part of the Bill of Rights, the requirement to provide independent and impartial courts is not subject to the general limitations clause as set out in s 36. Consequently, a lack of impartiality and independence will be fatal in every case. See Currie, de Waal *The Bill of Rights Handbook* 733.
[109] 2002 (1) SA 429 (CC) para [11].
[110] See §8.2, §8.7.
[111] See §8.13.
[112] See §8.17.

proceedings, the court may grant judgment if it is satisfied that the plaintiff, at an oral hearing, has proven its case.[113]

All of these procedural rules are designed to safeguard the right to a fair hearing. However, as noted in chapter 8 there is a need for these procedural rules to be critically evaluated. They must be tested for their efficiency. New procedures may have to be introduced to take into account modern forms of communication. As new trends for doing business emerge, it may be necessary to rethink the nature and content of court processes, which might have to be managed differently. To meet the lifestyle of the millennial court-user, the physical inquisitorial trial process might have to undergo a fundamental transformation. The right to a fair trial does not exclude the prospect of parties conducting a trial from different locations by using virtual technology platforms.

A particularly interesting aspect is whether legal representation is a prerequisite for a fair trial. It is trite that legal representation is not permitted in the small claims courts.[114] Section 34 of the Constitution does not explicitly confer a right to legal representation. It is conceivable that in certain types of proceedings – geared towards reducing costs – the right to legal representation may be limited. Given the nature of small claims courts, and their aims and objectives, chapter 7 takes the position that the prohibition of legal representation in the small claims courts is consonant with s 34 of the Constitution.

(f) Section 34 is not more important than the other rights in the Bill of Rights

While s 34 is essential for the maintenance of the rule of law, it is not more important than the other rights in the Bill of Rights such as the right to education,[115] housing,[116] healthcare or social security.[117] The Constitutional Court in *Soobramoney v Minister of Health (KwaZulu-Natal)* established that when it comes to providing services, the State cannot be expected to

[113] See §9.14.
[114] SCCA, s 7(2).
[115] Constitution, s 29.
[116] Constitution, s 26.
[117] Constitution, s 27.

provide beyond its available means.[118] Furthermore, it is for the executive and the legislature to determine how they wish to allocate resources.[119] The court went on to hold:

> 'The State has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.'[120]

This observation is important because it dispels the view that civil justice and civil justice reform require the State to provide top-notch facilities to promote access to justice.[121] For that reason, when it comes to advocating for reform measures in the small claims courts, this thesis takes a pragmatic and measured approach. To a large extent, the measures that are recommended can be accommodated within available resources. In so far as innovation is introduced, such as the use of technology in the courts and in court processes, the costs are not exorbitant.[122] For the most part, the cost of technological innovations will be borne by the litigants, for example, the cost of e-filing or serving documents by electronic means. Such measures are suggested as alternatives to current processes and procedures that have proven to be cumbersome, sometimes ineffective, and expensive.[123]

(g) Public hearing

Section 34 guarantees the right to a fair and 'public hearing.' This is in keeping with the general rule that court proceedings must be open to the public. Following the recommendations of the Hoexter Commission, the small claims courts are also open to the public.[124] However, this aspect of s 34 may be limited if there is a good reason for doing so. Hence, in cases involving children, for example, the courts have for a long time adopted the position that the proceedings must be held *in camera* (i.e. in private).

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[118] *Soobramoney v Minister of Health (KwaZulu-Natal)* [1998] 1 All SA 268 (CC) para [11].
[119] Ibid [29].
[120] Ibid [31].
[121] See also *Legal Aid South Africa v Magidiwana* 2015 (6) SA 494 (CC) where the court recognised that Legal Aid South Africa had finite resources and that it was impossible to help everyone who needed legal assistance.
[122] See chapters 4, 8.
[123] Ibid.
[124] *Report §*13.25. See also the discussion at §4.4.

In the small claims courts, one can hardly conceive of situations where a trial will be closed to the public. However, if ADR in the form of mediation is introduced in the small claims courts, this will present an interesting challenge to the requirement for a public hearing. A hallmark feature of mediation is the principle of confidentiality. In chapter 10 it will be argued that given the nature of mediation it is justifiable for the right to a public hearing to be limited in the case of mediation in the small claims courts.[125]

1.7 SOME ACCESS TO JUSTICE CHALLENGES FOR SOUTH AFRICAN SMALL CLAIMS COURTS

Since the purpose of small claims courts is to provide a forum for the speedy, cost-effective and efficient resolution of disputes, the legislation governing small claims courts in many jurisdictions pays careful attention to not only the procedural but also the substantive law aspects affecting the courts.

(a) Jurisdictional woes

For access to justice, careful attention must be paid to the substantive rules of jurisdiction as well as the regulated monetary jurisdiction of the small claims courts. It is vital for the small claims courts to address the social and economic challenges that people face.[126] As noted earlier, South Africa is confronted by poverty and unemployment. There is a significant proportion of the population that will never be able to litigate matters in the magistrates' courts. In some sense, therefore, the small claims courts have to cater for this skewed reality. If the monetary jurisdiction of the courts is set too low, it means that litigants will have fewer options to vindicate their rights. There is already evidence to suggest that it is not economically viable to institute a claim in a magistrate's court where the value of the claim is less than R80 000.[127]

[125] See also §4.4.
[126] Sarkin (n51) 636-637.
[127] See chapter 6 n 91, 93, 94, 96.

Furthermore, as will be discussed in chapter 6, the substantive rules of jurisdiction are far too cumbersome. Some of the rules are formalistic, nonsensical and redundant. Because the rules of jurisdiction act as gatekeepers to the courts, they affect access to justice.

(b) The 'one-shotter' requires greater access to justice than the 'repeat-player'

In his famous article, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change', Galanter[128] identifies two classes of litigants: the 'one-shotters' and the 'repeat-players'.[129] Classically the repeat-players are business entities and the State who litigate frequently in the courts. The one-shotter is the person in the street who litigates rarely. Galanter identifies certain advantages that repeat-players enjoy which the one-shotters do not. Repeat-players acquire knowledge of court procedures because they litigate often. This experience gives them the edge because they can employ court procedure to maximise their chances of winning in court. They also have deeper pockets. This allows them to employ the best lawyers who can financially deplete or browbeat the one-shotter into an unfavourable settlement. Galanter also mentions that repeat-players can form relationships with the court. Because they litigate frequently, their lawyers come to know court officials on a personal level. This allows them to influence the direction of a case in subtle ways.[130] From an access to justice perspective, the repeat-player has more advantages than the one-shotter.

The South African small claims courts have several features that ameliorate the abuse that Galanter mentions. Firstly, legal representation is not permitted in the courts.[131] This results in a drastic reduction of legal costs. Allied to this is the fact that only natural persons may sue in the small claims courts. Juristic persons can be sued, but they cannot sue.[132] However, as

[128] M Galanter 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974-1975) 95 *Law and Society Review* 95.
[129] Ibid 97.
[130] Ibid 98ff.
[131] SCCA, s 7(2).
[132] SCCA, s 7(1).

discussed in chapter 7 juristic persons are often represented in court by in-house counsel.[133] It *does* affect the level of expertise that they have when defending matters when compared to natural person plaintiffs. Fortunately, however, the small claims court commissioner proceeds inquisitorially.[134] This assists the parties by levelling the playing field as the judicial officer effectively runs the proceedings.

Even though the general trend is to exclude juristic persons from suing in the small claims courts, it will be argued (in chapter 7)[135] that there are good reasons in the South African context to allow juristic persons to sue. Small businesses should not be saddled with the cost of suing for small claims in the magistrates' courts. Furthermore, an impoverished natural person defendant should not suffer the financial burden of having to defend a matter in a magistrate's court when he or she is sued by a juristic person for a small claim. It may be better from an access to justice perspective to widen the rules of *locus standi.* The inquisitorial procedure, it will be argued, provides an adequate safeguard against any abuse that could arise from permitting juristic persons to sue in the small claims courts.

As far as the State is concerned, presently, it may not sue and be sued in the small claims courts. However, as will be argued in chapter 7, there may be good reasons for affording natural person plaintiffs a limited right to sue the State in the small claims courts. It would be in the interests of good governance and the rule of law for it to be permissible for local government to be sued in the small claims courts. It is submitted that if it were permissible for local government to be sued in the small claims courts, there would be a low risk of one-shotters being unduly prejudiced because the courts would use their inquisitorial function to prevent local government from gaining an unfair advantage. Furthermore, to permit actions against local government might result in better service delivery, which is a particular challenge in South Africa.

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[133] See §7.5.
[134] SCCA, s 26(3). See also §7.5.
[135] §7.5.

Another advantage that the one-shotter has in the South African small claims courts is that the processes and procedures of the courts are relaxed. As discussed in chapter 8, the parties may not cross-examine each other and the traditional rules of evidence in so far as they relate to admissibility are not applicable in the small claims courts. This affords the one-shotter protection against the potentially over-litigious repeat-player who might use the rules of procedure and evidence to over complicate a case or to limit truth-finding. It is not suggested that there is no room for further improvement. On the contrary, as will be highlighted in chapters 8 and 9, there is considerable scope for the development of the processes and procedures of the small claims courts to take into account technological advances and other practical realities. Furthermore, the courts should operate during business hours so that more people can access the courts at times that suit their lifestyle and work requirements. There is also a need for better court administration because current experiences reveal that poor court administration affects people's perceptions of access to justice. To this extent, recommendations will be made in chapters 4 and 5 for the overall improvement of court administration and for the employment of full-time presiding officers to service the courts during business hours.

A major stumbling block for access to justice and the one-shotter in the South African small claims courts is that there is no mechanism to insist that a plaintiff institutes proceedings in a small claims court where the matter falls within the jurisdiction of the court. As the law currently stands, the plaintiff, as the principal litigant, holds the card to decide whether to sue the defendant in a small claims court or in a magistrate's court.[136] A rich litigant, therefore, has the unfettered right to force a poor litigant to defend a matter in a magistrate's court, when the dispute could be conveniently resolved in a small claims court. It is submitted that South Africa must adopt a position that is similar to the one in England and Wales and that a small claims court track should be introduced in the magistrates' courts. A district magistrate, after

[136] SCCA, s 30.

identifying an appropriate case, should be free to refer the matter to the small claims court if the claim falls within the jurisdiction of the court.[137] In the overall process of civil justice reform, one must question and revisit the archaic idea of having a multiplicity of courts with concurrent jurisdiction.[138]

(c) ADR is needed

A further issue that must be addressed is the lack of ADR in the small claims courts. As much as ADR may be viewed with some scepticism, national and international experience suggests that ADR is part of the legal landscape with more and more countries adopting some or other form of court-annexed mediation. In South Africa, the court-annexed mediation rules in the magistrates' courts,[139] which came into operation on 1 December 2014, are a significant step to mainstreaming ADR as part of the court procedure. It is only a matter of time before ADR in the form of mediation will be introduced in the High Courts.[140] Chapter 10 discusses the trend towards ADR and the benefits of ADR, and makes recommendations for the introduction of mediation in the small claims courts.

1.8 CONCLUSION

In as much as 'access to justice' is a seemingly nebulous concept, local and foreign jurisprudence has added sufficient gravitas to the term. Under the influence of s 34 of the Constitution, there is sufficient consensus in South Africa about what access to justice means and what its prerequisites are. This is particularly useful for the purposes of this thesis, which locates small claims courts within access to justice theory and argues for reform on that basis.

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[137] See §4.7.
[138] See Pound (n1) 742.
[139] See Chapter 2 of the MCRs.
[140] On 6 March 2018, Chief Justice delivered the keynote address at the Mediation and Justice in South Africa Conference at the Nelson Wine Estate in Paarl, Western Cape. In his address the Chief Justice highlighted steps that were underway to introduce mediation and other forms of ADR in the High Court as part of the High Court procedures. In November 2017, the Rules Board for Courts of Law introduced the proposed new HCR 41A at a judicial conference on Judicial Case Management at Emperor's Palace, Johannesburg. Proposed HCR 41A seeks to introduce mediation in the High Court.

Access to justice thus informs many of the discussions that will follow, not least the issue of court management, discussed in chapter 4.

CHAPTER 2

THE HOEXTER COMMISSION'S RECOMMENDATIONS

2.1 INTRODUCTION

Writing in 1981 in *The Solicitor's Journal*, Mr Robert Egerton, a London solicitor, made the following concluding remarks:

> 'Our old adversary system of trial is too expensive for some types of cases and intolerably so for small claims. The factor most obviously contributing to the expense is the employment of lawyers by each of the parties, and this has become almost essential where elaborate rules have been developed to deal with the complexities of some contentious matters and the intricacies of litigation practice.'[1]

This quotation represents the staple argument for the creation of small claims courts in many parts of the world. It is also significant in that it was the opening salvo of the *Fourth Interim Report* of the Hoexter Commission of Inquiry into the Structure and Functioning of the Courts.

The Hoexter Commission under the chairmanship of Judge GG Hoexter, was tasked in 1979 by the South African government to inquire into the structure, functioning and rationalisation of South African courts, with a special emphasis on Local and Provincial Divisions of the Supreme Court (now High Court).[2] The main term of reference of the Commission was:

> 'To inquire into the structure and functioning of the courts…and to make recommendations on the efficacy of that structure and functioning and on the desirability of changes which may lead to the more efficient and expeditious administration of justice and a reduction in the cost of litigation…'[3]

Over a period of four years, the Commission rendered four interim reports and a *Fifth and Final Report* in 1983. Although the Commission was tasked to focus on the superior courts, in its

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[1] R Egerton (August 1985) *The Solicitor's Journal* 575 as quoted in *Report* § 2.1.

[2] Chapter 8 of the Constitution changed the names of the courts. The Supreme Court was renamed to the 'High Court' and the Appellate Division to the 'Supreme Court of Appeal'. See Paleker 'Civil Procedure in South Africa: the Past, the Present and the Future' *ZZP Int* (2011) 343 at 360 for a discussion of the practical impact of the name changes. See also de Vos 'Developments in South African Civil Procedural Law over the Last Fifty Years' (2000) 11 *Stellenbosch Law Review* 343 at 347.

[3] Hoexter Commission *Fifth and Final Report* (1983) 1 (hereinafter referred to as '*Fifth and Final Report*').

original terms of reference it was also required to give attention *'[t]o the desirability of providing special machinery for the settlement of minor civil disputes in an informal manner*.'[4] How this term of reference came about within the context of an investigation into superior courts is not certain.

Consequently, the Hoexter Commission embarked on a special inquiry into small claims mechanisms and produced its *Fourth Interim Report* ('*Report'*) in May 1982. In the *Report* it recommended the establishment of small claims courts in South Africa.

While there is no doubt that the Commission's recommendation was the single most important factor leading to the creation of a uniform system of small claims courts, it must be noted that the Commission was not the only government-sanctioned body to make such a recommendation. The Galgut Commission of Inquiry into Civil Proceedings in the Supreme Court of South Africa had already recommended in the late 1970s[5] the creation of a uniform system of small claims courts. However, the Galgut Commission's recommendation was never taken further.

This chapter will consider the work of the Hoexter Commission with a view to better understanding its recommendations for the establishment of small claims courts in South Africa.

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[4] *Report* § 1.1. Italics inserted for emphasis.

[5] The Galgut Commission was appointed in 1976. For more information see E Kahn 'The Extra-judicial Activities of Judges' (1980) 13 *De Jure* 188.

It is worth mentioning that there were cries from within the legal profession from as early as 1969 for the creation or the reintroduction of small claims courts mechanisms within the existing civil justice system. For example, P W du Plessis 'Hof vir Klein Sakies' (Febuary 1975) *De Rebus Procuratoriis* 68 writes:

> ''n Leemte in die struktuur van die Suid-Afrikaanse hofsisteem is klaarblyklik die afwesigheid van 'n hof vir klein sakie. Op verskeie geleenthede is doe noodsaaklikheid vie die skepping van sodanige hoof reeds aangestip [1969 *De Rebus* 483, 1971 *De Rebus* 255].'

Translation: A lacuna in the structure of the South African court is system is evidently the absence of a court for small claims. On various occasions the necessity of establishing such a court has been emphasised.

2.2 THE HOEXTER COMMISSION'S WORK IN CONTEXT

There was a realisation in the late 1970s that the South African civil justice system was not providing adequate access to justice. The justice system was considered unwieldy, time-consuming, and inefficient.[6] Aside from administrative and logistical problems, the justice system also faced a legitimacy crisis. The populace regarded the South African justice system as the handmaiden of the Apartheid regime.[7]

When the *Report* was presented in 1982 to the then State President, Mr PW Botha, South Africa was going through a tumultuous period of political unrest, governmental repression, economic instability, and global ostracisation.[8] The vast majority of South Africans could not access the institutional courts, which were divided along racial lines. There was a fundamental distrust of the law and all its institutions. The legal profession, too, reflected the broader societal patterns of racial and gender discrimination.[9]

It is interesting to note that in its *Fifth and Final Report,* the Hoexter Commission called for the appointment of black magistrates. Prior to 1977 there were no black magistrates in South Africa, and by 1982 only two out of 754 district and regional magistrates were non-white. The two were of Indian descent.[10] Non-whites were expected to obtain legal training and practical experience in 'self-governing' and 'independent homelands'.[11] The Hoexter Commission recommended that magistrates should be independent of the civil service and that 'active steps

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[6] *Fifth and Final Report* 128 et seq; see also de Vos (n2) 348.
[7] Sachs *Justice in South Africa*.
[8] For a comprehensive discussion of South Africa in the 1980s see Giliomee, Schlemmer *From Apartheid to National Building*.
[9] For an excellent analysis of the racial history of the South African legal profession and its systemic consequences see Pruitt 'No black names on the letterhead? Efficient Discrimination and the South African Legal profession' (2002) 23 *Michigan Journal of International Law* 545.
[10] Albertyn 'Judicial Diversity' in Hoexter, Olivier (eds) *The Judiciary in South Africa* 245 at 252.
[11] Minister of Justice 'Justice Vote' in Hansard *Debates of the House of Assembly* 6 June 1977 col 9363; see also Albertyn (n10) 252.

be taken to recruit judicial officers from all racial groups in the private sector.'[12] Although the Commission was cautious about politicising its work, it must have recognised the legitimacy problems facing the justice system and must have tried, in a conservative way, to balance the interests of the State with the interests of the individual citizen seeking formal justice.

When dissecting the *Report*, one must keep the broader South African context in mind and not focus narrowly on the recommendations in isolation. The recommendations reflect inherent limitations within the justice system and the institutions supporting it at that time. In fulfilling its mandate, the Hoexter Commission was given the unenviable task of performing its functions in an ideological vacuum, and was expected to discount the political, social and economic realties facing the country. In an ironic twist, the *Report* in itself is a reflection of precisely the socio-political and economic realties prevalent at the time. Consequently, when studying the *Report*, one should not be swept up by the seemingly benign academic study that informs the *Report;* the *Report* is a reflection of a dramatic scene that was unfolding in South Africa, and therefore calls for a healthy dose of scepticism and critical engagement.

Aside from the social, political and economic limitations, the imagination of the Commission was constrained by the *modus vivendi* of the time. When the Hoexter Commission sat, South Africa and the rest of the world were in the age of the typewriter. The personal computer and the internet were very much the stuff of science fiction. The cellular phone had not been invented. Consequently, when evaluating the *Report,* one must be conscious of the fact that the Commission's recommendations were restrained by available technology and prevailing human ingenuity.

In the study of legal institutions *context* counts. It is sometimes easy to forget that the present is a reflection of the idiosyncrasies of the past. While the Commission's *Report* stands as an

[12] *Fifth and Final Report* §6.14.

important monument to the underlying thought processes informing the current system of small claims courts in South Africa, an appreciation of context, and especially, the South African experience with its troubled history, is important. It makes one less hesitant to retain the plinth and to replace the monument that sits upon it so as to achieve a solution that better represents the aspirations of a modern society with transformed values and legitimate demands.

2.3 THE METHODOLOGY OF THE COMMISSION

In its enquiry into small claims procedures, the Commission approached the research question quite widely by drawing on a number of sources:

(a) submissions from select members of the legal profession, and other public interest groups and individuals;[13] and

(b) comparative research.

A glaring lacuna in the Commission's research methodology was that of wide public consultation. For example, there were no public hearings on the matter, and there was no participation by non-governmental organisations.[14] Today, of course, one can hardly think of the government passing legislation with limited public participation.[15] If one thinks of the small claims court as the most basic court of first access for the person in the street, then it seems rather strange that the ordinary citizen did not have a say in the shape and form that small claims courts would take.

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[13] *Report* § 1.2 states:
'Pursuant to its terms of reference the Commission solicited and received many submissions mostly from judges, advocates, attorneys, magistrates, teachers of law.'

[14] The Black Sash is an example of a non-governmental organization that operated during the time and had enormous grassroots experience working with underprivileged communities. See http://www.blacksash.org.za/index.php/our-legacy/our-history (last accessed on 1 March 2015).

[15] King 'Principles of Good Law' *Good Law Project Report II* (2016) 14-17.

What is also axiomatic from the *Report* is the lack of qualitative or empirical research of any kind. The Commission drew conclusions from the opinions of certain key and influential members of the legal profession (predominantly male) and attached quite a lot of probative value to their experiences.[16] This is problematic, because these individuals – many of whom would later go on to have distinguished careers in the legal profession culminating in appointments as justices of the Appellate Division, the Supreme Court of Appeal[17] and later, the Constitutional Court – would themselves today agree that they did not represent a cross-section of South African society.

The consultation process reveals a number of shortcomings: a distinct lack of black voices; a dearth of female voices; and the absence of public interest representations by non-governmental and civic organisations. The latter would have been engaging with communities at a grassroots level, and would have had a good assessment of issues confronting people in everyday disputes, especially in the various townships in South Africa.[18] Yet, the *Report* does not reflect their participation.

Because small claims procedures were already recognised in several world jurisdictions,[19] the Commission sent a deputation consisting of the chair of the Commission and the Commission's chief researcher (referred to in the *Report* as 'the deputation') to England and to three cities in the United States.[20] England was an obvious choice: South African civil procedure is based on English civil procedure.[21] The United States was also a good jurisdiction to explore, because

[16] *Report* §5.2-5.25.
[17] See n2.
[18] See Hund, Kotu-Rommopo 'Justice in a South African Township: The Sociology of Makgotla' (1983) 16 *CILSA* 179.
[19] *Report* §1.3.
[20] *Report* §1.3, 1.4.
[21] Paleker (n2) 343ff; see Erasmus 'The Interaction of Substantive Law and Procedure' in Zimmerman, Vissser (eds) *Southern Cross* 149ff.

the United States had, and continues to have, a strong and long history of recognising small claims courts in its various states.[22]

In England the deputation attended arbitration proceedings in connection with small claims in the County Court of Bolton, near Manchester.[23] In the United States, the deputation visited the Small Claims Division of the Civil Court of New York; the Special Pro-Se Branch of the Small Claims Court of the First Municipal District of the Circuit Court of Cook County, Chicago; and the Small Claims Court of the Municipal Court of the Los Angeles Judicial District, California.[24] In England and the United States, the deputation also met with legal practitioners, law school lecturers, and other persons from research institutes and the business sector.[25] These interactions are summarised in various parts of the *Report*.

2.4 THE COMMISSION'S RECOMMENDATIONS

The Hoexter Commission found that, despite arguments to the contrary, a 'strong preponderance of opinion' favoured the creation of small claims courts.[26] The Commission stated that it was:

> 'the clear view of the Commission that in South Africa there is a crying need for a small claims court; and indeed, that in regard to this particular aspect of the administration of justice the South judicial system has lagged behind other countries too far and too long.'[27]

While the Commission acknowledged that there was no universal model that could simply be adopted,[28] it noted that a significant proportion of the developed world had small claims

[22] The first small claims court in North America was established in 1913 in Cleveland, Ohio. See Steele 'The Historical Context of Small Claims Courts' (1981) 6 *Law & Social Inquiry* 293ff, and see Patry, Stinson, Smith *Evaluation of the Nova Scotia Small Claims Court Final – Report to the Nova Scotia Law Reform Commission* Saint Mary's University 8. This was followed by the court in Massachusetts in 1920. Today virtually every State in the United States has a small claims court: see Ison 'Small Claims' (1972) 35 *Modern Law Review* 37.
[23] *Report* §1.3.
[24] *Report* §1.3.
[25] *Report* §1.4; 1.5.
[26] *Report* §12.1.
[27] *Report* §12.2.
[28] *Report* §13.1.

procedures,[29] and consequently, South Africa needed to follow suit. The procedures of the small claims courts, said the Commission, would be novel in terms of entrenching several non-conventional and non-traditional legal concepts of civil trial procedure.[30]

Significantly, the Commission recommended that the small claims courts had to be rolled out in a phased program.[31] It was felt that small claims courts had to be piloted on a limited scale to see their impact on the civil justice system. The Commission felt that it was necessary to 'test the waters', as it were, before jumping in with full-scale nationwide changes.[32] The Commission envisaged that there would be a small claims court in all the densely populated metropolitan areas. It recommended, however, the creation of '*ad hoc* circuits' in small centres.[33] The Commission identified 'small centres' as rural districts that 'are large and sparsely populated.' The Commission stated:

> 'Some system of *ad hoc* circuits will have to be devised to bring a small claims court from the city to the country from time to time.'[34]

The specific recommendations of the Commission were as follows:

(a) The small claims courts would be separate and independent tribunals functioning at lower court level. They would be established by separate statute and not by means of amendments to the MCA. The procedure of the courts would be regulated by their own set of rules. The courts would be under the administrative responsibility of the Minister of Justice.[35]

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[29] See chapters 6 to 11 of the *Report*.
[30] *Report* §12.3.
[31] *Report* §14.6.
[32] *Report* §14.7 states: 'The Commission accordingly recommends that … a start be made by way of pilot projects operating in three large metropolitan areas, each such area respectively having –
(a) a predominantly White
(b) a predominantly Black
(c) a predominantly Coloured or Asiatic
[population group].'
On the merits of pilot schemes in the realm of civil procedure, see Johnson 'Promising Institutions: A synthesis Essay in Cappelletti, Weisner Vol I Book II *Access to Justice* 901.
[33] *Report* §14.5.
[34] *Report* §14.5.
[35] *Report* §14.3*(m)*.

(b) The processes and procedures of the courts would be characterised by simplicity, speed and inexpensiveness.[36] The Commission thought that a simple and inexpensive process was necessary to reflect the small value of the claims.[37] The Commission also envisioned litigants to be poor, uneducated and unsophisticated people and hence, it was important for the processes and procedures not to present an obstacle to people engaging the courts.[38] At this juncture it has to be noted that the welfare of litigants was not the only consideration that motivated the Commission to recommend a simplified, speedy and inexpensive process; cost to the State was a critical consideration. To this extent, it was stated:

> 'The Commission takes the view that the small claims court should be a forum which is inexpensive not only in terms of the cost to the litigants appearing before it, but also in terms of the financial burden which the State will have to shoulder in establishing and administering it.'[39]

(c) Paperwork would be kept to an 'absolute minimum'. The only pleadings required would be 'a simple notice'. Aside from a simple court docket, there would be no written memorial of proceedings. [40]

(d) The plaintiff's notice of claim would be served personally on the defendant. The defendant would be required to appear in person at the court on the date set for the trial and present his or her defence, if any. The defendant would also be permitted to file a counterclaim against the plaintiff. In the notice, the defendant had to be informed that if he or she failed to appear at court, default judgment would be taken, and that this would result in the initiation of proceedings to execute the judgment.[41]

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[36] Report §14.3*(a).*
[37] *Report* §14.3.
[38] *Report* §13.1.
[39] *Report* §13.31.
[40] The Commission accepted that the 'only pleading required of a plaintiff should be a "notice" pleading in very simple form; that no formal plea by the defendant should be required; and that the defendant should not be required to make any appearance at the small claims court before the day of the actual trial.' See *Report* §13.20.
[41] *Report* §14.3*(d).*

(e) Legal representation would not be permitted in the courts.[42] The Commission thought that this was in line with international trends and marked a critical step in terms of making the courts more affordable for litigants.

(f) The small claims courts would not be courts of record.[43] The primary motivation behind this recommendation was to reduce the financial burden on the State in administering small claims courts.[44] If the small claims courts had been courts of record, the courts would presumably have required expensive recording equipment, and perhaps the services of stenographers. The Commission clearly did not want to impose such costs on the State.

(g) The small claims courts would be open to all litigants irrespective of race or colour.[45] This recommendation was significant, considering that segregation in the lower courts was rife. In the 1980s the civil divisions of the magistrates' courts were not open to black people. People classified as coloured, Indian and Asian could litigate civil matters in the magistrates' courts, alongside white people. However, black people had to litigate their matters in front of 'Commissioners Courts' established in terms of the Black Administration Act[46].

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[42] *Report* §14.3*(k)*.

[43] *Report* §14.3*(b)*.

[44] At §13.31 of the *Report* the following is stated:

> 'The Commission takes the view that the small claims court should be a forum which is inexpensive not only in terms of the cost to the litigants appearing before it, but also in terms of the financial burden which the State will have to shoulder in establishing and administering it. *Accordingly the Commission accepts as a matter of principle that the small claims court should not be a court of record.'* (Italics supplied).

[45] *Report* §14.3*(e)*. At §13.45 the following is stated:

> 'The Commission accepts as a fundamental principle that the small claims courts should be open to litigants irrespective of race and colour. Although the small claims court will form of the system of lower courts, it will be separate from and exist independently of the magistrates' courts. It follows that in respect of persons the jurisdiction of the small claims court will not be ousted by section 17(4) of the Black Administration Act, 1927 (Act 38 of 1927); and that the small claims court will have jurisdiction also in cases in which both parties are Blacks.'

[46] Act 38 of 1927, s 17(4). The Special Court for Blacks Abolition Act 34 of 1986 abolished the commissioners' courts.

(h) The small claims courts would not make any award of costs as between party and party.[47] The costs claimable by the plaintiff would be limited to a modest filing fee[48] in respect of his or her notice of claim, plus a sum sufficient to cover the cost of service on the defendant. The recommendation that a costs order should not be permitted was consonant with the Commission's recommendation that legal representation should not be permitted.

(i) Only a natural person would be permitted to sue in the small claims court. Furthermore, actions based on cession claims would not be permitted. The question of jurisdiction would be determined by having regard to where the defendant lived, worked, or carried on business.[49]

(j) The monetary jurisdiction of the court would be for claims of R750 or less.[50]

(k) If a dispute fell within the jurisdiction of the small claims court, the plaintiff would be permitted to elect to proceed either in the small claims court or in any other 'conventional court.' The plaintiff would reserve the right to make the election and once he or she elected to sue in the small claims court, the defendant was obliged to submit to its jurisdiction.[51]

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[47] South Africa generally subscribes to a winner-takes-all system of cost recovery. The successful party to litigation is entitled to recover fees determined in terms of the tariff tables attached to rules of court. The Uniform Rules of Court of the High Courts and the Magistrates' Courts Rules each have their own table of tariffs for litigation in the respective courts. At the time of judgment, the court has wide discretion to make a costs order. The courts, generally award costs party-party, although the courts can award attorney-client or even attorney-own-client costs. Party-party costs are the reasonable and necessary costs incurred by the successful party, whereas attorney-client costs, also determined in terms of the tariff tables, constitute a slightly higher award and is made where a party can show his or her entitlement to such costs (for example, that he or she is entitled to such costs in terms of a prior contractual arrangement), or where the court feels that it should award such costs as a punitive measure (because the unsuccessful party abused the courts process, for example). Attorney-own client costs entitles the successful party to recover the full amount of costs that he or she would be liable for in terms of the fee agreement with his or her attorney. Such costs are awarded in exceptional cases (for example, a particularly egregious abuse of the court's process). See generally Cilliers *Law of Costs*; Francis-Subbiah *Taxation of Legal Costs in South Africa*.

[48] The filing fee was paid by appending a revenue stamp to the notice commencing action. It must noted that with effect from 31 March 2009 the Stamp Duty Act 77 of 1968 was repealed. This effectively brought an end to the payment of any court filing fees. Today one can file a suit in any court free of charge. See GN 360 *GG* 32059 of 27 March 2007.

[49] *Report* §14.3*(g)*.

[50] *Report* §14.3*(h)*.

[51] *Report* §14.3*(i)*.

(l) If the court found that the claim involved complex issues of law or fact, it could refuse to entertain the action. The plaintiff would then have recourse to the ordinary courts.[52]

(m) As a surrogate for legal representation, the Commission recommended that the service of a legal assistant should be made available free of charge at the seat of each court to provide assistance and legal advice to litigants. It was envisaged that the legal assistants would be fulltime salaried legal graduates or suitably qualified paralegals. The plaintiff's notice of claim would expressly inform the defendant that pre-trial assistance was available. It was recommended that the defendant had to be orally informed of this fact at the time when the notice was served on the defendant. A simple brochure had to be available at the court, describing the purpose and procedures of the court, and emphasising the low cost of using it.[53]

(n) The presiding judicial officer in the small claims court, 'the adjudicator', would not be a member of the civil service. He[54] or she would preside at hearings on an 'ad hoc' basis and not in a permanent capacity. The 'adjudicator' would be an unpaid volunteer making his or her services available on a regular basis. The adjudicator would be drawn from the ranks of qualified lawyers who had to have considerable experience in legal practice as advocates or attorneys.[55]

(o) The procedure of the courts was to be inquisitorial in nature and *not* adversarial. The adjudicator would assume a multiplicity of roles: mediator, counsel for the plaintiff, counsel for the defendant, arbitrator and adjudicator. As adjudicator, he or she had to engage in an investigative role of both fact-finder and decision-maker.[56] Although the

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[52] *Report* §14.3*(j)*.
[53] *Report* §14.3*(l)*.
[54] The report refers to the male pronoun 'he'. It can be argued that the Commission had not intended to exclude females from serving in the courts. However, it must be noted that at the time when the Report was written, there were very few female judicial officers in South Africa.
[55] *Report* §14.3*(n)*.
[56] *Report* §14.3*(o)*.

adjudicator could act as a mediator, and in that capacity encourage settlement, the Commission noted: 'the primary function of the small claims court will be the resolution of disputed claims through a process of adjudication'.[57]

(p) The proceedings had to be conducted in a 'relaxed atmosphere.'[58] The adjudicator, at the time of hearing a matter, would be free to adopt any method of procedure, which he or she considered to be convenient and fair to both parties. Consequently, the rules of evidence had to be relaxed.[59]

(q) Undefended claims would also be entertained by the small claims courts. However, default judgment would only be granted after the plaintiff proved his or her entitlement on the merits and quantum of the claim.[60]

(r) Upon the granting of judgment, the adjudicator would have the power to immediately hold a financial inquiry and require the debtor to give evidence as to his or her financial position under oath. Where necessary, the Commission recommended, the clerk of the small claims court could issue a provisional writ in order to secure the attachment of the debtor's movable assets in case he or she should default in making payment.[61]

(s) All hearings would happen in open court, unless both parties requested the adjudicator to conduct proceedings in private.[62]

(t) The small claims courts would function, 'so as far as possible, to meet the convenience of the litigants.' Although claims would be filed with the clerk of the court and legal assistance and advice by the court staff would be available at court during ordinary office

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[57] *Report* §14.3*(p)*.
[58] *Report* §14.3*(o)*.
[59] Ibid.
[60] *Report* §14.3*(q)*.
[61] *Report* §14.3*(r)*.
[62] *Report* §14.3*(s)*.

hours, 'actual hearings will be conducted in the evening and outside of ordinary office hours.' [63]

(u) There would be no appeal from the decisions of the small claims courts. An aggrieved party was to be given a limited right of review to the 'Supreme Court' (now the High Court).[64]

With these recommendations in place, the stage was now set for the government to take up the cudgels and to embark on a process that would lead to the realisation of small claims courts in South Africa. As will be seen in the next chapter it did not take the government long to act on the recommendations of the Commission.

[63] *Report* §14.3*(t)*.
[64] *Report* §14.3*(u)*.

CHAPTER 3

SMALL CLAIMS COURTS DURING THE PERIOD 1983 TO THE PRESENT

3.1 INTRODUCTION

Even before the government could act on the recommendations of the Hoexter Commission ('the Commission'), the provincial law societies and the Association of Law Societies welcomed the proposal to establish small claims courts. The legal fraternity organised symposia to publicise small claims courts and lauded them for providing 'accessible, speedy, inexpensive, simple to use, and fair' justice.[1] More than that, the legal fraternity viewed small claims courts as a kind of conscience cleansing opportunity. To this extent, it was noted:

> '[t]he recommendations raise exciting prospects for a fairer deal for the litigant with a small claim, and present the practising lawyer with an excellent opportunity to perform a community service[2] which will enhance the status of the profession and will dispel much existing bias.'[3]

This chapter will look at the period 1983 to the present. History is perhaps the best judge of the successes and failures of the past and a powerful mirror to ensure that the foibles of yesteryear are not repeated in the future.

3.2 THE ANNOUNCEMENT

On 19 October 1983, the legal profession displayed its enthusiasm to embrace small claims courts at a conference on 'Adapting the Law for Inflation' which was organised by the Institute of Foreign and Comparative Law at the University of South Africa. At the conference, the then Minister of Justice, Mr HJ Coetsee announced in his opening address that Cabinet had in principle accepted the Commission's recommendation for the establishment of small claims courts. The audience of approximately one hundred strong, consisting of judicial officers,

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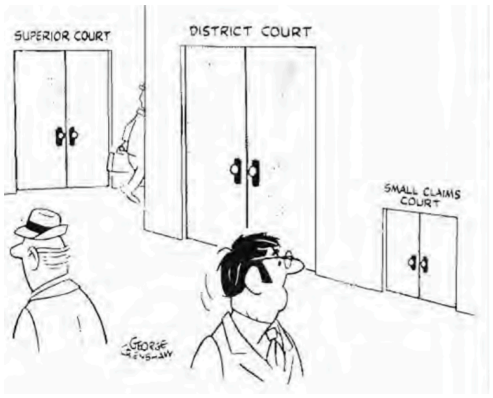
[1] 'Editorial' (September 1982) *De Rebus* 399

[2] The Hoexter Commission recommended that the small claims courts would be presided over by adjudicators who would be drawn from the ranks of the attorneys and advocates profession on a voluntary basis. See *Report* §

[3] Editor 'The Small Claims Court: Attorneys Serving Ordinary People' (September 1992) *De Rebus* 583.

members of the profession and law academics, welcomed the announcement, and so did the country's newspapers.[4] If pictorial manifestations are anything to go by, the January 1984 edition of *De Rebus* caricatured small claims courts in the following way:



However one wishes to interpret the cartoon, it is clear that the small claims courts were perceived as diminutive courts, not quite measuring up to the other institutional courts. In some sense, the pictorial was a portent of things to come.

3.3 SMALL CLAIMS COURTS ACT 61 OF 1984

Within a year of the announcement of Cabinet's endorsement of small claims courts, Parliament passed the SCCA,[5] which came into operation on 30 August 1985. Speakers in the House of Assembly, on the second reading, lauded the Small Claims Courts Bill as an 'important and historic advancement in the administration of justice in South Africa.'[6] In line with the Hoexter Commission's recommendation, pilot courts were established in Johannesburg, Pretoria, Durban, Pietermaritzburg, Cape Town, Springs, Port Elizabeth, and Rustenberg. The government envisaged that over the next few months and years, it would extend small claims courts incrementally.[7]

[4] Sanders 'News and Views' (January 1984) *De Rebus* 13.
[5] 61 of 1984.
[6] Scott-Macnab 'The Legal Profession's Declining Image: Is there a Better Way?' (January 1987) *De Rebus* 27.
[7] Coertse 'Howe vir Klein Eise' (August 1985) *De Rebus* 396.

Anatomically, the SCCA consists of a definitions section and ten chapters. The Act contains the empowering provisions for the establishment of the courts.[8] Additionally and significantly, it deals with the qualification requirements of presiding officers and the appointment of presiding officers,[9] the rules of jurisdiction,[10] procedure and evidence,[11] judgment and costs,[12] and the execution and enforcement of court orders.[13] As far as procedure is concerned, the Act sets out the rules of procedure in broad-brush strokes. In contrast to the procedure in all of the other courts,[14] the Act declares that the presiding officer 'shall proceed inquisitorially to ascertain the relevant facts, and to that end, the presiding officer may question any party or witness at any stage of proceedings.'[15] This is in stark contrast to the adversarial nature of litigation in all the other courts in the land.[16]

It is significant that the monetary jurisdictional limit of the small claims courts was set at R1 000.[17] The significance is underscored by the fact that on 2 May 1984 the monetary jurisdiction of the magistrates' courts changed from R1 500 to R3 000 in respect of all illiquid claims and to R10 000 in respect of liquid claims and liquid documents.[18] In numerical terms, the small claims courts' monetary jurisdiction was 1/3 (33.3%) of the monetary jurisdiction of the magistrates' courts. Even though the small claims courts' monetary jurisdiction is fifteen times higher today (R15 000)[19] than it was in 1984, the present monetary jurisdiction of the small claims courts is paltry (1/13.33 or 7.5%) relative to the jurisdiction of the district magistrates'

[8] SCCA, ss 2-7.
[9] SCCA, ss 8-11. See chapter 5.
[10] SCCA, ss 12-24. See chapter 6.
[11] SCCA, ss 26-33. See chapter 8.
[12] SCCA, ss 34-37. See chapter 9.
[13] SCCA, ss 38-44. See chapter 9.
[14] Where the procedure is adversarial.
[15] SCCA, s 26(3). See chapter 8.
[16] Paleker 'Fact and Truth-Finding in the South African Civil Procedure' in Uzalec and van Rhee (eds) *Truth and Efficiency in Civil Litigation – Fundamental Aspects of Fact-finding and Evidence-taking in a Comparative Context* 190-91.
[17] Coertse (n7) 397.
[18] Magistrates' Courts Amendment Act 56 of 1984.
[19] In terms of GN R185 in *GG* 37450 of 18 March 2014, with effect from 1 April 2014 the monetary jurisdiction of the small claims court is R15 000.

courts, which currently stands at R200 000.[20] The monetary jurisdiction of the small claims courts between 1985 and 2016 did not keep up (in real terms) with the rampant cost of litigation and wider demands for access to justice. Monetary jurisdiction will be discussed in more detail in chapter 6.

A further feature of the Act is that it excludes legal professionals from being able to represent litigants in the courts.[21] In its deliberations, the Commission paid extensive attention to the issue of legal representation. While some foreign jurisdictions allowed for legal representation in small claims courts, the Commission noted that there were a significant number that did not.[22] In the mind of the Commission, the arguments against legal representation were in keeping with the ethos of small claims courts, namely to foster speedy and cost-effective access to justice. The inclusion of legal professionals ran the risk of matters becoming protracted and expensive. The inquisitorial nature of proceedings was further reason for prohibiting representation by legal professionals.[23]

3.4 SMALL CLAIMS COURTS RULES

The SCCRs were published on 30 August 1985.[24] The SCCRs accompany the SCCA. Whereas the Act sets out the rules of procedure in broad-brush strokes, the SCCRs contain the nitty-gritty aspects of procedure. They also contain a set of precedent forms[25] and a table of tariffs and costs.[26]

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[20] In terms of GN 217 in *GG* 37477 of 27 March 2014, with effect from 1 June 2014, the monetary jurisdiction of the district magistrates courts is up to R200 000 and the regional magistrates' courts is from R200 000 to R400 000.
[21] SCCA, s 7(2).
[22] *Report* § 9.6.2, 9.15.2, 9.15.3, 10.2.7, 10.3.10, 10.4.9; 10.5.8; 11.8.
[23] *Report* §13.9. For further discussion see chapter 8.
[24] Rules Regulating Matters in respect of Small Claims Courts GN R1893 in *GG* 9909 of 30 August 1985 as amended by GN R851 in *GG* 13178 of 19 April 1991.
[25] SCCRs, Annexure 1.
[26] SCCR, Annexure 2.

According to the SCCA,[27] the Minister of Justice is responsible for making rules regulating the following aspects of the small claims courts:

> '*(a)* The practice and procedure, including the procedure when proceedings are reviewed;
> *(b)* fees and costs;
> *(c)* the duties and powers of officers of the court;
> *(d)* the establishment, duties and powers of one or more [advisory] boards[28] to advise the Minister on the functioning of courts;
> *(e)* any other matter which he may consider necessary or expedient to prescribe for carrying out the provisions of this Act or the attainment of its objects.'

The SCCRs are thus delegated legislation and, as such, cannot exceed the provisions of the SCCA in scope and in breadth. If they did so, the rules would be *ultra vires* and invalid.[29]

Whilst there was nothing inherently wrong with conferring power on the Minister to make rules for the small claims courts, it is noteworthy that the SCCRs have only been amended once since their inception. The last amendment to the SCCRs was in 1991 – some 27 years ago. This is in sharp contrast to the rules in the other courts, which have been consistently and routinely amended by the Rules Board for Courts of Law in terms of its mandate set down by the Rules Board for Courts of Law Act.[30]

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[27] Section 25(1). Section 25 will be amended by s 15 of Judicial Matters Amendment Act 8 of 2017. The Act has not yet come into operation. In the future the Rules Board for Courts of Law will make rules for the small claims courts.

[28] The role and purpose of advisory board will be discussed later.

[29] *Ex parte Christodolides* 1953 (2) SA 192 (T); *Gross v Commercial Union Assurance Co Ltd* 1974 (1) SA 630 (A) at 634D; *United Reflective Converters (Pty) Ltd v Levine* 1988 (4) SA 460 (W); *Minister of Safety and Security v Kekana* 1996 (2) All SA 324 (W); *Harmony Caterers (Pty) Ltd v Ford* 2002 (5) SA 536 (W).

[30] 107 of 1985. In terms of s 6(1) of the Act:

> 'The Board may, with a view to the efficient, expeditious and uniform administration of justice in the Supreme Court of Appeal, the High Court of South Africa and the Lower Courts, from time to time on a regular basis review existing rules of court and, subject to the approval of the Minister, make, amend or repeal rules for the Supreme Court of Appeal, the High Court of South Africa and the Lower Courts regulating–
> *(a)* the practice and procedure in connection with litigation, including the time within which and the manner in which appeal shall be noted;
> *(b)* the form, contents and use of process;
> *(c)* the practice and procedure in connection with the service of process or other documents, including the issue of interrogatories;
> *(d)* the practice and procedure in connection with the execution of process, including writs and warrants;
> *(e)* the practice and procedure in connection with the reference of any matter to a referee under section 38 of the Superior Courts Act, 2013, and the remuneration payable to any such referee;

3.5 CREEPING PROBLEMS

The enthusiasm, optimism, and fanfare soon subsided as cracks started appearing in the fabric of small claims courts, causing one commentator to lament that the small claims courts had been received with 'enthusiasm and a naive joy'.[31] A 'fatal flaw'[32] in the procedural mechanism of small claims courts was that successful plaintiffs were required to go through the ordinary magistrates' courts' judgment and execution procedures in order to enforce orders of the small claims courts.[33] The enforcement of small claims orders via the machinery of the ordinary magistrates' courts meant that while the plaintiff incurred almost no expense and enjoyed relatively speedy justice in the small claims court, he or she had to expend both money and time to have the judgment enforced. Scott-Macnab stated the problem as follows:

> 'The question of compliance and enforcement has plagued small claims procedures wherever they have been instituted. It is really only the threat of the plaintiff proceeding further with the complicated and

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(f) the compulsory examination by one or more registered medical practitioners of any party to proceedings in which damages or compensation in respect of alleged bodily injury is claimed and whose state of health is relevant for the determination of such damages or compensation, as well as the manner, time, place and responsibility for the cost of the examination, and the making available to the opposing party of any documentary report on the examination;
(g) the procedure at or in connection with any enquiry as to the mental state of any person, and the findings or orders which may be made or issued at any such enquiry;
(h) the appointment and admission of commissioners to take evidence and examine witnesses;
(i) the manner in which documents executed outside the Republic may be authenticated to permit of their being produced or used in any court or produced or lodged in any public office in the Republic;
(j) the appointment and admission of sworn translators;
(k) the duties of sheriffs and other officers of court;
(l) fees and costs, including the fees payable in respect of the service or execution of process (except subpoenas or warrants issued at the request of the State in criminal matters) or in respect of the summoning of persons to answer interrogatories;
(m) the manner of determining the amount of security in any case where it is required that security shall be given, and the form and manner in which such security may be given;
(n) the hours during which the offices of registrars and clerks of the court shall be open for official purposes;
(o) the manner or recording or noting evidence and proceedings;
(p) the custody and disposal of records or minutes of evidence and proceedings in the Supreme Court of Appeal and the High Court of South Africa;
(q) the appointment of assessors in proceedings in lower courts;
(r) the tariff of fees chargeable by advocates, attorneys and notaries;
(s) the taxation of bills of costs and the recovery of costs;
(t) generally any matter which may be necessary or useful to be prescribed for the proper despatch and conduct of the functions of the Supreme Court of Appeal, the High Court of South Africa and the Lower Courts in civil as well as in criminal proceedings.'

[31] Scott-Macnab 'The Legal Profession's Declining Image: Is there a Better Way' *De Rebus* (January 1987) 27.
[32] Scott-Macnab (n31) 27.
[33] For the provisions of s 41 of the SCCA. See chapter 9.

> traditional enforcement and execution procedures that may, and I repeat may, secure compliance with the judgment. It has been found that plaintiffs can do little else besides taking civil action or transferring to a magistrates' court where the defendant fails to comply with an order of the commissioner of the small claims court. The plaintiff must also pay in advance for the [sheriff] of the court to serve summons and execute against the defendant. It, therefore, can be a disquieting spectacle to see rows of disconsolate successful small claims plaintiffs wrestling with the problem of whether to proceed with the enforcement of their claims by transferring to the magistrates' courts. Even then, of course, if the defendant has nothing, they will get nothing.'[34]

The legislature was also criticised for failing to contemplate alternative methods of dispute resolution, such as mediation, as opposed to judicially imposed court orders and traditional enforcement techniques.[35]

A further issue that was identified was the lack of proper backup for court administration.[36] The small claims courts were dependent on the infrastructure and the personnel of the magistrates' courts to fulfill their function.[37] Magistrates' courts staff, it was felt, did not consider the administration of the small claims courts a priority. Their primary responsibility was to service the ordinary magistrates' courts, and their performance was evaluated on that basis. This meant that their hearts were not in the small claims courts. Commentators called for the small claims courts to be given their own personnel and a proper budget, and argued that they should not operate in the shadow of the magistrates' courts. After all, the small claims court was established as a separate and distinct court.[38]

To exacerbate matters, there was a perceived lack of enthusiasm on the part of many attorneys to serve as judicial officers (commissioners) in the small claims courts.[39] The reasons advanced for the lack of eagerness are not clear. Statistical information[40] from the time, however, paints

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[34] Scott-Macnab (n31) 27. For further discussion on the problems relating to the enforcement of small claims judgments, see chapter 9.
[35] Scott-Macnab 'Mediation Prior to Small Claims Litigation: A Human Approach' (November 1987) 619.
[36] Kuny 'Legal Redress for All – The Small Claims Court' (December 2001) *Advocate* 22 at 23.
[37] Scott-Macnab (n31) 27 quotes Mr Geyser, president of the Natal Law Society who said that the legal fraternity had detected that the small claims courts did not have the administrative back-up to cope with debt collecting.
[38] Kuny (n36) 23. For further discussion on court administration see chapter 4.
[39] Botha 'Small Claims Courts' (February 1994) *De Rebus* 87. See also Kuny (n36) 23.
[40] As at September 1992 there were approximately 358 serving commissioners for 23 and towns in the Cape Province. In the Orange Free State, 92 commissioners sat in 13 centres. The Transvaal had 318 commissioners. Cumulatively they heard approximately 750 cases a month: see Editorial (n3) 583.

a slightly difference picture – a significant number of attorneys *were* serving the courts with distinction. However, some commissioners complained that the jurisdiction of the court was too high,[41] resulting in an ever-increasing number of cases and the overburdening of commissioners. This they said caused reluctance amongst many attorneys to serve as commissioners. In a letter to the Editor in *De Rebus* the position was stated as follows:

> 'It was explained in the letter that the particular town was experiencing a reluctance on the part of attorneys to serve as commissioners, with the result that that few that were still willing to serve were still overburdened with work. The letter warned that, if this trend were to continue, a real danger existed that no commissioners would be available, with the result that this very important service could not be rendered to members of the public.
>
> The letter further explained that the whole purpose of these courts was to render a service to a part of the population that could not afford legal services and for that reason the attorneys' profession has been keen to assist.
>
> With the increase in the jurisdiction of the court, matters are now heard which are not really "small" claims. It was noted that in more and more cases people who could in fact afford legal services were subjecting their claims to the small claims court in order to establish a principle. Claimants also reduce their claims to be able to bring them before the small claims court.
> The suggestion was then made that commissioners be remunerated for their services.'[42]

At the time when this letter was written, the jurisdiction of the small claims courts had been increased to R2 000. The jurisdiction of the magistrates' courts was R20 000 in respect of illiquid claims and R50 000 in respect of liquid documents, liquidated claims and claims based on credit agreements. Bearing these thresholds in mind, it is strange that the writer viewed claims in the small claims courts as 'not really "small" claims'. The letter fails to outline a

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[41] However, there were also contrary opinions. For example, Kuny (n36) 22 argued that the monetary jurisdiction of the small claims court was too little and argued that it should be increased from R3000 to R10 000.

[42] *De Rebus* (February 1994) 87. See also Badenhorst 'Pressure mounts on existing small claims court commissioners' (April 1998) *De Rebus* 23 wherein the writer states the following:

> 'I have ascertained from the clerk of one of these courts that the number of available commissioners has dwindled considerably, and that new appointments have not kept pace with an increase in cases. I am afraid that this serious shortage of commissioners may not be a local problem only. If drastic action is not forthcoming, resignations of commissioners may snowball which will jeopardise the existence of these courts.
> There may be various reasons for this situation.
> *Government has not reacted to pleas of commissioners to be remunerated for their services or alternatively to be given some tax relief*. Furthermore, the shorter intervals between hearings and the longer hours at hearings are taking their toll. This may have led to the spate of resignations by commissioners, who in many cases have done their share of service to the community by serving in this capacity for a long time.' (Italics supplied).

For a discussion of the relationship between small claims courts and legal fees see §6.7.

principled, structured argument as to why attorneys refused to serve in small claims courts. One must therefore question, in light of other statistical evidence available at the time, whether in fact attorneys were generally reluctant to serve as commissioners in the small claims courts for the reason advanced, or at all.

A more pressing concern was the lack of adequate training for commissioners. In terms of the SCCA,[43] the procedure of the small claims court was inquisitorial, and not adversarial. As noted before, this marked a significant departure from the conventional South African civil procedure, which is grounded in the adversarial tradition. Fear was expressed that if training was not offered, the adversarial model would inadvertently creep into the small claims courts.[44] It was also argued that practitioners required training in areas of professionalism and judicial ethics.[45]

A particularly perplexing question that arose concerned the extent to which small claims courts could adjudicate matters involving African customary law. Section 14(3) of the SCCA provided:

> 'Notwithstanding anything to the contrary in any other law contained, a court may hear an action between Blacks as contemplated in section 10 of the Black Administration Act, 1927 (Act 38 of 1927), and the court may at such hearing apply such Black law and custom as may be proved.'

Professor Kerr identified two important questions as regards section 14(3):

- 'Does s 14(3)... mean that small claims courts are to function as Commissioners' courts in respect of civil claims between black South Africans except in so far as special provision is made in the Small Claims Courts Act on such matters as jurisdiction (ss 14-16), the absence of representation (s 72), procedure and evidence (ss 26-8), the absence of a record (s 3(1)) and the absence of a right to appeal (s 45)?'[46]
- 'If one accepts that a small claims court may apply customary law what sources of that law are available to it? Section 14 refers to "such Black law and customs as may be proved". A legislature which has prohibited representation and has required parties to appear in person (s 7(2) of the Small Claims Courts Act 1984) clearly relies on the presiding officer to know the law and to apply it. The legislature surely cannot have intended that the vast majority of litigants in cases involving customary law (all except those who are lawyers and who appear in person in their own matters) were to be placed in a position where they would lose their cases if they did not "prove" statutory rules, such as those in the statutes on succession ... , on land tenure... , and in the areas where they apply, the respective Codes of Zulu Law. Similarly, one cannot believe that the

[43] Section 26(3).
[44] Van Loggerenberg 'Die Hof van Klein Eise: Adversatief of Inkwisitories' (July 1987) *De Rebus* 343.
[45] Nochumsohn 'Johannesburg Small Claims Court "in disarray"' (November 2005) *De Rebus* 7; Khumalo 'Unprofessional for small claims court commissioners to miss sittings' (October 2000) *De Rebus* 11.
[46] Kerr 'Customary Law in the Small Claims Courts' (1984) 101 *SALJ* 726 at 727.

> legislature intended legally untrained and unrepresented litigants to "prove" the decisions of the Appellate Division or the Appeal Court for Commissioners Courts and its predecessors.'[47]

Fortunately, the aforementioned legal conundrums were resolved by s 23 of the General Law Amendment Act[48] of 1992, which deleted s 14(3) of the SCCA. Today, there are no longer special commissioners' courts for black people. As such, the small claims courts are in a similar position to any of the lower courts and may adjudicate small claims matters by application of African customary law, in so far as the matter falls within the general jurisdiction of the small claims courts. Like in any other small claims matter, it is the commissioner who bears the responsibility of establishing the applicable African customary legal principles that will apply to the factual scenario presented by the parties. [49]

3.6 2003 SMALL CLAIMS COURTS CONFERENCE

In 2003, the Department of Justice and Constitutional Development, with the support of the then Deputy Minister of Justice,[50] held a series of engagements with the legal profession and academia aimed at extending access to justice. Support for the small claims courts was identified as a project that could have a profound impact on access to justice.[51]

In November 2003, the Department of Justice organised a small claims courts conference in Camps Bay, Cape Town. The Department invited selected members and organisations representing the legal profession, the judiciary, non-governmental institutions, academia and members of civil society. Delegates were divided into small working groups, which considered practical steps to improve the functioning of the small claims courts. The workshop proved to be useful in that it revealed teething problems. It is interesting to note that 2003 also saw the

[47] Ibid 728.
[48] 139 of 1992.
[49] For a discussion of the general jurisdiction of the small claims courts, see chapter 6.
[50] The Hon Ms C Gillwald.
[51] Gangen 'Small Claims Courts Hear 20 000 Matters Despite Problems' **(**June 2008) *De Rebus* 13.

dramatic increase in the monetary jurisdiction of the small claims courts from R3 000[52] to R7 000.[53]

The primary product of the workshop was the adoption of a document titled '*The Guideline and National Action Plan for the Small Claims Courts in South Africa*'[54] (hereinafter referred to as the 'NAP').

3.7 NATIONAL ACTION PLAN (NAP)

The NAP adopted at the 2003 conference identified '7 key result areas' for improving the operations of small claims courts. To summarise, the NAP proposed that:

- The legislation governing small claims courts had to be reconsidered. It was felt that there were aspects of the legislation that were in conflict with the provisions of the Constitution. The view was also expressed that the rules of procedure were too technical and should be simplified to enable the courts to achieve their objective of providing cheap and quick civil justice. Furthermore, the current legislation was lacking for failing to provide an appropriate administrative structure for the establishment, management and development of small claims courts throughout the country.[55]
- Commissioners and court officials had to be properly trained. It was argued that commissioners should undergo training similar to the Department of Justice approved training that is received by magistrates. As far as court officials were concerned, delegates pointed out that many of them lacked professional training and this was evident from the chaotic nature in which the courts functioned.[56]

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[52] GN R1402 in *GG* 16661 of 15 September 1995 which came into operation on 1 October 1995.
[53] GN R313 in *GG* 26113 of 12 March 2004.
[54] Department of Justice and Constitutional Development *Guidelines and National Action Plan for the Small Claims Courts in South Africa.*
[55] Ibid 35ff.
[56] Ibid 41ff.

- A training and information manual for commissioners and court officials had to be drafted.[57]
- A public education and communication strategy had to be developed and adopted. Delegates thought it was mere lip service to talk about access to justice if people were unaware of *how to* access justice.[58]
- A student internship program had to be developed. Law students wanting to volunteer or to perform community service should be permitted to work at the small claims courts. They could assist with the administration of the courts and, where possible, they could even staff information desks and help desks. Students could also play a role in public education by speaking to communities.[59] It was common cause that the SCCA[60] and SCCRs[61] made provision for 'legal assistants' to assist litigants appearing in the small claims courts. None of the courts in the country had any assistants appointed.
- Small claims courts had to be decentralised at a rural level. Delegates were concerned that the most marginalised groups were being denied justice simply because it was logistically impossible for them to access the courts. Ground experience revealed that people in rural areas often had to travel long distances to reach a court. This severely impacted on their ability to use the court. Delegates felt that if the constitutional guarantee of access to justice[62] was to be realised, it was vital for the courts to go out to meet the people.[63]
- A national steering committee had to be appointed to co-ordinate, manage and facilitate the

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[57] Ibid 13ff.
[58] Ibid 50ff.
[59] Ibid 44ff.
[60] Section 11(1).
[61] SCCR 5 sets out the duties of the 'legal assistant' as follows:

> '(1) The legal assistant shall render to any person who has so requested him advice in regard to any action which falls within the jurisdiction of the court.
> (2) If he is so requested, the legal assistant shall render assistance with the drafting of the process of court.
> (3) Any act to be performed by the legal assistant in terms of these Rules may be performed by the clerk of the court.'

[62] Constitution, s 34.
[63] Department of Justice and Constitutional Development *Guidelines and National Action Plan for the Small Claims Courts in South Africa*.

re-engineering of the courts. It was clear that the statutory-mandated advisory committees, which were supposed to regulate small claims courts across the country in the various provinces and magisterial districts, were 'inefficient, dysfunctional, [and] inactive.'[64]

3.8 NATIONAL STEERING COMMITTEE: SIGNIFICANT MILESTONES AND SHORTCOMINGS

Following the recommendation of the delegates at the 2003 conference, and in line with the NAP, in 2005 the Minister of Justice and Constitutional Development[65] appointed a National Steering Committee for Small Claims Courts ('the Steering Committee'). Its responsibility was to co-ordinate the revitalisation of small claims courts in South Africa. The Steering Committee was chaired by the Deputy Minister of Justice and Constitutional Development[66] and consisted of:

- A senior representative of the Department of Justice who was also the Chief Director of the small claims courts project;
- two representatives of the Swiss Agency for Development and Co-operation;
- a representative of the Pretoria Society of Advocates;
- a representative of the Law Society of South Africa who also served as a cluster chair of a small claims courts committee;
- a representative of the Eastern Cape Law Society who was also a practising attorney and a commissioner of the small claims courts; and
- academic representatives for the various university law schools.

The initial period of appointment of the Steering Committee was for five years. However, the

[64] NAP (n54) 35ff; see also Department of Justice and Constitutional Development 'Re-engineering Small Claims Courts' *Unpublished Report* (June 2010) 5.
[65] The Hon B Mabandla.
[66] The Hon Adv J de Lange.

Steering Committee's term was extended for three more consecutive periods. Its work eventually came to an end in 2014. Small claims courts currently fall under the Vulnerable Groups and Women Portfolio of the Department of Justice, which in turn falls within the Court Services branch of the Department of Justice.[67]

Despite an initial slow start (principally because of fiscal control measures in respect of monies allocated to the Steering Committee) the Steering Committee accomplished several things during its period of operation. These include, *inter alia*:

- The processing of funding from the Swiss Agency for Development and Co-operation to kick-start and maintain the small claims courts project. In 2007, the government of the Swiss Confederation represented by the Swiss Development Corporation ('SDC') reached an agreement with the South African government in terms of which the SDC undertook to provide a grant contribution of R4.5 million to assist with the implementation of the NAP. The grant was for a three-year period commencing in March 2007 and terminating in February 2010. The Department of Justice, in turn, agreed to provide a grant contribution of R3.1 million for operational costs during the three-year period.[68] The Swiss were keen to partner with the South African government to improve access to justice for the poor. The small claims courts were identified as an ideal opportunity to realise this goal, and the Swiss involvement proved to be instrumental in fast-tracking the NAP.[69] In August 2010, the funding agreement between the SDC and the government was extended until the end of 2015.[70] As will be seen below, the partnership proved to be a game-changer for revitalising the small claims courts.
- The approval of a ten-year budget plan to organise, co-ordinate and manage the NAP.

[67] Department of Justice Unpublished Report (n64) 6.
[68] Department of Justice Unpublished Report (n64) 5.
[69] Gangen (n51) 13.
[70] Manyathi-Jele 'Additional R3 million boost for SCCs' (July 2015) *De Rebus* 11.

- The appointment of a project manager and the setting up of a staffed project office. The purpose of the project office was to compile reports, convene meetings and workshops, give effect to the key results areas identified in the NAP, and deal with the day-to-day operational issues arising from the small claims courts.
- Through the project office, the Steering Committee called for a national audit of all small claims courts in South Africa. The purpose of this audit was to elicit the following information:
  (i) The precise number of small claims courts in South Africa;
  (ii) the number of active advisory boards;
  (iii) the number of active commissioners;
  (iv) commissioner profiles with regard to gender and race;
  (v) the number of clerks, interpreters and security personnel available in each court;
  (vi) statistical information relating to the processing of court cases in terms of types of cases and case backlogs.
  (vii) information on court infrastructure; and
  (viii) general problems experienced at the courts.[71]

Data was collected by sending questionnaires to advisory boards, magistrates and commissioners. The data was received by the project office and independently verified. The information gathered is a valuable source because it draws on data from every part of the country. As such, the data does not suffer the usual shortcoming of empirical research, namely, limited sampling and the consequent possibility of skewed research trends. The project office continued to collect and update data on a regular basis and this has proved to be enormously useful in terms of identifying trends in the courts over several years. Some of the data will be

[71] Department of Justice Unpublished Report (n64) 7.

discussed in this thesis.[72]

A notable shortcoming is that the Steering Committee did not gather customer-satisfaction information. It could have easily used its directive powers to gather such information. Customer-satisfaction information would have been useful in terms of determining people's attitudes towards the courts in the various regions of South Africa.

The Steering Committee identified a number of districts in South Africa where small claims courts were needed. From very early on the Department of Justice indicated that it wanted every magisterial district in South Africa to have its own small claims court[73] in accordance with the call: '*One constituency, one small claims court.*'[74] By 19 May 2017 there were 405 small claims courts in the country[75] compared to the 151 courts that existed in 2003.[76] This translates to a significant increase in small claims courts, especially in rural and peri-urban areas.

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[72] I am grateful to Mesdames F Thema, C Naude and T Ramnarain at the Department of Justice who assisted me with the information at their disposal. Relevant data is used in this thesis.

[73] *Keynote Address by the Deputy Minister Of Department Of Justice And Constitutional Development: Mr A Nel (Mp) South African Women Lawyers Association (Sawla) National Agm: Gala Dinner : Protea Hotel, Bloemfontein; 21 March 2011*. In this address the Deputy Minister said:

> 'As part of continuing efforts to improve the civil justice system, various new small claims courts were established during the 2009/10 financial year to bring the total number of these courts to 224. The target is to establish a small claims court for each of the 384 magisterial districts by 2014, subject to the rationalisation of the areas of jurisdiction of lower courts as explained above.'

For a copy of the speech see http://www.sawla.org.za/media_room/MEDIA_Dep_Min.pdf (last accessed on 20 November 2016).

[74] See also Manyathi 'Small Claims Commissioners undergo training' (July 2010) *De Rebus* 12.

[75] See §4.2.

[76] Department of Justice Unpublished Report (n64) 11.

The following table gives an indication of the slow pace of expansion of small claims courts in the 1990s.

Source: Central Statistical Service *Statistics of Civil Cases for Debt* (January 1997).

TABLE 1 – SMALL CLAIMS COURTS, LITIGANTS REFFERED, SUMMONSES ISSUED AND HEARINGS

Item	1996	1995	1994	1993	1992	1991	1990
	Number						
Courts	120	113	111	109	106	103	92
Litigants referred	21 230	20 154	20 101	19 502	18 906	16 857	16 474
Summonses issued	27 463	24 905	25 112	24 929	24 942	19 520	16 551
Hearings	27 690	25 746	25 356	23 953	23 421	17 814	15 540

In 2008, the Department of Justice awarded a tender to a consultant firm to draft manuals for commissioners and court officials. The manuals were produced and published in May 2010.[77] The purpose of these manuals was to provide commissioners and clerks with readily accessible information so that they could better fulfil their duties. While the Department of Justice must be complimented for the initiative, which undoubtedly assisted court officials to understand the processes and procedures of the small claims courts, it must be noted that the manuals are, by and large, commentaries on the SCCA and SCCRs and contain limited practical advice. The manuals do not, for example, give commissioners practical advice about how to gather and weigh evidence or how to engage with parties in a manner that reflects gender or cultural sensitivity. Similarly, the manual for clerks also lacks practical information.[78] There is thus considerable room for the future improvement of these manuals.

The Steering Committee constantly engaged in negotiations with Justice College[79] to build capacity so that it could train commissioners and court officials. During the period 2007 to 2010, 114 commissioners were trained.[80] Since then, the amount of training has petered out.

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[77] Department of Justice and Constitutional Development *Small Claims Courts: Guidelines for Commissioners* 4.

[78] Department of Justice Unpublished Report (n64) 8 the following is observed:

> 'The manual for Clerks is essentially identical to the Commissioner manual. However, given the fact that clerks are not legally qualified their manual would benefit from a plain language edit. Perhaps more importantly, a base document used by clerks on a daily basis, the Code Small Claims (*sic*), was identified by the NAP as being a critical source document to be used when drafting the manual. This does not appear to have occurred. Thought needs to be given to whether this gap could be addressed in future versions of the clerk manual.'

[79] Justice College describes itself as follows:

> 'Justice College is a State Academy that is located within the Department of Justice and Constitutional Development. Our central focus is on offering a high quality, relevant expanded programme offering that is institutionalize to contribute to the DoJ&CD [Department of Justice and Constitutional Development) vision and strategic objectives. Our programmes are designed to offer functional skills that enhance participant's knowledge, skill and behavioral [*sic*] competencies.' For more information, see http://www.justice.gov.za/juscol/index.html#about-us (last accessed November 2016).

[80] Department of Justice Unpublished Report (n64) 9. See also *Address by Mr Andries Nel, Deputy Minister of Justice and Constitutional Development at the training of Commissioners of Small Claims Courts in East London* (http://www.gov.za/address-mr-andries-nel-deputy-minister-justice-and-constitutional-development-training-commissioners - last accessed November 2016); *Address by Mr Andries Nel, Deputy Minister of Justice and Constitutional Development at the opening of the Small Claims Court in Alexandra and the launch of the guidelines for Small Claims Court Commissioners and Clerks, held in Alexandra, Johannesburg* (http://www.gov.za/address-mr-andries-nel-deputy-minister-justice-and-constitutional-development-opening-small-claims - last accessed November 2016). See also Manyathi (n74).

Today there are a considerable number of commissioners who have not received training at all.[81] As regards court officials and clerks, Justice College seems to be doing a better job by offering a comprehensive five-day capacity building programme.[82]

Where the Steering Committee has particularly fallen short is in the area of co-ordinating a student internship program. Soon after the 2003 Small Claims Courts Conference, the Universities of Cape Town, Western Cape and Stellenbosch all expressed interest to comply with the NAP and to make their law students available to serve as volunteers at the small claims

[81] Choma in his article 'The Small Claims Court and Accessible Quality Justice for All' (2015) 42 (12) *Journal of Social Science* 59 at 62 asserts:

> 'The department provides education and training to both commissioners and Small Claims Courts clerks. Clerks were being trained on a continuous basis by the justice college.'

It would be appear from the above statement that more training is being offered to clerks than to commissioners.

[82] The purpose of the programme is to ensure that learners will know how to apply the provisions of the SCCA, in processing small claims court cases. The topics covered during the programme:

- Jurisdiction, parties and practical exercise.
- Introduction to Contract Law and Delict.
- Letter of demand (plus case study).
- Summons (plus case study plus how to use the register, time periods and procedure).
- Review (plus case study, plus how to use the register, time periods and procedure).
- The role of the clerks and ethics (practical exercises).
- Applications.
- Executions.
- Transferals.

At the end of the programme a participate is expected to:

- Apply the provisions of the Small Claims Court Act in processing Small Claims Court cases.
- Have insight into the processing of Small Claims Court cases.
- Assist, advise and facilitate the matters placed by members of the public and complete paperwork

Participants are expected to engage in practical sessions and are evaluated at different times during the 5-day programme. For more information, see http://www.justice.gov.za/juscol/f-lqj-01.html#lcp05 (accessed November 2016).

It is interesting to note that while the Justice College website has information about the training of commissioners, it has no information on the training of commissioners.

courts.[83] The initiative never materialised.[84] It must be noted, however, that during the period between August 2013 and October 2013, the University of Limpopo, in consultation with the Department of Justice, initiated a student-run mediation service in the small claims court of Mankweng. It would appear that the mediation service was relatively successful as more than 50% of cases were resolved through mediation.[85]

Another area that has not been particularly successful is public education. Some progress was made with the publication of pamphlets and brochures in all the official languages on the internet and in official buildings (such as courts and municipal offices).[86] But, more work needs to be done, especially with regard to finding creative and novel means to communicate with

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[83] Letter by Prof HM Corder, Dean of the Faculty of Law, University of Cape Town dated 22 April 2008 to the Office of Deputy Minister of Justice and Constitutional Development. In this letter the Dean confirmed that a meeting was held on 3 April 2008 in which Dean and the then Deputy Minister of Cheryl Gillwald discussed a student intern program at the small claims courts. The Dean, *inter alia,* stated:

> 'We are very pleased by your willingness to accommodate our students and hope that our students' involvement in the activities of the courts will have a positive effect on the publics' access to justice.'

See also *Budget speech by Ms Brigitte Mabandla, MP, Minister for Justice and Constitutional Development, National Assembly, Parliament, 20 May 2005* in which the Minister said:

> 'We are also proud to announce that we have completed a National Plan of Action to transform and re-engineer Small Claims Courts throughout South Africa. This is meant to ensure greater access to civil justice. We have formed a dynamic partnership with the Swiss Agency for Development and Co-operation; the South African Law Society and tertiary institutions in order to pursue our blueprint for Small Claims Courts': http://www.polity.org.za/article/b-mabandla-justice-dept-budget-vote-20052006-20052005-2005-05-20 (last accessed on 20 November 2016).

Subsequent meeting were also arranged by the University of Cape Town law faculty, the University of Western Cape, represented by Mr F Moosa, and the University of Stellenbosch, represented by Prof D Butler, in consultation with the Cape Law Society, represented by Mrs N Gangen.

[84] Department of Justice Unpublished Report (n64) 19-20.

[85] http://photos.state.gov/libraries/southafrica/56706/pdf-docs/AlumniConnexIssue8-March2014.pdf. (last accessed on 14 November 2016).

[86] Annexure 1 hereto contains some of the information material produced by the Department of Justice. See also http://www.justice.gov.za/scc/scc.htm (last accessed 14 November 2016); https://www.youtube.com/watch?v=yvWjvZm1RfI&feature=youtu.be (last accessed 14 November 2016); http://www.justice.gov.za/scc/2007_SCC_poster_StepbyStepGuide_a3.pdf (last accessed on 14 November 2016); http://www.justice.gov.za/scc/2010_scc-posterA1.pdf (last accessed on 14 November 2016); http://www.justice.gov.za/scc/docs/2010_sccpamphlet_final-web.pdf (last accessed on 14 November 2016). For multilingual information sheets in all eleven official languages see http://www.justice.gov.za/scc/docs/2008%20Small%20Claims%20Brochures_03%20zulu.pdf (last accessed on 14 November 2014). A confusing aspect of the brochures on the Department of Justice's website is that all the information brochures appear on the same page. This can easily confuse the public, because the jurisdictional amounts on the various brochures represent the amount at the time when the brochure was published. Unless one looks at the latest brochure, one could be confused about the jurisdictional limit of the court. It is submitted that the older brochures should be archived, and that only the latest and most relevant information should appear on the front page.

people who are functionally illiterate. While illiteracy levels are disputed in South Africa,[87] there is no doubt that a significant proportion of the population has difficulty with reading and writing.[88] For these individuals, alternative methods of communication are necessary. This would include the use of television,[89] radio,[90] and internet multimedia platforms[91] to convey information about small claims courts.

For the duration that the Steering Committee functioned, it received numerous complaints[92] about the functioning of the courts. The most notable complaints were:

- The small claims courts did not have dedicated staff. This stalled the preparation and completion of the necessary paperwork in the courts.[93]

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[87] Pretorius 'South Africa's Real Level of Literacy' (29 August 2013) *The Citizen* - http://citizen.co.za/news/news-national/31407/literatez/ (last accessed January 2017).

[88] Aitchison, Harley 'South African Illiteracy Statistics and the Case of the Magically Growing Number of Literacy and ABET learners' (2006) 39 *Journal of Education* 89.

[89] More than eight-tenths of South African households owned television sets (80.2%) and electric stoves (82.6%), while less than one-third (32.4%) owned washing machines: Statistics South Africa *General Household Survey, 2013* (18 June 2014) 55.

[90] It is estimated that 87% of the population listens to the radio: Mqadi 'Five Things that You Need to Know about Radio in South Africa' (1 July 2015) *Wits Vuvuzela* (http://witsvuvuzela.com/2015/07/01/five-things-that-you-need-to-know-about-radio-in-south-africa/ - last accessed on 14 January 1017). See also Meyers 'Radio and Development in Africa –A Concept Paper' *International Development and Research Centre (IDRC) of Canada* (August 2008).

[91] It is estimated that there were 28 580 290 internet users in South Africa in 2016 – see http://www.internetworldstats.com/af/za.htm (last accessed 12 January 2017). According to Cisco, video will account for seventy three percent of South African mobile data traffic by 2020, compared to fifty two percent at the end of 2015 –see http://memeburn.com/2016/05/south-africa-set-mobile-data-explosion/ (last accessed 14 January 2017). According the General Household Survey:

> 'The survey (GHS) found that there was high access to telecommunications for households nationally, as only 5% of households did not have access to either landlines or cellular phones in 2013. By comparison, 81.9% of households had access to at least one cellular phone, while 12.9% of households had access to both a landline and a cellular phone. Only 0.2% of households had only a landline. However access to these means of communication differed by province as a smaller percentage of households in Northern Cape (13%) and Eastern Cape (10.6%) had access to cellular and landline services together. Households in historically rural provinces such as Mpumalanga (90.6%) and Limpopo (92.6%) were very reliant on the more accessible cellular telephones than landlines. By contrast, a combination of both cellular phones and landlines in households were most prevalent in the more affluent provinces, namely Western Cape (29%) and Gauteng (16.7%).
>
> More than a third of South African households (40.9%) had at least one member who used the Internet either at home, workplace, place of study, or Internet cafés. More than half of households in Western Cape (54.4%) and Gauteng (54%) had access to the Internet while only just over a fifth of households in Limpopo (21.9%) had access to the Internet.': Statistics South Africa (n89) 13. See also pages 51-52 of the *Survey.*

[92] Department of Justice Unpublished Report (n64) 19-20.

[93] See also Jacobsberg 'The Low-Down on Small Claims Courts' (2009 August) *De Rebus* 5; Kaplan 'More Senior Small Claims Court Clerks Needed' (December 2009) *De Rebus* 5; Rasikhalela 'Small Claims Courts Woes Continue!' (August 2010) *De Rebus* 5.

- It took very long for commissioners to be appointed. After being nominated by their respective law societies, bureaucratic processes within the Department of Justice delayed commissioners from being appointed for many months. By the time that commissioners were appointed, many felt disinclined to act.[94]
- The after-hours court time was an inconvenience to many commissioners and litigants, especially working mothers and older people. The lack of safe transport to many of the courts often resulted in litigants not pitching up on their appointed court days.[95]
- There was a distinct lack of security at many of the courts during the evenings. Commissioners were placed in the unenviable position of maintaining order at the courts.[96]
- Interpretation services at the courts were negligible or non-existent.[97]

In response to these complaints, the Department of Justice held discussions with various regional heads of the magistrates' courts to improve operations at the small claims courts.[98] It would seem that the interventions had some positive results and that many, but not all, of the problems experienced at the courts have abated.[99] It would also seem that the Department of

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[94] Department of Justice Unpublished Report (n64) 19-20.
[95] Department of Justice Unpublished Report (n64) 19-20.
[96] See also Datnow 'A sad tale of harmful business practices in the small claims court' (September 1998) *De Rebus* 26; Mndebele 'Small Claims Courts "not 100% operational"' (July 2008) *De Rebus* 7.
[97] See also Editor 'Poor Administration Must Not Tarnish the Good that Small Claims Courts Do' (September 2009) *De Rebus* 4; Settle 'Blame Department for Small Claims Problems' (September 2009) *De Rebus* 5-6.
[98] Department of Justice Unpublished Report (n64) 11.
[99] Mr Greese, the chairperson of the small claims committee of the Law Society of South Africa and a long-serving commissioner of the Small Claims Court in Gauteng made the following observations in the *Law Society of South African Annual Report 2010/11:*

> 'As far as the running of the courts is concerned, problems are still being experienced with the lack of interpreters and the inexperience of some clerks of the Small Claims Courts, who continue to refer matters to the courts, although some of these matters cannot be entertained in those courts.
> Members of the SAPS also refer matters, which in fact are of a criminal nature and should have been investigated by the SAPS first, to the courts.
> At present, commissioners are required to have a minimum of five years' practical experience and, if possible, consideration should be given to increasing the number of years of experience prior to a practitioner being allowed to become a commissioner of the Small Claims Court, due to the fact that, in many instances, the courts function without the assistance of court orderlies and/or the police and the seniority of the commissioner is of vital importance to maintain order in the court during sessions, as litigants often become unruly.
> The Small Claims Courts: Guidelines for Commissioners, Version 1, 2010 (as well as a guideline for clerks) have been released, published and circulated by the Justice Department. An electronic copy of these and other useful material is available on the Department's website at www.justice.gov.za.

Justice stepped up its processes to approve the appointment of commissioners. By August 2013 there were 1561 commissioners nationwide, and the numbers have grown steadily since then. The Department of Justice conceded, however, that there was a 'shortage of commissioners in the rural areas.' [100] To address this issue and in consultation with the Magistrates' Commission,[101] the Department implemented a 'new innovation' whereby magistrates could also become commissioners of the small claims courts.[102]

Perhaps, the worst failure of the entire initiative to revamp the small claims courts was in the area of law reform. Although suggestions for reform have been tabled before the Steering Committee on several occasions[103] and the Steering Committee has reaffirmed the need for the Department of Justice to urgently look at various aspects of the legislation governing small claims courts, to date there have only been four legislative amendments affecting small claims

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> LEAD is currently working on a judicial skills e-learning course, which will include introductory training for commissioners of the Small Claims Courts.
> On the whole, the Small Claims Courts appear to be functioning in a satisfactory manner, largely due to the contribution made by members of the profession.'

In the 2011/2012 *Annual Report,* Mr Greese, on behalf of the committee, notes:

> 'In the Witwatersrand area, in particular, there are a number of Small Claims Courts which formerly functioned under a single court, but have now been proclaimed as independent courts for each of the particular magisterial districts. They now have all the administrative facilities of the Magistrate's Office for that district, so litigants are no longer required to travel to a central point far from their homes to have summonses and other process issued.'

It would thus appear that the incremental roll out of small claims court had the effect of improving the administration at the courts. However, as will be noted later, there are still problems with regard to court processes and procedures.

[100] Manyathi-Jele 'Magistrates Can Now Act as Commissioners' (August 2013) *De Rebus* 11.

[101] The Magistrate's Commission is a statutory body established in terms of the Magistrate's Act 90 of 1993. The objects of the Commission are amongst others, as follows:

- To promote continuous training of magistrates appointed in the Magistrates' Courts (District and Regional Courts).
- To advise the Minister regarding the appointment of magistrates.
- To advise or to make recommendations to, or report to the Minister, for information of Parliament regarding any matter which is of interest for the independence in the dispensing of justice and the efficiency of the administration of justice in the Magistrates' Courts.
- To carry out investigations and make recommendations to the Minister regarding the suspension and removal from office of magistrates.

For more information see also: http://www.justice.gov.za/contact/cnt_mcomm.html#sthash.IU7Q53Cm.dpuf (last accessed 9 January 2017).

[102] Manyathi-Jele (n100) 11.

[103] Department of Justice Unpublished Report (n64) 10. See also Law Society of South Africa *Annual Report 2008/2009* 51; Law Society of South Africa *Annual Report 2010/2011* 43; Law Society of South Africa *Annual Report 2012/2013* 53.

courts. Three of these have extended the monetary jurisdiction of the small claims courts[104] and the other amendment extended the territorial authority of small claims commissioners to perform their functions.[105] There have been no amendments to the procedure of the small claims courts.

3.9 CONCLUSION

At their inception small claims courts held a lot of promise. However, they quickly began to flounder. During the 1990s, they experienced teething problems and were on the verge of dying a slow death. To the credit of the government, they were resuscitated at the turn of the new millennium. Consequently, they survived and were expanded. Today there is a small claims court in nearly every magisterial district in South Africa. Even though small claims courts continue to require a lot of attention in terms of improving their administration and legislative framework, they play a fundamental role in ensuring that people from all walks of life can access speedy and cost-effective justice in claims where it does not make economic sense to litigate in the other courts.

In the next chapter, the administration of small claims courts will be discussed.

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[104] On 1 April 2014 the monetary jurisdiction of the small claims court was increased from R12 000 to its current level of R15 000 by virtue of GN 185 in *GG* 37450 of 18 Mar 2014. Previously, the small claims courts' jurisdiction was increased from R7 000 to R12 000 in terms of GN R 985 in *GG* 33696 of 27 October 2010 which came into operation on 1 November 2010, and from R3 000 to R7 000 in terms of GN R313 in *GG* 26113 of 12 March 2004 which came into operation on 1 April 2004.

[105] The Judicial Matters Amendment Act 42 of 2013, which came into operation on 22 January 2014, amended s 9(1) of the SCCA by adding paragraph *(c)*. Section 9(1)*(c)* provides as follows:

> 'A commissioner appointed in terms of paragraph *(a)* in respect of a specific court shall be deemed to be appointed for any court established under section 2 in that province.'

The purpose of the above amendment is discussed in chapter §5.3.

CHAPTER 4

THE ADMINISTRATION OF SMALL CLAIMS COURTS AND INCIDENTAL MATTERS

4.1 INTRODUCTION

To dedicate a chapter to court administration seems rather mundane. However, experience has shown that law on paper is one thing, and law in practice is quite another. The history of the small claims courts[1] reveals that since inception they have not realised their true potential. Some of the setbacks turn on the legislation and the monetary jurisdiction of the courts, but as noted in chapter 3, the muted influence of the courts is largely due to poor court administration and ham-handed logistical arrangements.

This chapter considers various aspects relating to the management of small claims courts. Strengths and weaknesses are identified and where relevant, proposals for reform are made.

4.2 THE POWERS OF THE MINISTER OF JUSTICE

Several provisions of the SCCA and the SCCRs empower the Minister of Justice to make decisions affecting the administration of the courts. It is important to look at these provisions and to critically evaluate whether they are successful in terms of promoting access to the courts.

[1] See chapter 3.

(a) Establishment of courts and regulation of the courts

Section 2 of the SCCA empowers the Minister of Justice by notice in the Government Gazette to:[2]

- Establish 'any area consisting of one or more districts or part of a district' for the adjudication of small claims;
- determine the seat of a court;
- determine one or more places in the area concerned for the holding of sessions of a court;
- alter the area for which a court has been established by 'including therein or excising therefrom any district or districts or part thereof';
- abolish a court that has already been established; and
- amend or withdraw any notice establishing a court, district or area.

The Minister may authorise a magistrate to establish a court in a district that has been proclaimed. The magistrate can also determine the place in that district for the sitting of a court.[3] There is no record that the Minister has ever delegated his or her authority to a magistrate to establish a small claims court.

Since 2003,[4] the Department of Justice (and by implication the Minister of Justice) has proclaimed many small claims courts. In an address on 19 May 2017, the Deputy Minister for Justice said:

> 'There are, at the end of the 2016/17 financial year, 405 Small Claims Courts covering all magisterial districts and sub-districts nationally with another 19 additional places gazetted as places of sitting of these courts. The establishment of Small Claims Courts, with at least one in each magisterial district and sub-districts in South Africa, is a major step forward in terms of enhancing access to justice. We are now focusing on ensuring full coverage in the Branch Courts.'[5]

[2] SCCA, s 2(1)*(a)-(e)*.
[3] SCCA, s 2(2).
[4] See chapter 3.
[5] *Address by the Deputy Minister for Justice and Constitutional Development, the Hon JH Jeffery, MP, at the Judicial Officers Association of South Africa (JOASA) Gala Dinner, held at the Aviator Hotel*

The rapid expansion of the small claims courts since 2003 is a feather in the cap of the Department of Justice, which clearly sees the importance of the courts in the promotion of access to justice.

(b) Advisory Boards

In the past, section 25(1)*(d)* of the SCCA empowered the Minister of Justice to appoint advisory boards to 'advise the Minister on the functioning of courts'. SCCR 2 fleshes out the composition and the functions of the advisory boards:

> '(1) *(a)* The Minister may establish a board as contemplated in section 25(1)*(d)* of the Act for a district or area and may appoint as many members to such board as he deems fit.
> (aA) A member of such a board shall hold office during the Minister's pleasure.
> *(b)* The Minister shall appoint the chairman and vice chairman of the said board.
> *(c)* If the chairman and vice-chairman are not available, a chairman shall be appointed by the members present.
> (2) The Minister may at any time dissolve the board**.**
> (3) The board may advise the Minister in regard to –
> *(a)* the appointment of suitable persons as commissioners, in the case of an attorney, after consultation with the president of the law society of which the attorney is a member and, in the case of an advocate, after consultation with the chairman of the bar council for the division of the Supreme Court of South Africa where the advocate practises.
> *(b)* the recruitment and utilisation of persons as commissioners, clerks, assistant clerks, interpreters, legal assistants and such other persons as may be necessary;
> *(c)* suitable court and office accommodation;
> *(d)* the times for the holding of court; and
> *(e)* any other matter which may be necessary for the proper functioning of the court.'

By 2003 many boards were vacated and hardly met. This fact was raised at the 2003 Small Claims Courts Conference.[6] In the national audit[7] following the establishment of the Small Claims Courts Steering Committee,[8] the Department of Justice discovered that more than 90% of the boards were not operational.[9] The Department reactivated

and Conference Centre, Kempton Park, Johannesburg, 19 May 2017, published at http://www.justice.gov.za/m_speeches/2017/20170519-Joasa_dm.html (last accessed on 10 October 2017).

[6] See §3.6.

[7] See §3.8.

[8] Ibid.

[9] Department of Justice *Narrative Report on the Small Claims Court Audit* 4.

many boards and by 2010 the overwhelming majority of boards of the then-proclaimed small claims courts were operational again. The Small Claims Courts project office[10] did a great job in keeping the boards informed of developments and maintaining regular communication with the boards. But by 2015, the efficiency of the boards started to wane again. With the dissolution of the project office in 2014[11] and the end of the Steering Committee's term of office,[12] it is unclear whether the boards continue to operate and if so, at what level.

The advisory board system is not ideal. There are no monitoring systems in place in the legislation to ensure that boards meet regularly. They seem to operate in a silo and as islands of decision-making. It is unclear how they feed into the national small claims courts narrative.

(c) The advisory boards must be scrapped

The advisory board system of regulating the small claims courts is unworkable. The SCCA should make provision for a national *Small Claims Courts Board* comprising members drawn from the ranks of the legal profession and Department of Justice officials who must serve for a fixed term. The Board must be tasked to liaise directly with the office of the Minister of Justice on issues pertaining to small claims courts. The proposed Board should also have some implementation functions.

At a grassroots level, *advisory committees* – also appointed for a fixed term – should monitor and regulate the day-to-day running of individual small claims courts. These advisory committees should represent clusters of small claims courts. For example, ten

[10] See §3.8.
[11] Ibid.
[12] Ibid.

small claims courts should represent one cluster and each small claims court should have one representative (preferably a commissioner) who represents that court on an advisory committee for a particular area. If there are 405 small claims courts, there will be at most 41 clusters in the country. It is important for small claims presiding officers to be well-represented on the advisory committees. The powers of the advisory committees must be articulated in legislation. The advisory committees must report to the Small Claims Courts Board on issues affecting the courts. They must also collect data about small claims courts on a regular basis and feed such information to the Board, which will then, in consultation with the Department of Justice, make strategic decisions affecting the courts.

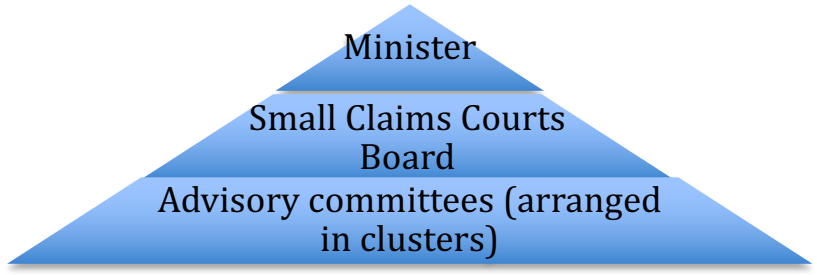
The legislation must stipulate how the Small Claims Courts Board and the advisory committees should be appointed and when they should meet. In this regard, lessons can be drawn from the Sheriffs Act.[13] The Sheriffs Act contains clear provisions for constituting and conducting meetings of the South African Board for Sheriffs. If the Board fails to meet regularly as stipulated in the Act, the Minister is permitted to appoint a new Board.[14] Like the Sheriffs Act, the SCCA should stipulate how the governing bodies of the small claims courts are expected to operate and it should stipulate accountability measures to ensure compliance.

Currently, the legislation is silent on how commissioners should be disciplined for misconduct. The SCCA creates the impression that the Minister is solely responsible for disciplining commissioners because the Minister can hire and fire commissioners at will.[15] This is untenable as there may be issues relating to judicial independence to

[13] 90 of 1986 (hereafter referred to as the 'Sheriffs Act').
[14] Sheriffs Act, s 14 read with s 14A.
[15] SCCA, s 9(3) read with s 9(5).

contend with.[16] Again, provisions similar to the Sheriffs Act should be considered. In terms of the Sheriffs Act, the South African Board for Sheriffs must establish a disciplinary committee, the task of which is to discipline sheriffs who are guilty of misconduct.[17] A similar mechanism can be introduced in the SCCA and the power to discipline presiding officers can be given to the proposed Small Claims Courts Board via its committee structure. Of course, if the presiding officer is a magistrate,[18] the Magistrates' Commission would be the appropriate body to discipline the judicial officer concerned.[19]

Table 1: Diagrammatic representation of proposed governance structures for the small claims courts



[16] See chapter 5.
[17] Sheriffs Act, ss 44(1), 18(1), 18(2), 49.
[18] See chapter 5.
[19] Section 2 of the Magistrates Act 90 of 1993 establishes the Magistrates Commission. The objects of the Commission are set out in s 4 of the Act. Section 4*(a)* lists one of the function as:

> 'to ensure that the appointment, promotion, transfer or discharge of, or disciplinary steps against, judicial officers in the lower courts take place without favour or prejudice, and that the applicable laws and administrative directions in connection with such action are applied uniformly and correctly...'

Section 6A provides that the Minister of Justice must by Regulations set out a complaints procedure. By GN R361 in *GG* 15524 of 11 March 1994 as amended, the Minister promulgated a complaints procedure. Once a magistrate is found guilty of misconduct and the Commission recommends to the Minister that the magistrates must be removed from office, the decision must be ratified by resolution of Parliament (see s 13 of the Magistrates Act 90 of 1993).

(d) Erosion of the Minister's powers by legislative error

Section 25 of the SCCA is due to be amended by s 15 of the Judicial Matters Amendment Act.[20] The section provides:

> '15. Section 25 of the Small Claims Courts Act, 1984, is hereby amended—
> *(a)* by the substitution for the heading of the following heading:
> ''**Power of [Minister] Rules Board for Courts of Law to make rules**'';
> *(b)* by the substitution in subsection (1) for the words preceding paragraph *(a)* of the following words:
> ''The Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), may, subject to the approval of the Minister [**may**] make, amend or repeal rules regulating the following matters in respect of small claims courts:'';
> *(c)* by the insertion of the word ''or'' at the end of paragraph *(d)*; and
> *(d)* by the substitution for paragraph *(e)* of the following paragraph:
> ''*(e)* any other matter which [**he may consider**] is necessary or expedient to prescribe for carrying out the provisions of this Act or the attainment of its objects.''.'

The purpose of the amendment is to confer power on the Rules Board for Courts of Law[21] to make litigation rules for the small claims courts. However, in amending s 25 of the SCCA, the legislature is creating a new problem in that it is conferring power on the Rules Board, albeit in consultation with the Minister, to appoint advisory boards. This amendment marks a radical departure from the work of the Rules Board,[22] and can only be regarded as a legislative misstep.

The Rules Board is not responsible for the administration of the courts. Nor is it responsible for the implementation of litigation rules. The Rules Board's powers and functions are limited to developing rules of procedure.[23] Consequently, there is little doubt that s 25 of the SCCA must be amended in the future to rectify what is clearly a legislative error of conferring implementation powers on the Rules Board.

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[20] 8 of 2017 (hereinafter referred to as the 'Judicial Matters Amendment Act'). The Act has not yet come into operation and is awaiting promulgation by the President. Words in square brackets signify a deletion from the existing provision and words underlined signify an insertion into an existing provision.
[21] Hereafter referred to as 'the Rules Board'.
[22] See Rules Board for Courts of Law Act 107 of 1985, s 6.
[23] Ibid.

(e) Litigation rules for the small claims courts will finally be in the hands of the Rules Board

Pending the enactment of s 15 of the Judicial Matters Amendment Act, the Minister of Justice is charged in terms of s 25 of the SCCA with making rules regulating:

> '*(a)* The practice and procedure, including the procedure when proceedings are reviewed;
> *(b)* fees and costs;
> *(c)* the duties and powers of officers of the court;
> *(d)* the establishment, duties and powers of one or more boards to advise the Minister on the functioning of courts;
> *(e)* any other matter which he may consider necessary or expedient to prescribe for carrying out the provisions of this Act or the attainment of its objects.'

Section 25 goes on to provide:

> '(2) Different rules may be made under subsection (1) with regard to different classes of cases.
> (3) No rule relating to State revenue or State expenditure shall be made under subsection (1), except with the concurrence of the Minister of Finance.
> (4) No new rule and no amendment or repeal of a rule shall come into operation unless it has been published in the Gazette at least 30 days before the day upon which it is expressed to come into operation.'

The Judicial Matters Amendment Act leaves subsections (2) to (4) of s 25 unaffected. However, in a significant development, it confers powers on the Rules Board to make litigation rules for small claims courts. This legislative change is welcomed. There is no doubt that the Rules Board will start very shortly to interrogate the small claims courts' legislation to improve the processes and procedures of the courts.[24]

The Rules Board should have been tasked a long time ago with making litigation rules for the small claims courts. This would have prevented the situation of the rules falling behind in many respects when compared to the other courts in the land. It is startling to note that the last time the SCCRs were amended was in 1991.[25] Many of the rules are

[24] On 29 September 2017, the Rules Board resolved to establish a Small Claims Courts Committee to look into the legislation of the small claims courts. I am thankful to the secretariat of the Board for his information.
[25] See §3.4.

impractical, some are *ultra vires*, and others require improvement to meet the needs of modern users of the courts.[26]

It is almost certain that the Rules Board will have to work with the Department of Justice to amend the SCCA because the Act is problematic on many levels and without amending the Act, proper amendments to the SCCRs cannot be introduced.[27]

4.3 SMALL CLAIMS COURTS ARE NOT COURTS OF RECORD

(a) Why the small claims courts are not courts of record

In accordance with the Hoexter Commission's recommendations, the small claims courts are not courts of record.[28] Unlike in the magistrates' courts, court proceedings are not transcribed from stenographers' notes or from audio recordings.[29]

The Hoexter Commission felt that because there would be no right of appeal from a decision of a small claims court, it would be a waste of time and money to record court proceedings.[30] Furthermore, the Commission thought it was necessary to reduce the 'financial burden which the State will have to shoulder in establishing and administering [the small claims courts].'[31] Consequently, in terms of the SCCA, on the conclusion of a case, the presiding officer is simply required to record and sign the verdict, judgment or order of the court.[32]

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[26] See chapters 6, 7, 8 and 9.
[27] On 10 October 2017, the Rules Board sent a letter to the legal profession and other interested parties to suggest amendments to the SCCA and other legislation so that the SCCRs can be effectively amended. A copy of the letter is in Appendix 5.
[28] *Report* §14.3*(b)*. The Hoexter Commission's *Report* is discussed extensively in chapter 2.
[29] MCA, s 4(1).
[30] *Report* §13.35.
[31] *Report* §13.31.
[32] SCCA, s 3(2).

(b) Difficult to prove misconduct on the bench in review proceedings if there is no record

While there is no right of appeal in the small claims courts,[33] s 46 of the SCCA permits a litigant to take a decision on *review*. The grounds upon which proceedings of a court may be taken on review before a provincial or local division of the High Court[34] are –

> '*(a)* absence of jurisdiction on the part of the court;
> *(b)* interest in the cause, bias, malice, or the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, on the part of the commissioner; and
> *(c)* gross irregularity with regard to the proceedings.'

Bias, malice, corruption, and the absence of jurisdiction may be established with adequate evidence and argument. Jurisdiction is common cause and can be determined on the papers before the court.[35] Malice, bias, and corruption can be proven by objective evidence that is external to a particular case before the court. However, a gross irregularity in the form of misconduct on the bench by the presiding officer can be quite difficult to prove if there is no record of the proceedings. How would a litigant show that the presiding officer was rude, intimidating, disinterested or otherwise discriminatory in a case in the absence of a record of the proceedings? The High Court would have to rely on the applicant's version of events. Of course, his or her version is capable of refutation by the small claims court presiding officer. The High Court may have some difficulty in determining whose version is correct.

Furthermore, there is always potential for presiding officers to fall short of what can be legitimately expected. If they knew that proceedings were recorded, the level of professionalism displayed by commissioners would improve.

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[33] SCCA, s 45.
[34] The Act still refers to 'the Supreme Court of South Africa.' In conformity with s 169 of the Constitution this should read 'High Court'.
[35] For a discussion of jurisdiction, see chapter 6.

(c) Taped proceedings and a time limit for review to reduce costs

To ameliorate an escalation of costs associated with recording proceedings, one could tape proceedings but not transcribe them unless the matter is taken on review, and only if the taped record is unusable (i.e. the audio quality is bad). Furthermore, there should be a time limit for taking matters on review.

In conformity with the general approach to review proceedings, the legislature has not placed a time bar on review proceedings in the small claims courts. Review proceedings must be initiated within a reasonable time.[36] What is reasonable is determined by the facts of a case. Perhaps for small claims, the legislature should follow the stance adopted by the Promotion of Administrative Justice Act.[37] Review proceedings under that Act have to be brought within 180 days of the decision that gives rise to the review.[38] There is no reason why a similar time bar should not apply in the small claims courts so that matters can be finalised without delay. A time bar will also preclude the small claims courts from having to keep records for a long time. A time bar might prejudice poor litigants. However, they should be allowed to apply for Legal Aid[39] to take matters on review. Legal Aid can use a taped record to determine whether the case is meritorious for further intervention.

(d) Records must be free of charge

When a matter goes on review to the High Court from a magistrate's court, the person applying for review is generally required to request a transcribed record from the

[36] See Van Loggerenberg *Erasmus Superior Court Practice* Vol 2 at D1-701 (Service 4, 2017) and see the authorities there cited.
[37] 3 of 2000.
[38] Ibid, s 7(1)*(b)*.
[39] Legal Aid is discussed in chapter 1.

registrar or clerk of the court. The court will not release the transcript without first obtaining payment. A litigant pays approximately R30 per page for the transcript. The fees for producing the record can be astronomical. A litigant also has to wait many months for the transcript as the transcription services are overburdened.[40] To perpetuate the litigant's misery, there are often mistakes on the transcriptions.

If small claims courts proceedings were recorded to improve professionalism and to make reviews easier, one would have to make court records available free of charge. If courts installed better technology, this would improve the audio quality of taped court proceedings. With improved audio recordings, there would be no need for transcriptions. Small claims courts proceedings are short. There is no reason why a review judge cannot listen to an audio recording of proceedings. In fact, this might be better as written records cannot adequately convey the tone and manner of proceedings.[41] Needless to say, video recordings would be even better. Installing better audio (and video) equipment in the courts will be expensive. But after this initial capital outlay, the cost of providing audio recordings would be negligible when compared to the cost of providing transcribed court records.

4.4 THE COURTS ARE OPEN TO THE PUBLIC

(a) Proceedings must be conducted with open doors

Until 1813 and in conformity with Roman-Dutch law, judgments and orders of court were pronounced in open court. However, evidence and arguments in cases were heard

[40] *How to Obtain Transcripts from the Court* Publication of the University of Witwatersrand Justice Project 'Know Your Rights' Series 6-7.
[41] Lederer 'The Effect of Courtroom Technologies on and in Appellate Proceedings and Courtrooms' (2000) 2 *Journal of Appellate Practice and Process* 251 at 253ff; Lederer 'Courtroom Technology: For Trial Lawyers, The Future Is Now' (2004) 19 *Criminal Justice* 18-21.

in private. In that year, the British Governor of the Cape issued a proclamation requiring all judicial proceedings to be carried on with open doors as a matter of 'essential utility, as well as the dignity of the administration of justice'. The public nature of court proceedings was reaffirmed by article 32 of the Cape Charter of Justice of 1932. The principle of openness was however not followed in some of the provinces, where the Roman-Dutch position continued to apply.[42] However, the matter was eventually settled with the coming into force of the Supreme Court Act.[43] Section 15 of the Supreme Court Act provided:

> 'Save as is provided in any law, all proceedings in any court of a division shall, except as any such court may in special cases otherwise direct, be carried on in open court.'

The provisions of the Supreme Court Act have been overtaken by the SCA, which came into operation on 23 August 2013. Section 9(1) of the SCA simply states that the superior courts 'must be open to the public every business day'. The provision seems to be more administrative than substantive. There is thus no equivalent provision to s 15 of the Supreme Court Act in the SCA.

In the magistrates' courts, s 5 of the MCA provides:

> '(1) Subject to the provisions of subsection (2), the proceedings in a court shall take place in open court.
> (2) A court may in the interest of the administration of justice or of good order or of public morals or at the request of the parties to the proceedings for reasons considered sufficient by the court, order that the proceedings shall be held behind closed doors or that specified persons shall not be present thereat.
> (3) If any person present at the proceedings of a court disturbs the order of the court, the court may order that such person be removed and detained in custody until the court adjourns, or the court may, if in its opinion order cannot be otherwise maintained, order that the court room be cleared and that the public shall not be present at the proceedings.'

In relation to the MCA, *Jones & Buckle* states:

> 'Section 34 of the Constitution of the Republic of South Africa, 1996, entrenches the right to have disputes resolved 'in a fair public hearing before a court'. It has been held that open courtrooms are likely to limit high-handed behaviour by judicial officers and to prevent railroad justice and, further, that open justice is an important part of the right entrenched in s 34 and that

[42] For a history of the open civil court in South Africa see *Financial Mail (Pty) Ltd v Registrar of Insurance* 1966 (2) SA 219 (W). See also *Botha v Minister van Wet en Orde* 1990 (3) SA 937 (W).
[43] 59 of 1959 (hereafter referred to as 'the Supreme Court Act').

it serves as a great bulwark against abuse.'[44]

Like the Supreme Court Act and the MCA, the SCCA also provides for open courts. Section 4 provides:

> '(1) Subject to the provisions of subsection (2), the proceedings in a court shall take place in open court.
> (2) A court may in the interest of the administration of justice or of good order or of public morals or at the request of the parties to the proceedings for reasons considered sufficient by the court, order that the proceedings shall be held behind closed doors or that specified persons shall not be present thereat.
> (3) If any person present at the proceedings of a court disturbs the order of the court, the court may order that such person be removed and detained in custody until the court adjourns, or the court may, if in its opinion order cannot be otherwise maintained, order that the court room be cleared and that the public shall not be present at the proceedings.'[45]

Evidently, s 4 of the SCCA is identical to s 5 of the MCA.

(b) ADR and the open-court principle

Chapter 10 argues for court-connected alternative dispute resolution ('ADR') in the small claims courts. In particular, mediation is favoured. It is argued that mediation should be court-connected and that a presiding officer should have the discretion to refer a matter to mediation. This begs the question whether mediation subverts the principle that litigation should be conducted in open court.

At first blush, court-connected ADR poses a challenge to the open-court principle. A cardinal rule of mediation is that all disclosures made at mediation are confidential. It is also common cause that mediation is held in private. The media and the public are not permitted to attend unless the parties agree otherwise. The only public record of the mediation is the settlement agreement between the parties if it is made an order of the court. Not even the agreement to mediate is for public consumption.[46] The purpose of holding mediation in private is that it promotes settlement because parties can speak to

[44] Van Loggerenberg *Jones and Buckle The Civil Practice of the Magistrates' Courts in South Africa* Vol 1 at Act17 (Service 10, 2017). See also *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* 2007 (1) SA 523 CC at 538C-D.
[45] See also *Report* §13.24 and §13.25.
[46] See chapter 10.

each other frankly and in a non-invasive environment.

When confronted with the question about whether small claims courts should operate in public or in private, the Hoexter Commission was clear. It stated:

> 'It must be conceded that there are substantial arguments favouring hearings in private. In general, private hearings seem to be more conducive to settlement than trials held in public. The heightened possibility of settlement at private hearings apart, it is of some significance that in the fifteen courts examined in the course of the national survey both plaintiffs and defendants listed "trials held in informal surroundings and in private" as the third priority among six proposed features of small claims reform.[47]
>
> Having carefully considered the arguments for and against, the Commission is firmly of the view that in South Africa all small claims hearings should take place in public unless both parties request the court to sit in camera. *In a multi-racial country such as ours, so the Commission considers, it is vitally necessary that … "judges must be judged."* The more so if legal representation at trial is barred. Unless the parties themselves desire otherwise, therefore, the Commission is of the opinion that the proceedings at the small claims trial should be exposed to public scrutiny.'[48]

As discussed above, the principle that court proceedings should be held in public is as a result of the English-law influence on the South African law of procedure. It must also be remembered that at the time when the MCA and the Supreme Court Act were promulgated, South Africa formed part of the British Empire. The British system of justice was standardised across the Union of South Africa.[49] The *trial* was the fundamental civil justice dispute resolution mechanism at the time. The purpose of the open-door principle was to prevent the State from abusing its power by prosecuting cases clandestinely and to prevent an abuse of judicial power.[50]

While the open-door principle has constitutional implications in terms of promoting open and transparent justice,[51] the principle cannot trump efforts to dispense justice

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[47] See also Ruhnka, Weller with Martin *Small Claims Courts – A National Examination* (1978) 185.
[48] *Report* §13.24 and §13.25. Italics supplied.
[49] Paleker 'Civil Procedure in South Africa: the Past, the Present and the Future' *ZZP Int* (2011) 343ff.
[50] Spigelman AC 'The Principle of Open Justice: A Comparative Perspective' (2006) 29 *UNSW Law Journal* 147 at 150.
[51] *Richmond Newspapers v Virginia* 448 US 555 (1980); *Publicker Industries Inc v Cohen* 733 F 2d 1059 (3rd Cir, 1984); *Westmoreland v Columbia Broadcast System, Inc* 752 F 2d 16 (2nd Cir, 1984); *Newman v Graddick* 696 F 2d 796 (11th Cir, 1983).

through alternative means, especially if those means are beneficial to the parties in arriving at outcomes that are more effective than the traditional trial-centred litigation model. As shown in chapter 10, the legislature and the courts are already endorsing ADR. Legislation and precedent recognise and give effect to the confidentiality of court-connected and court-directed mediation.[52] To facilitate mediation, the courts are prepared to limit s 34 of the Constitution because there are sound reasons for doing so. The courts appreciate that the aims and objectives of mediation are consonant with the values of an open and democratic society predicated on a range of liberties, which include the freedom to resolve disputes through processes that are private and confidential. It must also be borne in mind that parties are in any event at liberty to enter into settlement agreements and to stipulate that the terms of the settlement must remain confidential.

The Hoexter Commission's small claims model did not incorporate the prospect of mediation. The Commission's recommendations centred on trial. The open-court policy proposed by the Commission must thus be considered within this historical context. Furthermore, it appears that the Commission was concerned about race relations. This stands to reason. The small claims courts were the first deracialised courts in the country.[53] If court proceedings were held behind closed doors, the fear must have been that this would have given rise to allegations of bias and prejudice. But 24 years into democracy, the considerations of 1984 cannot limit the prospects for change in 2018.

[52] See §10.5.
[53] *Report* §13.45.

(c) Online courts and the open-door principle

Procedural law must harness modern technological advancements so that justice can be realised in an increasingly mobile and tech-savvy world.[54] It is just a matter of time before online courts, such as the ones in Michigan in the United States and Victoria, British Columbia in Canada,[55] make their appearance.[56] These virtual courts may not be open to the public and yet from an access to justice perspective, they will serve the public interest.

In light of ADR developments and continuous technological advancements, it is questionable whether ss 4(1) and 4(2) of the SCCA are useful. These provisions promote an anachronistic system of justice. The provisions should be replaced with one that is similar to s 9(1) of the SCA, which emphasises service delivery rather than prescribing the way in which proceedings must be conducted. If there is fear that non-public hearings will promote corruption in the courts, then the legislature needs to find another way to address this issue, for example, by auditing cases in the lower courts at random. One should not allow fears of corruption to stultify legal developments because if that is the case, South Africa will lag behind the rest of the world for a very long time.

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[54] See Kengyel, Nemessányi (eds) *Electronic Technology and Civil Procedure: New Paths to Justice from Around the World: 15 (Ius Gentium: Comparative Perspectives on Law and Justice).* For developments in England and Wales see Genn 'Online Courts and the Future of Justice' Birkenhead Lecture, Gray's Inn (16 October 2017) - https://www.ucl.ac.uk/laws/sites/laws/files/birkenhead_lecture_2017_professor_dame_hazel_genn_final_version.pdf (last accessed on 24 March 2018); see also Sela 'Streamlining Justice: How Online Courts Can Resolve The Challenges of Pro Se Litigation' (2016) 26 *Cornell Journal of Law and Public Policy* 331.

[55] Canada introduced an online tribunal for small claims (up to 25000 Canadian Dollars) in May 2012: Civil Resolution Tribunal Act, S.B.C. 2012, c 25 (Can.).

[56] Ponte 'Michigan Cyber Court: A Bold Experiment in the Development of the First Public Virtual Courthouse' (2002) 4 *North Carolina Journal of Law and Technology* 51-91.

(d) Perusal of court documents by the public and for academic purposes

In conformity with the principles of open and transparent justice and democratic governance,[57] s 6 of the SCCA allows the public to peruse documents under the supervision of the clerk of the court upon payment of the prescribed fee. According to the provision, documents must be preserved at the seat of the magistrate's court of the district where the small claims court is located for a period that the Director General of Justice may stipulate. Upon expiration of the period, documents may be removed to a place of custody or may be destroyed.

Section 6 is problematic. Firstly, the reference to a 'prescribed fee' is redundant. In the past, the clerk of the court had to be paid in revenue stamps. With the abolishment of revenue stamps, there is no mechanism for clerks to receive money for the inspection of documents.[58] Because of corruption at the courts, the clerks are not permitted to operate a cash register.[59]

Secondly, it can be near impossible to peruse small claims court documents at the courts. The filing system at many courts is in a state of disarray. Records are in shambles. They are frequently removed to places of safety and it is almost impossible to requisition documents that have been removed from a court building.[60] There is an

[57] Martin 'Online Access to Court Records – From Documents to Data, Particulars to Patterns' (2008) 53 *Villanova Law Review* 855 at 857. See also Peltz, Leonard, Andrews 'The Arkansas Proposal on Access to Court Records: Upgrading the Common Law with Electronic Freedom of Information Norms' (2006) 58 *Arkansas Law Review* 555.

[58] In the past court fees were paid by affixing revenue stamps to the appropriate court document/form. By GN 360 in *GG* 32059 of 27 March 2009 revenue stamps were demonetised and no longer issued.

[59] I am thankful to magistrates in Johannesburg for this information.

[60] See Mafu 'The Management of Court Records in Magistrate Court: A Case of Middledrift Magistrate Court, Eastern Cape' (Unpublished M.Lis Thesis, University of Forte Hare, 2014); see also the following online newspaper articles highlighting problems around the country: https://www.iol.co.za/news/crime-courts/missing-court-records-bedevil-cases-on-appeal-1513336 (last accessed 1 June 2017); https://www.businesslive.co.za/bd/national/2017-08-22-high-court-judges-deliver-stinging-rebuke-of-cape-magistrates-courts/ (last accessed on 30 August 2017; https://www.timeslive.co.za/news/south-africa/2017-08-22-useless-judges-give-their-damning-verdict-on-magistrates-courts/ (last accessed on 1 September 2017); http://lrc.org.za/lrcarchive/lrc-in-the-

urgent need for the Department of Justice to start storing court records in electronic format which can be accessed online[61] or at record centres at the courts.[62] This should not be difficult or expensive to do given that technology allows one to scan lengthy documents within seconds. There may be some human resource implications to accomplish the task, but these are not insurmountable because legal interns and even law students can be employed to scan documents and to create record repositories. It is unacceptable for court documents to go missing and for their retrieval from archives to be impossible.

Thirdly, s 6 does not mention that records may be perused for research purposes. Section 7 of the MCA provides:

> '(1) Subject to the provisions of section 7A and the rules the records of the court … shall be accessible to the public under supervision of the clerk of the court at convenient times and upon payment of the fees prescribed from time to time by the Minister in consultation with the Minister of Finance, and for this purpose and for all other purposes the records of any magistrate's court which has at any time existed within the Republic, shall be deemed to be the records of the court of the district in which the place where such court was held is situated, and such records shall be preserved at the seat of magistracy of that district for such periods as the Director-General: Justice may from time to time determine: Provided that the said Director-General may order that the records of a court for any regional division shall be so preserved at such a place or places within that division as he may from time to time determine: *Provided further that payment of such fees shall not be required from any person who satisfies the magistrate of the district where the records of the court are preserved, or any judicial officer designated by the said magistrate from among the members of his staff, that he desires access to the records of the court in connection with research for academic purposes.*'[63]

The proviso in s 7(1) makes it much easier to conduct academic research in respect of magistrates' courts' proceedings. The fee for the perusal of files is waived and there is a mechanism that allows for academic research. By not mentioning academic research

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news/3370-lost-court-records-delay-judgment-in-activist-court-case (last accessed on 30 August 2017); https://www.pressportal.co.za/story/5935/looking-for-copies-of-yourdivorce-records-papers-or-documents.html (last accessed on 1 September 2017).

[61] Winn 'Online Court Records: Balancing Judicial Accountability in an Age of Electronic Information' (2004) 79 *Washington Law Review* 307 at 310ff.

[62] It would seem that keeping digital records at the courts is the more preferable stance to take because keeping records online can violate the privacy rights of litigants, can have a chilling effect on access to justice, and can encourage people to hack into court systems to distort files: see, Eltis 'The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context' (2011) 56 *McGill Law Journal* 289.

[63] Italics supplied.

in s 6 of the SCCA, the legislature has created the impression that perusal of court documents for such purposes can only be undertaken if there is official authorisation from the Department of Justice. This interpretation is unfortunate.

To ease the difficulty of conducting academic research in small claims matters, s 6 of the SCCA must be amended to include a proviso that is similar to s 7(1) of the MCA. There is a need for ongoing legal research at the courts, especially if the legislation is amended and if new and innovative processes and procedures are introduced. It is also imperative for researchers to monitor court proceedings so that service delivery at the courts can be improved.

4.5 COURT PERSONNEL

(a) Officers of the court and their indemnity from liability

Section 11 of the SCCA is headed 'officers of the court'. In terms of this section, the magistrate of a district may appoint clerks and assistant clerks of the small claims court, interpreters and legal assistants 'for the performance of prescribed functions'. Furthermore, a 'messenger of the court' appointed under the MCA for the magistrate's court of a district 'shall act as the messenger of the court for a court in that part of the said district falling within the area of jurisdiction of that court.' Section 11(3) provides that:

> 'The State, a clerk of the court, an assistant clerk of the court or a legal assistant shall not be liable for any damage or loss resulting from assistance given in good faith by that clerk of the court, assistant clerk of the court or legal assistant to any party or prospective party to an action before a court or to the enforcement of a judgment or order in terms of section 41 in the form of legal advice or the compilation or preparation of a summons, statement or other document.'

At the 2003 Small Claims Courts Conference,[64] there was much discussion about court

[64] See §3.6.

officials. The view was widely held that many small claims courts did not have dedicated clerks, interpreters and legal assistants. The subsequent national audit confirmed this.[65]

In its *Report,* the Hoexter Commission clearly contemplated that the small claims courts, as separate courts, were to be staffed by their own personnel, even though the courts would hold sessions at the local magistrates' courts.[66] The Commission thought that it was essential to staff the courts with legal assistants because legal representation would not be permitted.[67]

In the national audit, the Department of Justice established that there were very few small claims courts clerks.[68] Due to human resource constraints, magistrates found it difficult to redeploy magistrates' courts' clerks to the small claims courts. Furthermore, magistrates do not have the power to hire additional clerks. This function is reserved for the Department of Justice. The clerks of the magistrates' courts often act as small claims clerks because the administrative function performed by the respective clerks is very similar.[69] The national audit also established that there were none (or hardly any) dedicated legal assistants in any of the courts.[70] At present, the lack of legal assistants continues to be an issue. The clerks of court fulfil the function of legal assistants. This is not ideal as the clerks are overburdened. A fundamental Hoexter Commission recommendation has thus failed.

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[65] See §3.8. According to the national audit (n9), 80% of the small claims courts operated without interpreters (page 6); and only 35% of the courts had dedicated clerks (page 7). There is no mention made of legal assistants. One can assume there were either none or their numbers were so negligible as not to warrant mentioning.
[66] *Report* §14.3*(l)* and 14.3*(t)*.
[67] See also discussion in §7.6.
[68] See n65.
[69] Compare SCCR 3 with MCR 3. Though the magistrates' courts rule is more expansive, the functions of the clerks of the magistrates' courts essentially include what clerks are required to do in the small claims courts.
[70] See n65.

(b) Steps taken to address the issues are not enough

Some steps were taken to rectify the situation, but to date, the issue of court personnel remains a substantial problem in many courts. For a short while, the Department of Justice contemplated using LL.B[71] students to serve as legal assistants. However, nothing came of this.[72] The reasons for not taking the initiative further are unclear. It is quite possible that one of the stumbling blocks might have been that law students are not covered by the indemnity contained in s 11(3) of the SCCA. Court interpreters, too, are few and far between in the small claims courts. There is a general lack of interpreters in the civil courts and the work ethic among interpreters is rather poor. To compound matters further, court personnel have been perceived as lazy, incompetent, poorly trained, rude and complacent.[73] It also does not help that the overwhelming majority of small claims courts operate after regular court hours when many court officials have gone home, leaving commissioners to deal with litigants who often become unruly.[74] The implementation of s 11 of the SCCA is thus a dismal failure.

[71] In South Africa, the LL.B. (Latin: Legum Baccalaureus) is offered both at the undergraduate and postgraduate levels. From 1996, it became the only legal qualification for legal practice.

[72] See §3.8.

[73] De Lange 'Court Interpreters Get 'Spaza Training' *The Citizen* (23 March 2014); Louw 'Court Interpreters Lost in Translation *Times Live* (8 June 2015): https://www.timeslive.co.za/news/south-africa/2015-06-08-court-interpreters-lost-in-translation/ (last accessed on 14 August 2014). See also Steytler 'Implementing Language Rights in Court: The Role of the Court Interpreter' (1993) 9 *South African Journal of Human Rights* 205ff; Moeketsi 'Some Observations on Answers to Courtroom Questions' (1999) 19 *South African Journal on African Languages* 237-244; Moeketsi 'The Do's and Don't in Court Interpreting: A Functional Approach to a Professional Code'(2000) 31 *Language Matters* 222-242; Hlope 'Receiving Justice in Your Own Language – the Need for Effective Court Interpreting in Our Multilingual Society' (April 2004) *Advocate* 42-47. See also 'Letters to the Editor' *De Rebus* (December 2010); Editor 'Law Society of South Africa Speaks Out on Conditions in Johannesburg and on Errant Magistrates' *De Rebus* (January-February 2011) 17; Welgemoed 'Echoing Enough it Enough' *De Rebus* (August 2011) 4. See also Paleker (n60) for the letters from attorneys complaining about court personnel reproduced at footnote 160.

[74] Law Society of South Africa *Annual Report 2010-2011* 43.

(c) Recommendations to address staffing problems

There are a number of measures that can be taken to reduce staffing issues in the small claims courts. Firstly, s 11 must be amended to give a greater role to court managers. Court managers, rather than magistrates, are responsible for daily administration in the courts.[75] Secondly, the power of court managers must be reflected in s 11 and their duties in the staffing process of the courts must be articulated. Thirdly, the performance of court managers and staff must be audited biannually and people who perform poorly must be disciplined and booted from employment. Fourthly, Justice College must offer regular and better training for court officials. The training must include instruction about ethics, customer relations and service delivery. Fifthly, more multilingual commissioners must be appointed so that interpretation services are limited to exceptional cases. Interpreters must include sign language experts to cater for the needs of the deaf. The term 'legal assistant' must be defined in the Act. Currently, the term is not defined. A future definition must include the prospect of legal assistance being rendered by *law students, paralegals, and other suitably qualified persons*. There may be people who are willing to render assistance in the courts as part of their community service contribution. If they are adequately trained, there is no reason to exclude them from offering their time. Needless to say, they, too, should be indemnified from liability.

(d) The role of clerk and legal assistant must be kept separate

According to SCCR 5:

> '(1) The legal assistant shall render to any person who has so requested him advice in regard to any action which falls within the jurisdiction of the court.

[75] The functions of a court manager can be gleaned from the following advertisement placed by the Department of Justice: https://joblistsouthafrica.com/court-manager-department-justice.html (last accessed 14 August 2017).

(2) If he is so requested, the legal assistant shall render assistance with the drafting of the process of court.
(3) Any act to be performed by the legal assistant in terms of these rules may be performed by the clerk of the court.'

SCCR 5(3) is problematic because it serves to license the practice of not appointing legal assistants and instead asking clerks to shoulder an additional responsibility.

If the SCCA permits legal assistants to be drawn from the ranks of law students and other suitably trained people, SCCR 3(6) must also be amended. Currently, the rule reads:

> 'Any act or notice to be performed or signed by the clerk of the court in terms of these rules may be performed or signed *by a legal assistant* or a commissioner except that no commissioner shall write out a statement or process for any party.'[76]

The phrase 'a legal assistant or' should be deleted because it would be inappropriate for a law student or a layperson to have equal administrative authority to that of the clerk or the commissioner. In fact, it may be argued that SCCR 3(6) is *ultra vires* as it stands because the SCCA does not contemplate giving a legal assistant (who may not be a clerk) equal administrative authority to that of a duly appointed clerk.

(e) The definition of 'State' must be defined in the indemnity provision for greater clarity

'State' is not defined in the SCCA. There is no doubt that for the purposes of s 11(3), 'State' includes national, provincial and local government.[77] As will be argued later, the word 'State' should be defined with greater clarity in the SCCA.[78] For the purposes of s 11(3), the word 'State' should be replaced with the phrase 'national, provincial and local government' to explicate that all the branches of government are immune from liability.

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[76] Italics supplied.
[77] It will be shown that historically local government was sued in the small claims courts and that the courts hold that the word 'State' may have different meanings within different statutory contexts: see chapter 7.
[78] See chapter 7.

(f) There are no 'messengers'

The reference to 'messenger of the court' in s 11(2) must be replaced with the phrase 'sheriff of the court'. Furthermore, sheriffs are not appointed in terms of the MCA; they are appointed in terms of the Sheriffs Act.[79] The legislative change must be reflected in the subsection.

4.6 LANGUAGE POLICY

Section 5(1) of the SCCA is unconstitutional. It provides that 'either of the official languages' may be used in the small claims courts. The reference to *either* language is a throwback to the time when South Africa had two official languages: English and Afrikaans. Today, the Constitution recognises 11 official languages.[80]

The issue of a language policy for the courts is a thorny one. Even though South Africa has 11 official languages, from a practical resource perspective it is difficult to ensure that each and every language is equally represented in the courts. For example, it would be very costly for every sign in a court building to reflect the 11 official languages and for every court document to be translated into all the languages. The exercise would be expensive and wasteful as South African languages are both demographically and geographically divided amongst the various provinces. From an economic and logistical perspective, it would make better sense for at least two dominant languages in every province to be represented. In the Western Cape, for instance, English, Afrikaans and isiXhosa should be represented, whereas in Kwa-Zulu Natal, Zulu and English should be the dominant languages. There is a need for one predominant language in all the courts to ensure a base level of language efficiency. It appears that

[79] Sheriffs Act, ss 2, 5, 6.
[80] Constitution, s 6.

English predominates as the most spoken and understood among all the languages in South Africa.[81]

It is interesting to note that in September 2017 the Chief Justice took the position that English should be the language of record in the superior courts. Polity.org.za reported on the matter as follows:

> 'English will be the only language of record in South African courts, Chief Justice Mogoeng Mogoeng said on Friday.
> "Nobody is saying South Africans are not permitted to speak in their mother tongue in a court of law," Mogoeng told reporters at the office of the chief justice in Midrand.
> "We are just saying, to facilitate efficiency and a smooth running of the court system, we would do well according to our experience... We [should] have everything that is said in a particular case captured in one language that is understood by all the judges - and that language is English,"he said.
> The decision was made during a two-day meeting held by the heads of courts, under the chairmanship of Mogoeng.
> Mogoeng said that poor people who had little resources and wanted to take their matters to the appeal court would have to exhaust their resources paying for their records to be translated.
> Not all appeal judges understood all 11 official languages, he added.
> "We are alive to the reality that language is a very emotive issue. When you don't allow people to communicate in their mother tongue, they feel disempowered," Mogoeng said.
> He said they had not arrived at the decision lightly, but had felt that what went into the records should be in English.
> "We are here to ensure that there is access to justice for all South Africans… If you are going to insist on changes that require additional resources, we will be more than happy to embrace that."'

Clearly, there is some backlash to the Chief Justice's language policy proposal. It must be noted that the Chief Justice is not suggesting that people would be forced to speak English in the courts. People would speak their own language and where necessary have the benefit of interpretation services if court proceedings are conducted in a language other than their home language. This is echoed in s 5(2) of the SCCA, which provides:

> '(2) If evidence is given in a language with which one of the parties is in the opinion of the court not sufficiently conversant, a competent interpreter may be called by the court to interpret that evidence into a language with which that party appears to be sufficiently conversant, irrespective of whether the language in which the evidence is given is one of the official languages.'

[81] The most common language spoken as a first language by South Africans is Zulu (23%), followed by Xhosa (16%), and Afrikaans (14%). English is the fourth most common first language in the country (9.6%), but is understood in most urban areas and is the dominant language in government and the media: see 'Tongues under Threat' *Economist* (22 January 2011) 58.

The Chief Justice is proposing that all court documents, records and judgments be written and recorded in English for the sake of administrative efficiency. Whether the language policy in the superior courts will apply in the lower courts remains to be seen.

Because the small claims courts are courts of first access to the public and legal representation is not permitted, there is a need for small claims documentation to be available in English as the dominant language of record and in at least one other provincial language. There is a special need to prioritise indigenous African languages.

Even though a party may obtain the services of an interpreter, experience has shown that interpretation services in the small claims courts are often difficult to come by. To counter this problem, small claims courts presiding officers should be multilingual. The use of indigenous languages in the small claims courts is very important. If presiding officers reflect the demographic profile of the South African population, it will go a long way to reducing the dependency of small claims courts on interpretation services. Furthermore, because the court proceeds inquisitorially,[82] it makes sense for the presiding officer to interact with the litigants on a personal level, as opposed to an interpreter acting as an intermediary.

For pleadings – such as the summons or the statement of defence[83] – parties should be free to write in their own languages and in simple terms. If legal assistants are appointed at the courts, they could assist litigants to translate pleadings that are written in a language other than English, for the benefit of the recipient of a pleading and for official record keeping.

[82] SCCA, s 26(3).
[83] See chapter 8.

4.7 THE ELEPHANT IN THE ROOM

An issue that looms large over small claims courts is whether the courts should be separate courts or whether they should be incorporated into the magistrates' courts with a special small claims track.

The Hoexter Commission was unequivocal that small claims courts should be separate courts but that they should share the infrastructure of the magistrates' courts. It appears from the Hoexter Commission *Report* that it was motivated principally by experiences in foreign jurisdictions.[84] Creating a separate system of small claims courts also accorded with the Apartheid structure of the courts. All the courts in the land operated on a racial basis. Black litigants were forced to litigate their matters in so-called 'Bantu Courts'.[85] As deracialised courts, the small claims courts functioned in sharp contrast to the other courts. If the small claims courts were amalgamated into the magistrates' courts this would have created an anomalous position in the magistrates' courts. The way of maintaining the racial divide was to keep the small claims courts separate and to treat them as the exception rather than as the norm.

From their inception, the small claims courts experienced logistical difficulties. The courts operated after hours.[86] They did not have their own staff and operated in the shadow of the magistrates' courts. At the 2003 Small Claims Courts Conference people complained that single parents and older people found it difficult and unsafe to attend the courts in the evenings. Commissioners conceded that they often did not have the protection of security in the courts and when litigants became unruly, the commissioner

[84] *Report* §13.5.
[85] Yates 'Bantu Civil Courts in South Africa' *De Rebus Procuratoriis* (October 1973) 421-423. For a discussion of the 'Bantu Courts', see chapter 5.
[86] This was on the recommendation of the Hoexter Commission: *Report* §13.23.

was expected to maintain order in the court. There were no legal assistants and people found it difficult to navigate court processes and procedures.[87] Many of the issues identified at the Conference were addressed but issues such as security and the lack of legal assistants remain an issue, even today.

It is interesting to note that the Department of Justice started a programme of recruiting sitting magistrates and retired magistrates to preside in the small claims courts. This is partly to make up for the shortage of presiding officers at various courts.[88] However, this also gives the courts more flexibility to operate during normal business hours. In Gauteng and Limpopo, for example, there are many small claims courts that now operate during the daytime, because magistrates realise that people have difficulty accessing the courts at night.[89] But the overwhelming majority of courts still operate according to the Hoexter Commission model, namely after hours and on weekends.

There is a need to rethink the small claims courts as separate courts. In England and Wales, as a result of the Woolf Reforms, the County Courts have a small claims track. A magistrate has discretion to refer any matter to the small claims track if the claim meets the monetary limit of the track.[90] In South Africa, the magistrates' courts have concurrent jurisdiction with the small claims courts. The plaintiff, as *dominus litis*, chooses which court he or she wants to go to. If the plaintiff can afford to bring a claim in a magistrate's court, he or she can do so. The defendant has no say. This situation seems rather unfair because it allows plaintiffs with more finances to force defendants with less economic means to defend matters in the magistrates' courts, where legal

[87] This was confirmed in the national audit (n9) at 5.
[88] See *Address by the Deputy Minister of Justice and Constitutional Development* (n5).
[89] I am thankful to Ms J Wessels, the Regional Court President of Polokwane and to Ms E De Klerk, the Senior Magistrate, Palmridge, for this information.
[90] Sime *A Practical Approach to Civil Procedure* 354-359.

representation is permitted and is often needed to navigate the more complex processes and procedures of the courts.[91]

To overcome many of the logistical and substantive access to justice issues in the small claims courts, it seems better to incorporate the small claims courts into the magistrates' courts system and to have a small claims track within the magistrates' courts. The small claims courts will still have their own processes and procedures. Litigants can choose to either institute a claim in the small claims courts or in the magistrates' courts. However, when they choose the latter option, they should be alive to the prospect that a magistrate could refer the matter to the small claims track if the value of the claim and its nature falls within the jurisdiction of the small claims court, and the matter is not too complex for the small claims court presiding officer to handle.

All small claims courts should operate during normal business hours and only if a court has sufficient security and personnel should it offer after-hours services. Again the amalgamation of small claims courts into the magistrates' courts system will make it easier for all small claims courts to operate alongside the magistrates' courts.

4.8 TECHNOLOGY

The power of technology must be harnessed. A litigant should be able to file and exchange documents online through a central portal dedicated to each individual case. Currently, the small claims courts operate manually. Litigants must issue and file documents in court. They must take time away from work, social responsibilities and family to do this. They often have to travel long distances to do so. For poor people, the cost of ordinary travel can be a challenge. Access to the internet is growing at a

[91] See chapter 6 for more on this issue.

rapid pace.[92] Even where a person cannot access the internet, it is likely that an acquaintance would have access.

Online assistance to litigants should be available. Again, law students and other properly trained people can be used to provide such services free of charge. The exercise simply requires some forward thinking and planning.

The use of technology as part of the processes and procedures of the court is considered in more detail in chapter 8.

4.9 CONCLUSION

The Department of Justice must be commended for expanding small claims courts so rapidly since 2003. The prevalence of small claims courts shows that the Department is committed to their presence in the civil justice system. However, as noted in chapter 3 and in this chapter, the issue of court administration remains a serious concern. Unless the management issues are confronted and dealt with in a decisive, co-ordinated and business-like manner, court procedures will not have their desired effect.

This chapter has offered some solutions for how to deal with issues of management. The solutions are for the most part not expensive to implement. In some instances, they require amendments to the SCCA and SCCRs to address governance issues. A new co-ordination structure in the form of a national *Small Claims Courts Board* and advisory committees based on a cluster approach is not expensive to implement. People serving on those committees would do so on a pro bono basis having regard to their involvement in the courts or in professional structures within the attorneys' or advocates' professions. Installing better technology at the courts will require an initial

[92] See chapter 3.

capital injection. But if quality equipment is sourced, it can serve the courts for many years and in the process can save the courts a lot of time, effort, and administration costs. The training of court officials is not a luxury. It is a necessity. No organisation can thrive if its human assets are left to flounder in an unsupportive environment.

CHAPTER 5

THE COMMISSIONER

5.1 INTRODUCTION

The Native[1] Administration Act[2] created the so-called 'Bantu/Black courts', also known as the 'commissioners' courts' because the courts were presided over by *commissioners*. These courts heard disputes involving black people only. Asian, coloured and white South Africans were required to resolve their disputes in courts other than the Black courts.[3]

The establishment of the commissioners' courts was an Apartheid instrument to formalise and encourage the use of African customary law to resolve disputes between black people. In so far as African customary law was deficient, the Black courts could refer to Roman-Dutch actions to resolve disputes involving eviction, purchase and sale, lease, succession and estate matters.[4] The establishment of the courts thus entrenched racial discrimination in the administration of civil justice, with the objective of forcing black people to resolve their disputes in a separate forum and through a separate system of law. The Native Administration Act was later renamed the Black Administration Act[5] and extended criminal jurisdiction to the commissioners' courts.

By the 1970s, the Black courts fell into 'sharp decline' because they obtained a bad reputation for offering an inferior system of justice based on racial grounds.[6] This prompted the Hoexter Commission in 1983 to propose the abolition of the commissioners' courts, subject to the caveat that the special Black divorce courts should be retained because they enjoyed popular

[1] In some literature the Act is also styled the 'Bantu Administration Act': see Yates 'Bantu Civil Courts in South Africa' (October 1973) *De Rebus Procuratoriis* 421.
[2] 38 of 1927 (hereafter referred to as the 'Native Administration Act').
[3] Bennett *Customary Law in South Africa* 139.
[4] Yates (n1) 422.
[5] Section 9.
[6] Bennett (n3) 140.

support.[7] By 1986, the commissioners' courts were closed down and their jurisdiction was transferred to the magistrates' courts and the small claims courts.

The reason for raising the issue of the commissioners' courts is that the Hoexter Commission *Report*[8] contains an interesting point of departure when compared to the SCCA. The Hoexter Commission recommended the establishment of small claims courts presided over by 'adjudicators'.[9] The term *adjudicator* was consonant with the foreign jurisprudence that the Commission had referred to. In many countries, the presiding officer of a small claims court is either titled 'adjudicator' or 'arbitrator.' The Commission felt that the former term was better for the South African small claims courts. Parliament, however, did not take the Commission's recommendation and opted for the pejorative label 'commissioner'.

The use of 'commissioner', it is submitted, was not coincidental and must be appreciated in the context of the Hoexter Commission's recommendation that the commissioners' courts should be terminated and that the small claims courts should operate on a deracialised basis.[10] When one ponders the Apartheid edifice, one must wonder how the small claims courts fit into that racist ideology. Perhaps, given the decline of the commissioners' courts, the purpose of the small claims courts was not to provide speedy and accessible justice for all; it was a cleverly engineered mechanism for the institution of legal proceedings between, against and by black people in a forum where the normal racial divide was relaxed, without affecting the fundamental structure of the magistrates' courts and the Supreme Court.[11] Some may say that

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[7] Hoexter Commission 'Enquiry into the Structure and Functioning of the Courts' *Fifth Report* Part V § 7.3.1-2; Part I § 3.4.3.8. For a discussion of the black family courts see Burman, Dingle, Glasser 'The New Family Court in Action: An Initial Assessment' (2000) 117 *SALJ* 111.

[8] Discussed in chapter 3.

[9] *Report* §13.4.

[10] *Report* §13.45.

[11] See *Report* §13.45. See §2.4 and in particular the discussion of the repealed s 14(3) of the SCCA. The existence of s 14(3) in the original version of the Act provides further credence to the argument that the government was trying to replace the old commissioners' courts with the small claims courts to a certain extent. See also Kerr 'Customary Law in the Small Claims Courts' (1984) 101 *SALJ* 726 at 727 where the writer raises the distinct possibility that the government was, in fact, trying to replace the commissioners' courts with the small claims courts.
In the past, the High Court of South Africa was called the Supreme Court of South Africa. Chapter 8 of the Constitution changed the names of the superior courts.

this argument politicises the small claims courts. However, every law and policy that emanated from the Apartheid regime requires suspicious engagement because the ruling National Party sought to use the law to maintain the Apartheid system. It is also interesting to note that the procedures of the small claims courts bear an uncanny similarity to the procedures of the commissioners' courts.[12]

Even if the Hoexter Commission had noble intentions, the government must have realised that black people were familiar with the commissioners' courts and the procedures thereof. Perhaps the small claims courts were an extension of that system of racialised justice, albeit cleverly disguised to create a semblance of normality. Given the racial history of South Africa, one must wonder whether the loaded appellation of 'commissioner' should be used at all. Perhaps the label 'commissioner' should be replaced in the future with the Hoexter Commission's label: *adjudicator*.[13] Be that as it may, the commissioner of the small claims court remains one of the most important actors in the story of these courts. Consequently, this chapter considers various aspects relating to the commissioner.

5.2 QUALIFICATION REQUIREMENTS OF COMMISSIONERS

(a) The Hoexter Commission's recommendations

The Hoexter Commission proposed that the commissioners of the small claims courts should be drawn from the pool of 'practising attorneys of at least seven years' standing; practising advocates of at least seven years' standing; [and] academic teachers of law of at least seven

[12] Native Administration Act, s 11(1). Bennett (n3) 139, n 32, notes:

> 'Under s 11(1), commissioners had discretion to apply either customary or common law... and the procedures in their courts were much more relaxed than those in the magistrates' courts or the Supreme Court. For example, commissioners could intervene to protect the interests of litigants. Thus…commissioners were obliged to assist unrepresented litigants to ensure that they did not suffer any undue prejudice.'

According to Yates (n1) 421:

> 'These are not courts in the Western sense, in that no record of evidence is kept and strict rules of evidence are not applied. All evidence is led *viva voce.* Hearsay evidence may be adduced… The rule regarding the right to begin is not rigidly followed and, most important, is that there are no formal pleadings required…Legal practitioners are not allowed to appear in these courts.'

[13] See also Kenyan Small Claims Court Act 2 of 2016 (hereafter referred to as the 'Kenyan Small Claims Court Act').

years' standing with actual experience of practice either as attorneys or advocates'.[14] The views of the Commission were incorporated into s 9(2) of the SCCA. The original version[15] of the SCCA read as follows:

> 'No person shall be appointed as a commissioner unless he is qualified –
> *(a)* to be admitted to practise as an advocate under the Admission of Advocates Act, 1964 (Act No. 67 of 1964); or
> *(b)* to be admitted to practise as an attorney under the Attorneys Act, 1979 (Act No. 53 of 1979); or
> *(c)* to be appointed as a magistrate under the Magistrates' Courts Act, 1944 (Act No. 32 of 1944),
> and for an uninterrupted period of at least seven years practised as an advocate or attorney or occupied the post of magistrate, or for that period was involved in the tuition of law and also practised as an advocate or attorney for such period as, in the opinion of the Minister, makes him suitable for appointment as a commissioner, or possesses such other experience as, in the opinion of the Minister, renders him suitable for appointment as a commissioner.'

(b) Amendment to the Small Claims Courts Act

Barely four years after the enactment of the SCCA, s 9(2) was amended.[16] The seven-year practical experience period was reduced to five years. The reason for the amendment is not difficult to fathom. After the initial enthusiastic reception of the small claims courts waned, commissioners were difficult to come by and this prompted the amendment to the Act.[17] By reducing the duration of active practice, the Department of Justice could attract younger and less busy practitioners to service the courts. The problem, however, was that the commissioners were not adequately trained.[18]

At the 2003 Small Claims Courts Conference,[19] delegates expressed the opinion that the eligibility requirements of commissioners must be changed and that the seven-year practical experience requirement had to be reinstated. The Law Society of South Africa's Small Claims Courts Committee also took this view. [20] The premise behind the submission is that many

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[14] *Report* §13.4.
[15] See GN 900 in *GG* 9202 of 2 May 1984.
[16] The amendment was brought about by Small Claims Court Amendment Act 63 of 1989, which came into effect on 1 September 1989.
[17] See §3.5 for the reasons why some practitioners refused to serve.
[18] Ibid.
[19] See §3.6.
[20] The Law Society of South African *Annual Report 2010-2011* at 43 states:

> 'At present, commissioners are required to have a minimum of five years' practical experience and, if possible, consideration should be given to increasing the number of years of experience prior to a practitioner being allowed to become a commissioner of the Small Claims Court, due to the fact that, in

commissioners lack the relevant experience and knowledge to service the courts and they consequently render incorrect decisions. This situation is particularly dire as a decision of a small claims court commissioner cannot be appealed.[21] By increasing the qualifications requirement, the argument is that the quality of decision-making would improve.

Given the number of small claims courts in the country today, and the shortage of volunteer commissioners – especially in rural areas where there are not many practising attorneys and advocates – to increase the practical experience requirement to seven years would undoubtedly exacerbate the problems that small claims courts face in terms of recruiting and retaining commissioners.[22] The answer to dealing with the inexperience of commissioners lies not in extending the duration of practical experience required, but in proper training.[23] Aside from five years of uninterrupted practical experience, every commissioner admitted to the attorneys' or advocates' professions would have served articles of clerkship[24] or pupillage,[25] and would have sat the Sidebar or Bar examinations. Five years of post-admission practical experience with the proper training seems more than adequate to serve the small claims courts, provided of course that commissioners receive specialised judicial training.[26] It should be borne in mind that the Minister may, in any event, turn down an application for appointment if the Minister feels that the applicant is unsuitable.[27] Furthermore, the SCCA

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many instances, the courts function without the assistance of court orderlies and/or the police and the seniority of the commissioner is of vital importance to maintain order in the court during sessions, as litigants often become unruly.'

[21] SCCA, s 45.

[22] Manyathi-Jele 'Magistrates Can Now Act as Commissioners' *De Rebus* 11.

[23] For problems relating to the training of commissioners see §3.8.

[24] The standard duration of articles of clerkship is two years unless the candidate attorney undergoes vocational training at the School for Legal Practice and completes all the practical training modules and evaluations at the School, in which case the period of in-firm articles of clerkship is reduced to one year. See s 2 read with s 2A of the Attorneys Act 53 of 1979.

[25] The duration of pupillage is one year. See https://capebar.co.za/pupillage/ (last accessed 15 January 2018). Interestingly, the Admission of Advocates Act 74 of 1964 does not mention the requirement for pupillage. However, to be a member of the organised Bar one has to serve pupillage. It is possible for a practitioner not to serve pupilage in which case the practitioner will form part of what is called the 'Independent Bar'. Members of the Independent Bar cannot hold chambers with advocates who have undergone all the training prescribed by the General Council of the Bar. Consequently, the overwhelming majority of advocates serve pupillage and sit the Bar examinations.

[26] It is interesting to note that the Kenyan Small Claims Court Act requires that in order to serve as adjudicators legal practitioners have 'at least three years of experience in the legal field.'

[27] SCCA, s 9(2).

provides that a commissioner can refuse to hear a matter deemed to be too complicated. He or she can refer the parties to the magistrates' courts. [28]

(c) Characteristics and qualifications

The SCCA does not stipulate particular characteristics that the commissioner should possess. It provides that commissioners must have undergone general legal training that would render them eligible for admission to either the attorneys' or advocates' professions. It does not stipulate that the commissioner should, for example, be a qualified mediator or that he or she must have undergone conflict management training. [29]

The qualifications criteria for commissioners may require amendment in the future. With the introduction of mediation in the small claims courts,[30] it may be necessary to stipulate that commissioners must have undergone mediation training. This will assist commissioners to identify cases that are ripe for mediation and will also enable commissioners to serve as mediators in matters over which they are not presiding. The stumbling block, however, may be that by adding more qualification requirements one may be narrowing the pool of eligible commissioners.

Adding further qualifications requirements would not have posed a problem if commissioners were remunerated for their services, as that would incentivise further professional development. The difficulty in the South African context is that commissioners are not remunerated,[31] and hence adding further qualifications requirements may have the unintended consequence of turning eager people away because the bar for appointment is set too high. It is submitted that the preference for additional qualifications should be contained in the appointments policy, and not written into the legislation. In other words, when appointing

[28] SCCA, s 23.
[29] See Clark *The Tasmanian Small Claims Courts: An Empirical Study* PhD Thesis, University of Tasmania (1993) at 120-122; Clark 'Small Claims Courts and Tribunals in Australia: Development and Emerging Issues' (1991) 10 *University of Tasmania Law Review* 201 at 227-228.
[30] See chapter 10.
[31] See discussion at §5.3.

people, those with additional skills should be preferred as a matter of policy, but additional qualifications should not be a prerequisite.

5.3 PART-TIME VERSUS FULL-TIME COMMISSIONERS

The cost of establishing small claims courts was a consideration in the mind of the Hoexter Commission.[32] Even when it came to the appointment of commissioners, the issue of costs loomed largely. Hence, the Commission emphasised that 'adjudicators'[33] should be 'unpaid volunteers' drawn from the ranks of practising attorneys and advocates.[34]

Since the establishment of the small claims courts in 1985, commissioners have served on a volunteer, unremunerated basis. The Department of Justice pays travel and subsistence expenses for official duties undertaken by commissioners. Sometimes commissioners do not bother to claim expenses because the claims procedure is cumbersome and slow, prompting many to perform their functions gratis.[35]

The volunteer system should work well given that there are just under 25 000 attorneys and 5 000 advocates in the country.[36] Those numbers should be able to service 405 small claims courts.[37] The difficulty, however, is that not all attorneys and advocates are prepared to serve. The issue of safety at the courts and the lack of adequate logistical support turn many away from serving.[38]This has been the case since the inception of the courts. Furthermore, in rural and peri-urban areas, the issue of available commissioners is problematic as there are not

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[32] *Report* § 13.31.
[33] See §5.1above.
[34] *Report* §13.3.
[35] Department of Justice *Narrative Report on the Small Claims Court Audit* 6. See also Law Society of South Africa *Annual Report 2007-2008* 39.
[36] As at April 2015, there were 23712 attorneys in the country. There were approximately 5000 registered law students in the country. Of the qualifying students, about 3000 go on to register articles in a given year: Manyathi-Jele N 'Latest Statistics on the Legal Profession' (August 2015) *De Rebus* 13. It is fair to conclude that there are ±25000 attorneys in the country at the present time. As at 26 April 2012 there were 4762 advocates in the country: see Department of Justice and Constitutional Development *National Assembly Question for Written Reply: Parliamentary Question No 947 of 26 April 2012*. It is thus safe to speculate that there are ± 5000 advocates in the country at the present time.
[37] See §4.2.
[38] See §4.7.

many law firms in those areas, and advocates, by and large, hold chambers in the large city centres.

According to the national audit of small claims courts,[39] there were 1036 commissioners in 2007, of whom 186 were inactive. The Western Cape had the most commissioners with 244 active commissioners, followed by Gauteng at 123 and Kwa-Zulu Natal at 108. The Northern Cape, one of the most economically challenged provinces in South Africa and with a large rural community, had a measly 31 active commissioners. The Free State, Limpopo, Mpumalanga and the North West provinces fared slightly better with 41, 67, 70, and 43 active commissioners respectively. The numbers suggest that the provinces with large cities tend to fare better than those that do not have significant metropolitan areas.[40]

To alleviate the problem of a lack of commissioners, the legislature in 2013 amended the SCCA by adding the following provision:

> 'A commissioner appointed in terms of paragraph *(a)* in respect of a specific court shall be deemed to be appointed for any court established under section 2 in that province.'[41]

In the past, a commissioner was appointed for a particular 'district'.[42] This prevented a commissioner from serving other districts in the same province. The amendment now permits a commissioner to sit anywhere in a province if his or her services are required. The mobility of commissioners will help to staff courts where there is a shortage of commissioners.

Aside from amending the SCCA, the Department of Justice also actively recruited commissioners to serve the courts. Today there are approximately 1921 commissioners nationwide. A particularly useful initiative has been the recruitment of retired and sitting

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[39] See §3.8.
[40] It must be noted that the figures do not tally. The discrepancy is also apparent from Tables 1 and 2 in §6.4. These are official statics supplied by the Department of Justice. Consequently, they are reported as provided. Despite the error margin, the statistics provide insight into the cohort of commissioners and how they are geographically divided.
[41] SCCA, s 9(1)*(c)*. Paragraph *(c)* was inserted by the Judicial Matters Amendment Act 42 of 2013, which came into operation on 1 April 2014.
[42] For the meaning of 'district' see s 1 of the SCCA.

magistrates to serve as commissioners.[43] Magistrates bring a considerable level of judicial expertise to the small claims courts. They also ensure that the courts can sit during regular business hours.[44] Volunteer practitioners hold sessions after hours and on weekends. As noted in chapter 4, the Hoexter Commission's model[45] of holding court sessions after hours was to accommodate volunteer commissioners. However, evening courts do not work for the elderly, single parents, those with safety concerns and those who have to travel long distances to reach court.[46]

When the provisions of the Legal Practice Act[47] come into full force, they will undoubtedly assist in staffing the courts with more commissioners. The Act envisages that legal professionals will in the future perform community service on a continuing basis to meet their professional obligations.[48] In terms of s 29(2)*(e)* of the Legal Practice Act, community service is broadly defined and includes 'any other service which … [a] legal practitioner may want to perform, with the approval of the Minister.' Serving as a commissioner in a small claims court thus falls within the ambit of the provision.

The Legal Practice Act will not, however, address the geographical representation of practitioners in the various provinces. The only solution seems to be that the Department of Justice must employ a combination of full-time remunerated and part-time volunteer commissioners to preside in the courts, especially in the provinces and rural districts where

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[43] In an address on 19 May 2017, the Deputy Minister of Justice said:

> 'Of the 1921 Commissioners presiding in our Small Claims Court, 55 are magistrates. These magistrates offer their time and expertise, free of charge, and after hours, to assist in this important task.'

See *Address by the Deputy Minister of Justice and Constitutional Development, the Hon JH Jeffery, MP, at the Judicial Officers Association of South Africa (JOASA) Gala Dinner, held at the Aviator Hotel and Conference Centre, Kempton Park, Johannesburg, 19 May 2017*, published at http://www.justice.gov.za/m_speeches/2017/20170519-Joasa_dm.html (last accessed on 14 December 2017).

[44] In Palmridge, Johannesburg for example, presiding magistrates hold small claims sessions during regular office hours. I am thankful to Ms E de Klerk, the Senior Magistrate of Palmridge, for this information.

[45] *Report* §13.23.

[46] See §4.7.

[47] 28 of 2014 (hereafter referred to as the 'Legal Practice Act').

[48] The Legal Practice Act, ss 6(5)*(b),* 26(1)*(c)*, 29, 85(5).

there is a lack of commissioners.[49] Of course, there is no reason why magistrates cannot sit as commissioners on a roster basis. In some districts where the communities are small, magistrates do not have enough work. Magistrates in those areas can sit as commissioners of the small claims courts, and hold weekly daytime and evening sessions to serve different needs.

If the small claims courts are incorporated into the magistrates' courts, as was suggested in chapter 4, the incorporation will not affect presiding officers of the small claims courts. The government can continue to recruit volunteer practitioners to serve the small claims court track of the magistrates' courts. The assimilation of small claims courts into the magistrates' courts may change the attitude of magistrates when it comes to serving as commissioners of the small claims courts. They may be more inclined to serve the small claims courts as a sister division of the magistrates' courts. Currently, the small claims courts are separate courts, and as such, they suffer from the stigma of inferiority. Status-driven magistrates might be disinclined to sit in the small claims courts. This may change with an integrated approach.

5.4 RACE AND GENDER REPRESENTATION OF COMMISSIONERS

The judiciary is criticised for consisting of elites who cannot relate to ordinary, and especially poor, South Africans.[50] It is particularly important for magistrates' courts and small claims courts presiding officers to reflect the demographic profile of South Africa as they preside over the courts of first access to the public. Transformation of the judiciary means that judicial officers must reflect a cross-section of society in terms of language, culture, race, religion, sexual orientation and class. Class is something that is often overlooked. Litigants appearing before presiding officers must be able to identify with them because of their

[49] The Kenyan Small Claims Court Act, s 6(4), provides: 'An Adjudicator may serve on a full time or part time basis.'

[50] See generally Andrews 'The South African Judicial Appointments Process' (2006) 44 *Osgoode Hall Law Journal* 565; Wesson, du Plessis 'Fifteen Years on: Central Issues Relating to the Transformation of the South African Judiciary' (2008) *South African Journal of Human Rights* 187; Dugard 'Court and the Poor in South Africa: a Critique of the Systemic Judicial Failures to Advance Transformative Justice' (2008) *South African Journal of Human Rights* 214; Carpenter 'Judiciaries in the Spotlight' (2006) 34 *CILSA* 361ff.

common backgrounds and life experiences. It is reassuring to find a judicial officer who may be a single parent, living with a disability, or who grew up in a township, and can truly understand and empathise with the plight of the vulnerable and the marginalised.

It is unclear to what extent small claims commissioners meet the transformation agenda in South Africa. Most of them are attorneys and advocates. Presumably some of them might come from historically disadvantaged backgrounds. The tables below reflect why much more work needs to be done on this front.

The following information was extracted from the national audit of small claims courts. The figures are quite startling and do not require much interpretation. Suffice it to say, females and the coloured community fared particularly poorly. This information prompted the Department of Justice to take immediate action. By 2015, many more commissioners were appointed, and the gender imbalance was addressed to some extent: see Table 2 below.

Table 1: Race and gender of commissioners as at November 2007[51]

Name of Province	Male				Female			
	White	Indian	Coloured	Black	White	Indian	Coloured	Black
Eastern Cape	89	3	4	22	6	1	-	8
Free State	42	-	-	2	-	-	-	-
Gauteng	143	9	2	20	18	-	-	3
Limpopo	36	4	-	37	5	-	-	1
Mpumalanga	48	-	-	21	5	-	-	-
North West	29	-	-	13	3	-	-	-
Northern Cape	34	1	2	-	-	-	-	-
Western Cape	239	3	7	1	12	-	2	-
Kwa-Zulu Natal	59	77	-	11	-	14	-	-
Total	**719**	**97**	**15**	**125**	**46**	**15**	**2**	**12**

[51] Source: Department of Justice. I am thankful to the project office for sharing this information. It must be noted that the figures do not tally with the provincial breakdown of commissioners in §5.3. The totals also do not add up. The figures are reported as provided. Even with the errors, the conclusions are correct. Women are substantially unrepresented and people of colour generally fair dismally when it comes to the racial composition of commissioners.

Table 2: Gender representation of commissioners as at August 2015[52]

Name of province	Number of commissioners
Eastern Cape	222 (183 male; 39 female)
Free State	65 (59 male; 6 female)
Gauteng	383 (319 Male; 64 female)
KwaZulu-Natal	252 (199 male; 53 female)
Limpopo	122 (114 male; 8 female)
Mpumalanga	111 (100 male; 11 female)
Northern Cape	47 (40 male; 7 female)
North West	75 (68 male; 7 female)
Western Cape	353 (301 male; 52 female)
	1 630 Commissioners (1 383 Male; 247 Female)

Clearly, the Department of Justice took steps to address the gender gap. However, the disparity between males and females remains problematic. The difficulty stems from the legal profession, which continues to be male-dominated.[53] The statistics above do not address the issue of race. On account of the missing data, this aspect remains inconclusive. Be that as it may, the race issue must be highlighted. By addressing race, one also addresses the issue of language in the courts. Multilingual commissioners can communicate with litigants in indigenous languages. This reduces the need for interpreters and instils public confidence in the small claims courts.[54] If mediation is introduced in the courts, commissioners who serve as mediators must speak the language of the parties. Effective mediation requires one-on-one interactions between the parties and the mediator.[55] Multilingual commissioners drawn from different race groups are thus essential.

[52] Source: Department of Justice.
[53] See Centre for Applied Legal Studies 'Transformation of the Legal Profession' University of the Witwatersrand (2014).
[54] See §4.6.
[55] See §10.7.

5.5 THE INDEPENDENCE OF COMMISSIONERS

(a) Commissioners are not members of the civil service

Research reveals that the status and independence of commissioners of the small claims courts were not probed post-1994. Following the Hoexter Commission's recommendation, commissioners are not members of the civil service.[56] In their capacity as unpaid volunteers, commissioners are not viewed as employees of the State. Consequently, the Department of Justice does not see them as 'judicial officers'. This probably explains why no-one has interrogated the constitutionality of s 9(3) of the SCCA. In terms of the provision:

> 'A commissioner shall hold office during the Minister's pleasure.'

Although a commissioner may resign by notice in writing to the Minister, s 9(4) provides:

> 'The Minister may at any time withdraw the appointment of a commissioner if in his opinion there is sufficient reason for doing so.'

(b) Judicial independence – the theory

In a democratic dispensation predicated on a separation of powers between the legislature, the executive and the judiciary, judicial independence is said to be fundamental for preserving the authority of the courts to uphold constitutional rules and norms, and accordingly, the rule of law.[57] Unlike other legal systems, where judicial independence is derived from either international law or indirectly from other constitutional provisions, the South African Constitution expressly makes provision for it.[58] Section 165 of the Constitution provides:

> '(1) The judicial authority of the Republic is vested in the courts;
> (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice;
> (3) No person or organ of the state may interfere with the functioning of the courts;
> (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts...'.

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[56] *Report* §13.3.
[57] See generally Cachalia 'Separation of Powers, Active Liberty and the Allocation of Public Resources: The E-Tolling Case' (2015) 132 *SALJ* 285ff.
[58] Hogg 'The Bad Idea of Unwritten Constitutional Principles: Protecting Judicial Salaries' in Dodek, Sossin (eds) *Judicial Independence in Context* 28.

Section 166 of the Constitution defines a 'court' as the Constitutional Court,[59] Supreme Court of Appeal,[60] High Court,[61] a magistrate's court[62] and '*any other court established or recognised in terms of an Act of Parliament,*[63] including any court of a status similar to either the High Courts or the Magistrates' Courts.' Given that legislation establishes small claims courts, the judicial authority of the small claims courts in terms of s 166*(e)* of the Constitution is indisputable. Consequently, small claims courts are entitled to the independence promised to courts in s 165 of the Constitution.

According to the literature, judicial independence is said to encompass three fundamental protections: *(a)* administrative and procedural freedom; *(b)* security of tenure of judicial officers; and *(c)* financial (remuneration) security of judicial officers.[64] As far as the small claims courts are concerned, the topic of financial security is a non-issue. Commissioners are by and large unpaid volunteers. Where magistrates are employed to serve as commissioners, s 12 of the Magistrates Act[65] governs their salaries. Section 12 contains sufficient safeguards to ensure that the remuneration of magistrates is free from State interference.[66]

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[59] Section 166*(a)*.
[60] Section 166*(b)*.
[61] Section 166*(c)*.
[62] Section 166*(d)*.
[63] Section 166*(e)*. Italics supplied.
[64] *De Lange v Smuts* 1998 (3) SA 785 (CC) paras [59], [70]; Dodek, Sossin (eds) *Judicial Independence in Context* 6. See also Gordan, Bruce *Transformation and the Independence of the Judiciary in South Africa* 7-8.
[65] 90 of 1993 (hereafter referred to as the 'Magistrates Act').
[66] In terms of s 12, the President is required to legislate the salaries of magistrates, acting on the recommendation of the Magistrates Commission. The objects of the Commission are set out in s 4 of the Act, which provides as follows:

> 'The objects of the Commission shall be –
> *(a)* to ensure that the appointment, promotion, transfer or discharge of, or disciplinary steps against, judicial officers in the lower courts take place without favour or prejudice, and that the applicable laws and administrative directions in connection with such action are applied uniformly and correctly;
> *(b)* to ensure that no influencing or victimization of judicial officers in the lower courts takes place;
> *(c)* to endeavour to promote the continuous training of judicial officers in the respective lower courts and to make recommendations in regard thereto to the Minister;
> *(d)* to compile a code of conduct for judicial officers in the lower courts;
> *(e)* to advise the Minister and to make recommendations to him or her regarding the administrative matters applicable to magistrates, including proposals regarding legislation purporting to regulate the conditions of service and relevant matters regarding magistrates, separately;
> *(f)* to carry out investigations and make recommendations to the Minister regarding the matters mentioned in section 13(3)*(a)*;
> *(g)* to advise the Minister or to make recommendations to him or her regarding the requirements for appointment and the appointment of judicial officers in the respective lower courts; and

(c) Procedural and administrative independence

When it comes to procedural freedom, small claims courts were less independent in the past. As noted in chapter 4, the Minister of Justice is currently responsible for making rules for the small claims courts. However, as noted in chapter 4 this position will change when the Judicial Matters Amendment Act[67] comes into operation.[68] In the future, the Rules Board for Courts of Law (the 'Rules Board'), established in terms of the Rules Board for Courts of Law Act,[69] will make the procedural rules of the small claims courts. About the independence of the Rules Board, Gordan and Bruce state:

> 'The Board consists of members of the legal profession, and while the Minister of Justice must approve the rules, he or she does not have the power to make any rules.'[70]

The former Chief Justice of South Africa, Arthur Chaskalson, acknowledged the institutional independence of the Rules Board.[71] Furthermore, the SCA confirms the powers of the Rules Board to make rules for the courts.[72] One must assume that the independence of the Rules Board was interrogated during the process of drafting the SCA, and was determined to be constitutionally sound. It is imperative that an independent and impartial authority legislates court procedures because adjectival laws are not benign. Left in the hands of the perverse, poorly crafted court procedures can subvert the rule of law.[73]

> *(h)* to advise the Minister or to make recommendations to him or her or to report to the Minister for the information of Parliament regarding any matter which, in the opinion of the Commission, is of interest for –
> (i) the independence of the dispensing of justice; and
> (ii) the efficiency of the administration of justice,
> in the lower courts.'

The purpose of the Commission is to ensure the independence of the magistracy, and this includes protection against interference with the salaries of magistrates.

[67] 8 of 2017.

[68] See §4.2. The President signed the Act but its commencement date has not been proclaimed.

[69] 107 of 1985 (hereafter referred to as the 'Rules Board for Courts of Law Act').

[70] Gordan, Bruce (n64) 25-26.

[71] A Chaskalson 'Background to the Judicial Bills' *General Council of the Bar of South Africa, Human Rights Committee: Conference on the Justice Bills: Judicial Independence and Restructuring of the Courts* (17 February 2007) – also available at http://www.sabar.co.za/conference_transcript.pdf (last accessed on 14 November 2017).

[72] SCA, s 30.

[73] In *Lawyers for Human Rights v Rules Board for Courts of Law* 2012 JDR 0601 (GNP), the court struck down court procedures drafted in terms of s 7(3) of the Promotion of Administrative Justice Act 3 of 2000 ('hereinafter referred tto as PAJA'). This incident illustrates how a poor set of procedural rules can subvert the aims and objectives of legislation intended to foster open and transparent government as mandated by s 33 of the Constitution. See also Quinot 'New Procedures for the Review of Administrative Action' (2010) 25 *SAPL* 646.

In conformity with s 173 of the Constitution,[74] s 8 of the SCA devolves aspects pertaining to the administration of justice in the superior courts to the Chief Justice[75] and, in the case of magistrates' courts,[76] to the Judge President of the relevant division of the High Court under which a magistrate's court falls.[77] Small claims courts are not mentioned in s 8. Under the SCCA, all aspects of court administration and oversight are in the hands of the Minister of Justice. This aspect requires attention. It is submitted that the Judge President of the relevant division of the High Court should exert some[78] influence over the small claims courts. Of course, if the small claims courts are integrated into the magistrates' courts,[79] the Judge President's powers over the magistrates' courts will by implication also extend to the small claims courts.

Usually rules of procedure lie within the province of the Rules Board. However, according to PAJA, parliament is required to approve the PAJA rules made by the Rules Board. Quinot discusses (at 649-651) the legislative history of the PAJA rules and how parliamentary and ministerial interference led to a breakdown of relations between the Rules Board and the Department of Justice. The Rules Board was unhappy with the amendments that parliament's Justice Portfolio Committee had effected to the PAJA rules that the Rules Board had drafted. Before the rules were implemented, the PAJA rules were challenged and struck down by the court in *Lawyers for Human Rights v Rules Board for Courts of Law.* After the *Lawyers for Human Rights* case, the Rules Board, pursuant to a public consultation process, redrafted the PAJA rules and submitted them to parliament in 2014. The National Assembly and the National Council of Provinces approved these rules without objection. Unfortunately, the new PAJA rules are not yet operational as they await cabinet approval. In the meantime, however, the courts are using the HCR 53 procedure: see Quinot (at 647-648).

[74] Section 173 of the Constitution provides:

> 'The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

[75] By virtue of *GG* 335500 of 23 August 2010, the President established a new National Department known as the Office of the Chief Justice. The purpose of the Office is to:

- Ensure that the Chief Justice can properly execute his mandate as both the head of the Constitutional Court and the head of the Judiciary;
- enhance the institutional, administrative and financial independence of the Office of the Chief Justice; and
- improve organisational governance and accountability, and the effective and efficient use of resources.

For more information see http://www.judiciary.org.za/doc/Establishment-of-the-OCJ-2010-2013.pdf (last accessed 15 January 2018).

[76] The magistrates' courts do not have inherent power to regulate their own process. They are creatures of statute: see §6.2. The Rules Board makes the procedural rules of the magistrates' courts under s 6 of the Rules Board for Courts of Law Act. This ensures that their procedures are free from unwanted political interference. Because the magistrates' courts fall under the administrative jurisdiction of the relevant division of the High Court within whose seat the particular court is located, the SCA gives effect to the inherent jurisdiction of the High Courts to exercise control over the magistrates' courts.

[77] SCA, s 8(4)*(c)*. In particular, the Judge President has to ensure that the magistrates' courts abide by the Chief Justice's 'Norms and Standards for the Exercise of Judicial Functions' GN 147 in *GG* 37390 of 28 February 2014.

[78] The Department of Justice should, by and large, be responsible for the day-to-day court administration and the fiscal management of the small claims courts. However, like the magistrates' courts, the Judge President should ensure that the small claims courts abide by service delivery norms and standards. The involvement of the Judge President will boost the standing of the courts and he or she can take up issues facing the courts within his or her district.

[79] See §4.7.

(d) Security of tenure

What is particularly egregious is that the Minister of Justice has the ultimate power to hire and to fire commissioners. This is in sharp contrast to the position in the superior courts where s 174 of the Constitution applies, and in the magistrates' courts, where the Magistrates Act is applicable. For the superior courts, the Judicial Service Commission ('JSC')[80] is required to investigate, deliberate and recommend candidates to the President for appointment to the bench.[81] In the case of magistrates, the Minister can only appoint a magistrate to the bench after he or she has consulted with the Magistrates Commission.[82] To relieve a superior court judge or a magistrate from active duty for misconduct, inefficiency or incapacity, the JSC[83] or the Magistrates Commission,[84] as the case may be, must investigate the judicial officer concerned. Upon conclusion of the investigation, the JSC or the Magistrates Commission must make the appropriate recommendation to the Minister who is tasked, if impeachment is recommended, to obtain a resolution from Parliament.[85] None of these safeguards extends to small claims court commissioners.

(e) Are commissioners judicial officers?

Commissioners are not appointed like other judicial officers. By tradition,[86] the provincial law societies or the bar councils nominate their members for appointment as commissioners on the invitation of the Department of Justice. After the nominations are received, the Minister of Justice, if he or she determines the nominee to be suitable, makes the appointment.[87] Nothing precludes a legal practitioner or academic who meets the criteria for appointment from

[80] Established in terms of the Judicial Service Commission Act 9 of 1994.
[81] For the JSC's appointments process see Andrews 'The Judiciary in South Africa: Independence or Illusion?' in Dodek, Sossin (eds) *Judicial Independence in Context* 480-482. See also Procedure of the Judicial Service Commission GN T 423 *GG* 24596 of 27 March 2003.
[82] Magistrates Act, s 10.
[83] For the disciplinary procedures of the JSC see GN R864 *GG 35802* of 18 October 2012.
[84] For the process to be adopted by the Commission see GN R1240 *GG* 19309 of 1 October 1998.
[85] Constitution, s 177; Magistrates Act, s 17(4).
[86] This process evolved organically and is not mandated by the SCCA.
[87] SCCA, s 9.

petitioning the Minister directly. There is no legislative provision that requires the Minister to consult with any external body when appointing a commissioner drawn from the legal profession. Of course, when magistrates sit as commissioners, their appointment would have been conducted in terms of the Magistrates Act, and hence they would have undergone the appointment procedures in terms of that Act.

It could be argued that there is no need to appoint commissioners in an independent process that is similar to the manner in which magistrates are appointed because commissioners are not judicial officers per se, but lay volunteers. However, this argument is weak. Even though most commissioners are unremunerated volunteers, they perform a judicial function under the authority of the State. The small claims court is not a tribunal or some informal forum; *it is a court*. The SCCA spells this out. It is axiomatic from the Act that commissioners are dispensing civil justice. Their orders are final and binding and cannot be appealed.[88] An order of a small claims court is executable anywhere in the country, albeit through the judgment enforcement machinery of the relevant magistrate's court.[89]

Whether a presiding officer is in the formal employ of the State or not does not make a difference. In *All India Judges' Association v Union of India; State of Himachlal Pradesh v High Court of Himacha Pradesh; Shamsher Bahadur Singh v State of Bihar*, the Supreme Court of India stated:

> 'The judicial service is not service in the sense of "employment". The judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the state. They are holders of public offices in the same way as the members of the council of ministers and the members of the legislature. When it is said that in a democracy such as ours, the executive, the legislature and the judiciary constitute the three pillars of the state, what is intended to be conveyed is that the three essential functions of the state are entrusted to the three organs of the state, and each one of them in turn represents the authority of the state. However, those who exercise the state power are the ministers, the legislators and the judges, and not the members of their staff who implement or assist in implementing their decisions. The council of ministers or the political executive is different from the secretarial staff or the administrative executive which carries out the decisions of the political executive. Similarly, the legislators are different from the legislative staff. So also the judges from the judicial staff. The parity is between the political executive, the legislators and the judges and not between the judges and the administrative executive.... The judges at whatever level they may be, represent the state and its authority unlike the administrative executive or the members of the other services. The members of the

[88] Ibid s 45.
[89] See chapter 9.

other services, therefore, cannot be placed on a par with the members of the judiciary, either constitutionally or functionally.'[90]

The high office of a judicial officer does not derive from a contract of employment entrenching benefits and perks. A person acquires the status of judicial officer by virtue of his or her judicial function. Accordingly, the right to judicial independence attaches to a judicial office by virtue of its form and function.[91]

If one looks at the oath that a commissioner takes at the time of assuming office, one will note that it is virtually identical to the one taken by magistrates.[92] In it, the commissioner declares that he or she 'will administer justice to all persons alike without fear, favour, prejudice… in accordance with the laws and customs of the Republic of South Africa.'[93] The oath evidences that commissioners are judicial officers and that they are entitled to judicial independence.

Section 48 of the SCCA provides:

'(1) Any person who wilfully insults a commissioner during the session of his court, or a clerk or messenger or other officer present at that session, or who wilfully interrupts the proceedings of a court or otherwise misbehaves himself in the place where the session of a court is held, shall, without prejudice to the provisions of section 4(3), be liable to be sentenced summarily or upon summons to a fine not exceeding R500 or to imprisonment for a period not exceeding six months, or to such imprisonment without the option of a fine.

(2) When a commissioner sentences any person under this section, he shall without delay transmit to the registrar of the [High Court] having jurisdiction for consideration and review by a judge in chambers, a statement, certified by him to be true and correct, of the grounds and reasons for the action taken by him, and shall also furnish to the person sentenced a copy of that statement.'

As regards the power to hold someone in contempt of court, the Constitutional Court (per Ackermann J) in *De Lange v Smuts*[94] held:

'[157] *The reluctance to confer powers of civil contempt upon institutions other than courts of law is not peculiar to our legal system. In the United Kingdom, as well, both the Legislature and the Courts have demonstrated an unwillingness to confer powers of civil contempt upon tribunals or agencies that are not courts of law. In the United States of America, as well, the Supreme Court has held that administrative agencies may not be given powers of coercive imprisonment*.

[158] It seems to me that there are sound reasons for the legislative and judicial reluctance, illustrated above, to extend powers of coercive imprisonment to institutions other than courts. Indefinite imprisonment for coercive purposes is potentially an extremely dangerous mechanism. Like imprisonment for punitive purposes, it is a form of deprivation of physical freedom which requires thorough procedural safeguards. Our Constitution provides detailed and careful procedures to be followed when a person is charged with a crime, including the requirement that the trial should take

[90] [1994] LRC 115 (SC) at 121c–h. See also Wallis 'Judges: Servants of Justice or Civil Servants?' (2012) *SALJ* 652ff.
[91] *De Lange v Smuts* supra [160].
[92] MCA, s 9(2)*(a)*.
[93] SCCA, s 9(9).
[94] Supra.

> place before an 'ordinary court'. Imprisonment for coercive purposes should be attended by substantially similar safeguards. *It is probably for this reason that institutions other than courts of law have generally not been granted the powers of coercive imprisonment by the Legislature.* This reluctance is embedded in an understanding of the nature of courts, on the one hand, and the requirements of appropriate procedural constraints upon the exercise of the power of coercive imprisonment, on the other.
>
> [159] The requirement that it is only a court, or an institution similar to a court, that may exercise powers that involve indefinite deprivation of liberty for coercive purposes is based not only on the nature of the officer presiding but also on the institution itself. *There can be no doubt that for the requirements of procedural fairness to be met, the presiding officer must be impartial and independent. Independence of a presiding officer is … assured by security of tenure and financial security. But the independence and impartiality of the presiding officer is only the first aspect of judicial independence. In addition to the independence and impartiality of the presiding officer, it seems to me that the institution or proceedings over which the officer presides must also exhibit independence and impartiality in the judicial sense.*'[95]

Some may argue that the issue of judicial independence is not that important in the small claims courts, as the courts cannot preside over matters involving the State. However, as will be shown in chapter 7, the issue of what constitutes the State for the purposes of the SCCA is a grey area. Furthermore, even if national, provincial or local government cannot sue and be sued in the small claims courts, individuals in the employ of the State can sue and be sued in their *personal* capacities. It is thus quite likely that undue influence could be exerted on a commissioner who is beholden to the position because it gives him or her status or notoriety in a community.

In the locus classicus case of *Valente v The Queen,*[96] the Canadian Supreme Court held that the notion that a judicial officer can be removed from office at someone's 'pleasure'[97] is incongruent with domestic and international[98] guarantees of judicial independence. The court stated:

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[95] Italics supplied.

[96] [1985] 2 S.C.R 673 (hereafter referred to as '*Valente*').

[97] Ibid [37]. The court at [35] drew attention to the views of Lord Denning –

> 'To these opinions on the importance of tradition as a safeguard of judicial independence may be added the following statement by Lord Denning in *The Road to Justice* (1955), at pp. 16-17:
>
> > "The County Court judges have some measure of protection but the stipendiary magistrates and the justices of the peace have no security of tenure at all. They hold office during pleasure....
> >
> > Nevertheless, although these lesser judges can theoretically be dismissed at pleasure, the great principle that judges should be independent has become so ingrained in us that it extends in practice to them also. They do in fact hold office during good behaviour and they are in fact only dismissed for misconduct. If any Minister or Government Department should attempt to influence the decision of any one of them, there would be such an outcry that no Government could stand against it."'

[98] Ibid [24].

> '…that the judge be removable only for cause, and that cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard. The essence of security of tenure [in terms of the Canadian Charter] is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.'[99]

In *Valente* the court, per Justice Le Dain, articulated the test for judicial independence as follows:

> 'Although judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions, it is sound, I think, that the test for independence for purposes of s. 11*(d)* of the Charter should be, as for impartiality, whether the tribunal may be reasonably perceived as independent. Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception. The perception must, however, as I have suggested, be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees.'[100]

The Constitutional Court has incorporated the *Valente* dicta into the South African jurisprudence on judicial independence.[101]

From the perspective of a reasonable layperson, the unbridled hiring and firing powers of the Minister of Justice entrenched in the legislation create a reasonable perception of bias and jeopardise the commissioner's ability to objectively dispense justice without fear, favour or prejudice.[102] It is submitted that the power given to the Minister to hire and fire commissioners at will is unconstitutional.

In the past, parliament was supreme, and the executive had almost untrammelled power to subdue the courts. Under the Constitution, this is no longer the case. The government is obliged to take steps to ensure the independence of the judiciary so that the latter can fulfil its functions without suspicion. The SCCA should be amended to firstly remove the offending provisions that impinge on the judicial independence of commissioners. Secondly, the independence of commissioners must be expressly entrenched in the legislation.

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[99] Ibid [31].
[100] Ibid [22].
[101] *De Lange v Smuts* supra [70]-[72].
[102] *President of the Republic of South Africa v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) para [35].

(f) Disciplining commissioners

The SCCA does not contain express provisions for disciplining commissioners for misconduct or inefficiency.[103] It appears that the Minister of Justice is responsible for this as well. How exactly he or she is expected to receive and deliberate on complaints is opaque. This vagueness is a further erosion of the independence of the small claims courts. It also raises access to justice issues, as citizens should be able to hold presiding officers accountable if their conduct brings the administration of justice into disrepute.

In the case of magistrates who serve as commissioners, the Magistrates Act and the Regulations[104] thereto would govern the process of disciplining them. One of the functions of the Magistrates Commission is to carry out misconduct investigations and to make recommendations to the Minister regarding the suspension and removal from office of magistrates. To this extent, the Regulations passed under the Act articulate the disciplinary process in considerable detail. It has to be noted that the Magistrates Act only deals with sitting magistrates. In the case of retired magistrates who serve as commissioners of small claims courts, the fall-back legislation would be the unsatisfactory SCCA.

A proper disciplinary process should be written into the SCCA. To this extent, regard can be had to either the Magistrates Act and the Regulations passed in terms thereof, or to the

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[103] Under the Regulations for Judicial Officers in Lower Courts, 1994 GN R361 *GG*15524 of 1 March 1994, a judicial officer can be held guilty of misconduct if he or she:

> '*(a)* is found guilty of an offence;
> *(b)* contravenes any provision of these Regulations;
> (*c)* contravenes the Code of Conduct, if there is one;
> *(d)* is negligent or indolent in the carrying out of his duties;
> *(e)* uses intoxicants or stupefying drugs excessively;
> *(f)* accepts, without the permission of the Minister, or demands in respect of the carrying out of or the failure to carry out his duties any commission, fee or pecuniary or other reward, not being the emoluments payable to him or her in respect of his duties, or fails to report to the Minister the offer of such a commission, fee or reward;
> *(g)* misappropriates or makes improper use of any property of the State;
> *(h)* absents himself or herself from his office or duty without leave or valid cause;
> *(i)* makes a false or incorrect statement, knowing it to be false or incorrect, with a view to obtaining any privilege or advantage in relation to his official position or his duties or to the prejudice of the administration of justice; or
> *(j)* refuses to execute a lawful order.'

[104] Complaints Procedure Regulations, 1998 GN R 1240 *GG* 193090 of 1 October 1998.

Sheriffs Act.[105] The Sheriffs Act empowers the South African Board for Sheriffs to establish a disciplinary committee, responsible for disciplining sheriffs against whom allegations of misconduct are laid.[106] If a Small Claims Courts Board is established – as proposed in chapter 4 – the Board must be empowered by legislation to address complaints against commissioners. It would be for the Board to establish a disciplinary committee and to make recommendations to the Minister for the suspension or removal of a commissioner. Alternatively, South Africa could follow the position taken in the Kenyan Small Claims Court Act, which provides:

> 'The provisions of the Judicial Service Act relating to the removal and discipline of Magistrates shall apply with necessary modifications to the discipline and removal of Adjudicators.'[107]

If one were to follow the Kenyan model, then the Magistrates Commission could be empowered to discipline commissioners. This model would make particular sense if the small claims courts were incorporated into the magistrates' courts.[108] Whatever model is adopted, the SCCA must make provision for a disciplinary process to foster judicial independence and to promote good governance and access to justice.

5.6 CONCLUSION

The small claims courts cannot operate without commissioners. They are integral to the success of the courts. What this chapter has shown is that there is a need for proper training of commissioners, especially at the time of appointment. Racial and gender diversity is essential to instil public confidence in the small claims courts. Improving the demographic profile of commissioners will also address language challenges in the courts.

The Hoexter Commission's model of holding court sessions after hours and on weekends, while laudable, does not make justice accessible to all people. The courts must function during normal office hours too. To achieve this, the small claims courts cannot be reliant on

[105] 90 of 1986.
[106] Ibid, s 18.
[107] Kenyan Small Claims Court Act, s 46.
[108] As proposed in §4.7.

volunteer practitioners only. The Department of Justice must employ more full-time commissioners or sitting magistrates to preside in small claims matters. This is especially relevant in the rural areas where there is a shortage of presiding officers. More should be done to persuade retired practitioners and magistrates to serve in the courts.

The SCCA must entrench the independence of commissioners. In this regard, thought must be given to the procedure for the appointment and dismissal of commissioners. Unconstitutional aspects of the SCCA must be repealed and replaced. A procedure must be laid out in the legislation for the disciplining of commissioners. The latter is essential to ensure accountability and service delivery in the small claims courts.

Finally, thought must be given to whether the term 'commissioner' should be retained. Given the chequered history of South Africa's lower court system, the presiding officer of the small claims court should be restyled with the appellation 'adjudicator'.

CHAPTER 6

JURISDICTION OF THE SMALL CLAIMS COURTS

6.1 INTRODUCTION

The rules of jurisdiction determine the competence of a court to hear a matter.[1] Unlike other rules of procedure, which are adjectival in nature, the rules of jurisdiction are substantive.[2] Consequently, they are governed by statute and the common law, and are not legislated by delegated legislation, such as rules of court. In so far as the rules of court deal with jurisdiction, the rules are only declaratory of the original legislation.

The time for determining jurisdiction is when the process initiating legal proceedings is served on the defendant.[3] Jurisdiction, once established, cannot generally be lost.[4]

Jurisdiction rules should not be taken lightly. If a litigant does not raise an objection to jurisdiction *in limine,*[5] the court may raise the issue of jurisdiction *mero motu* (i.e. of its own accord).[6] The effect of successfully raising jurisdiction as a legal issue is that the cause of action is abated.[7] The matter would have to start afresh in the court of correct jurisdiction. The effect of an abated matter is that prescription is deemed not to have been interrupted by the service of

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[1] *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1950 (2) SA 420 (A) at 424; *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd* 1987 (4) SA 883 (A) at 886D; *Ewing McDonald & Co Ltd v M & M Products Co* 1991 (1) SA 252 (A) at 256H; *Spendiff v Kolektor (Pty) Ltd* 1992 (2) SA 537 (A) at 551C; *Ndamase v Functions 4 All* 2004 (5) SA 602 (SCA) at 605H.

[2] Theophilopoulos 'Arresting a Foreign Peregrinus: *BID Industrial Holdings (Pty) Ltd v Strang* and a New Jurisdictional Lacuna' (2010) *Stell LR* 132 at 141.

[3] *Mills v Starwell Finance (Pty) Ltd* 1981 (3) SA 84 (N) at 89B–90H.

[4] Voet 5.1.64; *Mills v Starwell Finance (Pty) Ltd* 1981 (3) SA 84 (N) at 85; *Coin Security Group (Pty) Ltd v Smit* 1992 (3) SA 333 (A) at 344A–C; *Transnamib Bpk v Voorsitter, Nasionale Vervoerkommissie* 1993 (1) SA 457 (A) at 473A–J; Pistorius *Pollak on Jurisdiction* 12–14.

[5] The issue of jurisdiction is usually raised as point *in limine* (a preliminary procedural point). A court will not hear the merits of a case until it has ruled on the preliminary procedural point.

[6] *Wallace v Wood* (1883) 3 EDC 211; *Wienand v Goldschmidt* (1886) 5 EDC 257; *Stephan Brothers v Engelbrecht* (1894) 11 SC 248; *Garda v Bonato* 1913 TPD 810.

[7] W*illis v Cauvin* (1883) 4 NLR 97 at 98; *Riversdale Divisional Council v Pienaar* (1885) 3 SC 252 at 255; *Vidavsky v Body Corporate Sunhill Villas* 2005 (5) SA 200 (SCA) at 207C–F; *Geyser v Nedbank Ltd: In re Nedbank Ltd v Geyser* 2006 (4) SA 544 (W) at 547G–H; *Campbell v Botha* 2009 (1) SA 238 (SCA) at 243I–244A.

process.[8] It is, therefore, quite likely that a litigant may find himself or herself in a position of not being able to reinstitute an abated action in the court of correct jurisdiction, because prescription[9] has run its course.

In terms of the SCCA, a decision of the court is final and binding and not appealable.[10] A decision of the court may, however, be taken on *review*.[11] One of the grounds of review is the 'absence of jurisdiction on the part of the court.'[12] It is, therefore, important for a litigant to be cognisant of the rules of jurisdiction.

To deal with jurisdiction comprehensively, this chapter is divided into seven parts. Part I deals with several aspects. Firstly, it considers small claims courts as creatures of statute. Thereafter, a brief discussion of the relationship between jurisdictional rules and access to justice will ensue. This follows on from the more comprehensive treatment of the relationship between access to justice and the small claims courts in chapter 1 and hence, arguments that have already been made will not be repeated. Lastly, the concurrent jurisdiction of the magistrates' courts vis-à-vis small claims courts will be considered.

Part II looks at the monetary jurisdiction of the small claims courts and all aspects incidental thereto. Recommendations will be made for how to determine a 'small claim' in the future.

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[8] See in this regard *Ngqula v South African Airways (Pty) Ltd* 2013 (1) SA 155 (SCA) para [18].

[9] The Prescription Act 68 of 1969 governs prescription. The Act makes provision for two types of prescription: acquisitive and extinctive prescription. Extinctive prescription deals with the termination of civil causes of action on account of the passage of time. Chapter III of the Act sets out the time periods within which a claimant must institute a civil claim. The rules of prescription are also substantive in nature: *Bolton v Travelers Insurance Co* 475 F.2d 176 (5th Cir. 1973). In *Sun Oil Co. v Wortman* 486 U.S. 717, 736 (1988) (Brennan J concurring) the court held:

> 'The statute of limitations a State enacts represents a balance between, on the one hand, its substantive interest in vindicating substantive claims and, on the other hand, a combination of its procedural interest in freeing its courts from adjudicating stale claims and its substantive interest in giving individuals repose from ancient breaches of law.'

[10] Act 61 of 1984, s 45.

[11] SCCA, s 46.

[12] SCCA, s 46 (a).

Parts III and IV will critically analyse ss 12-24 of the SCCA, with reference to causes of action that the small claims courts are competent to hear (part III), and jurisdiction in respect of persons (part IV).

The discussions in parts II, III and IV are consonant with the general *three-step approach* to determining the jurisdiction of the small claims court. When confronted with the question of whether the small claims court has jurisdiction to entertain a matter, a litigant will invariably ask three questions:

(a) Does the claim fall within the monetary jurisdiction of the small claims court? – Part II.

(b) If the claim falls within the monetary jurisdiction of the small claims court, does the court have jurisdiction to entertain the cause of action? – Part III.

(c) If the claim falls within the monetary jurisdiction of the small claims court, and the court can entertain the cause of action, which local territorial small claims court should the matter be taken to? – Part IV.

Part V will look at the constitutional jurisdiction of the small claims courts. The constitutional jurisdiction of small claims courts has not been canvassed in the literature. This may be so because the court has limited constitutional jurisdiction. However, the impact of s 39(2) of the Constitution requires examination.

In all of the discussions that follow, problematic aspects of jurisdiction will be identified, and recommendations for reform will be made.

By way of comparative analysis, part VI will look at the jurisdictional rules of the Kenyan Small Claims Court Act.[13] The Act marks a refreshing addition to African procedural jurisprudence. A discussion of its jurisdictional features is thus warranted. Part VII concludes the chapter.

[13] 2 of 2016 (hereinafter referred to as the 'Kenyan Small Claims Court Act').

PART I

GENERAL CONSIDERATIONS

6.2 SMALL CLAIMS COURTS ARE CREATURES OF STATUTE

In terms of the common law, lower courts lack *inherent jurisdiction.*[14] All courts at magistrates' courts level and lower (such as small claims courts) are regarded as *creatures of statute*. Inherent jurisdiction is reserved for the superior courts (the High Courts, the Supreme Court of Appeal and the Constitutional Court).[15] As such, the superior courts are generally empowered to hear any matter and make any order, unless limited by law.[16] They may also regulate their own process where the interest of justice so requires.[17] As creatures of statute, lower courts are limited by the powers specifically conferred on them by their empowering legislation. This phenomenon has caused commentators and courts to pronounce that the jurisdiction of the

[14] See generally *Connolly v Ferguson* 1909 TS 195 at 198; *Bosiu v Landdros, Marquard* 1959 (1) SA 81 (O) at 87F; *Hatfield Town Management Board v Mynfred Poultry Farm (Pvt) Ltd* 1963 (1) SA 737 (SR) at 739E–F; *Samuel v Pagadia* 1963 (3) SA 45 (D) at 48C; *Hydromar (Pty) Ltd v Pearl Oyster Shell Industries (Pty) Ltd* 1976 (2) SA 384 (C) at 386H–387A; *Gqalana v Knoesen* 1980 (4) SA 119 (E) at 120; *Mason Motors (Edms) Bpk v Van Niekerk* 1983 (4) SA 406 (T) at 409D–F; *Suid-Westelike Transvaalse Landbou Koöperasie v Kotze* [2000] 1 All SA 170 (NC) at 174d–e; *Narodien v Andrews* 2002 (3) SA 500 (C) at 514E–F; *B v B* 2008 (4) SA 535 (W) at 543C–E.

[15] Section 173 of the Constitution provides:

> 'The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

The phrase *inherent power* means the same thing as *inherent jurisdiction:* see Harms *Civil Practice in the Superior Courts* Vol I (Issue 56) A3.2.

[16] Cilliers, Loots, Nel *Herbstein and van Winsen*: *The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa* (hereinafter referred to as '*Herbstein & Van Winsen*') 49 state:

> '... whereas inferior courts may do nothing which the law does not permit, superior courts may do anything that the law does not forbid.'

See also *Connolly v Ferguson* 1909 TS 195 at 198.

[17] *Universal City Studios Inc v Network Video (Pty) Ltd* 1986 (2) SA 734 (A); *Krygkor Pensioenfonds v Smith* 1993 (3) SA 459 (A); *White v Moffett Building & Contracting (Pty) Ltd* 1952 (3) SA 307 (O); *California Spice and Marinade (Pty) Ltd* [1997] 4 All SA 317 (W); *Soller v Maintenance Magistrate, Wynberg* 2006 (2) SA 66 (C); *Carmel Trading Company Limited v Commissioner for the South African Revenue Services* 2008 (2) SA 433 (SCA).

lower courts is limited to the four corners of their empowering legislation.[18] Erasmus[19] succinctly states the position:

> 'The magistrate's court[20] is a creature of statute[21] and has no jurisdiction beyond that granted by the statute creating it. It has no inherent jurisdiction such as is possessed by the superior courts and can claim no authority which cannot be found within the four corners of its constituent Act.'[22]

As creatures of statute, lower courts are also bound by all *delegated* legislation governing them. As such, they are bound by rules of court created by a delegated authority in terms of any empowering legislation.[23] As far as small claims courts are concerned, commissioners are constrained by the provisions of not only the SCCA, but also the SCCRs governing the courts. If the rules are deemed to be *ultra vires* or unconstitutional, the court must either proceed with

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[18] *Mabaudi v Mhora* (CIV(A) 427/05) [2011] ZWHHC 60 (03 March 2011) the court held:

> 'It has repeatedly been stated that the magistrates court is a creature of statute and has no jurisdiction beyond that granted by statute. It has no inherent jurisdiction such as is possessed by the superior courts and may claim no authority which cannot be found within the four corners of its statute.'

[19] As cited in Van Loggerenberg *Jones and Buckle: The Civil Practice of the Magistrates' Courts of South Africa* Vol 1 at 32 (hereinafter be referred to as '*Jones & Buckle*').

[20] The statement is apposite to small claims courts as well, as they, too, fall within the lower court tier.

[21] De Vos 'Jones & Buckle: The Civil Practice of the Magistrates' Courts in South Africa I: The Act and Jones & Buckle: The Civil Practice of the Magistrates' Courts in South Africa II: The Rules' (2012) *Stell LR* 408 at 409-410 argues that the description 'creatures of statute' in relation to magistrates' court is correct. But he cautions that: '[T]he use of the phrase "creatures of statute" to describe the jurisdiction of the magistrates' courts in the context of contrasting them with the superior courts may lead to a wrong perception. In his view this definition creates the impression that the superior courts are not creatures of statute, which he holds is incorrect. Each one of the High Courts in South Africa, dating back to the Supreme Court in the Cape, which was established by the First Charter of Justice of 1827, was "a creation of a statute" (see *Chunguete v Minister of Home Affairs* 1990 (2) SA 836 (W) 842H; HR Hahlo & E Kahn *The Union of South Africa: The Development of its Laws and Constitution* (1960) 205-206). Furthermore, de Vos goes on to state:

> '[T]he concept "inherent jurisdiction" is also used in a somewhat ambiguous way. The perception is created that it is a kind of general jurisdiction, which is also not correct. In *Chunguete*'s case Flemming J (as he then was) subjected the High Court's innate or general jurisdiction, which includes its inherent jurisdiction, to a thorough analysis and concluded that the latter power, in terms of which the courts can *inter alia* regulate their own process, is confined to the "procedural field" (*Chunguete v Minister of Home Affairs* 1990 (2) SA 836 (W) 847E). This position has of course been changed by section 173 of the Constitution of the Republic of South Africa, 1996 ("the Constitution") by virtue of which a High Court is also empowered to "develop the common law". Needless to say, the concept "common law" is wide enough to include both procedural and substantive law. This, in my view, does not detract from the essence of the court's inherent jurisdiction, as a power to be exercised in the procedural field. The Constitution has simply added another dimension to the court's inherent jurisdiction, which is to adapt procedural and substantive common law when necessary.
>
> It seems that what the definition tries to convey by using the concept "inherent jurisdiction" is that the general jurisdiction of the High Courts is much more extensive than that of the magistrates' courts. That is of course correct but the true reason for this distinction is that the creating statutes of the High Courts created a far broader, almost unrestricted kind of general or innate jurisdiction than what was achieved with the Magistrates Courts' Act (see *Chunguete v Minister of Home Affairs* 1990 (2) SA 836 (W) 842I-843C).'

[22] Underline supplied. The word 'Act' in the above statement should be replaced with the word 'legislation'. It is common cause that as creatures of statute, inferior courts are also bound by all delegated legislation governing them: *Tshisa v Premier of the Free State* 2010 (2) SA 153 (FB) at [11] and the authorities there cited.

[23] *Tshisa v Premier of the Free State* 2010 (2) SA 153 (FB) at [11]; Paleker 'Civil Procedure of the Magistrates' Courts' Vol 5 (Third Reissue) *Law of South Africa* §363 (hereinafter referred to as '*LAWSA')*.

the matter as if there is no issue with the rule, or refuse to hear the matter on the basis that it is too complicated for the court to hear.[24] Unlike the HCRs, the SCCRs do not give the commissioner any discretion to relax the application of the rules.[25] The lack of discretion is consonant with the idea that lower courts – as creatures of statute – are precluded from regulating their own processes. Therefore, in essence, small claims courts are strictly bound by the SCCA and SCCRs.[26]

6.3 JURISDICTION AND ACCESS TO JUSTICE

As mentioned in chapter 1, the impact of the Constitution, and more specifically, the Bill of Rights[27] on court procedure has been canvassed in many cases. Courts are concerned about litigation rules that are irrational, contradictory and/or unduly technical, for this impacts on access to the courts[28] and the right to equal treatment before the law.[29]

The rules of jurisdiction must be subject to constitutional scrutiny and vigilant assessment. They are not benign rules; they act as gatekeepers to litigants accessing the courts. It is trite that a court will not consider the merits of a case if it is established that the court does not have jurisdiction.[30] Raised as points *in limine,* jurisdiction rules can prevent litigants from obtaining the ear of the court.

For a long time, there was a lack of critical engagement with the rules of jurisdiction in the lower courts. It is submitted that it is more urgent than ever for the rules of jurisdiction of the lower courts to be debated. As courts of first access for the general public, the lower courts play a fundamental role in securing the rule of law. As a cheaper alternative to the superior courts,

[24] The small claims court does not have jurisdiction to declare legislation (even delegated) *ultra vires* or unconstitutional. See the discussion in Part V.
[25] See in this regard HCR 27(3) and MCR 60(9). See also further discussion in §8.6.
[26] *LAWSA* §363.
[27] Constitution, Chapter 2.
[28] Constitution, s 34.
[29] Constitution, s 9(1)..
[30] Theophilopoulos 'Constitutional Transformation and Fundamental Reform of Civil Procedure' (2016) *TSAR* 68 at 77.

the lower courts play an important role in preventing self-help, anarchy and mob justice. If it is difficult for people to access the courts, they are precluded from having their disputes resolved by peaceful means.[31]

6.4 JUDGMENT OF THE SMALL CLAIMS COURT IS ENFORCEABLE ANYWHERE IN THE REPUBLIC VIA THE EXECUTION MACHINERY OF THE MAGISTRATES' COURTS

Under the SCA[32] and the MCA,[33] the effect of suing in any High Court or magistrate's court of competent jurisdiction is that the judgment of the court is enforceable anywhere in the Republic. The SCCA does not contain a similar provision. The reason for this is that a judgment of a small claims court, while final and binding, cannot be executed through its own machinery. If the judgment debtor does not voluntarily settle the judgment creditor's claim, then according to s 41(1) of the SCCA, the claim must be enforced 'by execution in the magistrate's court having jurisdiction in accordance with the provisions of the Magistrates' Courts Act… and the judgment creditor may proceed as if the judgment was granted in the magistrate's court.' Once a matter is transferred to a magistrate's court for execution, the judgment is deemed to have originated in the magistrate's court. Consequently, ss 4(3) and 4(4) of the MCA take effect:

> '(3) Every process issued out of a court shall be in force throughout the Republic.
> (4) Any process issued out of any court may be served or executed by the [sheriff] of the court appointed for the area within which such process is to be served or executed.'

6.5 THE MAGISTRATES' COURTS RETAIN CONCURRENT JURISDICTION

The small claims courts do not have exclusive jurisdiction. The magistrates' courts have concurrent jurisdiction to hear any matter that falls within the small claims courts'

[31] *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC) at [22].
[32] SCA, s 42(2).
[33] MCA, s 4(3)-(4).

jurisdiction.[34] It must be noted that any term in an agreement to oust the jurisdiction of the small claims court to hear a matter that falls within the court's jurisdiction is void.[35]

The plaintiff, as the principal litigant, has the exclusive right to decide whether he or she wishes to sue in the small claims court, or in a magistrate's court.[36] The decision to bypass the small claims court comes at no peril to the plaintiff. He or she cannot, for example, be penalised for ignoring the small claims court by being prevented from recovering costs in the magistrate's court.[37] This situation is undesirable and requires legislative intervention because the idea of courts having vertical concurrent jurisdiction is archaic and holds little practical value.[38]

PART II

MONETARY JURISDICTION

6.6 THE MONETARY JURISDICTION OF SMALL CLAIMS COURTS

At present the monetary jurisdiction of the small claims courts is R15 000.[39] The monetary jurisdiction of the court is subject to several miscellaneous provisions contained in the SCCA. By and large, these miscellaneous provisions were incorporated wholesale from the MCA.

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[34] SCCA, s 24(1).
[35] SCCA, 24(2).
[36] *LAWSA* §401. See also *Report* 198 §(i).
[37] The courts have held that if the magistrates' courts have jurisdiction to hear a matter and the plaintiff takes the matter to the High Court, the High Court can discourage the approach by making an appropriate costs order against the plaintiff. The costs order could include the recovery of costs on the magistrates' courts tariffs. See in this regard: *Standard Credit Corporation Ltd v Bester* 1987 (1) SA 812 (W) at 819D; *Mofokeng v General Accident Versekering Bpk* 1990 (2) SA 712 (W); *McGlashan v Bush* 1932 WLD 89 at 93; *Van der Lith's Estate v Kruger and Van der Lith* 1932 TPD 81 at 82; *Hunt v Campbell* 1945 WLD 1 at 4. A similar position does not hold true for small claims courts as legal costs cannot generally be granted in the small claims courts. See SCCA, s 37.
[38] Pound 'The Causes of Popular Dissatisfaction with the Administration of Justice' (1906) 40 *American Law Review* 729.
[39] GN 185 in *GG* 37450 of 18 March 2014.

(a) Abandonment

The SCCA permits a plaintiff to abandon a portion of his or her claim in order to bring the claim within the monetary jurisdiction of the court. Section 18 of the SCCA provides:

> '(1) In order to bring a claim or counterclaim within the jurisdiction of a court, a party may in his [or her][40] summons or statement of defence, or at any time thereafter, explicitly abandon a part of that claim or counterclaim.
> (2) That part of a claim or counterclaim so abandoned, shall thereby be extinguished: Provided that if the claim or counterclaim is granted in part only, the abandonment shall be deemed first to apply to that part of the claim or counterclaim which was not granted.'

Where a portion is abandoned, the plaintiff is still required to prove the *full claim*. In so far as the full claim cannot be proved, the amount not proved will first be deducted from the abandoned portion.[41] This is to the plaintiff's advantage and is explained as follows:

> 'Where part of a claim is abandoned …, it is fully extinguished. If, however, the claim is upheld in part only, the abandonment is deemed first to take effect upon that part of the claim that is not upheld. The effect of these provisions is that part of the plaintiff's claim which is not upheld must be subtracted from the part of the claim which has been abandoned. Thus, for example, where a plaintiff has suffered damages in the sum of [R17000], but the claim was reduced to [R15000] to bring it within the court's jurisdiction and on an apportionment of damages, the plaintiff is held to be entitled to only 20% of his or her damages, the plaintiff will be entitled to judgment in the sum of [R3400] [being 20% of R17000]. Conversely, where a plaintiff proves damages in excess of [R15000], judgment will be limited to R15000. Stated differently, the plaintiff will recover [R15000] or whatever he or she proves, whichever is the lesser amount.'[42]

(b) Interest and costs

Interest accrued on a claim or costs associated with the litigation are not considered in the calculation of the value of the claim. Thus, if a claim is for R15 000 plus costs, the claim will still fall within the jurisdiction of the court. Furthermore, any claim for 'general or alternative relief' is not taken into account.[43]

As a general rule, the small claims courts do not order costs. However, s 37 of the SCCA makes provision for very few instances when costs can be awarded:

> 'Costs awarded in terms of this Act may only include –
> *(a)* court fees;

[40] The SCCA refers to the gender pronoun 'he'. In conformity with modern drafting trends, a future version of the Act must be gender sensitive.
[41] The provision is identical to s 38 of the MCA. For an interpretation of that section see: *LAWSA* § 58.
[42] *LAWSA* §394. The numerical values in the example have been adapted to take into account the current monetary jurisdiction of the small claims courts.
[43] SCCA, s 17(3).

(b) the prescribed amount for the issue of the summons;
(c) the fees and travelling expenses of the [sheriff][44] of the court.'[45]

The reference to 'general or alternative relief' refers to the salutary prayer contained in pleadings for 'further and/or alternative relief' and does not refer to specific relief contained therein.[46]

(c) Deduction of an admitted debt

Aside from abandonment, the SCCA also makes provision for the deduction of an admitted debt so as to bring a claim within the monetary jurisdiction of the small claims court. Section 19 provides:

> 'In order to bring a claim or counterclaim within the jurisdiction of a court a party may, in his [or her] summons or statement of defence or at any time thereafter, deduct from his [or her] claim or counterclaim, whether liquidated or unliquidated, any amount admitted by him to be due by him [or her] to the other party concerned.'[47]

The practical effect of a deduction, and the advantages and pitfalls of a deduction over an abandonment, are succinctly explained as follows:[48]

> '…where a plaintiff's claim is for [R20 000] and the defendant has a potential counterclaim for R5000, the plaintiff may deduct R5000 in respect of the latter, in order to bring his or her claim within the court's jurisdiction. If the plaintiff proves his or her claim in full and the defendant proves R5000, the plaintiff will recover [R15 000]. However, should the plaintiff only be able to prove, say, R10 000, the amount deducted by the plaintiff (R5000) is deducted from that amount and not from the higher amount or amounts [and hence the plaintiff will only receive R5000 at the end of the day].
>
> The question whether a plaintiff should abandon part of his or her claim or admit and subtract a potential counterclaim, could, depending on the circumstances, be of great importance. For example: P abandons R1000 in order to bring her claim of [R16000] within the jurisdiction of the court, and D counterclaims for R1000. If both parties prove their claims in full, P will get judgment for [R14000]. Should P, however, admit that she owes D R1000 and deduct this amount from her claim, she would be entitled to judgment of [R15000]. There are no hard and fast rules. Depending on the circumstances, it may be more advantageous to choose the one route instead of the other.'[49]

Even though the above practical illustrations are helpful in terms of highlighting the differences between a deduction and abandonment, they require clarification. They seem to create the

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[44] The Act refers to the 'messenger' of the court. All references to the 'messenger' of the court must be read as the 'sheriff' of the court. See in this regard Sheriffs Act 90 of 1986. The SCCA thus requires amendment.
[45] See SCCRs, Annexure 2.
[46] See *Jones & Buckle* (service 10) Act259. See also *Combustion Technology (Pty) Ltd v Technoburn (Pty) Ltd* [2002] JOL 10218 (C).
[47] This provision is identical to s 39 of the MCA.
[48] *LAWSA* §395.
[49] The numerical values in the example have been adapted to take into account the current monetary jurisdiction of the small claims court.

impression that the plaintiff may only deduct what amounts to a counterclaim.[50] From the wording of s 19, it is clear that for a deduction to be considered one does not need a counterclaim. The party seeking to establish jurisdiction may deduct 'any amount admitted by him [or her] to be due by him [or her] to the other party concerned.' Thus, on a claim in respect of a sale agreement, the plaintiff may deduct an amount that is owing to the defendant in respect of a delict. While the latter claim is not a counterclaim, it is a claim that falls within the purview of s 19, and hence, the deduction will be allowed.

(d) Splitting of claims not permitted

Section 20 of the SCCA prohibits splitting of claims to bring a matter within the jurisdiction of the court. In a sale agreement consisting of a number of goods for example, one will not be able to break up what is essentially one sale into several mini sales.

(e) Cumulative Jurisdiction

A plaintiff may combine several different causes of action in one summons.[51] The heading of s 21 of the SCCA ('cumulative jurisdiction') is vague, but the effect of the section is that multiple actions can be brought in one summons, provided that they do not separately exceed the monetary jurisdiction of the small claims court. Thus, if a plaintiff has a contractual claim for R15 000 and a delictual claim for R15 000 against the same defendant, both actions can be brought in the same summons, and the court will adjudicate each matter separately.

(f) Consent to jurisdiction

Section 22 of the SCCA declares that the parties may not consent to confer jurisdiction on the court to hear a matter over which it would otherwise lack jurisdiction. This provision applies to all aspects of the jurisdictional rules.

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[50] See discussion on counterclaims below.
[51] *De La Koski v Bredell, Brown & Co* 1911 TPD 114 at 117; *Darby v Levinsohn* 1926 NPD 146 at 147; *Mahomed & Son v Mahomed* 1959 (2) SA 688 (T) at 691; *Marais v Du Preez* 1966 (4) SA 456 (E) at 457-458.

In contradistinction, s 45 of the MCA, while prohibiting the parties from consenting to a cause of action being heard in the magistrates' courts over which the courts do not have jurisdiction, allows parties by consent to extend the monetary jurisdiction of the magistrates' courts. Furthermore, s 45 allows parties to consent to the locality of a specific magistrate's court when proceedings have already been instituted or are about to be instituted.

It is submitted that the legislature is correct to prohibit consent from overriding the general jurisdiction of the small claims courts, whether relating to monetary jurisdiction or relating to cause of action. To allow consent to override the monetary jurisdiction of the court would lead to an abuse of process. It would overburden the courts and undermine their ethos of affording assistance to litigants with *small claims*. However, in so far as the legislature excludes the possibility of parties consenting to the jurisdiction of a specific court, it is submitted that the Act should be amended to make such consent possible. The Act should be amended in a manner that will enable parties, as a matter of convenience, to consent to the jurisdiction of a particular court at the time when the proceedings have been instituted or are about to be instituted. Prior consent[52] should not be permitted as this might result in abuse.

It must be acknowledged that the legislature is currently in the process of amending s 45 of the MCA. According to s 3 of the Courts of Law Amendment Act,[53] s 45 of the MCA will be amended as follows:

> '3. Section 45 of the Magistrates' Courts Act, 1944, is hereby amended—
> *(a)* by the substitution for subsection (1) of the following subsection:
> ''(1) **[Subject to the provisions of section forty-six, the court shall have jurisdiction to determine any action or proceeding otherwise beyond the jurisdiction if the parties consent in writing thereto: Provided that no court other than a court having jurisdiction under section twenty-eight shall, except where such consent is given specifically with reference to particular proceedings already instituted or about to be instituted in such court, have jurisdiction in any such matter]** Subject to the provisions of section 46, the parties may consent in writing to the jurisdiction of either the court for the district or the court for the regional division to determine any action or proceedings otherwise beyond its jurisdiction in terms of section 29(1).''; and
>
> *(b)* by the addition of the following subsection:

[52] For example, consent contained in an agreement.
[53] 7 of 2017.

> ''(3) Any consent given in proceedings instituted in terms of section 57, 58, 65 or 65J by a defendant or a judgment debtor to the jurisdiction of a court which does not have jurisdiction over that defendant or judgment debtor in terms of section 28, is of no force and effect.''.'[54]

The explanatory memorandum to the Act explains the justification for the amendment as follows:

> 'This clause seeks to amend section 45 of the MCA which deals with consent to the jurisdiction of a court. Clause 3 seeks to provide that parties can consent to the jurisdiction of a magistrate's court to determine causes of action otherwise beyond its jurisdiction in terms of section 29(1). Either the district or regional division of the magistrate's court may deal with an action otherwise beyond its jurisdiction if the parties consents [*sic*] in writing to the jurisdiction of such district or regional division of the magistrate's court. A new subsection (3) stipulates that consent given in proceedings in terms of sections 57, 58, 65 and 65J of the MCA to the jurisdiction of a court which does not have jurisdiction over the defendant or judgment debtor is of no force and effect. Although the original purpose of section 45 was to allow parties to consent to the jurisdiction of a lower court where the amount of the claim exceeded the monetary jurisdiction of the lower court, the proviso in section 45 as it currently exists has been used to consent to the jurisdiction of a specific magistrate's court. In consenting to the jurisdiction of a specific magistrate's court, consumers are often required or find themselves consenting to the jurisdiction of a magistrate's court far away from where the consumer is either residing, carrying on business or employed. In consequence the consumer end up not being able to access [*sic*] such far away courts to challenge the order should the consumer wish to do so. In *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice And Correctional Services and Others*[55] the Court declared that section 45 does not permit a judgment debtor to consent in writing to the jurisdiction of a magistrate's court other than that in which the judgment debtor resides or is employed, in respect of the enforcement of a credit agreement to which the NCA applies.'

It is unclear from the proposed amendment and the accompanying memorandum whether the legislature intends to make it impossible in all circumstances for parties to consent to the jurisdiction of a particular magistrate's court. The memorandum suggests that the purpose of the amendment is to limit consent to the jurisdiction of a particular court: where the consent to judgment procedure applies (ss 57 and 58); where the clerk makes an order pursuant to an offer by a judgment debtor to pay off a judgment debt in instalments (s 65); in the case of emoluments attachment orders (s 65J); and where the National Credit Act[56] (the 'NCA') applies. The amendment viewed against the memorandum is thus confusing to understand. Be that as it may, it is submitted that the parties should be able to consent to the jurisdiction of a particular small claims court, the reason being that the mischief that the proposed amendment to s 45 seeks to address in the magistrates' courts is, by and large, not applicable to the small claims courts.

[54] Words in square brackets signify deletions from the existing provision, and words in underline signify insertions.
[55] 2015 (5) SA 221 (WCC).
[56] Act 34 of 2005.

The procedures in ss 57, 58, 65 and 65J of the MCA are not part of the small claims court procedure. In so far as one is permitted to sue in the small claims court – per s 15*(d)* of the SCCA – on a claim arising from a credit agreement as defined in the NCA, it is submitted that if one accepts the argument that will be made later (see part III) to the effect that the small claims courts should be precluded from hearing any claim that falls within the NCA, an amendment to s 22 of the SCCA to cater for consent to locality should be permitted. It must also be borne in mind that there are many more small claims courts today than there were in 1985.[57] Perhaps, the reason why the legislature did not introduce consent to locality in 1985[58] was on account of there being few pilot sites proclaimed when the courts were first introduced. Today, there are many sites.[59] Litigants should be free to voluntarily choose their small claims court on the basis of convenience and to override the territorial jurisdiction of the small claims court. This will save costs because people will not have to travel far to the seat of the court that has jurisdiction according to the rules, when there is a more convenient court close by.

(g) Counterclaim exceeding the jurisdiction of the court

According to s 47 of the MCA, where a defendant raises a counterclaim exceeding the monetary jurisdiction of the small claims court, the defendant is not obliged to abandon a portion of its claim or to deduct an admitted debt. The court is obliged to stay the action so that the claim in convention (main claim) and counterclaim can be brought in a court that has jurisdiction to hear both claims.[60] The difficulty, however, is that the SCCA does not contain a similar provision.

In *Swart v Sher,*[61] the plaintiff issued summons against the defendant in the small claims court for payment in terms of a contract of services. The defendant counterclaimed for the deposit that had been paid pursuant to the contract. He alleged that he was entitled to reimbursement as

[57] The small claims courts came into operation on 24 August 1985.
[58] See §3.3.
[59] See §3.8.
[60] MCA, s 41.
[61] 1987 (2) 454 (SE).

the plaintiff had performed defectively. The counterclaim exceeded the monetary jurisdiction of the small claims court. The commissioner hearing the case refused to stop proceedings, even though the defendant was able to show that he instituted proceedings in the magistrate's court, albeit after the plaintiff filed his claim in the small claims court. In an application to the High Court to interdict the commissioner (first respondent) from proceeding further, the court, per Zietsman J, held as follows:

> '[T]he mere allegation by a defendant in the small claims court that he intends bringing against the plaintiff a counterclaim for relief in excess of the small claims court's jurisdiction will not automatically lead to the stopping or staying of the proceedings brought by the plaintiff in the small claims court. There is no provision in the Small Claims Court Act 61 of 1984 or in the Rules made by the Minister in terms of s 25 of the Act (published under *Government Notice* R1893 in *Government Gazette* 9909 dated 30 August 1985) equivalent to s 47 of the Magistrates' Courts Act 32 of 1944. If a defendant has a counterclaim which exceeds the jurisdiction of the small claims court but which is in no way connected with the plaintiff's claim, and will not be affected by a decision made in respect of the plaintiff's claim in the small claims court, he will be able to bring his claim against the plaintiff in another court of competent jurisdiction. This will not, however, affect the jurisdiction of the small claims court in respect of the plaintiff's claim.
>
> However the position is… different where the respective claims of the parties are inter-related and depend upon a determination of the same issues. In such a case a decision in favour of the plaintiff on the plaintiff's claim in the small claims court may, on the principle of *res judicta*, prevent a court of higher jurisdiction from coming to a different conclusion on the same issues when considering the defendant's counterclaim. Similarly, a decision in favour of the defendant on the plaintiff's claim in the small claims court may prejudice any defence the plaintiff may thereafter wish to raise to the defendant's counterclaim in the higher court. The effect of such a decision could mean that the small claims court, in deciding on the plaintiff's claim, has at the same time determined the fate of the defendant's counterclaim which is a claim beyond its jurisdiction. A small claims court cannot determine claims beyond its jurisdiction even if all parties consent thereto (s 22 of the Act).
>
> It may be that a mere statement by a defendant that he has a counterclaim… against the plaintiff and that his counterclaim will require the determination of issues which are also relevant to the plaintiff's claim will not in itself be sufficient to stop or stay the proceedings in the small claims court, and that the commissioner will be required to satisfy himself that the defendant's statement is made in good faith and that he in fact intends bringing such a claim against the plaintiff in a court of competent jurisdiction. However, if, *prima facie*, the defendant satisfies him on these points he will in my opinion be obliged to stay or stop the proceedings in the small claims court in order to enable the defendant to bring his action against the plaintiff in the higher court. The plaintiff will then be able to advance his claim in that higher court in the form of a counterclaim.'[62]

From the dictum above, it is clear that before there is a stay of action, the commissioner has to make two enquiries. He or she must determine whether:

- The counterclaim is incidental[63] to the main claim (i.e. arising from the same law and facts); and

[62] Ibid 457B-J.
[63] For more discussion on *incidental* see Part IV § 7.15 (c)

- the defendant is acting in good faith in that he or she intends to bring an action in a court of competent jurisdiction.

In both instances, *prima facie* evidence is required, as opposed to clear evidence.[64]

In the interest of making the law accessible to the layperson, the court's approach to staying of actions should be entrenched in the SCCA.

6.7 METHODOLOGY FOR DETERMINING THE SMALL CLAIMS COURTS' MONETARY JURISDICTION

At their establishment, the small claims courts' monetary jurisdiction was relatively on par with the monetary jurisdiction of the magistrates' courts.[65] In fact, the Hoexter Commission proposed that the jurisdiction of the courts could be, but should not exceed, half the jurisdiction of the magistrates' courts.[66] As time passed, however, the jurisdiction of the magistrates' courts overtook the jurisdiction of the small claims courts by a large margin.

Table 1: History of the changes of the monetary jurisdiction of the Small Claims Courts vis-à-vis the district[67] magistrates' courts

Proclamation	Jurisdiction of the small claims courts	Jurisdiction of the magistrates' courts
Government Notice R. 185 in Government Gazette No. 37450 of 18 March 2014	R15 000	R200 000 at the time of proclamation and now R400 000
Government Notice 985 in Government Gazette No. 33696 of 27 October 2010	R12 000	R100 000
Government Notice No. R.313 in Government Gazette No. 26113 of 12 March 2004	R7000	R100 000

[64] *Swart v Sher* supra 458B.
[65] See §3.3.
[66] *Report* §13.2.
[67] In the past, the civil section of the magistrates' courts was not divided into district and regional courts. The distinction between district courts and regional courts was established with the coming into force of the Regional Courts Amendment Act 31 of 2008 on 9 August 2010. The current jurisdiction of the district court is R200 000 and the regional court from R200 000 to R400 000. When comparing the jurisdiction of the small claims courts to the magistrates' courts, the comparison must be made with district courts as they represent the entry level magistrates' courts. See also notes 73 and 74 below.

Government Notice No. R. 1402 in Government Gazette No. 16661 of 15 September 1995	R3000	R50 000
Government Notice No. R.4707 in Government Gazette No. 26113 of 30 May 1991	R2000	* R5000 liquid claims R3000 illiquid claims
Government Notice No. 900 in Government Gazette No.9209 of 2 May 1984	R1000	R5000 liquid claims R3000 illiquid claims

The present jurisdictional gap between the small claims courts and the district magistrates' courts is far too large and is perhaps the most significant obstacle to access to justice in the small claims courts. In this section two issues will be considered:

- The reasons why the jurisdiction of the small claims courts never kept up in relative terms with the jurisdiction of the magistrates' courts; and
- how to calculate the monetary jurisdiction of the small claims courts in the future.

(a) Reasons why the small claims courts' monetary jurisdiction is so low when compared to the magistrates' courts

The South African legal profession, like so many other professions within the country and elsewhere in the world, is by and large self-regulating. Even though there is some government oversight, the profession maintains its independence by self-regulation.[68] The government shows enormous deference to regulatory bodies within the legal profession, especially when it comes to making new policy or creating laws that affect professional standing and indeed, the work of the profession.

The legal profession vets all amendments affecting the courts and makes inputs to the relevant government agencies. A member of the legal profession may do so individually, or via his or her professional body tasked with deliberating or commenting on any new legislative or policy

[68] See Legal Practice Act 28 of 2014.

development. As a bloc, therefore, the legal profession is a very powerful lobby group. It is enormously protective of its turf in terms of preventing an encroachment on its core functions, reputation, and business opportunities.

On the surface, the legal profession has always welcomed an increase in the monetary jurisdiction of the small claims courts. On closer inspection, however, it is fair to say that the profession has always held its ground in terms of ensuring that any increase was measured and conservative. The profession has never openly petitioned for a dramatic increase in the small claims courts' jurisdiction. The reason for this, of course, is that legal representation is not permitted in the small claims courts. The wider one casts the net of small claims, the more business the profession is likely to lose. While the members of the profession have never used the 'loss of business' argument to prevent an increase in the jurisdiction of the courts, they have, as a matter of course, relied on logistical arguments to ensure that the courts' jurisdiction is conservatively increased.[69] They often argue that an increase in the monetary jurisdiction of the courts will overburden the courts with more work than the courts can realistically handle.[70]

The second reason why the monetary jurisdiction of the small claims courts has not kept up with the monetary jurisdiction of the magistrates' courts has to do with the way in which the tariff tables[71] were historically drafted by the Rules Board for Courts of Law[72] (the 'Rules Board') in the magistrates' courts. General Provision 1 of Part I of Table A of Annexure 2 of the MCRs currently provides:

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[69] See annual reports of the Law Society of South Africa: http://www.lssa.org.za/about-us/annual-reports (last accessed 1 March 2016) and in particular, the reports of the small claims courts' committee.

[70] See the discussion in chapter 4.

[71] The tariff tables are appended to the Magistrates' Courts Rules (Annexure 2) and the Uniform Rules of Court (Rule 70). They set out the tariffs which attorneys and advocates may charge clients on the lowest party-party basis. In the overwhelming majority of cases, a court will order the unsuccessful party (either plaintiff or defendant) to pay the winner's party-party costs. The winner will be compensated in terms of the tariff tables for the reasonable and necessary costs of litigation. Party-party costs make up roughly 60% of the cost of litigation. The other 40% will be recovered from the client and represents the difference between the party-party fee and what the legal representative is entitled to charge in terms of the fee agreement that the attorney has with the client. In South Africa, most attorneys charge on an hourly basis. For more information see Peté, Hulme, du Plessis et al *Civil Procedure – A Practical Guide* 290ff.

[72] For the powers and functions of the Rules Board for Courts of Law, see §3.4.

'When the amount in dispute is less than or equal to the amount of R7000 costs shall be taxed on Scale A; when the amount in dispute exceeds the amount of R7000, but is less than or equal to R50 000, costs shall be taxed on Scale B; when the amount in dispute exceeds R50 000, but is less than or equal to the maximum jurisdictional amount determined by the Minister from time to time in respect of the magistrates' courts for districts,[73] costs shall be taxed on Scale C; when the amount exceeds the maximum jurisdictional amount determined by the Minister from time to time in respect of magistrates' courts for districts and the process is issued out the magistrates' courts for a regional division[74] or when the matter is in respect of a cause of action in terms of s 29(1B)*(a)*[75] of the Act, costs shall be taxed on Scale D.'

To illustrate how scales A, B, C and D work, consider the following extract from the most recent table[76] of tariffs:

'Part III[77]

Defended Actions (and Interpleader Proceedings)

Item	Scale A R	Scale B R	Scale C R	Scale D R
1 Instructions to sue or defend or to counterclaim or defend a counterclaim, perusal of all documentation and consideration of merits and all necessary consultations to issue summons	R487,00	R647,50	R778,00	R1011,50
2 Summons	R244,50	R340,00	R406,50	R528,00
2A Particulars of Claim or Declaration	R244,50	R340,00	R406,50	R528,00
3 Appearance	R41,00	R41,00	R49,50	R64,00
4 Notice under rule 12(1)(b) and (2)	R41,00	R41,00	R49,50	R64,00
5 Plea	R244,00	R340,00	R406,50	R528,00
6 Claim in reconvention	R244,00	R340,00	R406,50	R528,00
7 Reply, if necessary	R244,00	R340,00	R406,50	R528,00
8 Drawing up of all documents not specifically mentioned, including request for further particulars, schedule of documents, all affidavits, subpoenas, any notice not otherwise provided for and drawing up of statements by witnesses	—	—	—	—
9 Production of documents for inspection, or inspecting documents, per quarter of an hour or part thereof of the time spent	R144,50	R144,50	R182,50	R235,50

…'

[73] Currently the district magistrates' courts' jurisdiction is R200 000: GN 217 in *GG* 37477 of 27 March 2014 with effect from 1 June 2014.
[74] Currently, the regional magistrates' courts' jurisdiction is R201 000-R400 000: GN 217 in *GG* 37477 of 27 March 2014 with effect from 1 June 2014.
[75] Section 29(1B)(a) concern matrimonial proceedings.
[76] This table reflects the tariffs as at 15 March 2017.
[77] Part III of Table A of Annexure 2 of the MCRs.

Under the tariff tables each aspect of litigation is itemised, and an appropriate fee is attached on the party-party[78] tariff. For a long time, Scale A of the tariff was linked to the monetary jurisdiction of the small claims courts. Hence, the current R7 000 reflects a time when the monetary jurisdiction of the small claims courts was set at that amount. As the jurisdiction of the small claims courts grew, Scale A was adjusted to reflect the change.

The effect of linking Scale A with the small claims courts' monetary jurisdiction was that a plaintiff who, as a matter of choice,[79] bypassed the small claims courts and instituted a claim in the magistrates' courts was only able to recover costs from the opposing losing[80] party on the lowest scale (Scale A) of the tariffs. The net result of this was an increase in the cost of litigation to the litigant. On a small claim, the cost to the litigant for legal representation in the magistrates' courts often exceeded what was recoverable from the other party.[81] Of course, this would have impacted negatively on litigants. Restraining the sudden and rapid increase in the monetary jurisdiction of the small claims courts was a mechanism by which the legal profession prevented more matters from falling into Scale A of the tariffs, thereby causing less prejudice to litigants who chose to sue in the magistrates' courts for small claims.[82]

In 2012, the Rules Board, quite correctly, decided to detach Scale A from the small claims courts' monetary jurisdiction. Consequently, the current value of Scale A (R7 000) is less than

[78] See the discussion in footnote 71 above.
[79] See discussion at §6.5.
[80] See the discussion in footnote 71 above for a discussion of the winner-takes-all-system of costs in South Africa.
[81] McQuoid-Mason 'Access to Justice in South Africa: Are there Enough Lawyers?' (2013) 3 *Oñati Socio-legal Series* 561 at 574.
[82] To illustrate the problem practically, take the following example: John (client) mandates Sally (attorney) to institute action against Wallace in respect of a motor vehicle accident. Sally informs John that she charges a professional fee of R1000 per hour. The value of the claim is R6500. Instead of suing in the small claims court, John as *dominus litis* decides to sue Wallace in the magistrates' court. Since the value of the claim is less than R7000, if John wins the case he will recover costs (party-party) from Wallace on Scale A of the tariffs. Thus he will recover from Wallace R244, 50 for the summons that was issued and served, for example. However, if it took Sally an hour to draft the summons, she will recover from her client, John, the difference between her fee and what was recovered from Wallace. It thus stands to reason that when a matter fall into Scale A of the tariffs, the winning party recovers less from the other party than would have been the case had the claim fell into Scales B or C. The legal profession thus had an interest to keep the threshold limit for claims falling into Scale A low, because if matters fell into that category, their clients would be prejudiced. Unfortunately, because Scale A was linked to the small claims jurisdiction, the legal profession opposed increases in the jurisdiction of the court for fear that the threshold limit for Scale A would also increase.

the present monetary jurisdiction of the small claims courts (currently set at R15 000). For as long as the magistrates' courts share concurrent jurisdiction[83] with the small claims courts, disconnecting Scale A from the small claims courts' monetary jurisdiction is rational and correct. If the legislature wants to discourage litigants from using the magistrates' courts in respect of claims that fall within the small claims courts' jurisdiction, it must do so directly.[84] To rely on indirect methods often results in unintended consequences.

The delinking of Scale A from the small claims courts' monetary jurisdiction serves as an invitation to the Department of Justice to increase the monetary jurisdiction of the small claims courts, as the negative impact of doing that on magistrates' court litigants is far less than what it was in the past. It is likely that, on account of the delinking, the Department of Justice might face less opposition from the legal profession to a substantial increase in the jurisdiction of the small claims courts. There is, in any event, a growing feeling in the country that the legal profession needs to do more to address access to justice concerns.[85] The small claims courts provide an ideal opportunity to address that sentiment.

(b) Calculating the monetary jurisdiction of the small claims courts

When calculating the monetary jurisdiction of the small claims courts, one may be inclined to compare the monetary jurisdiction of South African small claims courts with those in foreign jurisdictions. This is rather unhelpful and provides artificial results. On a survey of foreign jurisdictions, monetary limits range from a few hundred rand to many thousands of rands – after engaging in currency conversion. A numerical pattern is not discernible.[86] What is apparent is

[83] See §7.5.
[84] See discussion in §4.7.
[85] See generally chapter 3.
[86] Examples of small claims jurisdictional limits:
Kenya: In terms of Small Claims Court Act, small claims courts can hear matters up to Ks100 000. Section 11 authorises the Chief Justice to set limits and empowers him or her to set 'local limits'. For more discussion, see discussion at Part VI below.
England and Wales: England and Wales does not have a separate small claims court. Such claims are handled by the county court after being allocated to the small claims track of the county court system. Small claims take place under a special set of rules. Low-value cases, including most non-personal injury cases up to £10 000, are usually assigned to the small claims track, producing a small claims action in the county court. Consultation is underway

that the monetary jurisdiction of courts is governed by the prevailing socio-economic circumstances set against the general backdrop of the cost of litigation. It is submitted that within the South African context one must be governed by similar considerations.

Some may argue that the jurisdictional limit of the small claims courts must be determined by adjusting the courts' monetary jurisdiction by the inflation rate, or perhaps, the Consumer Price Index. It is submitted that these variables are not useful.

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on raising the limit to £15,000. It should be noted that the limit is only a guideline. The court may allocate a case to the small claim track where the claim is over the guideline if it is considered that the case is simple enough that it is an appropriate way of disposing of the matter.

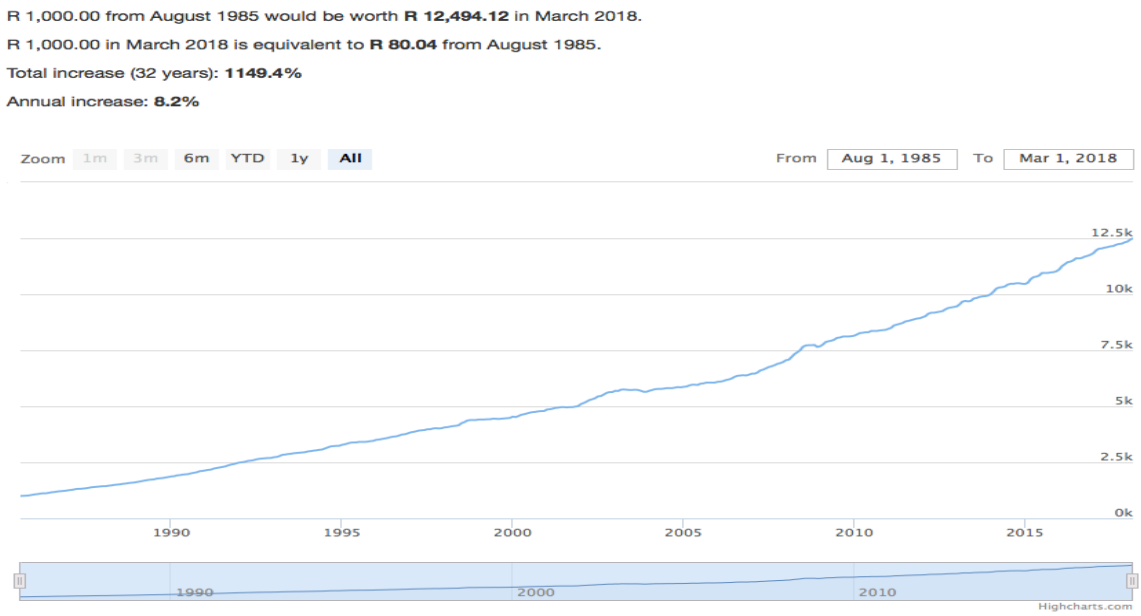
Australia: Northern Territory: A small claim is up to $25 000; Queensland: Queensland Civil and Administrative Tribunal deals with minor civil disputes, which involve amounts up to $25 000; South Australia: a minor claim is up to $25 000 in value; Western Australia: a minor claim involves a claim that does not exceed $10 000.

Brazil: Under Article Three of Law No. 9,099/1995, civil claims involving an amount up to 40 (forty) monthly minimal wages or R$ 24 880 (October 2012) may be filed before a Special Civil Court.

Canada: Nova Scotia: The maximum claim that may be recovered in the small claims court is $25 000; British Columbia: The maximum claim that may be recovered in the Small-Claims Division of the Provincial Court is $25 000; Manitoba: Small-Claims Courts adjudicate claims up to $10 000; New Brunswick: Small claims courts can adjudicate claims up to $12 500; Ontario: The limit for a small claim is $25 000; Quebec: Small-Claims Court can hear claims up to $ 15 000; Saskatchewan: The Civil Division of the Saskatchewan can hear small claims up to $ 20 000.

European Union: A European Small Claims Procedure for cross-border claims was established on 1 January 2009 for processing claims with values up to 2000 EUR.

Table 2: R1 000[87] adjusted according to the mean average inflation of 8.2%[88] from August 1985[89] to March 2018.

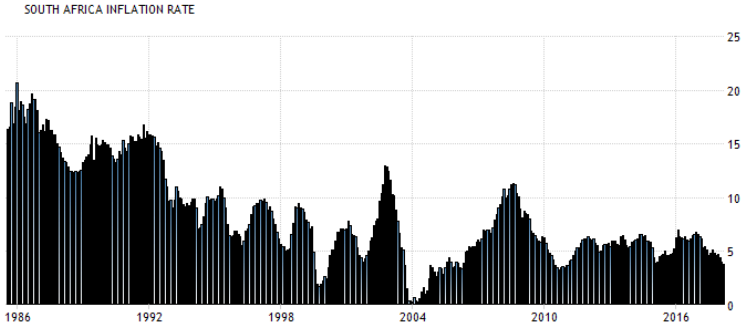


The above diagram illustrates inflation as a marker for determining the jurisdiction of the small claims courts. It is clear that if this marker is used, then the present jurisdiction of the courts exceeds the target. The current jurisdiction of the courts (R15 000) fares better than the projection of R12 500.

Inflation, or for that matter, the Consumer Price Index, should not be the marker for determining the jurisdiction of the court. These variables are valuable for determining the general cost of living. However, they are not useful for determining the cost of specialised services, such as

[87] R1000 was the commencement value of the small claims courts' monetary jurisdiction at the time of their establishment in 1985. See Table 1 above.

[88] The following diagram sets out the level of inflation for the period 24 August 1985 to 31 December 2016.



Source: Statistics South Africa.
South Africa's inflation rate reached an all time high of 20.70 percent in January 1986 and a record low of 0.20 percent in January of 2004.

[89] Small claims courts came into operation on 24 August 1985.

legal services. The jurisdiction of the court should be priced having regard to the market cost of litigation. The cost of litigation in South Africa is incredibly high and rivals the cost of litigation in many first-world countries. Rampant poverty and inequality[90] prevent many people from being able to access the courts. South Africa also has the problem of the 'missing middle'. The overwhelming majority of middle class people cannot access the courts and would also not qualify for state-sponsored legal assistance through the Legal Aid system.[91]

To use rigid financial indices to peg the small claims courts' jurisdiction is wrong. Some commentators may highlight that the Rules Board does in fact use the Consumer Price Index to update the tariffs of costs for the magistrates' courts, the High Court and the Supreme Court of Appeal. However, such an argument would miss the point that those tariffs relate to party-party costs,[92] recoverable from the unsuccessful party, and do not affect the 'reasonable and professional fees'[93] that practitioners can charge their clients over and above party-party costs. The 'reasonable and professional fees' are, by and large, unregulated in the traditional sense

[90] Winner of the Nobel Prize for Economics, Joseph Stiglitz writes in his book *The Price of Inequality* 29:

> 'More-equal societies have Gini coefficients of .3 or below. These include Sweden, Norway, and Germany. The most unequal societies have Gini coefficients of .5 or above. These include some counties in Africa (notably South Africa with its history of grotesque racial inequality) and Latin America–long recognized for their divided (and often dysfunctional) societies and polities.'

[91] Klaaren 'The Cost of Justice' (Unpublished Briefing Paper) writes:

> 'Legal services in South Africa are expensive, particularly for the poor. In 2005, AfriMAP concluded "the major barrier to access to justice in South Africa remains the high cost of legal services. ...[T]he average South African household would need to save a week's worth of income in order to afford a one-hour consultation with an average attorney." Things do not seem to have improved significantly. In 2013, Dugard and Drage reported that "[SERI] clients with a monthly income of R600 ... are frequently charged fees in the region of R 1,500 ... just for an initial consultation." (2013). Even in terms of High Court rules (which are often interpreted loosely) a 15-minute consultation may cost R177.50 and a page of drafting can be charged at R50... These fees restrict access to justice for the poor, especially civil justice which is largely not available from Legal Aid South Africa. These fees also restrict access to justice across the board for the not-so-poor, for instance persons in a household earning over R6000 a month and thus not qualifying for Legal Aid.'

According to Statistics South Africa 60% of South African workers earned a monthly salary of R4300 a month in 2014: Mojapelo 'Do 60% of South African workers earn less than R5,000 a month?' *Business Day* (23 March 2016); See also Gloppen *Social Rights Litigation as Transformation: South African Perspectives* Michelsen Institute 3,9. And see the discussion in chapter 1 about the 'missing middle' problem and the limitations of the Legal Aid system.

[92] See discussion at footnote 71 above.

[93] Practitioners determine their professional fees on an hourly rate depending on the complexity of a matter and the locality where the legal advice is sought. In the big city centres, legal services are more expensive. In Pretoria for example, the services of a candidate attorney would be in the range of R1500 per hour and the services of a partner in a firm would be as much as R6000 per hour: http://www.mcoetzeelaw.co.za/news-articles/25-the-cost-of-an-attorney-in-south-africa (last accessed 1 March 2017).

and depend on what the legal fraternity considers to be appropriate having regard to a myriad of considerations.[94] When determining their fees, members of the legal profession do not necessarily apply the Consumer Price Index or the rate of inflation. The profession often takes into account fluid considerations such as the cost of doing business in South Africa and other market-related forces[95] that impact on professional work.

To determine the jurisdiction of the small claims courts (and hence, when a claim can be considered a *small claim*), it is submitted that one has to work out the point at which it is not financially viable to sue in the magistrates' courts. In an instructive article, Judge Dunstan Mlambo, Judge President of the North and South Gauteng High Court, commented in 2012 that attorneys 'who act prudently and ethically will advise their clients not to take claims for less than R 43 000[96] to trial in the magistrates' courts'. The Judge concluded:

> 'Consequently, R 43 000 should be the jurisdictional limit of the Small Claims Courts. A more precise jurisdictional limit could be determined by research, including market research, but I trust that what is set out above is sufficient to demonstrate that a jurisdictional limit of R 7 000, or even R 12 000,[97] for the Small Claims Courts is inadequate.'[98]

It is axiomatic that Judge Mlambo made his recommendation based on the market cost of litigation and not on market-related indices such as the Consumer Price Index. Extensive market research with regard to the actual cost of litigation is needed to determine the jurisdiction of the small claims courts. Such research must be conducted regularly. It will also ensure that there is greater parity between the jurisdiction of the small claims courts and the district magistrates' courts, as was the case in 1985 when the small claims courts were established.

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[94] For the manner in which fees are determined for the advocates by the General Council of the Bar, see: http://www.sabar.co.za/GCB-UniformRules-of-Ethics-updated-July2012.pdf (last accessed 1 March 2017). For the manner in which fees are determined for the attorneys' profession see: http://capelawsoc.law.za/wp-content/uploads/2016/02/RulesForTheAttorneysProfessionMar2016-1.pdf (last accessed on 1 March 2017).

[95] Such as the availability of work, the level of competition and expertise needed to successfully practice in a particular legal area, and the seniority of the legal professional.

[96] Attorneys at a *Costs Indaba* held by the Rules Board for Courts of Law in February 2014 echoed similar sentiments. At the Indaba, an attorney representing one of the organising bodies of the profession went so far as to state that she advised clients not to sue in the magistrates' court if the claim was less than R80 000: M Manyathi-Jele 'Costs Indaba' *De Rebus* (April 2014) 14. See also Eramus 'Cost and Fee Allocation in Civil Procedure – Republic of South Africa' cited at http://www personal.umich.edu/~purzel/national_reports/South%20Africa.pdf (last accessed 24 November 2016).

[97] At the time when Judge Mlambo was writing the jurisdiction of the small claims court was R7000 and there was talk of increasing the amount to R12 000.

[98] Mlambo 'The reform of the Costs Regime in South Africa: Part 2' *Advocate* (2012) 22 at 29.

What we have today is an artificial determination of the monetary jurisdiction of the small claims courts, which does not promote access to justice. The small claims courts' monetary jurisdiction is out of kilter with the economic realities in the country.

It is submitted that having regard to the socio-economic realities in the country, the monetary jurisdiction of the small claims courts should be in the region of R60 000 to R80 000.[99]

6.8 TERRITORIAL JURISDICTION

The jurisdiction of the small claims courts is limited by territoriality. In terms of the SCCA, the area of jurisdiction of a court 'shall be the area or district for which it was established'.[100] As noted before,[101] the Minister of Justice may by notice in the Gazette –

> *'(a)* establish for any area consisting of one or more districts or a part of a district a court for the adjudication of claims in terms of this Act, called a small claims court;
> *(aA)* determine the seat of such a court…'

The effect of the above provision is that a litigant must sue in the court of appropriate territorial jurisdiction after applying the rules of jurisdiction. The purpose of territoriality is to ensure that litigants cannot forum shop and that the administration of justice is not hamstrung by inordinate amounts of claims being brought in certain courts, while other courts have little or no work.

PART III

CAUSE OF ACTION

6.9 MATTERS BEYOND THE JURISDICTION OF THE SMALL CLAIMS COURTS

Section 16 of the SCCA identifies several types of actions that small claims courts cannot hear. The section provides:

> 'A court shall have no jurisdiction in matters –
> *(a)* in which the dissolution of any marriage, or of a customary union as defined in section 35 of the Black Administration Act, 1927 (Act 38 of 1927), is sought;
> *(b)* concerning the validity or interpretation of a will or other testamentary document;

[99] §This amount is motivated by the discussion in notes 91, 93, 94, 96 above.
[100] SCCA, s 12.
[101] See chapter 4.

(c) concerning the status of a person in respect of his mental capacity;
(d) in which is sought specific performance without an alternative claim for payment of damages, except in the case of-
(i) the rendering of an account in respect of which the claim does not exceed the amount determined by the Minister from time to time by notice in the Gazette;
(ii) the delivery or transfer of any property, movable or immovable, not exceeding in value the amount determined by the Minister from time to time by notice in the Gazette determined for the purposes of this section;
(e) in which is sought a decree of perpetual silence;
(f) in which is sought damages in respect of –
(i) defamation;
(ii) malicious prosecution;
(iii) wrongful imprisonment;
(iv) wrongful arrest;
(v) seduction;
(vi) breach of promise to marry;
(g) in which an interdict is sought.'

(a) Section 16(a): 'in which the dissolution of any marriage, or of a customary union as defined in section 35 of the Black Administration Act, 1927 (Act 38 of 1927), is sought'

Only the High Courts and the regional magistrates' courts may grant divorce orders under the Marriage Act,[102] the Recognition of Customary Marriages Act[103] or the Civil Union Act.[104] They may also hear nullity suits.[105] The district magistrates' courts are precluded from hearing such actions. Section 16*(a)* is thus in keeping with the hierarchical structure of the courts with regard to status matters.[106]

Section 35 of the Black Administration Act[107] has been repealed.[108] The words '*or of a customary union as defined in section 35 of the Black Administration Act, 1927 (Act 38 of 1927)*' are thus meaningless and should be deleted from the provision.

[102] Act 25 of 1961.
[103] Act 120 of 1998.
[104] Act 17 of 2006.
[105] MCA, s 29(1B).
[106] See generally Pistorius *Pollak on Jurisdiction* (1993) 133ff.
[107] 38 of 1927.
[108] Section 35 has been repealed by s 1 (7) of the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005.

(b) Section 16(b): 'concerning the validity or interpretation of a will or other testamentary document'

Actions concerning the validity and construction of wills have historically been reserved for the superior courts.[109] In keeping with that principle, the SCCA precludes a court from hearing a matter involving wills. It must be noted, however, that a court can engage in the interpretation of a will where the interpretation is necessary to deliberate a claim over which it does have jurisdiction.

Section 17(2) of the SCCA provides:

> 'Where the amount claimed or other relief sought does not exceed the jurisdiction of a court, the court shall not be deprived of that jurisdiction merely because it is necessary for the court, in order to arrive at a decision, to give a finding upon a matter beyond its jurisdiction.'

In *Le Roux v Le Roux* the magistrate's court was faced with the question of whether it could interpret a will to give effect to a mortgage bond. On an interpretation of s 37(2) of the MCA – which is worded identically to s 17(2) of the SCCA – the court held that it could interpret the will in order to consider the defence relating to the rectification of the mortgage bond, as it was argued that the mortgage bond should have reflected the terms of the will. The process of interpretation, though beyond the jurisdiction of the court, held the court, was ancillary to a cause of action over which the court had jurisdiction, namely the mortgage bond.[110]

(c) Section 16(c): 'concerning the status of a person in respect of his mental capacity'

Mental capacity is a status issue. Such matters are classically reserved for the superior courts under the common law. The SCCA thus confirms a rule that has been in place since time

[109] See also MCA, s 46(2)(a).
[110] [1998] 2 All SA 315 (O) at 318I. However, in *Fourie v Fourie* 1998 (1) SA 509 (C) the court held that s 37(2) had to be restrictively interpreted and that in light of the general prohibition against lower courts hearing matters involving wills, the courts should not engage in the process of interpreting wills even if the process of interpretation is ancillary to the main matter. It is submitted that the latter decision should not be followed in so far as it fails to appreciate that the purpose of s 37(2) is to permit a court to grant judgment on an 'amount claimed' or 'relief sought' that falls within the jurisdiction of the court and it is necessary, in order to arrive at a decision, to make a finding upon an issue that is beyond its jurisdiction. See also *Tshisa v Premier of the Free State* 2010 (2) SA 153 (FB) para [10].

immemorial. There may be some argument for the lower courts to hear certain types of status matters – mental capacity being one of them. However, it would be inappropriate for small claims courts to hear such matters as it would be too difficult for such matters to be litigated in a court that does not allow for legal representation. The evidential issues would also be too complex and time-consuming for the small claims courts.

Unlike the MCA,[111] the SCCA makes no provision for the appointment of a curator *ad litem* to represent a litigant who has limited or no legal capacity. Rule 13(8)*(b)* of the SCCRs provides in respect of service of process by the sheriff:

> '(8) Where two or more persons are to be served with the same process, service shall be effected upon each, except –
> *(a)* in the case of two or more persons sued in their capacity as trustees of an insolvent estate, liquidators of a company, executors, *curators* or guardians, when service may be effected by delivery to any one of them in any manner hereinbefore prescribed…'.[112]

The reference to 'curator' in the above rule, it would appear,[113] is to the curator *bonis*,[114] and not a curator *ad litem*, where the former is sufficient under the common law[115] to defend proceedings for an incapacitated defendant.

(d) Section 16(d): 'in which is sought specific performance without an alternative claim for payment of damages'

This provision mirrors s 46(2)*(c)* of the MCA. According to the common law, a court will, as a general rule, lean in favour of granting specific performance. However, where the court finds that it would be inappropriate to do so, the court will grant damages as a surrogate for specific

[111] MCA, s 33.
[112] Italics supplied.
[113] This is inferred on account of the absence of a provision similar to s 33 of the MCA.
[114] A curator *bonis* must be distinguished from a curator *ad litem*. The former is appointed by court order to manage the estate of an incapacitated person, whereas the latter is appointed to institute or defend litigation for an incapacitated person. The former retains the position for as long as the incapacity exists, whereas the latter loses his or her office as soon as the litigation is resolved.
[115] An instance under the common law where the *curator bonis* can defend proceedings is where someone is declared a prodigal (spendthrift). The *curator bonis* will manage the affairs of the prodigal and will also be served with process if the prodigal is sued. The reason for this is that, unlike a minor or a person with a severe mental disability, a prodigal, generally possesses the cognition to appreciate the nature of litigation. There is thus no need to appoint a curator *ad litem*. See further *Jones & Buckle* (service 10) Act 233 fn 3.

performance.[116] In the High Court one can, as a matter of right, claim specific performance. There is no need to quantify a claim for specific performance with an alternative claim for damages.[117] If the High Court finds that it cannot grant specific performance, the plaintiff is permitted to amend its pleadings to quantify the claim for specific performance with an alternative claim for damages and to lead evidence thereon. To save time and expense, the High Courts have informally developed the 'double-barrel procedure' to encourage parties to quantify a claim for specific performance with an alternative claim for damages.[118]

The difference between High Court and lower court procedure is that whereas the requirement to quantify a claim for specific performance has developed organically in the High Courts, the requirement forms part of the jurisdictional rules in the lower courts,[119] and is a remnant of the historical limitation placed on the lower courts to grant money judgments only.[120] It is open to debate whether it makes sense in the modern era to perpetuate a restriction of a bygone era.

For some time there was confusion in the law reports about the meaning of 'specific performance' in s 46(2)*(c)* of the MCA. The first question that arose was whether the reference to 'specific performance' was to specific performance *ad factum praestandum* (a factual obligation) only, or whether it included specific performance *ad pecuniam solvendam* (a monetary obligation). If specific performance referred to both, a plaintiff would be faced with the absurd situation of having to quantify a claim for performance sounding in money with the same amount framed as damages in order for the court to have jurisdiction over a matter. After some debate,[121] the provincial divisions of the High Court took the position that the reference to 'specific performance' in s 46(2)*(c)* refers to specific performance *ad factum praestandum*

[116] *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 398 (A) at 440G–H; *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A) at 913C–D; *National Union of Textile Workers v Stag Packings (Pty) Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781H.
[117] *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781H.
[118] *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 470D; *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd* (2) 2005 (6) SA 23 (C) at 42B–E.
[119] *Malkiewicz v Van Niekerk and Fourouclas Investments CC* [2008] 1 All SA 57 (T) at 60f.
[120] *Jones and Buckle* (service 10) Act 302-303.
[121] *Carpet Contracts (Pty) Ltd v Grobler* 1975 (2) SA 436 (T) at 442C–D.

and not *ad pecuniam solvendam.*[122] By parity of reasoning, the same position holds true in the small claims courts.

The second question that arose was whether 'specific performance' is limited to contractual claims, or whether it includes delictual[123] or statutory performance. Though the courts are split, it would appear that, for magistrates' courts' procedure, the tide leans in favour of holding that the claim for specific performance refers to contractual performance only, and not to other types of performance.[124] It has been held that this interpretation is consonant with s 30 of the MCA, which permits the magistrates' courts to grant prohibitory and mandatory interdicts.[125] This interpretation, however, does not bode well for the small claims courts, because unlike the magistrates' courts, they cannot grant interdicts.[126] Hence, if 'specific performance' is interpreted restrictively, it would create ambiguity about whether they would be entitled to grant factual relief as a matter of right (i.e. without a quantification in damages) where the relief

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[122] *Tuckers Land & Development Corporation (Edms) Bpk v Van* Zyl 1977 (3) SA 1041 (T) at 1045D followed in *Otto v Basson* 1994 (2) SA 744 (C).

[123] For example, an order to retract a defamatory article in a newspaper or to repair a wall: see *Malkiewicz v Van Niekerk and Fourouclas Investments CC* [2008] 1 All SA 57 (T).

[124] In *Oliver v Stoop* (1978) 1 SA 196 (T) at 201B and 202C-D, the court held that 'specific performance' referred to contractual obligations only. In *Zinman v Miller* 1956 (3) SA 8 (T) at 12D-E, the Full Court, in an *obiter dictum* per Rumpff J (with Martiz JP and Williamson J concurring) thought that the reference to 'specific performance' in s 46(2)(c) of the MCA included delict and statute. A similar sentiment was expressed in *Carpet Contracts (Pty) Ltd v Grobler* 1975 (2) SA 436 (T) at 439G-H where Viljoen J (Cillié JP concurring) stated:

> 'It may be argued that "specific performance" as the term is used in sec. 46 (2) *(c)* has a wider connotation than specific performance as the term is usually accepted in relation to the law of contract. This was in actual fact decided in the case of *Zinman v Miller*, 1956 (3) SA 8 (T), decided by the Full Court of this Division, where RUMPFF, J., as he then was, gave the judgment of the Court. He said at p. 12D:
>
> > "The reference to 'specific performance' in sec. 46 (2) *(c)* is a reference in my opinion to claims which a plaintiff seeks ordinary relief of a final nature based on an obligation, in terms of which the defendant is bound to render specific performance."
>
> In other words any obligation, including an obligation arising e. g. from *delict*, could give rise to a claim for specific performance, but in this particular case we have to deal with an obligation arising *ex contractu;* and it follows that our enquiry will be limited to "specific performance" in relation to contract.'

The modern view seems to be leaning in favour of *Oliver v Stoop* supra. In this regards see *Malkiewicz v Van Niekerk and Fourouclas Investments CC* [2008] 1 All SA 57 (T) at 60e-f.

[125] In *Malkiewicz v Van Niekerk and Fourouclas Investments CC* [2008] supra the court held at 60e-f.

> 'In my view the conclusion of the court in *Olivier v Stoop* (*supra*) was correct. It is supported by the authors of Jones and Buckle, *The Civil Practice of the Magistrates' Courts in South Africa* 9ed at 191-192 and Pretorius, *Burgerlike Prosesreg in die Landdroshowe* volume 1 at 53-54.
>
> It is undeniably so that the normal context of the concept "specific performance" is the field of contract. Where section 30 confers jurisdiction in respect of interdicts on magistrates' courts, it would largely nullify that jurisdiction if it would be subject to the restriction that an interdict can only be sought if there is an alternative prayer for damages. Interdicts in the High Court are rarely, if ever, sought on that basis.'

[126] See discussion in §6.9(g).

sought is not framed as an interdict. It is submitted that the prohibition against specific performance may in any event have to be revisited if the parties agree to specific performance following a process of mediation.[127]

Section 16*(d)*, like s 46(2)*(c)* of the MCA, contains exceptions to the jurisdictional rule of quantifying a claim for specific performance with an alternative claim for damages. Small claims courts are permitted to grant specific performance in claims involving the rendering of an account, as well as for the delivery and transfer of property (movable and immovable). This means that a small claims court can, for example, enforce the real right of ownership (*rei vindicatio*) without requiring the plaintiff to quantify that claim in monetary terms. The courts can also enforce personal rights arising from contract that require a defendant to deliver property. It is interesting to note that the exception applies to both movable and immovable property. From statistical information,[128] it would appear that the small claims courts hardly ever preside over claims involving immovable property, where title or possession is sought. Unless the jurisdictional monetary limit of the small claims courts is increased dramatically, it is highly unlikely that the small claims courts will ever preside over claims involving real and personal rights to immovable property.[129] It therefore seems nonsensical for the SCCA to refer to 'immovable' property. Following the Kenyan Small Claims Court Act, the SCCA should only make provision for the 'delivery and recovery of movable property.'[130]

[127] See the discussion in chapter 10.
[128] See Table 3 below.
[129] In a study concluded in December 2015 by First National Bank, a major South African commercial bank, the average cost of housing in South Africa was determined:

	Average House Price	Price
1	Major Metro Areas	**R1 213 493**
2	Upper Income Area	**R2 641 917**
3	Middle Income Area	**R1 396 396**
4	Lower Income Area	**R868 887**
5	Affordable Area	**R461 407**
6	*Former Black Township	**R323 472**
7	Holiday Towns	**R952 965**

Source: https://businesstech.co.za/news/wealth/107185/this-is-how-much-the-average-house-costs-in-south-africa/ (last accessed 14 December 2016).
[130] See Kenyan Small Claims Court Act, s 12 (1)(c). See discussion in Part VI below..

(e) Section 16(e): 'in which is sought a decree of perpetual silence'

At present, only the High Courts may entertain an application for a decree of perpetual silence. Magistrates' courts are precluded from granting orders of perpetual silence.[131] A decree of perpetual silence is a common-law remedy to bring an end to threats of litigation that never ensues.[132] The constitutionality of this remedy has not been tested. However, since the small claims courts cannot hear such matters, there is no need to consider the remedy any further, other than to state that it is strange that this provision appears in the SCCA at all.

(f) Section 16(f): 'in which is sought damages in respect of defamation, malicious prosecution, wrongful imprisonment, wrongful arrest, seduction, breach of promise to marry'

In its deliberations, the Hoexter Commission noted that having regard to 'the simplified procedures to be adopted with regard [to] both the pleading and to the conduct of the trial in the small claims court', it was appropriate for the jurisdiction in respect of causes of action to be 'appreciably more limited than that of the magistrates' court.'[133] Aside from the restrictions listed in s 16*(a)* to *(e)* of the SCCA, it proposed that the courts should not be permitted to hear claims involving damages for defamation, malicious prosecution, wrongful imprisonment, wrongful arrest, seduction, and breach of promise to marry.[134] The legislature agreed.

It is submitted that the decision to limit the jurisdiction of the court is not inherently problematic. It is consistent with the approach taken in many foreign jurisdictions.[135] Several of the causes of action enumerated in s 16*(f)* are, by and large, in respect of claims directed at the State. It is common cause, however, that the State may not sue and be sued in the small

[131] MCA, s 46(2)(d).
[132] See for further discussion *Garber v Witwatersrand Jewish Aged Home* 1985 (3) SA 460 (W).
[133] *Report* §13.46.
[134] *Report* §13.48.
[135] *Report* § 11.12.1, 10.4.4.

claims court.[136] In so far as some of the claims (such as breach of promise to marry and defamation) involve natural persons, these claims are not inherently complicated and therefore, one must question whether the small claims courts should be excluded from hearing such types of claims. One must remember that a small claims court can in any event refuse to hear a matter that is deemed to be too complicated. Should complex issues of evidence arise the court can refer the parties to a magistrate's court.[137]

It is important to note, however, that small claims courts can hear personal injury claims, provided that such claims are not regulated by other areas of the law that oust the jurisdiction of the small claims courts.[138]

(g) Section 16(g): 'in which an interdict is sought'

In its *Report*, the Hoexter Commission highlighted that small claims courts historically served the function of enforcing money judgments, and that it was not common for the courts to entertain claims for specific performance.[139] On a preponderance of experiences in international jurisdictions, the Commission recommended that the courts' jurisdiction should by and large

[136] SCCA, s 14(2). See chapter 7.
[137] SCCA, s 23.
[138] The Road Accident Fund 56 of 1998 does not define the word 'court' in the Act. The Fund is a statutory body with legal personality (The Road Accident Fund Act, s 2(1)). It is exclusively funded by the State and hence, is a state entity. It would thus appear that the Fund cannot be sued in the small claims court as the State cannot be sued in the small claims court (SCCA, s 14(2)). This is also consonant with the 'Practice Note' issued by the Chief Executive Officer of the Fund in the January/February (2008) *De Rebus* 38 to the following effect:

> 'In the case of legal proceedings having to be commenced, it is the court (High Court or magistrate's court, depending on the amount claimed) within whose geographical area of jurisdiction the accident occurred that would have the requisite jurisdiction in a particular matter. Alternatively, the court (High Court or magistrate's court, again depending on the amount claimed) within whose geographical area of jurisdiction the Road Accident Fund (the Fund) has its principal place of business…
> Where legal proceedings have to be commenced in the High Court the Fund is not entitled to consent to jurisdiction in respect of a court that does not possess jurisdiction to entertain the action in accordance with the provisions of s 19 of the Supreme Court Act 59 of 1959, read with s 15(2) of the Road Accident Fund [*sic*].
> However, the Fund may consent to a particular magistrate courts's [*sic*] jurisdiction in terms of s 45(1) of the Magistrates' Courts Act 32 of 1944 or alternatively, the Fund may elect not to object to the jurisdiction of a particular magistrate court [*sic*], in terms of s 28(1) of the Magistrates' Courts Act.
> This practice note withdraws and replaces the practice note published in 1997 (June) *DR* 383, as it relates to the jurisdiction and institution of legal proceedings.'

[139] *Report* §, 6.4.1, 7.3, 8.1.2, 9.8, 10.2.1, 10.4.4, 13.4.5, 13.4.6, 13.4.7, 13.4.8.

be limited to granting money judgments. In its final recommendations, the Commission, however, did not expressly preclude the granting of interdicts.[140]

In the original version of the SCCA, s 16*(g)* did not feature. The subsection was inserted after an amendment to the Act.[141]

It seems correct for the small claims courts not to grant interdicts as a freestanding remedy. To do so would subject the courts to an inordinate amount of work. It could lead to an abuse of the court process, and would create complex conundrums when trying to figure out how a request for an interdict stacks against the monetary jurisdiction of the court.

6.10 JURISDICTION IN RESPECT OF CAUSES OF ACTION

Section 15 of the SCCA provides:

> 'Subject to the provisions of this Act, a court shall have jurisdiction in respect of causes of action in –
> *(a)* actions for the delivery or transfer of any property, movable or immovable, not exceeding in value the amount determined by the Minister from time to time by notice in the Gazette;
> *(b)* actions for ejectment against the occupier of any premises or land within the area of jurisdiction of the court: Provided that where the right of occupation of the premises or land is in dispute between the parties, that right does not exceed in clear value to the occupier the amount determined by the Minister from time to time by notice in the Gazette;
> *(c)* actions based on or arising out of a liquid document or a mortgage bond, where the claim does not exceed the amount determined by the Minister from time to time by notice in the Gazette;
> *(d)* actions based on or arising out of a credit agreement as defined in section 1 of the National Credit Act, 2005 (Act 34 of 2005), where the claim or the value of the property in dispute does not exceed the amount determined by the Minister from time to time by notice in the Gazette;
> *(e)* actions other than those already mentioned in this section, where the claim or the value of the matter in dispute does not exceed the amount determined by the Minister from time to time by notice in the Gazette;
> *(f)* actions for counterclaims not exceeding the amount determined by the Minister from time to time by notice in the Gazette, in respect of any cause of action mentioned in paragraphs *(a)* to *(e)*.'

[140] *Report* § 13.4.8.
[141] Small Claims Courts Amendment Act 63 of 1989, s 2.

(a) Section 15(a): 'actions for the delivery or transfer of any property, movable or immovable, not exceeding in value the amount determined by the Minister from time to time by notice in the Gazette'

This provision allows a court to consider actions *in rem* (for example, the real right of ownership) or *in personam* (for example, arising from contract)[142] involving movable and immovable property provided that the market value[143] of the property does not exceed R15 000. While one can appreciate movable property claims coming before the small claims courts, it is difficult to conceive of immovable property claims being litigated there considering that the monetary jurisdiction of the courts is very low. It is submitted that if the provision is to be meaningful, the monetary jurisdiction of the small claims courts has to be dramatically increased. What may also be needed is for the Minister of Justice to stipulate a different monetary jurisdiction for the courts in claims involving immovable property. To that end, it is suggested that a survey must be conducted of the cost of low-income housing in South Africa and that the mean market value of such property be used as the indicator for the small claims courts' monetary jurisdiction in respect of immovable property claims.[144] Alternatively, the reference to immovable property should be deleted.

(b) Section 15(b): 'actions for ejectment against the occupier of any premises or land within the area of jurisdiction of the court: Provided that where the right of occupation of the premises or land is in dispute between the parties, that right does not exceed in clear value to the occupier the amount determined by the Minister from time to time by notice in the Gazette'

[142] See discussion above at §6.10(e).
[143] *Van der Merwe v Van der Merwe* 1973 (1) SA 436 (C) para [20].
[144] See note 129 above.

In light of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[145] ('the PIE Act'), the small claims courts have very limited jurisdiction to grant eviction orders. For the most part, their jurisdiction covers eviction orders in respect of commercial property only.[146] The small claims courts cannot grant eviction orders involving residential premises occupied by natural persons, as the PIE Act reserves such jurisdiction for the magistrates' courts and the High Courts.[147] However, the small claims courts can grant judgments for outstanding rental. Each month's rental constitutes a separate cause of action. Provided that all the causes of action on the arrear rental fall within the monetary jurisdiction of the small claims courts, they can be claimed in the same summons.[148]

In the case of commercial property, an eviction order will only be granted if the claim falls within the monetary jurisdiction of the court. To calculate the value of the claim one has to determine the value of the right to occupation by the occupier (i.e. the tenant). The value of the right can be, but is not limited to, the cost of hiring alternative premises for the lease period, or the profit expectation that the tenant would have had for the duration of the lease. The amount of the rental is not the determinant for the value of occupation because as the courts have stated, rental constitutes the benefit to the landlord and not the tenant.[149] It is unclear whether the small claims courts are effective to hear many matters involving commercial property. Again, the biggest stumbling block is the low monetary jurisdiction of the courts. Clearly, the value of occupation may fall within the monetary jurisdiction of the courts in cases where the lease is terminable on one month's notice. But once the lease duration is greater than that, it becomes incredibly difficult to see how the courts can preside over evictions in respect of commercial property.

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[145] Act 19 of 1998.
[146] See in this regard *Ndlovu v Ngcobo; Bekker and Bosch v Jika* 2003 (1) SA 113 (SCA).
[147] Section 1 (iii) of the PIE Act defines 'court' as: 'any division of the High Court or the magistrate's court in whose area of jurisdiction the land in question is situated…'
[148] See §6.6(e) above.
[149] *Langham Court (Pty) Ltd v Mavromaty* 1954 (3) SA 742 (T) at 746F–747A*; Jordaan v De Beer Scheepers* 1975 (3) SA 845 (T) at 848D–849H.

(c) Section 15(c): 'actions based on or arising out of a liquid document or a mortgage bond, where the claim does not exceed the amount determined by the Minister from time to time by notice in the Gazette'

When determining a claim arising out of a liquid document[150] or mortgage bond, one should not calculate the value of the claim by looking at the amount on the face of the document. Rather reference should be made to the outstanding amount owing by the debtor to the creditor at the date when the process initiating the action is served on the debtor (the defendant).[151]

Section 15*(c)* must be interpreted with reference to s 15*(d)* as discussed below.

(d) Section 15(d): 'actions based on or arising out of a credit agreement as defined in section 1 of the National Credit Act, 2005 (Act 34 of 2005), where the claim or the value of the property in dispute does not exceed the amount determined by the Minister from time to time by notice in the Gazette'

A 'credit agreement' is defined quite widely in the NCA. It includes a mortgage bond and a liquid document, which has been entered into by a creditor provider (natural or juristic person) and a debtor.[152] For a credit agreement to fall within the purview of the Act, the transaction giving rise to the agreement must be at 'arms-length'.[153] A transaction is considered to be at arms-length if it is entered into between persons that are not in a familial relationship, where the parties are independent of each other, and the nature of the transaction is such that the credit provider strives to obtain the maximum advantage that may be gained from entering into the agreement, for example, by levying interest on sums forwarded at the prevailing market rates.[154]

[150] A liquid document has all of the following characteristics: It is a written instrument, signed by the defendant, or his or her agent, evidencing an acknowledgement of indebtedness, which is unconditional, of a fixed amount in money. Classic examples of liquid documents would be cheques, promissory notes, architects certificates, mortgage bonds and acknowledgement of debts. See *LAWSA* § 46.
[151] *Jones & Buckle* (service 10) Act139-140.
[152] NCA, s 1.
[153] NCA, s 4(1).
[154] NCA, s 4(2)

Before a credit provider can obtain judgment on a credit agreement as defined by the Act, the credit provider has to jump through several hoops, one of which is that the credit provider should afford the credit receiver an opportunity to seek the assistance of a debt counselor with a view to restructuring the debt. This is governed by ss 129[155] and 130[156] of the NCA. In the

[155] Section 129 provides:

'(1) If the consumer is in default under a credit agreement, the credit provider-
(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
(b) subject to section 130 (2), may not commence any legal proceedings to enforce the agreement before-
(i) first providing notice to the consumer, as contemplated in paragraph *(a)*, or in section 86 (10), as the case may be; and
(ii) meeting any further requirements set out in section 130.

(2) Subsection (1) does not apply to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such an order.

(3) Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.

(4) A credit provider may not reinstate or revive a credit agreement after-
(a) the sale of any property pursuant to-
(i) an attachment order; or
(ii) surrender of property in terms of section 127;
(b) the execution of any other court order enforcing that agreement; or
(c) the termination thereof in accordance with section 123.

(5) The notice contemplated in subsection (1) *(a)* must be delivered to the consumer-
(a) by registered mail; or
(b) to an adult person at the location designated by the consumer.

(6) The consumer must in writing indicate the preferred manner of delivery contemplated in subsection (5).

(7) Proof of delivery contemplated in subsection (5) is satisfied by-
(a) written confirmation by the postal service or its authorised agent, of delivery to the relevant post office or postal agency; or
(b) the signature or identifying mark of the recipient contemplated in subsection (5) *(b)*.'

[156] Section 130 provides:

'(1) Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and-
(a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86 (10), or section 129 (1), as the case may be;
(b) in the case of a notice contemplated in section 129 (1), the consumer has-
(i) not responded to that notice; or
(ii) responded to the notice by rejecting the credit provider's proposals; and
(c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127.

(2) In addition to the circumstances contemplated in subsection (1), in the case of an instalment agreement, secured loan, or lease, a credit provider may approach the court for an order enforcing the remaining obligations of a consumer under a credit agreement at any time if-
(a) all relevant property has been sold pursuant to-
(i) an attachment order; or
(ii) surrender of property in terms of section 127; and
(b) the net proceeds of sale were insufficient to discharge all the consumer's financial obligations under the agreement.

magistrates' courts, a credit provider is required to plead compliance with the provisions of ss 129 and 130 in the summons, and the magistrate has to be satisfied that all aspects of the NCA have been meticulously complied with before the court will grant judgment.[157] The procedure for complying with the Act is exacting. To complicate matters further, the Act is not the model

(3) Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that-
(a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with;
(b) there is no matter arising under that credit agreement, and pending before the Tribunal, that could result in an order affecting the issues to be determined by the court; and
(c) that the credit provider has not approached the court-
(i) during the time that the matter was before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction; or
(ii) despite the consumer having-
(aa) surrendered property to the credit provider, and before that property has been sold;
(bb) agreed to a proposal made in terms of section 129 (1) *(a)* and acted in good faith in fulfilment of that agreement;
(cc) complied with an agreed plan as contemplated in section 129 (1) *(a)*; or
(dd) brought the payments under the credit agreement up to date, as contemplated in section 129 (1) *(a)*.

(4) In any proceedings contemplated in this section, if the court determines that-
(a) the credit agreement was reckless as described in section 80, the court must make an order contemplated in section 83;
(b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3), or has approached the court in circumstances contemplated in subsection (3) (c) the court must-
(i) adjourn the matter before it; and
(ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed*;*
(c) the credit agreement is subject to a pending debt review in terms of Part D of Chapter 4, the court may-
(i) adjourn the matter, pending a final determination of the debt review proceedings;
(ii) order the debt counsellor to report directly to the court, and thereafter make an order contemplated in section 85 *(b)*; or
(iii) if the credit agreement is the only credit agreement to which the consumer is a party, order the debt counsellor to discontinue the debt review proceedings, and make an order contemplated in section 85 *(b)*;
(d) there is a matter pending before the Tribunal, as contemplated in subsection (3) *(b)*, the court may-
(i) adjourn the matter before it, pending a determination of the proceedings before the Tribunal; or
(ii) order the Tribunal to adjourn the proceedings before it, and refer the matter to the court for determination; or
(e) the credit agreement is either suspended or subject to a debt re-arrangement order or agreement, and the consumer has complied with that order or agreement, the court must dismiss the matter.'

[157] MCR 5(7), 6(11). See also *Roussouw v FirstRand Bank Limited* 2010 (6) SA 429 (SCA) at 455C-G.

of clarity and has been the subject of several court decisions because of interpretational and other problems.[158]

To expect a presiding officer in the small claims court to wade through the NCA and the Regulations[159] passed in terms of the Act[160] is a tall order indeed. The provisions of the Act are simply too complex for consideration in the small claims courts. Even though juristic persons are precluded from suing in the small claims courts – and it is therefore unlikely that the courts will be saddled with claims involving accredited credit providers[161] – it is likely that the courts could hear matters involving natural persons who have extended and received loans where the Act is applicable to the transaction concerned. Anecdotal evidence reveals that many presiding officers routinely use s 23[162] of the SCCA to avoid hearing matters that involve the NCA. It is submitted that those presiding officers are acting correctly. The legislature needs to seriously reconsider s 15*(d)* of the SCCA and repeal the jurisdiction of the small claims courts to hear matters involving the NCA. Section 15*(d)* was conceived at a time before the NCA came into operation. After its promulgation, the legislature simply amended the section to recognise the NCA, without giving much consideration to the complexities heralded by the Act. These complexities have been highlighted in many court decisions[163] and it is unwise to impose those complexities on small claims courts. It must also be borne in mind that small claims litigants

[158] See, *inter alia*, *Carter Trading (Pty) Ltd v Blignaut* 2010 (2) SA 46 (ECP *Voltex (Pty) Ltd v Chenleza CC* 2010 (5) SA 267 (KZP); *Nedbank Ltd v Wizard Holdings (Pty) Ltd* 2010 (5) SA 523 (GSJ); *Renier Nel Inc v Cash on Demand (KZN) (Pty) Ltd* 2011 (5) SA 239 (GSJ); *Absa Technology Finance Solutions Ltd v Pabi's Guest House CC* 2011 (6) SA 606 (FB); *Voltex (Pty) Ltd v SWP Projects CC* 2012 (6) SA 60 (GSJ); *Absa Technology Finance Solutions (Pty) Ltd v Viljoen t/a Wonderhoek Enterprises* 2012 (3) SA 149 (GNP); *Absa Technology Finance Solutions (Pty) Ltd v Michael's Bid A House CC* 2013 (3) SA 426 (SCA); *Absa Technology Finance Solutions (Pty) Ltd v Michael's Bid A House CC* 2013 (3) SA 426 (SCA); *RMB Private Bank (A Division of FirstRand Bank Ltd v Kaydeez Therapies CC (in Liquidation)* 2013 (6) SA 308 (GSJ); *Rodel Financial Service (Pty) Ltd v Naidoo* 2013 (3) SA 151 (KZP); *Absa Technology Finance Solutions (Pty) Ltd v Michael's Bid A House CC* 2013 (3) SA 426 (SCA); *Hattingh v Hattingh* 2014 (3) SA 162 (VB); *Asmal v Essa* 2016 (1) SA 95 (SCA).
[159] National Credit Regulations GN R489 in *GG* 28864 of 31 May 2006, as amended.
[160] NCA, s 171 read with Schedule 3 (7).
[161] NCA, s 40.
[162] Section 23 provides that a small claims court commissioner can refuse to hear a matter if the matter is too complex.
[163] See note 158 above. See also for further discussion Otto and Otto *The National Credit Act Explained*; Scholtz, Otto, Van Zyl et al *Guide to the National Credit Act*.

are unrepresented, and may be unaware of their rights in terms of the NCA. If commissioners do not fastidiously apply the provisions of the Act, miscarriages of justice will inevitably occur.

Removing matters that fall within the NCA from the reach of the small claims courts will undoubtedly affect the character of the courts as forums to sue for debts owed. In many jurisdictions,[164] small claims courts play an important role in recovering debts extended as loans. Unfortunately, in South Africa, the NCA with its complex processes and procedures has made it difficult for such claims to be heard in the small claims courts. The NCA makes no provision for special procedures for small claims. Perhaps it should.

(e) Section 15(e): 'actions other than those already mentioned in this section, where the claim or the value of the matter in dispute does not exceed the amount determined by the Minister from time to time by notice in the Gazette'

This catch-all provision allows the small claims courts to hear matters that are not excluded by common law, statute and s 16 of the SCCA. The provision is identical to s 29(1)*(g)* of the MCA. In the interpretation of that section, commentators have said that the provision gives the courts wide latitude to hear a myriad of matters involving contract and delict, but also other types of claims such as those based on unjust enrichment, for example. Of course, in the small claims courts, jurisdiction to hear delict matters is circumscribed by s 16*(f)*[165] of the SCCA. Needless to say, s 15*(e)* is subject to the monetary jurisdiction of the small claims courts.

In the past, s 15*(e)* permitted small claims courts to hear a wide range of consumer-related matters involving defective goods and services. This was in keeping with the historical evolution of small claims courts internationally as consumer tribunals.[166] It is therefore most

[164] Australia, Canada, Kenya, United Kingdom and United States of America.
[165] See discussion above.
[166] See, Steele 'The Historical Context of Small Claims Courts' (1981) *American Bar Foundation Research Journal* 293. See also generally the Hoexter Commission's *Report* chapter 10.

unfortunate to note that the power of the small claims courts to preside over consumer-related matters has been severely hampered in recent times.

Since 2002, the legislature has passed legislation to provide wide-ranging protection to consumers. The first was the Electronic Communications and Transactions Act,[167] which provides safeguards in the online and electronic transaction spheres. The second was the NCA, which regulates the credit industry to protect consumers from reckless credit services. The third was the Consumer Protection Act[168] ('CPA'), which applies to most consumer markets, and agreements that are not covered by the NCA.[169]

Section 69 of the CPA has far-reaching consequences for the small claims courts and for other civil courts, in so far as it relates to the power of the courts to hear consumer matters. Section 69 is headed 'Enforcement of rights by consumer' and provides as follows:

> 'A person contemplated in section 4 (1) may seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by –
> *(a)* referring the matter directly to the Tribunal, if such a direct referral is permitted by this Act in the case of the particular dispute;
> *(b)* referring the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud;
> *(c)* if the matter does not concern a supplier contemplated in paragraph *(b)* –
> (i) referring the matter to the applicable industry ombud, accredited in terms of section 82 (6), if the supplier is subject to any such ombud; or
> (ii) applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing that consumer court; or
> (iii) referring the matter to another alternative dispute resolution agent contemplated in section 70; or
> (iv) filing a complaint with the Commission in accordance with section 71; or
> *(d)* approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted.'

The above section affords consumers various methods of resolving their disputes. The section does not apply to 'service providers'. This is clear from the reference to s 4(1)[170] of the Act.

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[167] Act 25 of 2002.
[168] Act 68 of 2008.
[169] For a comprehensive analysis of the CPA see, Naudé, Eiselen (eds) *Commentary on the Consumer Protection Act* (hereinafter referred to as *Commentary*)
[170] Section 4(1) provides:

> 'Any of the following persons may, in the manner provided for in this Act, approach a court, the Tribunal or the Commission alleging that a consumer's rights in terms of this Act have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring:
> (a) A person acting on his or her own behalf;
> (b) an authorised person acting on behalf of another person who cannot act in his or her own name;

To understand s 69 fully, one needs to reconcile the section with the rest of the Act. In terms of the Act, the principal bodies tasked with resolving consumer disputes are the National Consumer Commission[171] and the National Consumer Tribunal.[172] Further entities may be employed to resolve disputes: ombuds with jurisdiction;[173] industry ombuds;[174] consumer courts;[175] alternative dispute resolution agents;[176] and *civil* courts as a last resort.[177] While s 69 is non-prescriptive about the hierarchy according to which the entities mentioned in the section must be approached,[178] it is clear that a civil court with jurisdiction over a matter may only be approached 'if all other remedies available to [the consumer] in terms of national legislation have been exhausted.'[179] Civil courts are thus forums of last resort, but only where the CPA applies. This is an important qualification, because in terms of s 2(10) of the CPA, where a consumer wishes to rely on common-law rights (such as those entrenched by the law of contract or delict) and not on the Act, the consumer will *not* have to follow the routes of redress in s 69, but may 'immediately approach a civil court…'.[180] This will classically be the case where the transacting parties cannot be construed as 'consumer' and 'service provider' as defined in s 1 of the Act.

It is not difficult to appreciate why the legislature restricted access to the courts as first ports of call. Costs, time, and efficiency are some of the reasons for opting for alternative dispute

(c) a person acting as a member of, or in the interest of, a group or class of affected persons;
(d) a person acting in the public interest, with leave of the Tribunal or court, as the case may be; and
(e) an association acting in the interest of its members.'

[171] CPA, s 85.
[172] CPA, s 26.
[173] See for discussion: van Heerden 'Protection of Consumer Rights and Consumer's Voice' in *Commentary* (Revision Service 1) 69-9.
[174] See for discussion: *Commentary* (Revision Service 1) 69-10
[175] Section 1 of the CPA defines a 'consumer court' as 'a body of that name, or a consumer tribunal, that has been established in terms of applicable provincial legislation.' From the definition is it clear that these are not formal courts per se but rather administrative tribunals. For further discussion on this point see: van Heerden n173 (Revision Service 1) 69-10.
[176] *Commentary* (Revision Service 1) 69-12.
[177] CPA, s 69(d).
[178] *Commentary* (Revision Service 1) 69-2.
[179] See also s 115 of the CPA for further confirmation of the proposition that the courts cannot be approached as a matter of first instance.
[180] See also *Commentary (*Revision Service 1) 69-2.

resolute mechanisms.[181] The difficulty, however, is that the legislature lost sight of the small claims courts, which have historically offered quick and inexpensive redress to consumers. As van Heerden notes:

> '…it can be argued that it is conceivable that many disputes involving vulnerable consumers will involve relatively small amounts which could be dealt with by the small claims courts in an efficient, speedy and cheap manner. To insist that the consumer who has already access to a small claims court first exhaust the other redress options contemplated in s 69 might not always be in such consumer's best interest. As such, the constitutional right to access to the courts might be unjustifiably infringed if immediate access to the small claims courts is barred.'[182]

To complicate matters further, a consumer is not always entitled to obtain damages when an alternative dispute mechanism is used. If the body concerned makes an order to the effect that there has been a contravention of the Act, the consumer would have to institute a court action to recover damages. The logic, in that instance, of requiring the consumer to approach the court as a last resort, is thus questionable.[183]

Van Heerden calls for the amendment of s 69. She argues that, at the very least, small claims courts should be afforded the right of hearing consumer claims without the need for alternative remedies to be exhausted first. There is merit in her suggestion, as there are considerably more small claims courts in South Africa than consumer commissions, tribunals, ombuds etc. If one has regard to some of the objectives of the CPA, namely: to reduce and ameliorate any disadvantages to consumers 'who are low-income persons or persons comprising low-income communities', 'who live in remote, isolated or low-density population areas and communities'; and to provide 'an accessible, consistent, harmonized, effective and efficient system of redress for consumers', then it appears the small claims courts tick all the boxes.[184] It is thus unclear what can be gained from limiting the jurisdiction of small claims courts under s 69 of the CPA.

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[181] Section 3(g) of the CPA provides that one of the purposes of the Act is to create an enabling environment for a consistent, accessible and an efficient system of consensual dispute resolution.
[182] *Commentary* (Revision Service 1) 69-15.
[183] In *Digital SMS Marketing CC v National Consumer Commission* case no NCT/3584/2011/101(1) of 1 November 2012 (NCT) and *Audi SA (Pty) Ltd v National Consumer Commission* NCT/4058/2012/101(1)(P) CPA it was held that the Tribunal was not empowered to make a damages award.
[184] CPA, s 3.

(f) *Section 16(f): 'actions for counterclaims not exceeding the amount determined by the Minister from time to time by notice in the Gazette, in respect of any cause of action mentioned in paragraphs (a) to (e)'*

This section confirms that small claims courts can hear counterclaims that fall within their monetary jurisdiction, provided that the nature of the counterclaim falls into the substantive areas of law that may be heard by them. However, as will be discussed in part IV, the counterclaim in question has to be 'incidental' to the main claim. This is not evident on a reading of s 16*(f)*. It will be recommended in part IV that legislative reform is needed to enable the small claims courts to hear non-incidental counterclaims

Section 16*(f)* has to be read with s 14(4) of the SCCA. In terms of the latter provision, the small claims court does not have jurisdiction to entertain a counterclaim 'based in whole or in part upon a cession or assignment of rights.' This provision, it is submitted, ensures that small claims matters remain uncomplicated, and that third parties do not abuse the small claims court process by bringing claims in courts when they are, but for a cession or assignment of rights, otherwise ineligible to do so.

6.11 STATISTICAL EVALUATION OF SMALL CLAIMS COURT MATTERS BASED ON CAUSE OF ACTION

Table 3: Small claims matters by cause of action for the period 2012-2014[185]

Region	Liquid actions		Action against occupier		Credit agreement		Damage to property		Monies lent		Other causes		Services rendered	
	2012/ 2013	2013/ 2014	2012/ 2013	2013/ 2014	2012/ 2013	2013/ 2014	2012/ 2013	2013/ 2014	2012/ 2013	2013/ 2014	2012/ 2013	2013/ 2014	2012/ 2013	2013/ 2014
Eastern Cape	992	905	1032	437	2394	2158	2033	2031	7828	9620	6576	3453	3916	4611
Free State	200	116	265	209	955	795	1000	662	7861	5528	4794	953	3331	2244
Gauteng	359	1346	2611	1582	5928	3508	5375	2999	16727	9876	1719	5523	14036	7829
KZN	668	1157	884	813	1112	903	1787	2085	7202	6023	4721	3280	4224	4094
Limpopo	256	192	485	263	3444	1525	1091	942	7525	5530	2089	2450	6172	4496
Mpumalanga	178	627	180	191	552	786	841	721	2778	2460	1390	1096	1727	1701
North West	94	67	394	204	2440	1767	962	649	4877	3950	4142	1832	3405	2941
Northern Cape	1431	0	61	36	126	144	213	187	1313	1092	4429	352	415	359
Western Cape	1264	49	1228	447	620	393	2606	2110	4412	3535	5553	2754	2376	2184
Grand Total	5547	4459	7140	4182	17571	11979	15908	12386	60523	47614	35413	21693	39602	30459

[185] Source: Department of Justice and Constitutional Development.

Table 4: Small claims matters by cause of action for the period 2014-2015[186]

Cause of Action	Number of matters	Amount (million)	% of total claims
Action against occupier	1387	8 553 440.19	3%
Action arising from liquid documents	307	1 810 170.64	1%
Credit agreements	3621	15 055 681.00	8%
Damage to property	5324	34 190 312.72	11%
Money lent and advanced	6342	22 275 048.04	13%
Money owed	16387	73 641 592.61	34%
No services rendered	5185	24 275 491.67	11%
Return of goods	3884	18 644 219.27	8%
Services Rendered	5211	22 252 795.78	11%
Grand Total	47648	220 698 751.92	100%

If there was any doubt whether small claims courts make a significant contribution to the administration of justice in South Africa, then the two tables above should put that doubt to bed. The small claims courts are popular, and make a significant contribution in every South African province. One can only imagine what the position would be if the courts' monetary jurisdiction was increased, and if some of the jurisdictional impediments to accessing the courts were relaxed.

From the tables above, one can also draw the following observations:

- The courts hear very few rental disputes. This may be because, as noted above, the courts cannot grant eviction orders in residential occupancy disputes. At most, a landlord can claim

[186] Source: Department of Justice and Constitutional Development.

outstanding rental. It is also the case that many rental disputes are dealt with quite successfully by Rental Housing Tribunals established in terms of the Rental Housing Act.[187] Tribunals have been established all over the country, especially in the large city centres.[188] They have proven to be extremely successful in terms of resolving disputes between landlords and tenants quickly and efficiently. One can also access them free of charge.[189]

- One can only assume that the reference to 'credit agreements' in the statistics is to credit agreements defined in terms of the NCA. As discussed before, the small claims courts are permitted to hear claims involving credit agreements arising from the NCA. The amount of credit agreement claims that are heard in the small claims courts is startlingly high, bearing in mind that juristic persons cannot sue in the small claims courts. One can thus infer that the credit agreement claims are being pursued by natural persons against other natural persons, or by natural person plaintiffs against juristic defendants – although logic dictates that the latter scenario is by no means the norm. One can only hope that the presiding officers hearing those claims are following the procedures laid down in the NCA[190] for protecting the rights of credit receivers.
- It is interesting to note that the 2012-2014 statistics refer to 'liquid actions', but the 2014-2015 statistics refer to 'liquid document' actions. The reason for the difference is unclear. A liquid document is a document that *ex facie* acknowledges unconditional indebtedness. Claims based on such documents could also fall under the NCA.[191] A liquid action under the 2012-2014 statistics is much wider as it refers to all claims that are capable of speedy and prompt ascertainment,[192] for example, a claim for the outstanding amount on a sale.

[187] Act 50 of 1999, Chapter 4.
[188] http://www.legaltalk.co.za/rental-housing-tribunal/ (last accessed on 24 March 2017).
[189] See https://www.westerncape.gov.za/sites/www.westerncape.gov.za/files/hs-humansettlements-rental-housing-tribunal-annualreport-2015-2016.pdf (last accessed on 24 March 2017).
[190] In particular, the procedures laid down in ss 129 and 130 of the Act. For more discussion see §6.10(d) above.
[191] See definition of credit agreement in s 1 of the NCA.
[192] *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T).

- It would seem that the small claims courts continue to hear many consumer-related matters. One can only infer that these matters deal with claims that do not fall under the CPA. As noted above, the small claims courts cannot be approached as a matter of first resort in matters that fall under the CPA. If, however, presiding officers are hearing matters that fall within the CPA, then those judgments would be defective and reviewable, as one of the grounds for review in the small claims courts is the lack of jurisdiction.[193]
- Damage to property looms large in the statistics. Following a request for information that was sent to the Department of Justice, it was highlighted that this item encapsulated a range of possibilities and could, for example, include damage to a motor vehicle following a motor vehicle accident.
- While the 2012-2014 table contains an item for 'other', the 2015-2016 table does not contain an 'other' category. The reason for the anomaly cannot be explained, save to state that those collecting the official data may not have been attuned to a further categorisation. 'Other' refers to the full range of contractual and delictual claims. Following a request for information that was sent to the Department of Justice, it was suggested that 'other' also included claims relating to stock theft in the rural areas, claims relating to stokvels,[194] and claims against municipalities. It would appear that municipalities are frequently sued in the small claims courts for incorrect municipal charges. This is most interesting given that the State cannot sue and be sued in the small claims courts.[195]

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[193] SCCA, s 46(a).

[194] Section 1 of the NCA defines as 'stokvel' as:

> ' a formal or informal rotating financial scheme with entertainment, social or economic functions, which-
> *(a)* consists of two or more persons in a voluntary association, each of whom has pledged mutual support to the others towards the attainment of specific objectives;
> *(b)* establishes a continuous pool of capital by raising funds by means of the subscriptions of the members;
> *(c)* grants credit to and on behalf of members;
> *(d)* provides for members to share in profits from, and to nominate management of, the scheme; and
> *(e)* relies on self-imposed regulation to protect the interest of its members.'

A stokvel is a credit agreement in terms of the Act: s 8(2)(c).

[195] For the meaning of 'State' see the discussion in chapter 7.

The statistics above, though not offering a wealth of insights, do assist in understanding the types of matters that come before small claims courts. They also give credence to the usability and popularity of small claims courts as courts of first access to many South Africans. They make a significant contribution to economic development and social cohesion. This is evident from the fact that the courts presided over just under a quarter of a billion rand worth of claims in 2014-2015.

PART IV

TERRITORIAL JURISDICTION

6.12 WHICH SMALL CLAIMS COURT SHOULD THE MATTER BE TAKEN TO?

Once it is established that a matter falls within the monetary jurisdiction of the small claims court, and that the court can hear the cause of action, the plaintiff is required to sue in the appropriate court.

6.13 JURISDICTION IN RESPECT OF PERSONS

Section 14(1) of the SCCA sets out the rules to enable a plaintiff,[196] as principal litigant, to select the relevant court. Section 14(1) provides:

> '14. Jurisdiction in respect of persons
> (1) Subject to the provisions of subsection (2), a court shall have jurisdiction in respect of –
> *(a)* any person who resides, carries on business or is employed within the area of jurisdiction of the court;
> *(b)* any partnership, as defendant, which has business premises situated or any member of which resides within the area of jurisdiction of the court;
> *(c)* any person in respect of any proceedings incidental to any action instituted in that court by such person;
> *(d)* any person, whether or not he resides, carries on business or is employed within the area of jurisdiction of the court, if the cause of action arose wholly within that area;
> *(e)* any defendant, whether in convention or reconvention, who appears and takes no objection to the jurisdiction of the court;
> *(f)* any person who owns immovable property within the area of jurisdiction of the court in actions in respect of such property or a mortgage bond thereon.'

[196] For who may be 'plaintiff' see s 7 of the SCCA.

In accordance with the common-law principle *actor sequitur forum rei*,[197] the reference to 'person' in subsection (1) is to the *defendant*. In many respects, s 14 is similar to s 28(1) of the MCA.[198] Consequently, the way in which the courts and academics have interpreted and commented on s 28(1) of the MCA is applicable to s 14(1) of the SCCA.

(a) Section 14(1)(a): 'Any person who resides, carries on business or is employed within the area of jurisdiction of the court'

Section 14(1)*(a)* permits a plaintiff to sue a defendant in the small claims court that is situated in the area where the defendant resides, carries on business, or is employed.

Residence must be distinguished from domicile. Domicile is a person's legal residence and is governed by the provisions of the Domicile Act.[199] Domicile requires one to exercise a

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[197] *Sciacero & Co. v Central South African Railways* 1910 TS 119, the Court, per Innes CJ, held at 121:
'The general rule with regard to the bringing of actions is *actor sequitur forum rei.* The plaintiff ascertains where the defendant resides, goes to his forum, and serves him with the summons there.' See also Voet 5.1.64.

[198] The MCAprovides:
'**28 Jurisdiction in respect of persons**
(1) Saving any other jurisdiction assigned to a court by this Act or by any other law, the persons in respect of whom the court shall, subject to subsection (1A), have jurisdiction shall be the following and no other:
(a) Any person who resides, carries on business or is employed within the district or regional division;
(b) any partnership which has business premises situated or any member whereof resides within the district or regional division;
(c) any person whatever, in respect of any proceedings incidental to any action or proceeding instituted in the court by such person himself or herself;
(d) any person, whether or not he or she resides, carries on business or is employed within the district or regional division, if the cause of action arose wholly within the district or regional division;
(e) any party to interpleader proceedings, if-
(i) the execution creditor and every claimant to the subject matter of the proceedings reside, carry on business, or are employed within the district or regional division; or
(ii) the subject-matter of the proceedings has been attached by process of the court; or
(iii) such proceedings are taken under section 69 (2) and the person therein referred to as the 'third party' resides, carries on business, or is employed within the district or regional division; or
(iv) all the parties consent to the jurisdiction of the court;
(f) any defendant (whether in convention or reconvention) who appears and takes no objection to the jurisdiction of the court;
(g) any person who owns immovable property within the district or regional division in actions in respect of such property or in respect of mortgage bonds thereon.'

[199] Act 3 of 1992.

deliberate intention to reside at a particular place indefinitely.[200] Residence, on the other hand, requires one to make a place one's home by returning there regularly.[201] To this extent, the courts have said that residence is something less than domicile and something more than mere physical presence.[202] Whereas a person can only have one domicile, one could, according to South African law, have multiple residences. The important thing is that when a defendant is sued in a court, the court must have jurisdiction over the area where he or she is physically resident at the time when the summons is served.[203]

To determine whether a defendant resides within the jurisdiction of a court is a factual inquiry. The courts take myriad factors into account to establish residence. This is classically illustrated in *Zwyssig v Zwyssig*.[204] The plaintiff and defendant were divorced in Florida, United States of America. Judgment was entered in favour of the plaintiff against the defendant for a certain sum of money. The plaintiff then sought provisional sentence[205] against the defendant in the Witwatersrand Local Division of the High Court for the amount of the judgment entered against the defendant by the Florida court. The plaintiff relied on residence as the basis of jurisdiction. The defendant raised several defences, one of which was that he did not reside within the area of the court, and consequently, the court did not have jurisdiction over him. Having regard to the personal circumstances of the defendant, the court held:

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[200] *Toumbis v Antonio* 1999(1) SA 636 (W).

[201] In *Beedle & Co v Bowley* (1895) 12 SC 401 at 403, the Court held:

> 'When it is said of an individual that he resides at a place it is obviously meant that it is his home, his place of abode, the place where he generally sleeps after the work of the day is done.'

The *Beedle* dictum was cited with approval in *Mayne v Main* 2001 (2) SA 1239 (SCA) at 1243G–H. In *Cowie v Pretoria Municipality* 1911 TPD 628 at 633 the Court held:

> 'In order to constitute residence, a party must possess, at least, a sleeping apartment, but an uninterrupted abiding at such a dwelling is not requisite. Absence, no matter how long, if there be the liberty of returning at any time, and no abandonment of the intention to return whenever it may suit the party's pleasure or convenience so to do, will not prevent a constructive legal residence.'

[202] *Martiz v Erasmus* 1914 CPD 120; *Ngadi v Temba* (1905) SC 574. Pistorius (n4) 56 fn14 criticises the rule and asks the pertinent question: 'Why should a plaintiff be prejudiced by the defendant's arrangements?'

[203] In *Hogsett v Buys* 1913 CPD 200 at 205 the court stated:

> 'It has never been laid down what degree of permanence is required in residence; but at all events it ought to be shown that the person sought to be brought within the jurisdiction had some interest in the place where he was served, in the sense that there was some good reason for regarding it as his place of ordinary habitation of the date of service.'

[204] 1997 (2) SA 467 (W).

[205] A judgment of a foreign court is enforced by the provisional sentence procedure: *Jones v Krok* 1995 (1) SA 677 (A).

> 'It has repeatedly been emphasised that it is impossible to lay down a definition of the concept of residence. There are a number of factors which must be taken into account, each of which may go some way towards proving that residence has been established. In a particular case, the absence of one or more of these factors may be more than compensated by the presence of others. Some factors are more important than others. The duration of the stay, the acquisition of property and the procurement of employment are each obviously more significant than, for instance, the frequency of the visits, the number of friends or acquaintances resident within the area, or the amount of money spent on each visit, all of which is equally compatible with the habits of a peripatetic business executive.
>
> It is useful to begin the enquiry with a comparison of the conduct under scrutiny and that of the casual visitor or holiday-maker. Residence is something more than a casual visit and something less than domicile. Applying these tests to the facts of the case [the defendant] was hard pressed to contend that a South African residence had not been established. It plainly had...'.[206]

In *Mayne v Main*,[207] a foreign-domiciled defendant was, *inter alia*,[208] found to have resided within the jurisdiction of the court, because his love interest resided there, and he was known to have returned to South Africa for extended periods of time in order to be with her. The court thus applied the adage 'home is where the heart is' for the purpose of establishing jurisdiction.[209]

A defendant 'carries on business' where he or she trades for his or her own account. This must be distinguished from the situation where a defendant is employed. Employment signifies the

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[206] *Zwyssig v Zwyssig* 1997 (2) SA 467 (W) at 471C-E.

[207] *Mayne v Main* supra.

[208] In *Mayne v Main* supra, the court (paras [15]-[16]) forensically analysed the defendant's duration of stay in South Africa over several years and also took into account his business interests in the country. In this regard the court held:

> 'During all this time the respondent, with two exceptions, spent an annual holiday at Plettenberg Bay over the Christmas period. He therefore throughout maintained a regular link with South Africa. The extent to which the work done by the respondent in South Africa, and the time he spent here, increased over the years, particularly from 1994 onwards, is well illustrated by the following admitted or common cause facts. In 1990 the respondent spent a total of 55 days in South Africa, of which 25 days were on holiday. The corresponding figures for 1991 were 45 and 22 days respectively. In 1992 the respondent spent 27 days in South Africa, all of them on holiday. In 1993 there was a significant jump to 132 days spent here, 32 of them on holiday. These figures increased in 1994 to 263 and 61 days respectively. In that year the respondent entered and left the country on eight occasions. During the period 1 January 1995 to 31 July 1995 the respondent spent 174 days in South Africa, and over the whole of 1995, 270 days. Leaving aside the holiday periods, the vast majority of the time spent by the respondent in South Africa in 1994 and 1995 was on the Witwatersrand or, to be more specific, Johannesburg.
>
> In keeping with his burgeoning interest in South Africa from 1994, the respondent (in the form of Dayspring) set up an office in Johannesburg. It was equipped with all the basic technology (such as computers and the like) needed to enable him to communicate with the persons and corporations he represented. He also arranged for the acquisition (on lease agreement) of a motor vehicle to serve his needs. Dayspring's expenses were initially paid *via* a non-resident account. Later, in December 1995, More 2000 became the local management company for Dayspring. The respondent was its representative and a signatory on its banking account. Local business was transacted through it and it became the vehicle through which all expenses incurred in South Africa, by both Dayspring and the respondent personally, were paid.'

[209] *Mayne v Main* supra [25].

presence of a master-servant relationship in terms of a contract of employment with fixed and perpetual remuneration. Whereas a schoolteacher could be sued in the small claims court of the locality of his or her employment, an independent contractor would have to be sued where he or she operates or conducts his or her business. The place where the contractor performs services may not be the place where he or she carries on business.

By and large, establishing jurisdiction in the small claims courts against natural person defendants on the basis of residence, business locality, or employment is not contentious. Difficulties, however, arise when defendants happen to be juristic persons or trusts.

(i) Companies

In the case of companies, a distinction must be drawn between the position before the commencement of the Companies Act of 2008 and the position after the commencement of the Act.[210] Prior to the Companies Act of 2008, the case of *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd*[211] read with the Companies Act of 1973[212] had settled the question of where a company resides and carries on business. In *Bisonboard*, the court held that a company has a fictitious residence[213] and that jurisdiction may be established on the principle of *actor sequitur forum rei*. A defendant company, it was held, may be sued in the court where its registered head office is situated or where its principal place of business is located.[214] The principal place of business, held the court, is located where the company has its central control and general administration.[215] The registered head office of a company, on the other hand, is the address chosen for that precise purpose in its incorporation documents.[216] The court held

[210] 72 of 2008 (hereafter referred to as 'the Companies Act of 2008'). This Act came into operation on 1 May 2011.
[211] 1991 (1) SA 482 (A).
[212] 61 of 1973 (hereafter referred to as 'the Companies Act of 1973').
[213] *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) at 497-498 (hereafter referred to as '*Bisonboard*'). .
[214] Ibid at 495C.
[215] Ibid at 496B.
[216] Ibid at 501I-502B.

further that the residence of a company and the place where it carries on business will invariably coincide for the purposes of establishing jurisdiction.[217]

With the coming into force of the Companies Act of 2008, it has been held that, on an interpretation of s 23(3) of the Act, a company only has one place of residence, namely, where its registered head office is located, and that this address corresponds with its principal place of business. Section 23(3) provides:

> '(3) Each company or external company must –
> *(a)* continuously maintain at least one office in the Republic; and
> *(b)* register the address of its office, or its principal place if it has more than one office –
> (i) initially in the case of –
> *(aa)* a company, by providing the required information on its Notice of Incorporation; or
> *(bb)* an external company, by providing the required information when filing its registration in terms of subsection (1); and
> (ii) subsequently, by filing a notice of change of registered office, together with the prescribed fee.'

In *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd*,[218] a matter involving the business rescue of a company, the court was required to determine whether jurisdiction on the basis of the residence of the company had been established in terms of s 19(1)*(a)* of the Supreme Court Act.[219] In this regard, the court, per Binns-Ward J, held:

- Under the Companies Act of 1973, express provision was made in respect of which court had jurisdiction. Section 12(1) of the Companies Act of 1973 provided:

  > 'The court which has jurisdiction under this Act in respect of any company or other body corporate, shall be any provincial or local division of the High Court of South Africa within the area of the jurisdiction whereof the registered office of the company or other body corporate or the main place of business of the company or other body corporate is situate.'[220]

- The Companies Act of 2008 contains no equivalent provision to s 12(1). Jurisdiction in respect of matters arising under the Companies Act of 2008 must therefore be determined

[217] Ibid 1991 (1) SA 482 (A) at 489G.
[218] 2013 (1) SA 191 (WCC).
[219] Act 59 of 1959.
[220] *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (Nedbank Ltd Intervening)* 2013 (1) SA 191 (WCC) para [10].

on common-law grounds, unless it can be said that a proper reading of the Act reflects a different intention.[221]

- Under the Companies Act of 1973, companies often chose an address for convenience rather than the office of the company itself. Frequently, a company's registered office correlated with the address of its auditor.[222] On an interpretation of the Companies Act of 1973, service of any process could be effected on the company at its registered office or principal place of business.[223] This interpretation was supported by the court in *Bisonboard.*[224] Section 23(3) of the Companies Act of 2008, on the other hand, makes it clear that the registered office is the only office that must be maintained and that it cannot be an address of a third party used for convenience.[225]
- Whereas the Companies Act of 1973 expressly acknowledged the possibility of a distinction between a company's registered office and its principal place of business, the Companies Act of 2008 requires the registered office and the principal place of business for jurisdictional purposes to be at one and the same address.[226]

In light of the above, the court ruled:

> 'The result would be that there would in respect of every company be only a single court in South Africa with jurisdiction in respect of winding-up and business rescue matters…[227]
>
> Furthermore, winding-up and business rescue are also matters which are interlinked in such a manner by the provisions of the 2008 Act that it is undesirable for reasons of comity between courts of equal status, efficiency, commercial convenience and certainty that they be amenable to proceedings in concurrent jurisdictions. These are considerations militating in favour of the recognition of a regime that recognises a company only to be resident in one place rather than two, thereby assuring that only one court will have jurisdiction.'[228]

[221] Ibid [11].
[222] Ibid [17].
[223] Ibid [19].
[224] 1991 (1) SA 482 (A).
[225] *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (Nedbank Ltd Intervening)* supra [20].
[226] Ibid [21].
[227] Ibid [23].
[228] Ibid [23].

Commentators argue that the court's reasoning is of general application and is not limited to the facts of the case.[229] Section 23(3) has effectively disposed of the possibility of there being two grounds on which to establish jurisdiction against a defendant company as the distinction between the registered head office and the principal place of business for jurisdictional purposes no longer exists.[230] It is unclear whether the legislature did this intentionally or inadvertently. Whatever the reason is, there are repercussions for establishing jurisdiction against companies in all matters, and in all courts.

For the small claims court litigant, s 23(3) of the Companies Act comes as cold comfort. Unlike litigants in the High Courts or the magistrates' courts, small claims court litigants are unrepresented. They have to litigate matters themselves and are personally responsible for all court processes. They do not have the luxury of instructing correspondent attorneys in other towns and cities to file claims and to prepare for court hearings. A small claims court litigant has to travel to the seat of the court to issue summons and to appear at the hearing. If the claim is particularly small, the expense of travelling to the seat of the court may exceed the value of the claim. For the impecunious litigant, weighing up the cost of the immediate capital outlay for travel against providing food and shelter for his or her family can so easily result in that person forgoing civil justice. This does not bode well for access to justice in a court that was designed to make litigation an affordable reality for the poorer litigant. The limiting of jurisdictional grounds has dire consequences.[231]

It may be argued that the problem above – and any other similar jurisdictional problem – could be overcome by applying s 13 of the SCCA. In terms of this provision:

> 'An action may, with the consent of all the parties, or upon the application of one of the parties who satisfies the court that the hearing of the action in that court may result in undue expense or inconvenience to him, be transferred by the court to any other court, and in such a case the latter court shall, notwithstanding anything to the contrary in this Act contained, have jurisdiction to hear that action.'

[229] See Van Loggerenberg *Erasmus Superior Court Practice* (service 2, 2016) A2-98 (hereinafter referred to as *Superior Court Practice*).
[230] See also *LAWSA* §35 footnote 14.
[231] See also Moulton 'The Persecution and Intimidation of The Low-Income Litigant as Performed by the Small Claims Court in California (1968-1969) 21 *Stanford Law Review* 1672.

It is axiomatic that the provision allows for the transfer of actions from one court to another on the grounds of expense and inconvenience. The court to which a matter is transferred will be deemed to have jurisdiction, even though it would not ordinarily have jurisdiction according to the rules of jurisdiction. The difficulty with relying on this provision, it is submitted, is that the litigant must institute action in the court of correct jurisdiction first,[232] and then request the transferring court, on application, to transmit the matter to any other court. The expense of the initial phase of securing the transfer may be a deterrent to instituting proceedings at all. Consent of all the parties to obtain a transfer is always possible, but experience shows that a litigant is unlikely to consent to the relaxation of litigation rules if there is a tactical advantage to be gained. It is also the case that one litigant often uses the economic impoverishment of the other litigant to his or her advantage. This is more so the case when a natural person sues a commercial enterprise and the latter possesses greater financial means.[233]

There are several possibilities to overcome the difficulty of establishing jurisdiction against companies. First, the Companies Act of 2008 could be amended to broaden the grounds on which jurisdiction may be established against companies. Many of the larger companies in South Africa operate administrative centres in the major cities in all of the provinces of South Africa. What harm can there be in establishing jurisdiction on the basis of a company's administration center in a particular province or region? The literature, in any event, is silent on why the legislature decided to make it more difficult to establish jurisdiction against a company when the jurisdictional principles under the Companies Act of 1973 as supported by *Bisonboard*[234] worked so well for a very long time.

[232] This to be inferred from the phrase 'hearing of the action in that court.' For a court to 'hear an action' it must have jurisdiction to do so.
[233] See chapter 4. See also M Galanter 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974-1975) 95 *Law and Society Review* 95ff.
[234] Supra.

A second suggestion would be to amend the table of tariffs and costs[235] of the small claims courts so as to make it possible for natural persons to recover reasonable travelling costs when suing juristic persons. Juristic defendants have deeper pockets. Presiding officers should have the discretion to award travelling costs to plaintiffs where the interests of justice so require. The difficulty, of course, is this: at what point should the costs be awarded? If costs are awarded at the end of the hearing, the provision of costs would not assist poor litigants who do not have the money to make the initial capital outlay. If costs are awarded *pendente lite*[236] this may lead to abuse. Nothing would prevent a litigant from lodging a sham claim dressed up as a good claim, to take the travel costs that have been awarded to him or her, and to abandon the claim altogether. This risk, it could be argued, may be low given s 30 of the SCCA. The section provides:

> '30 Withdrawal of claims
> (1) A plaintiff may at any time, whether before or during the hearing of his action, withdraw his claim with the consent of the court and on such conditions as the court may determine, whereupon the proceedings shall be ceased.
> (2) If proceedings are ceased as contemplated in subsection (1), the plaintiff may bring a fresh action with the consent of the court.'

The provision envisages that a litigant will not have a free hand to abandon a claim. What is unclear, however, is what the position will be if the plaintiff simply fails to appear at court. Presumably, his or her claim will be struck out. If this happens, the defendant will not be able to recover any *pendente lite* costs that may have been made available to the plaintiff. The provision of *pendente lite* costs is thus not a good idea.

A third proposition would be to expedite and simplify the mechanisms for issuing of claims in the small claims courts so that litigants do not physically have to go to the seat of the court to issue summonses. As will be discussed in chapter 8, the issuing of summonses in the small claims courts needs to be overhauled so that litigants can issue and serve summonses online or by other electronic means. After a summons is issued, the litigant should be permitted to transfer

[235] SCCRs, Annexure 2.
[236] That is, before the litigation.

the matter to any other court. In conjunction with the simplified issuing of summons process, an administrative process could be formulated to enable a presiding officer in chambers to decide on the papers whether to transfer a matter to any other small claims court. This will, of course, require an amendment to s 13 of the SCCA.

Fourthly, s 13 of the SCCA could be amended to enable a natural person litigant to approach *any* small claims court in *any* district and to request that court, on good cause shown, to assume jurisdiction over a particular matter involving a juristic person.[237] This will entail a radical departure from the normal rules of jurisdiction in the small claims courts. If one is committed to access to justice and to legal transformation consonant with the right to equality before the law, then out-of-the-box solutions are needed. It would mean that the common-law principle *'actor sequitur forum rei'* will have to be jettisoned in these exceptional cases. It is submitted that the interests of justice would be better served if one took a more flexible approach in the small claims courts to the question of jurisdiction. Such flexibility is consistent with the aims and objectives of small claims courts and gives credence to the right of access to the courts. Flexibility will not jeopardise the administration of justice in terms of allowing for forum shopping, as every litigant would have to make out a good case for wanting a particular small claims court to assume jurisdiction over a matter.

When deciding to transfer a matter or to assume jurisdiction over a matter, a court should have regard to the convenience to both parties, the convenience to the court, and the general dispensing of justice. To prevent abuse of process and to mitigate instances of unwarranted review proceedings, it is submitted that the presiding officer should provide reasons for either allowing or refusing the application. To suggest that the SCCA cannot be amended as suggested above would be wrong. One has only to refer to s 27 of the SCA for an example of where the legislature has generously relaxed the rules of jurisdiction in the High Courts, and facilitated

[237] See See Moulton (n231) 1672.

the transfer of matters from one High Court to another to prevent claims from being abated on the ground of lack of jurisdiction.[238]

A fifth possibility would be to jettison the *actor sequitur forum rei* principle so that jurisdiction may established where either the plaintiff or the defendant resides, carries on business, or is employed. The *actor* principle is attributed to the inherent limitations associated with the Roman-Dutch system of ensuring an enforceable judgment.[239] Suing in the defendant's court assisted in ensuring that the courts of Holland could grant enforceable judgments. Aside from the physical presence of the defendant, the defendant invariably owned property in the territorial area of the court. Given that South Africa is a unitary state and that all judgments are enforceable anywhere in the Republic,[240] it makes little sense to over-emphasise the enforcement of a judgment as the underlying basis of particular jurisdictional rules. Given that judgments are easily enforceable in the Republic and that the jurisdictional rules of private international law do not require a slavish adherence to the *actor* principle, the principle can be relaxed.[241]

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[238] Section 27 of the Superior Courts Act provides:

> '**27 Removal of proceedings from one Division to another or from one seat to another in same Division**
>
> (1) If any proceedings have been instituted in a Division or at a seat of a Division, and it appears to the court that such proceedings-
>
> *(a)* should have been instituted in another Division or at another seat of that Division; or
>
> *(b)* would be more conveniently or more appropriately heard or determined-
>
> (i) at another seat of that Division; or
>
> (ii) by another Division,
>
> that court may, upon application by any party thereto and after hearing all other parties thereto, order such proceedings to be removed to that other Division or seat, as the case may be.
>
> (2) An order for removal under subsection (1) must be transmitted to the registrar of the court to which the removal is ordered, and upon the receipt of such order that court may hear and determine the proceedings in question.'

This section has been generously interpreted by the courts. See in this regard *Superior Courts Practice* (service 2, 2016) A2-140Aff and the authorities cited therein.

[239] Voet 5.1.64.

[240] See §6.4.

[241] Perdue 'Personal Jurisdiction and the Beetle in the Box' (1991) 32 *Boston College Law Review* 529ff and see the authorities there cited for a movement towards 'transient jurisdiction' predicated on effective service of process and not on where the defendant resides. See also discussion in Part VI below.

(ii) Close Corporations

The jurisdiction of close corporations is governed by s 7 of the Close Corporations Act,[242] which provides as follows:

> 'For the purposes of this Act any High Court and any magistrate's court, within whose area of jurisdiction the registered office or the main place of business of the corporation is situated, shall have jurisdiction.'

Strangely s 7 does not refer to the small claims courts at all. However, s 7(1) of the SCCA expressly provides:

> 'Only a natural person may institute an action in a court and, subject to the provisions of section 14(2), a juristic[243] person may become a party to an action in a court only as defendant.'

It is quite clear, therefore, that close corporations, as juristic persons, can be sued in the small claims courts.

In the future, however, close corporations will feature less in the small claims courts. The reason for this is that since the coming into force of the Companies Act of 2008, it is no longer possible to register a close corporation in South Africa. Existing close corporations have a choice of either retaining their current form or converting to companies.[244] Many close corporations also liquidate over time, thereby reducing the number of active close corporations in the country.[245]

[242] Act 69 of 1984.
[243] The phrase 'juristic person' is not defined in the SCCA.
[244] Companies Act 71 of 2008, schedule 2.
[245] The following table is illustrative of the steady trend of close corporation liquidations.

Table 1.2 – Liquidations of close corporations according to industry (number)

Industry	January - March 2015			March 2014			February 2015			March 2015		
	C	V	Total	C	V	Total	C	V	Total	C	V	Total
1.Agriculture, hunting, forestry and fishing	2	0	2	1	0	1	0	0	0	2	0	2
2.Mining and quarrying	0	0	0	0	0	0	0	0	0	0	0	0
3.Manufacturing	3	21	24	0	8	8	0	6	6	3	8	11
4.Electricity, gas and water	0	4	4	0	2	2	0	1	1	0	2	2
5.Construction	1	16	17	1	10	11	1	7	8	0	7	7
6.Wholesale and retail trade, catering and accommodation	8	60	68	6	26	32	3	24	27	5	24	29
7.Transport, storage, communication	1	12	13	0	6	6	0	5	5	1	4	5
8.Financing, insurance, real estate, business services	6	77	83	3	46	49	2	24	26	2	31	33
9.Community, social, personal services	10	21	31	1	7	8	0	5	5	8	10	18
Total number of liquidations	**31**	**211**	**242**	**12**	**105**	**117**	**6**	**72**	**78**	**21**	**86**	**107**

C = Compulsory.
V = Voluntary.

Statistics of liquidations and insolvencies, March 2015

Source: Statistic South Africa *Statistics of Liquidations and Insolvencies (Preliminary)* March 2015.

(iii) Trusts

Trusts are not juristic persons. They are regarded as *sui generis* entities.[246] They cannot sue and be sued in their own names. In line with the common law, if one wants to sue a trust in a small claims court, one would have to cite the trustees of the trust in their representative capacities.[247] Thus to sue a trust in the small claims court, a plaintiff would have to sue the trustees of a trust and in that way extract a debt owed by the trust. There are two difficulties in this regard.

The first difficulty arises when there are multiple trustees. A plaintiff would only be able to establish jurisdiction in terms of s 14(1)*(a)* of the SCCA where *all* the trustees collectively reside, carry on business or are employed. If the trustees reside, carry on business, or are employed in different jurisdictional areas, the plaintiff would have to rely on an alternative ground of jurisdiction – such as the area where the whole cause of action arose.[248] The same problem exists in the magistrates' courts.[249]

It is much easier in the High Courts to establish jurisdiction against multiple defendants. Section 21(2) of the SCA allows the High Court to exercise jurisdiction over any person who resides, carries on business or is employed outside of the territorial jurisdiction of the court and who has been joined to proceedings as a further defendant. As long as the court has jurisdiction over one or some of the defendants according to the normal rules of jurisdiction, the court will automatically have jurisdiction over defendants over whom it would ordinarily not have

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[246] *Braun v Blann and Botha* 1984 (2) SA 850 (A) at 859E.

[247] *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 (W) at 126H-I. For further discussion as regards why a trust can be sued in the small claims court, see the discussion in chapter 7.

[248] See discussion below for the difficulties with this proposition.

[249] *Jones & Buckle* (service 10, 2016) Act 96A states:

> 'Where two executors of an estate resided in different districts it was held that, as they must be sued jointly, the Supreme Court was the only competent forum. There does not appear to be any provision in the Act to remedy this position, unless the cause of action arose wholly within one district (s 28(1)(d), or there is an appearance by the defendant without an objection to the jurisdiction of the court (s 28(1)(f), or the action is in relation to immovable property within the district (s 28(1)(g)) or unless there is consent (s 45).'

Although the above statement is made within the context of multiple executors, the position is applicable to multiple trustees who must also be sued jointly and severally on behalf of a trust. See also *Hughes v Estate Fitzgerald* (1910) 20 CTR 494.

jurisdiction. In *Mossgas (Pty) Ltd v Eskom*, the court held that the purpose of the provision was to avert '[t]he [jurisdictional] difficulty which would arise when defendants who are liable to a plaintiff on the same cause of action … are resident in different jurisdictions…'.[250] Section 21(2) expands the jurisdiction of the court. At the same time, it makes it convenient for a plaintiff to establish jurisdiction in a case involving multiple parties. One cannot see why a similar provision cannot be introduced into the SCCA.[251] This would definitely make it easier to sue trustees acting in their representative capacities. It would also assist a plaintiff to sue multiple parties in a delictual or contractual matter.

The second difficulty with suing trusts is that it is not so easy to determine the identities of the trustees at the time when the action arises. Trust documents are lodged with the office of the Master of the High Court at the time of their establishment. However, trust deeds are frequently amended to reflect new trustees. These amendments are often not lodged.[252] Consequently, it can be quite difficult to determine the identities of trustees at the time of litigation. Suing the wrong trustee can jeopardise the claim because jurisdiction would not be established.

[250] In *Mossgas (Pty) Ltd v Eskom* 1995 (3) SA 156 (W). It has to be noted that the court was interpreting the s 19(1)(b) of the Supreme Court Act 59 of 1959. Section 21(2) of the SCA is identical to s 19(1)(b). See also *Majola v Santam Insurance Co Ltd* 1976 (1) SA 874 (SE).

[251] This is more so the case because one can already establish jurisdiction in the small claims court against multiple partners of a partnership by suing in the court where any partner resides: see s 14(1)(b) of the SCCA. There is thus no reason why the same latitude cannot be extended to a trustee of a trust.

[252] Section 4 of the Trust Property Control Act 57 of 1988 requires trust instruments and amendments to trust instruments to be lodged with the Master of the High Court. While the provisions of s 4 are pre-emptory, trust's amendments are often not lodged by trustees. To compound matters further, it can be very difficult for a third party to obtain information about a trust as the record system in the Master's office is not properly mechanised. Unless, one is in possession of the trust information (such as registration details), and knows where the trust was registered, one can easily find that the information pertaining to a trust is not accessible. For the unrepresented lay-litigant in the small claims courts, this poses a particular problem as he or she would have to travel to seat of relevant Master's office and would have to be in possession of relevant details relating to the trust. To compound matters further, the Master's office in the various centres is often in disarray: see http://www.iol.co.za/news/crime-courts/masters-office-of-high-court-in-chaos-1233690 (last accessed 24 March 2017); https://www.pressreader.com/south-africa/the-witness/20170217/281681139635955 (last accessed on 24 March 2017); http://sentineltrust.co.za/Advisory/problems-experienced-with-the-pretoria-master/ (last accessed on 24 March 2017); http://allafrica.com/stories/200809020511.html (last accessed on 24 March 2017).

The solution to the two problems above is to enable a trust to be sued in its own name as a matter of procedural convenience. At present, SCCR 27, which is similar[253] to MCR 54 and HCR 14, allows certain non-juristic entities to be sued in their own names as a matter of procedural convenience. The rule provides:

> '27 Actions by and against partners, a person carrying on business in a name or style other than his own name, syndicate or association
> (1) Any person carrying on business in a name or style other than his own name or two or more persons who are co-partners may be sued in such name or style or in the name of the partnership.
> (2) The provisions of this rule shall also mutatis mutandis apply to an unincorporated company, syndicate or association.'

On an interpretation of MCR 54 and HCR 14, the courts have held that the effect of the rules is not to change the common law as they do not endow the entities mentioned in them with separate personality. They simply seek to make it convenient for these entities to be parties to proceedings as a matter of procedural convenience.[254] When these entities are sued, it is the responsibility of the party who relies on the rules to use the special mechanisms within the rules to flush out the identities of the natural persons who were in effective control of the entities at the time when the cause of action arose.[255] It is submitted that the theoretical interpretation given to MCR 54 and HCR 14 is applicable to SCCR 27 – the practical difference being that in the small claims courts, the presiding officer will illicit the relevant information from the representative of the entity as regards the identities of the persons who are/were in effective control of the entity concerned. It is submitted that if SCCR 27 was amended to make provision for a trust, the presiding officer would similarly be able to investigate the identities of the trustees. On conclusion of the inquiry, the presiding officer would *ipso facto* join those persons to the proceedings. The effect of the joinder would not be to make the trustees personally

[253] The Rules are similar but not the same. They differ in that in MCR 54 and HCR 14 the entities mentioned in the Rule can sue and be sued in the courts, whereas under SCCR 27, the entities mentioned *can only be sued* in the small claims court. For further discussion on this point, see Chapter 8 §.
[254] See *D F Scott (EP) (Pty) Ltd v Golden Valley Supermarket* 2002 (6) SA 297 (SCA).
[255] See ibid.

liable.[256] It would just mean that the judgment granted would be proper in terms of the common law.[257]

(iv) Firms, associations, sole proprietorships, body corporates, syndicates

None of these entities are juristic persons. They are all businesses or voluntary associations that have natural persons behind them. Under the common law, the individuals behind these entities would have had to be sued in their personal capacities in respect of a cause of action arising

[256] See §7.4.

[257] In *Cupido v Kings Lodge Hotel* 1999 (4) SA 257 (E), the court held:

> 'It is so that Rule 14 does not make specific mention of a trust who conducts a business under a name other than its own. Nonetheless, the nature and purpose of the trust, particularly the so-called business trust, have undergone a metamorphosis to the extent where the trust frequently competes directly with conventional business organisations on the open market. (*Honoré*, (*op cit* at 74).) Trusts are often viewed as independent entities. For example a trust may possess assets, incur liabilities for debts and can also be sequestrated. (*Magnum Financial Holdings (Pty) Ltd (in Liquidation) v Summerly and Another NNO* 1984 (1) SA 160 (W).) Moreover, in certain circumstances a trust (similar to partnerships) is treated as if a person.
>
> > "But though a trust is not apart from statute a juristic person, there are cases which decide that, for purposes such as insolvency the trust estate is distinct from the private estate of the trustee. In the law of income tax a trust is treated by statute as a person. It is a practice in certain Deeds Registries to register land or real rights in land in the name of a trust. The Trust Property Control Act 1988 now describes in general terms that "trust property shall not form part of the personal estate of the trustee except insofar as he as a trust beneficiary is entitled to the trust property" and it imposes on the trustee a duty to separate clearly the trust property from his own personal property." (*Honoré,* (*op cit* at 7).)
>
> In recent years business trusts have become increasingly popular. (Pace and Van der Westhuizen *Wills and Trusts* at 6.) They often participate in business in unison with corporations and other recognised commercial structures. It is not unusual for financial institutions to create trusts in order to administer corporate interests under the name and guise of such trusts. The profit motive which predominates in business has siphoned through to the self-styled business trust. There is in many respects very little practical difference between the common business enterprise or corporation and the business trust. These developments have made it difficult for a plaintiff who intended on suing a defendant to always be sure whether he was dealing with a trust, a corporate body or a private individual. *Honoré*, (*op cit* at 75) emphasises the difficulties which can arise for a litigating party where he had concluded business with a trust:
>
> > "It is relatively difficult for those doing or contemplating business with a trust to discover the terms of the trust instrument or the names of the trustees. There is no requirement that their names be listed in business documents as in the case of companies and close corporations. By the Trust Property Control Act, s 18, any person may obtain a copy of the trust instrument if in the opinion of the Master he has sufficient interest in the document to do so. This may not, however, enable him to discover the names of the trustees since their names may not appear in the trust instrument."
>
> Once it is accepted that Rule 14 was enacted for the purpose of streamlining the method of citation of litigants and in particular to obviate technical defences being taken with regard to the citation of the litigating parties, then there can be no reason why the provisions of Rule 14 should not be applied in respect of trusts, particularly where a trust conducts its business under a name other than by which the trust is known…'

from the business of the entity. Jurisdiction would have been established against each member individually.

To ameliorate the complexity of establishing jurisdiction against each individual member, SCCR 27 permits a plaintiff to sue these entities in their own name as a matter of procedural convenience. The effect of this is that jurisdiction may be established on the principle of *actor sequitur forum rei*[258] where the entity carries on business. The presiding officer will use his or her investigative powers at the hearing to identity the natural persons behind the mask so that all of the relevant members can be joined as parties to the proceedings. Once joined, all the members would be personally liable for a judgment made against the entity on the basis of joint and several liability.[259]

The reference in SCCR 27(1) to '[a]ny person carrying on business in a name or style other than his own name' is to the *sole proprietorship*, even though the phrase is not used in the rule. Body corporates are also not mentioned in the rule. However, SCCR 27(2), which refers to an 'unincorporated company, syndicate or association' is wide enough to include a body corporate.[260]

There is little doubt that SCCR 27 – like its counterparts in the magistrates' courts[261] and the High Court[262] – serves a laudable purpose, as it simplifies the rules for establishing jurisdiction in an indirect manner. For that reason, it is recommended that the rule be retained, but redrafted.

Small Claims Court Rule 27 should be redrafted to read more simply. In addition, the entities mentioned in the rule should be revisited and expanded. There is no reason why, as stated above, the rule should not apply to trusts.[263] As noted above, there are inherent problems with suing

[258] See §6.13.
[259] See *D F Scott (EP) (Pty) Ltd v Golden Valley Supermarket* supra.
[260] See ibid [1].
[261] MCR 54. See discussion above.
[262] HCR 14. See discussion above.
[263] See footnote 257 above.

trusts in the small claims courts. If the rule was redrafted to permit a trust to be sued in its own name without reference to trustees, this would go a long way to resolving the issues confronting the plaintiff wishing to sue a trust. But it may also mean that s 14(1)*(b)* of the SCCA will have to be amended.

(b) Section 14(1)(b): 'Any partnership, as defendant, which has business premises situated or any member of which resides within the area of jurisdiction of the court'

A partnership is a contractual relationship between two or more people under which each of them contributes or undertakes to contribute towards an enterprise to be carried on jointly between them with the object of making and sharing a profit. As an entity a partnership is not a juristic person. It does not have a personality separate to that of the individuals forming it (i.e. the partners).[264]

Under the common law, a partnership could not be sued in its own name. The partners had to be sued jointly and severally.[265] However, in terms of the MCA[266] and the MCRs,[267] as well as the HCRs,[268] a partnership can be sued in its own name. Jurisdiction can be established against a defendant partnership on the basis of where it carries on its business or on the basis of where *any* partner resides. In conformity with this general rule, the SCCA also establishes the jurisdictional rule whereby a partnership can be sued in the court of the area where its business premises are located or where *any* member thereof resides. Once jurisdiction is established in respect of a single partner, all the other partners can be brought to the seat of the court. Any judgment made by the court would be enforceable against the personal assets of any individual partner, irrespective of where he or she may reside in the Republic.[269] The joinder of one is thus the joinder of all.

[264] R Sharrock *Business Transactions Law* (2011) 503ff.
[265] Ibid 503.
[266] MCA, s 28(1)(b).
[267] MCR 54.
[268] HCR 14.
[269] See *D F Scott (EP) (Pty) Ltd v Golden Valley Supermarket* supra; *Cupido v Kings Lodge Hotel* supra.

That a partnership may be sued in its own name finds further support in SCCR 27 (discussed above).[270] If a partnership is sued in its own name, the presiding officer would invariably have to inquire into the identities of every partner so that any judgment which the court grants will be enforceable not only against the partnership assets, but also against each individual partner.

(c) Section 14(1)(c): 'any person in respect of any proceedings incidental to any action instituted in that court by such person'

It is often the case that a plaintiff institutes action against a defendant by establishing jurisdiction according to the rules of jurisdiction, and the defendant desires to raise a counterclaim (claim in reconvention) to the plaintiff's action (claim in convention). Section 14(1)*(c)* allows a defendant to bring a counterclaim in the same court that hears the claim in convention. The practicality of doing so is evident. It prevents a multiplicity of actions and is consequently convenient, saves time, and saves expense.

At first blush s 14(1)*(c)* seems uncontroversial. However, the provision has been misconstrued in the small claims courts. The confusion is around the word *incidental* in the provision. Many presiding officers and litigants incorrectly think that it is permissible to bring any type of counterclaim in the small claims courts. For a counterclaim to be entertained, it has to be *incidental.*

Section 14(1)*(c)* was copied verbatim from s 28(1)*(c)* of the MCA. On an interpretation of s 28(1)*(c)* the courts have held that the word *incidental* is significant. For a claim to be incidental it has to arise from the main claim. Peté et al provide the following practical illustration within the context of magistrates' courts procedure:

> 'It is often the case, however that the counter-claim has nothing to do with the claim in convention. For example, assume that A sues B for an alleged breach of contract and that B wants to counter-claim for injuries sustained during an alleged assault on him by A. The counter-claim (assault resulting in injury), did *not* arise out of the same facts as the claim in convention (breach of contract). Therefore, the counter-claim is *not* incidental to the claim in convention, and B may not rely on s 28(1)(c) for jurisdiction. If we assume that A does not reside, carry on business, and is not employed, in the district or regional division

[270] See discussion on page 65 above.

> of the particular Magistrates' Court in which he has sued B, and that the alleged assault on B did not occur in that district or regional division, B will probably have to bring his action for assault not as a counter-claim, but as a separate action in a separate court which has jurisdiction to hear that claim.'[271]

On account of the mirroring legislative provisions, the above illustration is applicable to small claims court matters as well.

It is unclear why the drafters of the MCA decided to use the word *incidental* in s 28(1)*(c)*, given that it was not necessary in terms of the Roman-Dutch law for a counterclaim to be *incidental* to the main claim. In *Brunette v Stanford,*[272] the court held that the reason why counterclaims had been allowed by the Dutch courts was that it was in the interest of the State to bring legal matters to finality ('*ut sit finis litium'*) and to prevent a multiplicity of claims. To this extent, the court (per Cloete J) stated:

> 'By looking at the text-books I think it will be found clearly laid down that the principle of reconventional claims was introduced into the Dutch law simply because it was for the interest of the state, "*ut sit finis litium*." When an action was, therefore, brought against a defendant, if he had any kind of cross action, of whatever nature, against the same party who brought the original suit, it was competent for him at once in pleading to make his claims in reconvention, so that the pleadings would go on *pari passu* to the day of trial, and prevent the plaintiff from getting judgment against the defendant when that defendant might have otherwise meritorious claims as a valid set-off. These reconventional claims, by being thus pleaded at once, prevented the necessity of defendant taking out fresh summonses, or beginning other proceedings which really might lead to very great injury. It was in this way that reconventional claims came to be mixed up with conventional. On the day of trial, when the plaintiff chose to put down his case in convention, the defendant has thus also a right to put down his case in reconvention; and, if he obtain a judgment in this reconvention, he may at once bring that judgment as a satisfaction or deduction from, or even obtain a larger amount than the claim of the plaintiff. It is therefore emphatically laid down in the text-books that in an action of account, there may be a cross-action for slander or one raising any other matter whatever. With regard to the question of giving security, as the defendant's counsel has admitted that he is perfectly ready to give security, it is as well that should be done, because although it may happen that the property may realise less than the amount of the mortgage, it may also happen that it may realise more.'[273]

It would appear from the case law that the MCA altered the relaxed common-law position in the magistrates' courts. The drafters of the SCCA unceremoniously dragged the small claims courts by their bootstraps to adopt the magistrates' courts position. It is submitted that as long as a small claims court has jurisdiction to entertain the substance of the counterclaim, the court

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[271] Peté, Hulme, du Plessis et al *Civil Procedure – A Practical Guide* 2ed 67. The writers go on to state further:
> *'Jones and Buckle* agree with this general approach and describe that they believe to be the scope of s 28(1)(c) as follows:
>> "It is submitted that the language of s 28(1)(c) points to matters which are really incidents of the claim in convention, that is, interlocutory orders, orders for costs, issue of execution, setting aside of judgment, etc, and which may have to be made against a defendant as well as against a plaintiff..."'

[272] (1859) 3 Searle 221.

[273] Ibid at 226.

should be entitled to hear the counterclaim, even if it does not arise from the main claim. This would prevent a multiplicity of actions.

The SCCA should be amended and the word *incidental* should be deleted so that small claims courts have more flexibility to hear counterclaims in the form of 'set-off'. Such a relaxed approach would be consistent with the aims and objectives of small claims courts, which are to promote the expeditious resolution of disputes without the intrusion of undue technicality. It would also be in conformity with the way that counterclaims are dealt with in small claims courts in other jurisdictions.[274]

(d) Section 14(1)(d): 'any person, whether or not he resides, carries on business or is employed within the area of jurisdiction of the court, if the cause of action arose wholly within that area'

This provision allows a plaintiff litigant to establish jurisdiction in the small claims court on the basis of where the cause of action arose. There is nothing wrong with establishing jurisdiction on the basis of cause of action. However, what is problematic is that the provision requires that the cause of action must have arisen 'wholly' within the jurisdiction of the court. Again, like so many other provisions in the SCCA, this provision is identical to one which exists in the magistrates' courts, namely s 28(1)*(d)* of the MCA.

The word 'wholly' has been the subject of litigation. The courts have said that for a cause of action to arise *wholly* within the jurisdiction of the court, the plaintiff must show that all of the material facts (the *facta probanda*) that are necessary to establish a particular substantive cause

[274] In Indiana (Indiana Small Claims Court Rules, as amended 1 January 2017, Rule 5A) California and New York, for example, the counterclaim does not have to be incidental to the main claim. The same is the case in England and Wales: see Sime *A Practical Approach to Civil Procedure* 194ff. In the European small claims procedure, however, the counterclaim has to be incidental to the main claim: Kramer 'A Major Step in the Harmonization of Procedural Law in Europe: the European Small Claims Procedure: Accomplishments, New Features and Some Fundamental Questions of European Harmonization' in Jongbloed (ed) *The XIII World Congress of Procedural Law: The Belgian and Dutch Reports* (253-283 at 264. It should also be noted that the Kenyan Small Claims Court Act seems to limit counterclaims to contractual disputes (s 12(1)(e)). However, it is not required for the counterclaim to be incidental to the main claim. See discussion in Part VI below.

of action must have arisen in the jurisdictional area of the court.[275] In a delict matter, it is necessary to show that all the facts to fulfill the constitutive elements of the delict occurred in the same jurisdictional area.[276] In the case of contract, offer, acceptance, breach and/or performance must have occurred in the territory of the court concerned.[277] Needless to say, the requirement is quite onerous as many transactions straddle court borders – often within the same province.

Peté et al are critical of s 28(1)*(d)* of the MCA. They argue that the word 'wholly' unnecessarily restricts the jurisdiction of the lower courts. They point out that the rules of jurisdiction in the High Court are more relaxed. To establish jurisdiction on the basis of cause of action in the High Court, the plaintiff need merely show – in accordance with private international law rules pertaining to jurisdiction – that some of the elements of the cause of action arose within the jurisdictional area of a particular court. They argue that the same position should be applicable in the lower courts.[278] As regards small claims courts they observe as follows:

> 'Assume that [a] resident…orders tiles to the value of R5000-00 from a dealer who has a branch in Umhlanga. Assume also that, like many businesses in the formal sector, the dealer is a company or close corporation. The agreement is concluded at the dealer's Umhlanga premises, with the goods to be delivered to the resident's home in Durban North. Assume that that the dealer has another branch of its business in Port Shepstone on the South Coast of KwaZulu-Natal. The resident pays R5000 to the dealer, but the goods fail to arrive. The dealer begins to make excuses for late delivery, then begins to avoid the resident's calls and finally ignores the letter of demand despatched by the resident's attorney… As the dealer would possibly foresee, the resident's attorney eventually advises the resident to proceed with the matter in the small claims court, as the amount involved does not make the attorney's involvement economically viable.
>
> The intention behind the creation of the small claims courts was to provide a cheap and effective alternative to the magistrates' courts for small claims… [T]he jurisdictional sections to the Magistrates' Courts Act have been reproduced with little discernable change in the Small Claims Courts Act, meaning that the same jurisdictional problems which arise in the magistrates' courts will affect litigants in the small claims courts also.'[279]

They go on to state:

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[275] *McKenzie v Farmer's Co-operative Meat Industries Ltd* 1922 AD 16 at 23; *King's Transport v Viljoen* 1954 (1) SA 133 (C) at 138A-139G.
[276] *Thomas v BMW South Africa (Pty) Ltd* 1996 (2) SA 106 (C). See also Hulme, Peté 'A New Look at an Old Question – Precisely Where Does A Cause of Action Based on Contract or Delict arise in the case of Civil Claims in the Magistrates' Courts and Small Claims Courts?' (2011) *Obiter* 304 at 319ff.
[277] *Jonker v Esterhuizen* 1927 CPD 225 at 227; *Herholdt v Rand Debt Collecting Co* 1965 (3) SA 752 (T) at 756G-575A; *Buys v Roodt (nou Otto)* 2000 (1) SA 535 (O) at 539I-540A.
[278] Hulme, Peté (n276) 321.
[279] Hulme, Peté (n276) 307-308.

> 'Since the agreement was concluded in the dealers' Umhlanga premises, with the goods delivered to the consumer's home in Durban North, the conclusion of the contract and the breach (that is, the failure to deliver the tiles), occurred within the jurisdiction of two separate courts namely, the Durban and Verulam [small claims courts]. Therefore, on the basis of the law as it currently stands, the cause of action did not arise wholly within the jurisdiction of a single court, and the plaintiff is precluded from using [s 14(1)*(d)*] to proceed in either of the [small claims courts]. He is obliged to ulitise [s 14(1)*(a)*] … with all the costs which that entails. In all probability, he will decide not to go ahead with the matter and will abandon is claim.'[280]

Peté et al are correct. Section 14(1)*(d)* is untenable. It creates unnecessary obstacles to establishing jurisdiction in the small claims courts. It is submitted that the word 'wholly' should be deleted from the provision as this would best serve to widen the rules of jurisdiction, remove unnecessary technicality, and foster access to the courts.

(e) Section 14(1)(e): 'any defendant, whether in convention or reconvention, who appears and takes no objection to the jurisdiction of the court'

Section 14(1)*(e)* creates an implied submission to the jurisdiction of the small claims court and mirrors section s 28(1)*(e)* of the MCA. A defendant is precluded from raising an objection to the *territorial* jurisdiction of the court if he or she 'appears' and does not raise an objection. It is important to note that a defendant cannot submit to the jurisdiction of the court to hear a matter that exceeds the monetary jurisdiction of the court. The defendant also cannot consent to give the court jurisdiction over causes of action and remedies in respect of which the court does not have jurisdiction by virtue of the SCCA.

For the purposes of magistrates' courts' procedure, the word 'appears' has been interpreted to refer to the situation where the defendant pleads and does not object to the jurisdiction of the court.[281] However, in some instances, the courts have held that the defendant should be permitted to object to the jurisdiction of the court even after the defendant has pleaded, as long as the objection is raised before *litis contestatio.*[282] Whatever the situation may be, in the small

[280] Hulme, Peté (n276) 314.
[281] *William Spilhaus & Co (MB) (Pty) Ltd v Marx* 1963 (4) SA 994 (C) at 999A-G; *Commericial Union Assurance Co Ltd v Waymark* 1995 (2) SA 73 (Tk) at 80G-81A.
[282] *Purser v Sales* 2001 (3) SA 445 (SCA) at 542C-D. *Litis contestatio* refers to the moment when pleadings are closed.

claims courts the defendant's plea is optional.[283] Therefore, it is unclear how an *appearance* will be determined when there is no plea. Because the small claims courts do not have a formal system of pleadings, the SCCA and SCCRs make no mention of *litis contestatio.* [284] Furthermore, litigants are unrepresented. It is thus uncertain how s 14(1)*(e)* operates in practice.

In principle, it should not be controversial for a small claims court to assume jurisdiction over a matter in respect of which it lacks territorial jurisdiction – as long as the substance and the monetary value of the claim fall within the jurisdiction of the court. It was argued earlier that the small claims courts should have the power to assume jurisdiction over matters on the basis of convenience,[285] even if the particular matter does not fall within the territorial jurisdiction of the court. Section 14(1)*(e)* of the SCCA is consonant with the spirit of that idea. It is submitted that as a general proposition, the small claims courts should be permitted to assume jurisdiction over matters that would otherwise fall outside of their territorial jurisdiction and that the wording of s 14(1)*(e)* should be amended to give effect to that general power. To that end the following wording is proposed: *any defendant, whether in convention or reconvention, who appears and takes no objection to the jurisdiction of the court, or where the court on a balance of convenience, determines that it should exercise jurisdiction over a claim.*

The amendment would make it possible for the small claims courts to exercise jurisdiction on the basis of an implied submission, as well as on the basis of assumed jurisdiction, premised on convenience.[286] This wide latitude will make it far easier for people to sue in the small claims courts and will prevent matters from being disposed of on the technicality of territorial jurisdiction. For the small claims courts, we should subscribe to low-level principles of

[283] SCCA, s 29(3).
[284] Contrast the position in the magistrates' courts per MCR 21A and in the High Courts per HCR 29.
[285] See discussion page on page 58 above. The argument was made within the context of being able to sue defendant companies more easily.
[286] See discussion at page 61.

territorial jurisdiction. A court should be allowed to exercise jurisdiction over a matter if it is convenient for all the parties.

(f) Section 14(1)(f): 'any person who owns immovable property within the area of jurisdiction of the court in actions in respect of such property or a mortgage bond thereon'

In terms of this provision, jurisdiction may be established in the court where the defendant owns immovable property. However, the action in question has to be in respect of the property concerned or in respect of a mortgage bond registered over the property. For a claim to be in respect of property, it does not matter whether the claim is *in rem* or *in personam,*[287] provided that there is a direct causal relationship between the claim and the immovable property in question.[288]

PART V

THE CONSTITUTION

6.14 THE CONSTITUTIONAL JURISDICTION OF THE SMALL CLAIMS COURTS

Chapter 8 of the Constitution sets out the hierarchy of the courts. Small claims courts fall under the 'lower court' category.[289] As such, they may not 'enquire into or rule on the constitutionality of any legislation or any conduct of the President.'[290] The reference to 'legislation' means all original and delegated legislation.[291]

The constitutional limits and powers of small claims courts may be further circumscribed by additional legislation. To this end, s 49 of the SCCA provides:

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[287] See §6.10*(a)*.
[288] *Kleynhans v Wessels* 1998 (4) SA 1060 (SCA).
[289] Constitution, s 166 read with s 170.
[290] Constitution, s 170.
[291] Currie, De Waal *Bill of Rights Handbook* 111 (hereinafter referred to as '*Handbook*').

> '**Jurisdiction as to plea of *ultra vires***
> No court shall be competent to pronounce upon the validity of a provincial ordinance, a regulation, order or by-law made under a statute or a statutory proclamation of the State President, and every court shall assume that every such ordinance, regulation, order, by-law or proclamation is valid.'

Section 49 reinforces the idea that small claims courts cannot preside over matters where the validity of legislation or executive action is brought into question. Having regard to the Promotion of Administrative Justice Act,[292] it is indisputable that small claims courts also cannot adjudicate any administrative action matters, whether in the form of review proceedings or otherwise.[293]

It is submitted that s 49 of the SCCA should be retained, but for the sake of clarity, the section should be redrafted along the lines of s 110 of the MCA.[294] Section 110 provides:

> '(1) A court shall not be competent to pronounce on the validity of any law or conduct of the President.
> (2) If in any proceedings before a court it is alleged that —
> *(a)* any law or any conduct of the President is invalid on the grounds of its inconsistency with a provision of the Constitution; or
> *(b)* any law is invalid on any ground other than its constitutionality,
> the court shall decide the matter on the assumption that such law or conduct is valid: Provided that the party which alleges that a law or conduct of the President is invalid, may adduce evidence regarding the invalidity of the law or conduct in question.'

Section 49 should be redrafted to mirror the provisions of s 110(1). However, subsection (2) of the proposed new s 49 should read:

> *(2) If in any proceedings before a court it is alleged that —*
> *(a) any law or any conduct of the President is invalid on the grounds of its inconsistency with a provision of the Constitution; or*
> *(b) any law is invalid on any ground other than its constitutionality,*
> *the court shall conduct the matter in terms of s 23.*

The insertion of subsection (2) above will give presiding officers clear guidance about their responsibility when constitutional invalidity is alleged. Section 23 of the SCCA enjoins a court to stop proceedings when complex matters of law arise. In line with the Constitution, it seems only appropriate for a matter to be halted when the validity of legislation, or for that matter, the common law is brought into question. Currently, s 49 and s 110 make no mention of the

[292] Act 3 of 2000.
[293] See definition of 'court' in s 1 of the Act.
[294] This section was inserted into the Magistrates' Courts Act by s 1 of the Magistrates' Courts Amendment Act 80 of 1997.

common law.[295] This is because historically lower courts could not change the common law. Only superior courts could do so, relying on their inherent jurisdiction.[296] The inherent jurisdiction of the superior courts is confirmed in s 173 of the Constitution.[297]

In the interpretation of s 110 of the MCA, commentators have argued that even though lower courts have limited jurisdiction, it does *not* mean that they have no constitutional jurisdiction *at all*. While they cannot apply the Bill of Rights or the rest of the constitutional provisions directly[298] to any law (and that includes the common law), they can apply the Bill of Rights indirectly,[299] as that does not involve a pronouncement on the validity of any law. As Currie and De Waal note:

> 'Rather, it [indirect application] involves the interpretation of legislation and the development of the common law so that both are in accordance with the Bill of Rights.'[300]

There is thus no impediment to prevent a small claims court from indirectly applying the Bill of Rights to a matter that comes before it.

6.15 INDIRECT APPLICATION

The indirect application of the Bill of Rights draws authority from s 39(2) of the Constitution which provides:

> 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote, purport and objects of the Bill of Rights.'

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[295] *Jones &Buckle* (service 10, 2016) Act678 state:

> 'The word "law" is defined in s 2 of the Interpretation Act 33 of 1957 as "any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law". The word "law" as defined in the Interpretation Act has been held to refer to the enactment of a body having legislative authority and not to the common law. Section 170 of the Constitution of the Republic of South Africa, 1996, prohibits magistrates' courts from enquiring into or ruling on the constitutionality of any legislation or any conduct of the President. Despite the absence of any reference to the common law in either s 170 of the Constitution of the Republic of South Africa, 1996, or in s 110, magistrates' courts clearly do not have the power to rule on the constitutionality of any rule embodied in the common law. Magistrates' courts are creatures of statute and have no jurisdiction beyond that granted by the statute creating them. No statutory jurisdiction has been accorded to magistrates' courts to enquire into or rule on the validity of the rules of common law or to develop the common law.'

[296] See §6.2.

[297] See *Jones & Buckle* (service 10, 2016) Act 678. See n295 above.

[298] For a discussion on the direct application of the Bill of Rights, see *Handbook* 34-55.

[299] For a discussion on the indirect application of the Bill of Rights, see *Handbook* 113.

[300] *Handbook* 113.

Section 39(2) does not draw a distinction between higher and lower courts. When interpreting a statute a court, tribunal or forum is obliged to positively promote the Bill of Rights.[301] The courts have stated that the 'purport and objects' also refer to s 1 of the Constitution, the founding values.[302]

6.16 STATUTORY INTERPRETATION

In several court decisions[303] it has been held that the courts bear a duty to interpret all legislation in conformity with the Bill of Rights even if a litigant has failed to rely on s 39(2). Where legislation is *capable* of being read in conformity with the Constitution, the courts are duty bound to read it accordingly.[304] This approach is subject to a major qualification, namely, deference to the doctrine of precedent. If a higher court has interpreted a statute after 27 April 1994,[305] a lower court is bound to abide by that interpretation. A lower court would not be able to override that interpretation on an application of s 39(2).[306] Small claims courts are bound by the decisions of the Constitutional Court, the Supreme Court of Appeal and the High Court of the province in which they are located. The decision of a High Court of another province is persuasive authority, but not binding authority, irrespective of whether the matter was heard by a single judge or a full court.[307]

To illustrate the point: Assume that A brings an action in delict against B in the small claims

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[301] *Mkhize v Commission for Conciliation, Mediation and Arbitration* 2001 (1) SA 338 (LC), the Labour Court held that the CCMA is a 'tribunal' within the meaning of s 38 of the Constitution and that a commissioner was therefore obliged by s 39(2) of the Constitution to entertain a constitutional argument relating to the exclusion of evidence in violation of the right to privacy.
[302] See *Handbook 57*.
[303] See the authorities cited in note 304.
[304] See *De Lange v Smuts NO* 1998 (3) SA 785 (CC) para [85]; *Hyundai Motor Distributors v Smit NO* 2001 (1) SA 545 CC [23]; and see *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para [17]. See also *Handbook* 58.
[305] 27 April 1994 is the date of the first South African democratic elections. It is also the date when the Interim Constitution (Constitution of the Republic of South Africa Act 200 of 1993) came into operation. Even though the Interim Constitution was later replaced by the Constitution of South Africa, 1996, 27 April 1994 is seen to be the definitive date for the decisive break from the past and the ushering in of the new legal order.
[306] *S v Walters* 2002 (4) SA 6123 (CC) para [61]; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) para [29].
[307] Hahlo, Khan *The South African Legal System and its Background* 256-257.

court. In the course of proceedings, A needs to establish that B owes him a duty of care. There is a statute that has a direct bearing on whether such a duty exists. In the interpretation of that statute, the small claims court would be obliged to ensure that any decision that it renders is in conformity with the Constitution. When interpreting the statute in question, the court would have to keep the values of the Constitution (as encapsulated in the Bill of Rights) uppermost in its mind. If the court can interpret the statute in a manner that is in conformity with the Constitution without a declaration of invalidity, the court can proceed to do so. However, if the interpretation would be strained or if it is clear that the statute, on an ordinary reading, is so blatantly incongruent with the Constitution, the small claims court would not be able to proceed further.[308] The court would have to halt proceedings and advise the parties that the matter needs to be taken to the High Court as the matter falls outside of the jurisdiction of any of the lower courts.

Assume further that the statute is capable of being interpreted in conformity with the Constitution, but a superior court, whose decision is binding precedent on the small claims court in question, has after 27 April 1994 made a ruling on the interpretation of that statutory provision. The small claims court would not be able to ignore that decision, even if that decision did not consider the issue of constitutionality. The small claims court would be bound to give effect to that ruling. At best the court could rule that a constitutional issue has arisen and that justice would be better served if the matter was taken to the High Court for consideration. To this extent, the court would rely on s 23 of the SCCA to divert the matter. Lower courts are not free to ignore precedent. They must abide by precedent and must proceed cautiously.[309]

[308] See *Mateis v Ngwathe Plaaslike Munisipaliteit* 2003 (4) SA 361 (SCA); *Hyundai Motor Distributors v Smit NO* 2001 (1) SA 545 CC at para [24].
[309] *Ex parte Minister of Safety and Security: in re S v Walters* 2002 (4) SA 613 (CC) at para [61]; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) paras [27]-[29].

6.17 DEVELOPMENT OF THE COMMON LAW

In *K v Minister of Safety and Security*, the Constitutional Court stated that the duty to apply s 39(2) requires all courts 'to be alert to the normative framework of the Constitution not only when a startling new development of the common law is in issue, but in all cases where the incremental development of a [common-law] rule is in issue.'[310] The courts are duty bound to be vigilant of the common law to ensure that it is consonant with the sprit, purport and objects of the Bill of Rights.[311]

When a lower court is confronted with the possibility of the common law being inconsistent with the Constitution, the court must see if it can interpret the common law in a manner that is consistent with the Constitution. If it cannot interpret the common law to be consistent with the Constitution, the common law would be unconstitutional and would require development. The difficulty that lower courts face is that they cannot develop the common law. Common-law development falls to the superior courts.[312] A small claims court would thus have to stop proceedings and inform the plaintiff that the matter needs to go to a superior court.[313]

To illustrate the point, let us take the following scenario: A sues B in the small claims court for breach of contract. A relies on a term of the contract which amounts to a restrictive covenant. After a limitations analysis,[314] the court finds that the restrictive covenant is discriminatory on a listed ground in terms of s 9[315] of the Constitution. Would the court be obliged to stop proceedings? The answer depends on whether the court is expected to develop the common law. It is trite that contracts should be upheld, unless they are deemed to be against public policy.[316] Freedom of contract (*pacta sunt servanda*)[317] and the rule against enforcing contracts

[310] *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para [17].
[311] See also *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) paras [33]-[39].
[312] *S v Thebus* 2003 (6) SA 505 (CC) para [31].
[313] The court can rely on s 23 of the SCCA.
[314] Constitution, s 36.
[315] Section 9 of the Constitution entrenches the right to equality.
[316] See *Barkhuizen v Napier* 2007 (5) SA 323 (CC).
[317] See ibid [57] and [87].

that are against public policy[318] are both common-law precepts. The Constitutional Court has held that the common-law principle of freedom of contract is not absolute, and that it can be limited where the contract is offensive to public policy.[319] Today, public policy is grounded in the Constitution and, more specifically, the Bill of Rights.[320] Given that the court, in the above factual scenario, is not being asked to develop any common-law rules but merely to give effect to the Bill of Rights within an existing common-law framework,[321] there is no need for the court to stop proceedings. The court can decide the matter and give effect to constitutional values by refusing to enforce the restrictive covenant. It would do so by infusing the common-law public policy basis for setting aside contracts with constitutional values. The infusion, however, would have to be mindful of precedent. If the small claims court in question finds post-27 April 1994 precedent that recognises the validity of the restrictive covenant, the precedent in question will tie the hands of the presiding officer.

If one changed the scenario above to assume that the restrictive covenant itself was expressly recognised by the common law, then to overcome the restrictive covenant the court would have to develop the common law by specifically declaring the common-law rule unconstitutional. If this were the case, the small claims court would only be able to give effect to the Constitution by changing the common law. Since the small claims courts (as lower courts) cannot develop the common law and also cannot apply the Bill of Rights directly, the most appropriate course would be to stop proceedings and to invite the plaintiff to take the matter to a superior court.

6.18 TRAINING OF PRESIDING OFFICERS

To prevent miscarriages of justice in small claims courts, it is imperative that presiding officers acquire adequate training as regards their constitutional mandate. There is no indication from

[318] *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A). See also Dale Hutchison, Chris Pretorius, Tjakie Naude et al *The Law of Contract in South Africa* 21ff.
[319] *Barkhuizen v Napier* supra [29]-[30].
[320] *First National Bank of SA Ltd v Rosenblum* 2001 (4) SA 189 (SCA).
[321] See *Rivett-Carnac v Wiggins* 1997 (3) SA 80 (C); *Farr v Mutual and Federal Insurance Co Ltd* 2000 (3) SA 684 (C).

any of the training[322] that has been made available to commissioners thus far, that they have been specifically educated on their constitutional role and responsibilities. While one can clearly legislate the small claims courts' lack of direct constitutional authority, it is difficult to legislate the courts' indirect constitutional responsibilities because it is easier to legislate negative duties than positive responsibilities. Only adequate training can ensure that presiding officers can meet the challenge of applying their constitutional authority impartially and without favour, fear or prejudice.[323]

PART VI

THE JURISDICTION OF THE KENYAN SMALL CLAIMS COURTS UNDER THE KENYAN SMALL CLAIMS COURT ACT: SOME OBSERVATIONS

6.19 MONETARY JURISDICTION

Section 2 of the Kenyan Small Claim Courts Act legislates the monetary jurisdiction of the courts. The 'prescribed limit' of the court is 'one hundred thousand shillings[324] or such other sum as the Chief Justice may determine by notice in the *Gazette*.' The Chief Justice, as the head of court, is thus clearly entitled to raise the jurisdictional monetary limit of the courts. As noted earlier, [325] in South Africa, the Minister of Justice is responsible for determining the jurisdictional limits of the courts. There seems to be merit in conferring the determination of jurisdictional limits on the head of the judiciary. This would also be consistent with ss 173 and 165(6) of the Constitution. It would, however, mean that the powers and functions of the Chief Justice under s 8 of the SCA would have to be expanded.

[322] See discussion in chapter 3. The *Guidelines for Commissioners* (2010), published by the Department of Justice, makes no mention of the constitutional responsibilities of the small claims courts.
[323] See Jagwanth 'The Constitutional Responsibilities of Lower Courts' (2002) 18 *SAJHR* 201 at 224.
[324] As at 12 June 2016, the rand equivalent was R13016, 34.
[325] See Chapter 4.

The Chief Justice of Kenya is also empowered to determine the 'local limits of the jurisdiction of [the] Small Claims Court.'[326] The purpose of this is to ensure that the courts are 'accessible in every sub-county' and that they meet the aim of being 'decentralized units of judicial service delivery'.[327] On various occasions, this chapter has highlighted the need for increasing the monetary jurisdictional limit of the South African small claims courts. If there is a fear that the dramatic increase of the limit will render small claims courts unwieldy due to sudden increases in workloads, then it seems that the Kenyan Small Claims Court Act provides an interesting alternative. South Africa could easily increase the jurisdiction of the small claims courts in its financial and commercials hubs; whereas the jurisdiction of the courts in other areas, where logistical arrangements do not support a dramatic increase in monetary jurisdiction, could be incrementally increased.

6.20 JURISDICTION IN RESPECT OF CAUSES OF ACTION

Kenyan small claims courts have jurisdiction to determine 'any civil claim'[328] relating to:

- A contract of sale and supply of goods or services;
- a contract relating to money held and received;
- liability in tort (delict) in respect of loss or damage caused to any property or for the delivery and recovery of movable property;
- compensation for personal injuries; and
- set off and counterclaim under any contract.[329]

The courts are specifically precluded from hearing actions 'founded upon defamation, libel, slander, malicious prosecution or is upon a dispute over a title to or possession of land, or employment or labour relations.'[330]

[326] Kenyan Small Claims Court Act, s 11(1).
[327] Kenyan Small Claims Court Act, s 11(2).
[328] Kenyan Small Claims Court Act, s 12(1).
[329] Kenyan Small Claims Court Act, s 12(1).
[330] Kenyan Small Claims Court Act, s 13(5).

What is immediately discernable from the Kenyan Small Claims Court Act is that the provisions relating to causes of action read so much simpler than the South African counterpart. The Act makes it clear that there is a closed list of claims that the courts can hear. By being so clear, the legislature has avoided having to set out the jurisdictional rules relating to causes of action in overly technical terms.

In keeping with the historical evolution of small claims courts, all consumer-related matters may be heard in the courts. The Kenyan courts do not suffer from the limitations imposed by s 69 of the South African CPA.[331]

The Kenyan small claims courts can easily hear debt recovery claims as they are not subject to the complex processes and procedures of the South African NCA.[332] Interestingly, while the courts can hear damage to property claims (movable and immovable), they cannot hear disputes arising from title to or possession of land. The restriction makes perfect sense given that the jurisdictional limits of small claims courts are not conducive to hearing immovable property claims involving title to or possession of land.[333] A limiting feature is that counterclaims or set-off may only be entertained in respect of contractual claims. It is submitted that perhaps, it would have been better to allow for counterclaims in tort (delict) matters too. However, the fact that set-off is permitted suggests that the counterclaim in question need not be *incidental* to the main claim.[334] As long as two debts are due, they may be set-off against each other.[335]

6.21 JURISDICTION IN RESPECT OF PERSONS

The determination of the locality to sue is much more relaxed in the Kenyan Small Claims Court Act. The claimant (plaintiff) may sue either where he or she 'resides' or 'carries on

[331] See the discussion on page 42ff above.
[332] See discussion on on page 38ff above.
[333] See discussion on page 36ff above.
[334] See discussion on page 70ff above.
[335] See Van der Merwe, Lubbe *Contract – General Principles* (2003) 515.

business' or where the respondent (defendant) 'resides'.[336] The principle of *actor sequitur forum rei* therefore has been relaxed.[337]

Where there are multiple plaintiffs such as trustees of a trust or executors of a deceased estate, there is no need to establish that a jurisdictional link exists in respect of all such parties. In terms of s 16(1) of the Act, 'two or more persons [having] claims against the same respondent' may bring their claims in the name of 'one of such persons as the representative of some or all of them' provided that the authority to act is given in writing.[338]

The Act makes no reference to jurisdiction being established on the basis of 'employment'. It is submitted that the absence of 'employment' as a jurisdictional link is quite nuanced, as it prevents a defendant from being embarrassed by service of process at the place of his or her employment – which is where service of process could take place in the South African context for the court of the defendant's employment locality to have jurisdiction over the matter.[339]

A court where the 'cause of action arose' or 'where the contract to which the claim relates was either made or was intended to be performed' will also have jurisdiction to hear a matter.[340] It is axiomatic that the 'whole' cause of action does not have to have arisen in the jurisdiction of the court. The plaintiff only needs to establish that a part of the cause of action arose in the jurisdiction of the court. This is a far cry from the South African position where it is notoriously difficult to establish jurisdiction on the basis of cause of action.[341]

The Kenyan Small Claims Court Act deals with jurisdiction in an uncomplicated way. The provisions are short and to the point. There is no mention of 'specific performance' or various rules detailing the calculation of monetary claims.[342] A matter either falls within the jurisdiction

[336] Kenyan Small Claims Court Act, s 15(1)(a) read with s 15(1)(e).
[337] See discussion on page 62 above.
[338] Kenyan Small Claims Court Act, s 16(1). See discussion on page 64.
[339] See discussion on page 52ff above.
[340] Kenyan Small Claims Court Act, s 15(1)(c).
[341] See discussion on page 72ff above.
[342] See § 6.6 and discussion on page 29 above.

of the court or it does not. Perhaps, most significantly, the Act does not prevent the State from being sued in the small claims courts. This speaks to the confidence of the Kenyans as regards the place of small claims courts in the overall civil justice system.

PART VII

6.22 CONCLUSION

This chapter has exhibited the complex nature of establishing jurisdiction in South African small claims courts. The complexity is to a large extent attributed to the way in which the SCCA was drafted. The legislature, by and large, copied the cumbersome provisions of the MCA into the SCCA. The legislative drafting process displays a lack of creative design for what was to be a unique set of courts. The rules of jurisdiction are complex. Therefore, they do not promote access to justice. Instead, they hamper access to justice.

The complexities of establishing jurisdiction run like a thread throughout the procedures of the small claims courts. This will be appreciated in the next chapter, which deals with parties to proceedings and standing to sue.

CHAPTER 7

PARTIES IN THE SMALL CLAIMS COURTS

7.1 INTRODUCTION

Who may sue and be sued in the small claims courts has been the subject of debate. Should the State be permitted to sue and to be sued in the small claims courts? What about juristic persons? There is the overwhelming consensus that juristic persons should be capable *of being sued* in the small claims courts. But, differences of opinion exist about whether they should be permitted *to sue*.

It is not contentious that natural persons should sue and be sued in the small claims courts. After all, the purpose of small claims courts is to hear the 'ordinary day-to-day grievances and disputes involving the common [person]' who cannot afford the cost of litigation in a small claim.[1] What remains unsettled in the literature is whether natural persons should be allowed to bring actions in their *personal* capacities only, or whether they should be allowed to institute actions in the names of their *alter egos*, such as partnerships, sole proprietors, firms, etc. Even though these are not juristic persons, people often operate small businesses via these vehicles.

An ancillary question to the debate of who may sue and be sued in the small claims courts is whether legal representation should be permitted. Should lawyers be allowed to represent clients in the small claims courts and if they are allowed, what role should they play? Does the lack of legal representation prejudice the lay litigant?

[1] Steele 'The Historical Context of Small Claims Courts' (1981) 6 *American Bar Foundation Research Journal* 293 at 295.

This chapter will address the above issues, having regard to the South African socio-economic context, as well as the relevant provisions of the SCCA and SCCRs. Where relevant, recommendations will be made for reform.

7.2 RELEVANT STATUTORY PROVISIONS

Section 7 of the SCCA provides:

> '7. Parties who may appear in court
> (1) Only a natural person may institute an action in a court and, subject to the provisions of section 14 (2), a juristic person may become a party to an action in a court only as defendant.
> (2) A party to an action shall appear in person before the court and, subject to the provisions of subsection (4), shall not be represented by any person during the proceedings.
> (3) .....
>
> (4) A juristic person shall be represented in a court by its duly nominated director or other officer.'

The above section was amended by the Small Claims Courts Amendment Act.[2] The Amendment Act deleted subsection (3) of the original version of the SCCA. The former subsection 3 read as follows:

> '(3) A minor or other person who does not have the capacity to institute or defend proceedings in a court of law unassisted, shall be assisted in a court by his parent, spouse, guardian, as the case may be.'

The implications of the Amendment Act and the deletion of subsection (3) will be canvassed in §7.4 below.

Tucked away in s 14(2) of the SCCA appears the following provision:

> '(2) No action shall be instituted against the State in a court.'

It is axiomatic from a reading of s 7(1) read with s 14(2) that the State can neither sue nor be sued in a small claims court. The definition of 'the State' as well as the constitutional implications of the State's exclusion from the small claims courts are discussed in §7.3 below.

Aside from the SCCA, the SCCRs also have a bearing on parties and their *locus standi* to appear in

[2] 92 of 1986.

the small claims courts. In this regard, there are two rules that require analysis: rules 23 and 27. Small Claims Court Rule 23 provides:

> '23. Representation of parties
> (1) It shall not be necessary for any person to file a power of attorney to act on behalf of a legal entity, but the authority of any person acting for such a party may be challenged by the other party during the proceedings after he has noticed that such person is so acting and thereupon such person may not without the leave of the court so act further until he has satisfied the court during the proceedings that he has authority so to act.
> (2) If a party dies or becomes incompetent to continue an action the action shall thereby be stayed until such time as an executor, trustee, guardian or other competent person has been appointed in his place or until such incompetence shall cease to exist.
> (3) Where an executor, trustee, guardian or other competent person has been so appointed, the court may, on verbal application, order that he be substituted in the place of the party who has so died or become incompetent.'

The above provision allows for a substitution of parties where legal incapacity or death intervenes during proceedings pending before the court.

Small Claims Court Rule 27 was discussed in chapter 6.[3] For the sake of convenience, the Rule bears repetition:

> '27. Actions by and against partners, a person carrying on business in a name or style other than his own name, syndicate or association
> (1) Any person carrying on business in a name or style other than his own name or two or more persons who are co-partners may be sued in such name or style or in the name of the partnership.
> (2) The provisions of this rule shall also *mutatis mutandis* apply to an unincorporated company, syndicate or association.'

Small Claims Court Rules 23 and 27 are discussed in §7.4 below.

All of the above provisions inform the current state of the law as regards parties and their *locus standi* to sue and to defend proceedings in the small claims courts.

[3] See §6.13.

7.3 THE 'STATE' AS A PARTY

(a) What is 'the State' for the purposes of the Small Claims Courts Act?

The SCCA is clear: 'the State' may not be sued in the small claims courts.[4] The fact that only natural persons can sue in the small claims courts[5] means that the State may not sue as a plaintiff either.

'The State' is not defined in the SCCA or the Interpretation Act.[6] One may be inclined to refer to the Constitution. Section 239 of the Constitution provides:

> **'**organ of state means –
> *(a)* any department of state or administration in the national, provincial or local sphere of government; or
> *(b)* any other functionary or institution-
> (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
> (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.'

The Constitution's definition of 'organ of state' is not indicative of what 'the State' means in all legislation, or more particularly the SCCA. The correct approach to determine the meaning of 'the State' is found in *Thomas v Minister of Defence and Military Veterans*.[7] In that case, the Supreme Court of Appeal was required to interpret the phrase 'including the State' for the purposes of s 35(1) of the Compensation for Occupational Injuries and Diseases Act.[8] It is common cause that the statute in question did not define 'the State'.[9] Relying on the decision in *Cool Ideas 1186 CC v Hubbard,*[10] the Supreme Court of Appeal held:

> 'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:
> *(a)* that statutory provisions should always be interpreted purposively;
> *(b)* the relevant statutory provision must be properly contextualised; and
> *(c)* all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in *(a)*.

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[4] See §7.2.
[5] SCCA, s 7(1).
[6] 33 of 1957.
[7] 2015 (1) SA 253 (A).
[8] 130 of 1993. *Thomas v Minister of Defence and Military Veterans* supra [1].
[9] *Thomas v Minister of Defence and Military Veterans* supra [9].
[10] 2014 (4) SA 474 (CC) para [28].

> In addition this court has said that the process of interpretation is objective and '(t)he inevitable point of departure is the language of the provision itself read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'[11]

The court drew attention to *Holeni v Land and Agricultural Development Bank of South Africa.*[12] In *Holeni*, the question arose whether 'the Land Bank [can] be considered to be the State as referred to in s 11*(b)* of the Prescription Act 68 of 1969.'[13] Navsa JA held:

> '(t)he State as a concept does not have a universal meaning. Its precise meaning always depends on the context within which it is used.'[14]

Relying on the dictum in *Holeni*, the court in the *Thomas* case concluded:

> 'What is clear from this is that the term 'the State' may have different meanings in different contexts and in different legislation.'[15]

What is clear from *Holeni* and *Thomas* is that s 239 of the Constitution is not indicative of what constitutes 'the State' for all legislation. The meaning of 'the State' in legislation has to be 'contextualised'. Furthermore, a statute does not have to be read in conformity with the Constitution in all cases, especially where the statute is not subject to a constitutional challenge. Since the meaning of 'the State' in s 14(2) of the SCCA is not subject to a constitutional challenge, s 239 of the Constitution has no bearing on the content of the phrase. The meaning of 'the State' in the SCCA has to be determined by having regard to the prevailing context at the time when the SCCA was drafted and enacted.

The Hoexter Commission *Report*[16] does not help to identify the legislative intent behind the use of the phrase 'the State' in the SCCA. At no point in the *Report* does the Commission recommend that 'the State' should not sue and be sued in the small claims courts.

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[11] *Thomas v Minister of Defence and Military Veterans* supra [8].
[12] 2009 (4) SA 437 (SCA).
[13] *Holeni v Land and Agricultural Development Bank of South Africa* supra [10].
[14] *Holeni v Land and Agricultural Development Bank of South Africa* supra [11].
[15] *Thomas v Minister of Defence and Military Veterans* supra [10].
[16] Discussed in chapter 2.

In an instructive article[17] written in 1982, Baxter tried to make sense of the meaning of the phrase 'the State' in the then-prevailing constitutional and administrative law jurisprudence.[18] He lamented that phrases such as 'the Republic', 'the State' and 'the Government' 'are tossed about with gay abandon',[19] and that it is often difficult to fathom what was meant when these terms were used in legislation. Baxter distinguished between 'the State' and 'the Government'. The latter term, he argued, was much wider than the phrase 'the State.' 'The Government' referred to the 'legislative, executive and judicial branches and covered all the various organs of the State'.[20] Baxter found that after South Africa became a Republic in 1961, the word 'State' replaced the word 'Crown' in South African legislation.[21] The word 'State' as a synonym for the 'Crown' was something more than 'the administration'[22] but less than 'the Government', as 'the State' did not, for example, include the judiciary.

Baxter noted that what was meant by 'the State' differed under national law when compared to international law. Under international law, 'State' referred to a particular territory and the people within it. Hence, in international law one talks of 'State parties'.[23] The 'State' under national law referred to certain agencies of 'the Government'. The difficulty, however, was that it was not easy to discern what the legislature intended when it referred to 'the State' because the phrase was often repeated 'laconically'[24] and inconsistently in legislation. [25] Baxter concluded:

> '"[T]he State" appears to be used collectively as a collective noun for:

[17] Baxter '"The State" and other Basic Terms in Public Law' (1982) 99 *SALJ* 212.
[18] See also L Baxter *Administrative Law* (1984). In this work, Baxter draws heavily from the research conducted for his article '"The State" and other Basic Terms in Public Law' (n17).
[19] Baxter (n17).
[20] Baxter (n17) 216.
[21] Baxter (n17) 221.
[22] Baxter (n17) 235 writes: '"Administration" is one of the most notoriously ambiguous terms in public law…' He goes on to say:

> '… since all organs of government perform all three functions [executive, legislative and judicial], we are driven to saying that "the administration" consists of all the organs of "the State" apart from those almost solely concerned with legislating (that is Parliament, the provincial councils and the homeland legislative assemblies) or adjudicating (the Supreme Court and (?) magistrates' courts, but not administrative courts).'

[23] Baxter (n17) 221-222.
[24] Baxter (n17) 223.
[25] Baxter (n17) 224.

(a) the collective wealth ("estate") and liabilities of the sovereign territory known as the "Republic of South Africa" which are not owned or owed by private individuals or corporations; and

(b) the conglomeration or organs, instruments and institutions which have as their common purpose the "management" of the public affairs, in the public interest, of the residents of the Republic of South Africa as well those of her citizens abroad in their relations with the South African "Government".'[26]

Baxter qualified the above summary with the following caveat: 'This description can never be anything more than a rough guide.'[27] After surveying various legislative enactments in force in the 1980s, as well as pronouncements of the courts, Baxter concluded that when the legislature used the phrase 'the State' in legislation, the reference was in *almost all cases* to the executive of the government and *in some instances* to the provincial organs of the government.[28] From Baxter's analysis, it appears that 'the State' rarely referred to local government. This interpretation makes perfect sense and explains why municipalities, which were more localised forms of government in the 1980s, were frequently sued in the small claims courts.[29] They were *not* seen as part of 'the State' for the purposes of the SCCA.

Having regard to Baxter's analysis and the test employed by the Supreme Court of Appeal in the *Thomas*[30] case, one can conclude that the reference to 'the State' in the SCCA is to what we would call today the 'national government' (including the executive). It *probably* also includes what is known in modern parlance as the 'provincial government'. One cannot, however, be absolutely certain about the latter interpretation because the courts have not interpreted the meaning of 'the State' in the SCCA. Baxter found, provincial authority was often, but not always, considered to be part of 'the State' in 1980s legislation. What appears certain from Baxter's analysis is that it is highly unlikely that 'the State' as conceived in the 1980s, when the SCCA was drafted and later enacted, included local government (municipalities).[31]

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[26] Baxter (n17) 225-226.
[27] Baxter (n17) 225.
[28] Baxter (n17) 227.
[29] In am indebted to Mr Van Greese for this information. He also serves as the Chair of the Small Claims Committee of the Law Society of South Africa.
[30] *Thomas v Minister of Defence and Military Veterans* supra.
[31] Bredenkamp *The Small Claims Court* states:

Chapter 6 drew attention to the fact that municipalities are currently sued in the small claims courts[32] – a situation that is contrary to the current 'official'[33] position. Given the discussion above, it would thus appear that the small claims courts do have jurisdiction to hear claims involving local government and that the presiding officers of some small claims courts are following past practice. Their interpretation of the SCCA is consistent with the approach adopted in the *Thomas*[34] and *Holeni*[35] cases – that the meaning of 'the State' can differ from s 239 of the Constitution, in so far as 'the State' may 'have different meanings in different contexts and in different legislation.'

The SCCA should be amended to contain a definition of 'the State', as this will clarify matters. If it is intended that the State should be precluded from being a party in the small claims courts in the future, the definition of 'the State' should *include* national and provincial government. However, it is submitted that the definition should *exclude* local government. Service delivery at local government level is an issue in South Africa.[36] Litigants should be able to hold local government accountable in

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'A plaintiff desiring to sue a State Department will have to use another competent court such as the Magistrates' Court.'

Although Bredenkamp makes no mention of municipalities in his commentary, the writer connects the 'the State' in the SCCA with 'State Department', which is indicative of a more centralised form of government, as opposed to municipalities, which are localised forms of government.

[32] See §6.11.

[33] The Western Cape Government and the Department of Justice seem to think that municipalities and Local Government cannot be sued in the small claims court: https://www.westerncape.gov.za/service/small-claims-courts (last accessed 1 April 2017); http://www.justice.gov.za/scc/scc.htm (last accessed 1 April 2017). The information is incorrect because the State's interpretation relies on s 239 of the Constitution. That interpretation overlooks the legislative history and the context of the SCCA. Older websites are emphatic that municipalities can be sued in the small claims courts. See, for example: https://ossafrica.com/esst/index.php?title=Using_the_Small_Claims_Court (last accessed on 1 April 2017). This website was last updated in April 2009. The modern interpretation seems to stem from the publication by the Department of Justice of *Small Claims Courts: Guidelines for Commissioners*. See §3.8 for the origins of this publication. In the publication, the following is incorrectly stated at 30:

'The term "State" includes the provincial administrations and municipalities (Local Government).'

After 2010 and coinciding with the publication of the *Guidelines*, information websites took the position that municipalities cannot be sued in the small claims courts. Despite these information sites and the Department of Justice's official position, it is nevertheless interesting to note that some commissioners still hear matters involving municipalities. This issue has not come before the superior courts. The reason for this might well be that after a judgment is made against the municipality, the sheriff, who is responsible for the execution of the judgment, simply ignores it.

[34] *Thomas v Minister of Defence and Military Veterans* supra.

[35] *Holeni v Land and Agricultural Development Bank of South Africa* supra .

[36] De Visser, Steytler 'Confronting the State of Local Government: The 2013 Constitutional Court Decisions' (2017) 7 *Constitutional Court Review* 1; Bilchitz 'Citizenship and Community: Exploring the Right to Receive Basic Municipal Services in *Joseph*' (2010) 3 *Constitutional Court Review* 45. In a keynote address titled 'The Major Risks Facing South Africa Going Forward from the Public Protectors Point of View and Consequences of Risks that have Materialised in

the small claims courts for claims that fall within their jurisdiction. Residents should not have to incur exorbitant costs when enforcing claims against local government. Permitting people to sue local government in the small claims courts might marginally[37] improve services at local government level. It will afford citizens (especially the poor, living in informal settlements) the ability to exercise their basic rights to proper services, without having to resort to violent protests[38] as a vehicle for social justice. In many cases, where local government is sued in the courts, parties claim money owed to them in respect of incorrect assessments[39] relating to rates and levies[40] or they sue for damages[41] pursuant to poor municipal services. There is no reason why this type of claim cannot be brought in a small claims court if it is of such a value that it falls within the monetary jurisdiction of the small claims courts.

Respect of the Impact of Government, Business and Citizens' delivered by Adv K Malunga, the Deputy Public Protector of South Africa, at the *Risk Management South Africa Conference* held on 17 September 2015, the following was stated:

> 'Arguably the greatest single failure of governance in South Africa is at local government level, as the lives of far too many citizens – especially those in small towns and rural areas – remain basically unchanged. Ironically by volume we as Public Protector South Africa receive the highest number of complaints against municipalities.'

[37] The causes of a lack of service delivery are complicated and require a multifaceted approach as identified by Fjeldstat 'What's Trust got to do with it? Non-payment of Service Charges in Local Authorities in South Africa (2004) 42 *Journal of Modern African Studies* 539-562. Fjeldstat indicates that one cannot lay all blame at the doorsteps of the Government because since 1994 there has also been what he calls a 'culture of entitlement' whereby people expect services without paying for them. Vandalism, theft and a lack of social cohesion have also contributed to the service delivery difficulties in the country. See also *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) para [93]; *Liebenberg v Bergrivier Municipality* 2013 (5) SA 246 (CC) para [80].

[38] Powell, M O'Donnovan, De Visser *Civil Protests Barometer 2007-2014* state at 6:

> 'Ever since data was first recorded in 2007 it is clear that an ever increasing proportion of protests involve violence...In 2007 just less than half (46 percent) of all protests were associated with some form of violence. By 2014 83 percent of protests involved violence on the part of the protesters or the authorities.
>
> … Physical attacks on individuals were less prominent (315 protests). The destruction of property (including arson) was recorded more often than attacks on individuals (a combined total of 372 protests). Two-thirds of the types of violence recorded at protests thus went beyond "mere" intimidation and involved the destruction of property, assault, looting and even death.'

[39] Beamish 'New Property Owners Held Liable for Defaulters Dues' (30 April 2014) in *Moneyweb* reported that in the City of Tshwane Metropolitan Municipality '[m]unicipal accounts are notoriously inaccurate and are often hugely overinflated.' See also: http://www.biznews.com/undictated/2016/03/03/my-r89-000-water-bill-any-suggestions-on-what-to-do-now/ (last accessed 1 November 2016); http://www.knysnaplettherald.com/news/News/Southern-Cape-Property/137109/Court-decides-against-municipal-rates (last accessed 1 November 2016).

[40] People often pay rates and levies under a state of duress. It is not uncommon for municipalities to turn off people's water or electricity supply if their rates and levies are not up to date. Municipalities also reserve the right to sell people's houses to recover outstanding money for rates and levies. See Beamish (note 39).

[41] For example, personal injury due to a badly maintained pavement, or damage to a vehicle on account of a pothole: *Hume v Divisional Council of Cradock* (1880) 1 EDC 104; *Jordaan v Worcester Municipality* (1893) 10 SC 159; *Halliwell v Johannesburg Municipal Council* 1912 AD 659. For a list of municipality cases, see Boberg *The Law of Delict – Acquillian Liability* Vol 1.. See also du Bois 'State Liability in South Africa: A Constitutional Remix' (2010) 25 *Tulane European and Civil Law Forum* 139 at 149ff.

A monetary judgment granted in a small claims court against local government is executable. The State Liability Act,[42] which amongst other things restricts the enforcement of judgments against national and provincial government,[43] does not apply to municipalities.[44]

It is interesting to note that in Kenya[45] and other places[46] the State or organs of State[47] may be sued in small claims courts. This speaks to the confidence of those governments in their small claims courts.

If the small claims courts had jurisdiction to hear claims against the State, there is little doubt that litigation against the State would increase. This could be detrimental to the public purse, but only in the short term. The long-term gain would be that State performance would improve, and this could result in the reduction of claims overall. Furthermore, if the small claims courts had a measure of limited jurisdiction to hear claims against the State, the State would in all likelihood save a significant amount in legal costs.[48] Matters would be resolved quickly and efficiently through an official, impartial and unbiased court process in which legal representation is not permited. The State would

[42] 20 of 1957 (hereinafter referred to as the 'State Liability Act').
[43] Section 4 read with s 4A of the State Liability Act. See also Paleker *The South African Sheriff's Guide – Practice and Procedure* (revision service 1, 2016) 10-3, 10-4.
[44] In terms of s 152(1) of the Local Government: Municipal Finance Management Act 56 of 2003, a municipality can, however, apply to the High Court for debt relief and restructuring. When this happens, all legal proceedings, including the execution of legal processes, will be stayed.
[45] As long as a matter falls within the jurisdiction of the small claims court, the Kenyan Small Claims Court Act of 2016 does not restrict the categories of persons who may be sued. There is no provision in the Act that makes the State immune from litigation in the small claims court. See §6.21.
[46] See Saskatchewan: Small Claims Courts Act, 1997, ss 2(a), (d), (f). In California local government agencies can sue and be sued in the small claims courts: The California Code of Civil Procedure Ch 5.5, Art 4, s 116.420 (c); Pagter, McCloskey, Reinis 'The California Small Claims Court' (1964) 52 *California Law Review* 876 at 884, 887.
[47] In New York, a municipality may be sued: see Kaye, Lippman *A Guide to Small Claims Courts in the NYS City, Town and Village Courts* (2014) 2.
[48] Van Onselen 'Counting the Costs of the Government's Legal Fees' (21 February 2017) *Financial Mail* writes that in 2016 alone the Government spent R873 million on legal services, and that was only at national department level. See also 'South Africa's Department of Home Affairs Legal Fees Total Almost R50 million': https://www.immigrationsouthafrica.org/blog/department-of-home-affairs-tackled-democratic-alliance/ (last accessed 1 April 2017); Op-Ed 'Personal Legal Cost Orders Against Rogue Public Officials are the Frontline in the War Against Impunity' Daily Maverick (19 April 2017): https://www.dailymaverick.co.za/article/2017-04-19-op-ed-personal-legal-cost-orders-against-rogue-public-officials-are-the-frontline-in-the-war-against-impunity/#.WQxKRVKB2ZM (last accessed 1 April 2017); Op-Ed 'Making Legal Costs Personal Would Reduce Silly State Cases' *Accountability Now* (17 August 2016): http://accountabilitynow.org.za/making-legal-costs-personal-reduce-silly-state-cases/ (last accessed 1 April 2017).

also be showing good faith to its citizens in terms of providing an accessible, cheap and efficient forum for the ventilation of limited types of disputes.

The intensity and scale of service delivery protests in recent years are the greatest threat to the rule of law and democratic values.[49] To deny the poor and the marginalised accessible and legitimate forums to resolve their disputes will only intensify their efforts to obtain redress by all means possible, even violent conflict. For these reasons the small claims courts should, as a minimum, adjudicate claims against local government. As localised grassroots courts, operating within communities, small claims courts have the potential of making a significant contribution in terms of ameliorating feelings of alienation and helplessness experienced by so many. Having the courts adjudicate matters might also result in the reduction of damage to infrastructure, which seems to be the inevitable consequence of violent protests.

(b) Is it unconstitutional to immunise the State from being sued in the small claims courts?

A legislative ouster of the jurisdiction of some courts to hear certain matters is not unconstitutional if there is a good reason for the limitation. The Labour Relations Act,[50] for example, establishes mechanisms for the resolution of labour-related disputes.[51] The small claims courts, magistrates' courts and High Courts are precluded from hearing labour matters. The Commission for Conciliation, Mediation and Arbitration and the Labour Court, established in terms of the Labour Relations Act, must resolve labour disputes. Special labour dispute resolution mechanisms are said to best protect workers' rights. Another example is the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act,[52] which provides that only the magistrates' courts and the High Courts may grant

[49] See address by the Deputy Public Protector in note 36.
[50] 66 of 1995 (hereinafter referred to as the 'Labour Relations Act').
[51] Labour Relations Act, Chapter VII.
[52] 19 of 1998.

eviction orders.[53] This is to secure tenants' rights to housing.[54] A third example is that of the validity and interpretation of wills, which are matters that the High Courts have exclusive jurisdiction over,[55] as they relate to the status of people.

Claims against the State can be heard in the magistrates' courts[56] and the High Courts. The courts have wide jurisdiction to hear civil claims involving the State. Consequently, it cannot be said that the prohibition relating to claims against the State in the small claims courts is automatically unconstitutional. To make such an argument one would have to argue that the Constitution has been violated in some way.

One could perhaps make the case that s 34 of the Constitution is violated in that litigants have restricted access to justice in matters involving 'the State'. Litigants are more likely to be able to afford to sue the State in the small claims courts than in the other courts. However, as noted in chapter 1, the right of access to justice is not absolute and may be subject to limitations. The right does not guarantee that the State must make litigation affordable in every instance. Such a proposition would place an enormous burden on the State to allocate vast resources to the justice sector. At best, the State must take progressive steps to make courts available to hear civil claims. The State must also provide the infrastructure and the legislative framework to make litigation speedy, effective and generally affordable so that litigants' rights to equality,[57] equal treatment before the law,[58] and dignity[59] are realised. But 'the State' can limit the types of matters that some courts are allowed to hear if such a limitation would be in the interest of the administration of justice and good governance.

[53] See the definition of 'court' in s 1.
[54] Constitution, s 26.
[55] MCA, s 46(2)*(a)*.
[56] MCA, s 28(2); SCA, s 21, and the interpretation thereto in van Loggerenberg *Erasmus Superior Courts Practice* (Original Service, 2015) A2-100.
[57] Constitution, s 9
[58] Constitution, s 9(1)
[59] Constitution, s 10.

There may be sound policy reasons for removing matters involving the State from the jurisdiction of small claims courts, such as: (i) to better maintain control over the public purse; (ii) to enable the State to appeal matters in the public interest; and (iii) to efficiently manage its human resources and administrative processes. On account of the lack of an appeals process,[60] and the truncated and informal procedures in the small claims courts,[61] it may not be in the public interest to pursue some or all claims involving the State in the small claims courts. The State may not have adequate human agents within its available resources to effectively represent it in the small claims courts. It is trite that cases come before the small claims courts much faster than those in the magistrates' courts. There is no system of pleadings or pre-trial procedures.[62] The State could easily find itself in a situation where it is regularly unable to defend proceedings in the small claims courts because bureaucratic procedures prevent it from preparing for cases quickly. This will prejudice the tax payer because defaults judgments[63] will be levied against the public purse. On the flipside, the functioning of the courts may be compromised. Presiding officers may be inclined to grant the State postponements for extended periods of time so that it may adequately prepare for court. This might, in turn, have the unintended consequence of limiting the efficiency of the courts as forums of speedy redress. Consequently, the mere limitation on the small claims courts to hear matters involving the State is not in itself unconstitutional. The limitation must be seen in the broader context, having regard to the role and function of small claims courts, and the expectations on these courts to provide simplified processes and procedures.

[60] SCCA, s 45
[61] See discussion in chapter 8.
[62] See discussion in chapter 8.
[63] Where a defendant fails to appear at court on the date of the trial, the court can grant default judgment in favour of the plaintiff: SCCA, s 35(1). See also discussion in chapter 9.

Notwithstanding the above considerations, there may be a *moral imperative* for the State to engage its citizens in an easily accessible forum. Open, transparent and accountable government are cornerstone values enshrined in the Constitution.[64] When citizens are unable to hold organs of State accountable because they do not have the means to access courts, it does not bode well for justice as many wrongs will go unchecked.

The unaffordability of litigation by the poor and middle-income people[65] in South Africa threatens the democratic participation of many millions who cannot access justice and the equal protection of the law.[66] To exclude the small claims courts altogether from holding organs of State accountable sends a message that the State does not take the access to justice dilemma in South Africa seriously enough to warrant even low-level engagement with the needs of the citizenry. It is submitted that the SCCA should be amended and that, as a minimum, small claims courts should hear matters involving local government.

(c) The State should be sued but should not sue in the small claims courts

If the position is adopted in the future whereby the State or some organs of the State can be parties to proceedings in the small claims courts, the State must have a qualified right to appear in the small claims courts, in that the State should not be permitted *to sue* in the small claims courts.

The law, and more specifically, procedural law must be vigilant of the power imbalance between the State and the citizen. The State occupies the powerful position of being able to use the machinery of

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[64] Constitution, s 1*(d)*; South African Government *Mid-Term Self-Assessment Report – National Action Plan 2013-2015* 3.

[65] See the discussion about the 'missing middle' in chapter 1.

[66] Habscheid 'The Fundamental Principles of the Law of Civil Procedure' (1984) 17 *The Comparative and International Law Journal of Southern Africa* 1 at 22 writes:

> 'Indeed, to interpret the plaintiff's access to court as a right one can exercise against the state is not an expression of extreme dogmatism, but rather a conception which condemns every denial of justice, whether formal or real, open or covert, as a betrayal by the state. And it appears that certain dilatory procedural practices, as well as extremely lengthy proceedings, which may result in a denial of justice, constitute a violation of this fundamental right.'

government, which includes its laws (adjectival and substantive), to subvert the rights of citizens.[67] The small claims courts should remain as forums wherein natural person plaintiffs, and perhaps juristic plaintiffs,[68] can sue. The small claims courts should not be forums for the State, in any of its guises, to bring actions against citizens.[69]

A decision of a small claims court is final and cannot be appealed.[70] It seems morally unfair for defendant citizens to be bound by judgments made in favour of the State in respect of which there is no right of appeal.[71] The lack of appeal against the State may also undermine the constitutional imperative of open, transparent and accountable government.

The moral and constitutional objection is, however, absent if a citizen plaintiff initiates proceedings against the State because the plaintiff would have the choice of either instituting an action in the magistrates' courts or the small claims courts. If an action is instituted in a magistrates' court, the plaintiff will enjoy the right of appeal.[72] If the plaintiff elects to sue in a small claims court, he or she would be waiving the right to appeal.

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[67] The rules of procedure can affect the application, development and interpretation of substantive law. See in this regard Habscheid (n66). Civil processes and procedures that constitute the law of civil procedure are not benign. They can materially affect the substantive rights of people. For an illustrative example, see: *Lawyers for Human Rights v Rules Board for Courts of Law and Another* [2012] 3 All SA 153 (GNP).

[68] See the discussion in §7.5 below.

[69] It is not common for the State to sue citizens. However, there is nothing to preclude the State from enforcing contractual obligations or bringing delictual actions. It is trite that the small claims courts can hear actions based on contract or delict: see chapter 6.

[70] SCCA, s 45. A decision of a small claims court can only be taken on review. The grounds of review are limited: SCCA, s 46.

[71] In countries where the State is permitted to sue in the small claims courts, it is generally (though not always) the case that a decision of the small claims court can be taken on appeal. For example, see s 38(1) of the Kenyan Small Claims Courts Act of 2016; Code of Civil Procedure of California, Part 1, Title 1, Chapter 5.5, Article 7, s 116.710.

[72] In chapter 9 it is argued that the SCCA should be amended to permit magistrates to refer matters to the small claims court if the claim falls within the jurisdiction of the small claims court. If this suggestion is accepted, in cases involving the State, the magistrate would have to factor in the lack of an appeals process in the small claims court, and this consideration should be sufficient to allow the plaintiff to continue in the magistrates' court.

If an appeal mechanism is introduced into the small claims courts,[73] the arguments above would no longer be applicable and there would be no principled objection to the State initiating actions in the small claims courts.

(d) The Institution of Legal Proceedings Against Certain Organs of State Act[74]

When an organ of State is sued, the plaintiff is required to comply with the Institution of Legal Proceedings Against Certain Organs of State Act (hereinafter referred to as 'PACOS'). PACOS is binding whenever an 'organ of [S]tate' is sued. For the purposes of the Act[75], an organ of State refers to national, provincial and local government.[76] In terms of PACOS, national departments, Provincial departments, municipalities, functionaries or institutions exercising a power or performing a function under the Constitution or a provincial constitution are all organs of State.[77]

The Act applies to 'debts' owed by organs of State. A 'debt' is any obligation arising from any cause of action such as contract, delict or statutory liability, stemming from either acts or omissions, for which an organ of State is liable. It is trite that the debt could also result from vicarious liability in the law of delict.[78]

In terms of s 3(1) of PACOS, no legal proceedings for the recovery of a debt may be instituted against an organ of State unless the creditor has given the organ of State in question notice in writing of his or her intention to institute the legal proceedings. The organ of State may consent in writing to the institution of the legal proceedings without notice.

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[73] But see discussion in chapter 8.
[74] 40 of 2002. For the legislative history of this statute see Paleker 'Letters of Demand (*Interpellatio Extraiudicialis*): Form and Substance' (2005) 30 *Journal for Juridical Science* 68.
[75] See discussion at §7.3.
[76] PACOS, s 1.
[77] PACOS, s 1(1).
[78] PACOS, s 1(1). For more on the subject see Boonzaier 'State Liability in South Africa: A More Direct Approach' (2013) 130 *SALJ* 330ff.

The notice of intention to institute legal proceedings must be served on the organ of State within six calendar months from the date on which the debt became due.[79] The notice must briefly set out the facts giving rise to the debt and particulars of the debt as are within the knowledge of the creditor.[80] A debt is not due until the creditor has knowledge of the identity of the organ of State and of the facts giving rise to the debt. The creditor is regarded as having acquired such knowledge as soon as the creditor could have acquired the information by exercising reasonable care, unless the organ of State wilfully prevented its acquisition.[81] A defect in the content of the notice can be waived by the organ of State.[82]

If an organ of State relies[83] on a creditor's failure to serve a notice, the creditor may apply to a court having jurisdiction for condonation of the failure.[84] The court may grant condonation if it is satisfied that the debt has not prescribed, good cause exists for the failure by the creditor, and the organ of State is not unreasonably prejudiced by the failure.[85]

Section 4 of PACOS sets out how a notice must be served, namely hand delivery, certified mail, electronic mail, or facsimile.[86] Where the notice was sent by electronic mail or facsimile, the creditor must, within 7 days[87] from the date upon which the notice was sent, take all reasonable steps to ensure that the notice has been received.[88] In addition, the creditor must deliver by hand or send by certified mail a certified copy of the notice to the relevant officer or person, together with an affidavit indicating the date on which, the time at which, and the e-mail address or facsimile number to which,

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[79] PACOS, s 3(2)*(a)*.
[80] PACOS, s 3(2)*(b)*.
[81] PACOS, s 3(3).
[82] PACOS, s 3(1)*(b)*(ii).
[83] From the tenor of s 3(4), it seems clear that a court cannot *mero motu* take notice of a failure by a creditor to give notice to an organ of State of an intention to institute legal proceedings.
[84] PACOS s 3(4)*(a)*.
[85] PACOS, s 3(4)*(b)*.
[86] PACOS, s 4(1).
[87] The seven-day period is reckoned to be calendar days.
[88] PACOS, s 4(1)*(a)*.

the notice was sent, as well as proof that it was sent or transmitted. The steps taken to ensure that the notice was received by the officer or person to whom it was sent must also be set out. The affidavit must state whether confirmation of receipt of the notice has been obtained and, if applicable, the name of the officer or person who has given that confirmation.[89]

Section 4(1) lists the functionaries on whom a notice must be served. In the case of a municipality, the notice must be served on the municipal manager.[90]

Section 5 of PACOS provides for the service of process on organs of State. No process may be served before the expiry of 30 days calculated from the date of service of the notice above upon the relevant organ of State.[91] Where process has been served prematurely, it is regarded as having been served on the first day after the expiry of the requisite 30-day period.[92]

From the above, it is evident that if a municipality (or for that matter, any organ of State) is sued in a small claims court, compliance with PACOS is mandatory. The unrepresented litigant may not know that compliance is required. The necessity of the assistance of the clerks of the courts[93] and legal asssitants[94] cannot be underestimated. If the required notice of proceedings is not sent as stipulated in PACOS, the plaintiff would have to seek condonation by way of 'application'. The small claims courts generally cannot hear applications, and there is no formal procedure stipulated in the SCCA or the SCCRs for bringing applications. Consequently, one can only infer that such applications will be brought orally from the plaintiff's bench, and the court will proceed inquisitorially to determine whether the requirements for condonation are met.

[89] PACOS, s 4(2)*(b)*.
[90] PACOS, s 4(1)*(b)*.
[91] PACOS, s 5(2).
[92] PACOS, s 5(3).
[93] For a discussion of the functions of the clerk of the court, see chapter 4.
[94] For more on the functions of legal assistants, see chapter 4 and see the discussion in §7.5.

In so far as some municipalities are or have been sued in the small claims courts,[95] there should have been compliance with PACOS. If the SCCA is amended in the future to include a definition of 'State' so that municipalities can officially be sued,[96] then it is recommended that the SCCRs should be amended to cater for condonation proceedings in terms of PACOS. A full-blown application for condonation is not feasible. The SCCRs should make provision for an informal oral application procedure. Furthermore, the clerks and legal assistants must be trained to ensure that the notice in terms of PACOS is sent to the municipal manager before court proceedings are initiated.

7.4 NATURAL PERSONS

The effect of s 7(1) read with s 7(4) of the SCCA is that natural persons can sue and be sued in the small claims courts. There are several qualifications to this general rule.

(a) Mental or other incapacity

In the past, it was possible for an incapacitated person to be represented by a parent, spouse or guardian in a small claims court. However, the deletion of subsection (3) from s 7 by the 1986 Amendment Act[97] removed such a possibility. It is interesting to note that SCCR 13(8)*(b)* makes reference to a 'curator'. Rule 13(8)*(b)* deals with service of process. It provides:

> '(8) Where two or more persons are to be served with the same process, service shall be effected upon each, except –
> *(b)* in the case of two or more persons sued in their capacity as trustees of an insolvent estate, liquidators of a company, executors, curators or guardians, when service may be effected by delivery to any one of them in any manner hereinbefore prescribed'.

It is difficult to reconcile SCCR 13(8)*(b)* with s 7 of the SCCA. The rule provides that a process may be served on the legal representatives of a defendant when the defendant suffers from some sort of incapacity, whether mental or otherwise. Presumably, the purpose behind the rule is to enable the

[95] See §7.3*(a)*.
[96] See §7.3*(a)*.
[97] See §7.2.

representatives to appear in court on behalf of the defendant who is incapacitated. Small Claims Court Rule 13(8)*(b)* was drafted in 1985. The existence of the rule no longer makes sense in light of the deletion of s 7(3) of the SCCA. The rule is thus *ultra vires.* Pending the removal of the rule, it should be ignored. The position today is that if a presiding officer is of the opinion that a party lacks capacity, the presiding officer must halt proceedings so that the matter can be instituted in a magistrate's court, where a *curator ad litem* can be appointed for the litigant concerned.[98]

SCCR 23(1) and SCCR 23(2) may also be *ultra vires*.[99] With the deletion of s 7(3), substitution of a litigant with a third party is not possible. The legislative intent behind the deletion of subsection (3) was clearly to remove the possibility of persons other than the litigants themselves appearing before the court. This seems to make sense, given that small claims courts' commissioners are expected to proceed inquisitorially, and to gather information principally from the litigating parties. Furthermore, since the rules of evidence are not applicable in the small claims courts,[100] and there are no formal pleadings or discovery procedures, the oral testimony of the litigant is vital to the outcome of a case.[101] Even though a deceased or incapacitated person can be substituted by an executor or curator in a magistrate's court,[102] it must be remembered that procedure in the magistrates' courts is more formal. The incapacitated litigant also has the benefit of legal representation in a magistrate's court. The legal representative might be in possession of consultation notes drafted during the client's lifetime or when the client was lucid. Such possibilities are, by and large, not applicable in the small claims courts.

The deletion of s 7(3) must have been in response to a practical problem relating to the inability of representatives of incapacitated or deceased litigants to fulfil the obligation of presenting credible

[98] See s 33 of the MCA.
[99] See §7.2 for these provisions.
[100] See chapter 8.
[101] See chapter 8.
[102] MCR 52(3).

oral evidence on behalf of such persons. The presence of representatives would also make nonsense of the rule that legal representation is not permitted in the small claims courts,[103] because in many cases the representatives of incapacitated persons would be attorneys or advocates.[104]

(b) Minors

According to the common law, minors[105] can sue and be sued.[106] If a minor is 7 years or below, the minor cannot sue or be sued in his or her own name. The minor has to be represented by his or her guardian. If the minor is above the age of 7, either (i) the minor can sue or be sued in his or her own name but be assisted by his or her guardian; or (ii) the minor's guardian can sue or be sued in his or her representative capacity on the minor's behalf.[107] The deletion of s 7(3) has made it impossible for minors to sue or to be sued in the small claims courts, even where parents or guardians represent them. Litigation involving minors must be instituted in the magistrates' courts.

It is unclear why minors are precluded from suing and being sued in the small claims courts. Young people with legitimate claims should be allowed to bring claims in the small claims courts either in their personal capacities or duly assisted by adult guardians. In New York, for example, minors (who are defined as persons below the age of 18) are permitted to sue with the assistance of their parents

[103] SCCA, s 7(2).
[104] Boezaart 'The Role of the Curator Ad Litem and Children's Access to the Courts' (2013) *De Jure* 707 at 712-713.
[105] That is, persons below the age of 18: see Children's Act 38 of 2005, s 17.
[106] Under the common law, a minor's guardian is generally not liable for a minor's delicts or for contractual obligations that the minor has entered into. A minor's parent or guardian is also not responsible for the costs of the opposition in respect of civil proceedings. The minor remains liable for his or her own delicts if delictual liability can be established against the minor. In the case of the minor's contract, the parents/guardians are liable to a limited extent, namely for the provisions of goods and services that are deemed to be necessary for the minor's well-being and maintenance. For more on the subject: see Hahlo 'Actions by Minors' (1955) 72 *SALJ* 137 at 138*;* Cilliers, Loots, Nel *Herbstein & Van Winsen: The Civil Practice of the High Courts of South Africa* 163; van Heerden, Cockrell, Keightley et al *Boberg's Law of Persons and the Family* 878-895, 803 and the authorities cited at fn 135.
[107] Peté, Hulme, du Plessis et al *Civil Procedure – A Practical Guide* 16-17 (hereinafter referred to as *Civil Procedure – A Practical Guide*).

and guardians.[108] The same applies in Saskatchewan, Canada.[109] The Small Claims Courts Rules of Ontario, Canada contain a very interesting provision. Rule 4.01(2) provides:

> 'A minor may sue for any sum not exceeding $500 as if he or she were of full age'.[110]

There is no reason why the South African small claims courts cannot accommodate minors' actions. The purpose of small claims courts is to give a voice to those who cannot afford costly litigation. Why should a minor have to sue or be sued in a magistrate's court when the claim falls within the jurisdiction of the small claims courts?

Minors are elligible to testify in civil proceedings. Under the common law, there is no specific age at which a child is deemed to be competent to testify in court. Even very young children can testify. The governing principle is that a child witness must be able to distinguish between truth and falsehood and understand the importance of telling the truth; and must be able to communicate effectively.[111] Provided that this governing principle is adhered to, there is no reason why a child plaintiff or defendant in the small claims court could not be examined by a presiding officer.

(c) Married persons

With the abolition of marital power,[112] married people have equal standing to sue and defend legal proceedings.[113] A party married out of community of property can institute and defend an action without spousal consent in a small claims court. If a party is married in community of property, spousal consent to institute and defend proceedings would be necessary in so far as the cause of action

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[108] Lippman, Pfau, Fisher et al *Your Guide to Small Claims & Commercial Small Claims in New York City, Nassau County, Suffolk County* 2.
[109] The Small Claims Act, 1997 (Chapter S-50.11 of the Statutes of Saskatchewan), s 15(2)*(b)*.
[110] O. Reg 258/98: Rules of the Small Claims Court, as amended 1 January 2017.
[111] Schwikkard, Van der Merwe *Principles of Evidence* (2015) 451.
[112] In the past, women married out of community of property were subject to the marital power of their husbands. Section 29 of the General Law Fourth Amendment Act 132 of 1993 retrospectively abolished marital power.
[113] *Civil Procedure – A Practical Guide* 19.

affects the joint estate.[114] It must be noted, however, that while spousal consent is stated as a statutory requirement in this case, the validity of legal proceedings does not depend on it.

Under the Matrimonial Property Act, lack of consent does not vitiate proceedings, even where the marriage is in community of property and the joint estate is affected. In the case of a marriage in community of property where the joint estate is affected, a judgment of the court is extracted first from the separate property of the spouse who did not obtain spousal consent, and if there is insufficient property, the court's judgment is executed against the joint estate. On the dissolution of the marriage, whether by death or divorce, an adjustment is made in favour of the out-of-pocket spouse. The adjustment is a matter for the spouses and does not affect the initial creditor's claim.[115]

The above rules apply in the small claims courts as well, irrespective of whether the parties are married in terms of the Marriage Act,[116] the Recognition of Customary Marriages Act[117] or the Civil Union Act.[118] The relevant provisions of the Matrimonial Property Act are applicable to all of these different types of marriages.

Since Islamic marriages are not yet recognised, 'spouses' married by Islamic law are treated in the same way as spouses married out of community of property – meaning that spousal consent for litigation is not required. [119]

Despite the abolition of marital power, SCCR 10(4) contains an anachronism that is unconstitutional. The rule deals with the citation of parties in a small claims court summons. It provides:

> '(4) The summons shall also –

[114] Section 17 of the Matrimonial Property Act 88 of 1984 (hereinafter referred to as the 'Matrimonial Property Act') and see *Civil Procedure – A Practical Guide* 20.
[115] Matrimonial Property Act, s 17.
[116] 25 of 1961.
[117] 120 of 1998.
[118] 17 of 2006.
[119] Moosa, Abduroaf 'Faskh (Divorce) and Intestate Succession in Islamic and South African Law: Impact of the Watershed Judgment in *Hassam v Jacobs* and the Muslim Marriages Bill' (2014) *Acta Juridica* 160.

> *(a)* show the surname of the defendant by which he is known to the plaintiff, the defendant's sex and residence or place of business, and, where known, his first name or initials, and, in the case of a woman, her marital status …'

On a similar provision, which prevailed in the High Court (namely, HCR 17(4)), the court in *Nedcor Bank Ltd v Hennop*[120] held:

> 'Further, the reference to the defendants' sex and women's marital status as required by Rule 17(4) is certainly outmoded and anachronistic. It indeed offends the equality provisions contained in the Constitution of the Republic of South Africa Act 108 of 1996. The preamble speaks of equality between men and women and s 9(1) provides that every person shall have the right to equality before the law and s 9(3) is emphatic that no person shall be unfairly discriminated against, directly or indirectly on the grounds of sex, gender or disability. In my view, in these enlightened times, the omission to state the defendants' sex and, in the case of a woman, her marital status in the summons is of no consequence and certainly not amenable to render the plaintiff's application for summary judgment to be fatally defective.'

This decision prompted the Rules Board for Courts of Law to amend HCR 17(4) and MCR 5(4). It is submitted that the Rules Board should in the future[121] amend SCCR 10(4) so that the rule accords with constitutional values.[122]

(d) Aliases of natural persons

Where a natural person trades in a name other than his or her own, he or she *can be sued* in the small claims court in the name of his or her alias. A natural person, however, *cannot sue* in the name of an alias. On a reading of SCCR 27,[123] this is not immediately apparent because there is a dissonance between the heading of SCCR 27 and the content of the rule. The heading is framed in both the active and the passive, in that it refers to '[a]ctions *by* and *against*…'. The content of the rule, however, is framed in the passive. Clearly, on an ordinary and literal interpretation, the legislative intent is that the rule only applies to the situation where aliases *are sued*. It is trite law that a heading to a provision in legislation is only relevant when the content of a provision is ambiguous.[124] The content of SCCR

[120] 2003 (3) SA 622 (T) at 626G-J.
[121] See discussion in chapter 5 relating to the proposed legislation to confer power on the Rules Board for Courts of Law to make rules for the small claims courts.
[122] See also chapter 8.
[123] The provisions of SCCR 27 is set out in §8.2.
[124] *Chotabhai v Union Government (Minister of Justice and Registrar of Asiatics)* 1911 AD 13 at 24; *Turfontein Estates Ltd v Mining Commissioner, Johannesburg* 1917 AD 419 at 431.

27 is unambiguous. Consequently, the position is that SCCR 27 only allows defendants to be sued in the names of their aliases. This is in contrast to HCR 14 and MCR 54.[125]

High Court Rule 14 and MCR 54 allow for a range of entities (aliases of natural persons) mentioned in those rules to sue and to be sued in their own names as a matter of procedural convenience. The drafters of the SCCRs, on the other hand, intended to limit the application of the principle. Their decision is consistent with the rule that juristic persons (large and small) cannot sue in the small claims courts. If the drafters had allowed unincorporated entities to sue in their own names, this would have conflicted with the current position that excludes juristic persons from suing in the small claims courts. If, however, the SCCA is amended in the future[126] to enable juristic persons to sue in the small claims courts, SCCR 27 should be amended in line with HCR 14 and MCR 54 so as to enable unincorporated entities to sue in their own names.

As discussed in chapter 6, to sue an alias in its own name comes with certain complications. In order to attach the assets of the defendants behind the alias, the identities of those persons would need to be flushed out. While MCR 54 and HCR 14 contain processes and procedures for doing precisely that, the SCCRs are deficient in this respect. It would appear that the presiding officer is required to investigate the identities of the natural persons behind the alias. This aspect of the SCCRs requires some attention because it is unclear what the presiding officer is expected to do when persons who are identified are not physically present in court. Can the court *ipso facto* join those persons to the proceedings *in absentia*? Surely this cannot be so, as it would fly in the face of the *audi alteram partem* principle. Is the court expected to subpoena those parties to court? The difficulty with such a proposition is that there is currently no provision to summon a person (witness) before a small claims court.[127] Is the court obliged to dismiss the matter on the basis that the court cannot make a finding?

[125] See also Bredenkamp (n31) 8.
[126] See the discussion in §7.5.
[127] See the discussion in §8.19.

Would the court have to recommend that the matter be heard in a magistrate's court, where MCR 54 would be applicable? What seems more likely is that the court could grant judgment against the entity concerned. The judgment would be enforceable against the entity's assets only, and not against the natural persons behind the entity.[128]

For a judgment to be enforceable, it would be important that ownership of the entity has not passed hands prior to judgment because if that has occurred, the judgment would not be executable even against the entity's assets.[129]

The Saskatchewan Small Claims Courts Act of 1997 contains a useful provision which may be of assistance in the situation outlined above. Section 13 of the Saskatchewan Act allows for a 'third party' who is not a party to the proceedings to be drawn into the proceedings by applying to court for the service of a 'third party' notice.[130] The plaintiff or the defendant, as the case may be, must simply believe that 'he or she may be entitled to recover all or part of a judgment from a person [the third party] who is not a party to the claim or counterclaim'.[131] In the notice, the third party is informed of the nature of the claim. Importantly, the presiding officer 'may refuse to issue a notice of third party claim if the judge thinks that the third-party claim: *(a)* is without reasonable grounds; *(b)* discloses no triable issue; or *(c)* is frivolous, vexatious or an abuse of the court's process.' With a few adaptions, the Saskatchewan third party procedure could be implemented in South African small claims courts to enable a court to draw persons who were not originally cited in proceedings into an action. Presumably, once the court establishes the identities of the individuals behind the alias from the defendant who appears at the first hearing, the court could postpone the matter to enable service of the third-party notice on the persons concerned. On the next hearing date and with all the parties

[128] *DF Scott (EP) (Pty) Ltd v Golden Valley Supermarket* 2002 (6) SA 297 (SCA) paras [13], [18].
[129] Ibid [18].
[130] A specimen notice is contained in The Small Claims Regulations, 1998 (Chapter S50.11 Reg 1), as amended, Form C.
[131] The Small Claims Act, 1997 (Chapter S-50.11 of the Statutes of Saskatchewan), s 13(1).

present – or with proof of service of the third-party notice – the court would be in a position to deliberate the matter to finality. The court's judgment would then be enforceable against the personal assets of all the individuals who were drawn into the action.

Currently a trust cannot be sued in its own name in the small claims courts. As discussed in chapter 6, this requires reconsideration as there are practical difficulties that arise.[132] The SCCA and SCCRs must be amended to permit a trust to sue in its own name and to allow for the flushing out of the names of the trustee(s) by the elicitation of the information from the trust's representative (who may be the trustee) in court. Unlike the aliases mentioned in SCCR 27, the judgment of the court would only be enforceable against the trust's assets and not against the trustees' personal estates. It is settled law that a trustee is in a fiduciary position vis-à-vis a trust and does not enjoy beneficial ownership in the trust assets.[133] Hence, the trustee is not personally liable for the debts and obligations of a trust. It is thus less complicated to sue a trust in its own name and to enforce the court's judgment.

7.5 JURISTIC PERSONS

Juristic persons[134] may be sued in the small claims courts. However, they cannot sue. In *Raman v Barlow Motor Investments (Pty) Ltd T/A Natal Motor Industries, Prospecton*[135] the applicant (plaintiff), a natural person, instituted an action against a juristic person in the small claims court. The respondent (defendant) counterclaimed. The counterclaim was successful, and the court dismissed

[132] See §6.13.
[133] *Braun v Blann and Botha* 1984 (2) SA 850 (A) at 859F–H; *BOE Bank Ltd (Formerly NBS Boland Bank Ltd) v Trustees for the time being of the Knox Property Trust* [1999] 1 All SA 425 (D) at 435b.
[134] In South African law, a statutory juristic person is: a company, incorporated in terms of the Companies Act 71 of 2008; a close corporation, incorporated in terms of the Close Corporations Act 69 of 1984; or any other body incorporated by statute in terms of which it is conferred separate legal personality. The common law makes provision for a further type of person namely, the *universitas*. Under the common law, the *universitas* is permitted to sue and be sued in its own name. To be a *universitas* the constitution of the entity must permit the entity to institute and defend proceedings, to acquire rights and obligations its own name, and should allow for perpetual succession: *Molotlegi v President of Bophuthatswana* 1989 (3) SA 119 (B) at 125G–I; *African National Congress v Lombo* 1997 (3) SA 187 (A) at 195I–196J; *Interim Ward S 19 Council v Premier, Western Cape Province* 1998 (3) SA 1056 (C) at 1060G–1061A; *Rail Commuter Action Group v Transnet Ltd t/a Metrorail (No 1)* 2003 (5) SA 518 (C) at 554C–557C.
[135] 1999 (4) SA 606 (D).

the applicant's action. The applicant took the matter on review to the High Court, arguing that on a 'literal and strict interpretation' of s 7(1) of the SCCA, a juristic person was not permitted to sue in a small claims court, even as a plaintiff in reconvention.[136] The court, per Hurt J, reasoned as follows:

- Section 7(1) should not be interpreted as precluding a juristic person from raising a counterclaim after having been brought before the court by the plaintiff as a defendant in convention. The reference to the *institution of an action* in s 7(1) is to the act of initiating proceedings by way of an action in a small claims court. Bringing a counterclaim cannot be said to be 'instituting an action'. Moreover, s 29 of the SCCA prescribes that a written demand must be sent before any summons is issued.[137] This would not be applicable to a counterclaim, where the defendant is already before the court because the plaintiff has issued summons.[138]
- On an interpretation of ss 34*(b)*,[139] 35(1)[140] and 35(2)*(b)*[141] of the SCCA, it is clear that when the legislature used the word 'defendant' in the context of those provisions, the legislature was plainly referring to the 'plaintiff in reconvention.' If the legislature had intended to exclude the possibility of a juristic plaintiff in reconvention from bringing a counterclaim in a small claims court, the legislature would have been more explicit. [142]
- In many instances, the facts upon which a claim is based are inextricably interwoven with the facts pertaining to a counterclaim. The court held that '[s]ubstantial problems could arise from

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[136] *Raman v Barlow Motor Investments (Pty) Ltd T/A Natal Motor Industries, Prospecton* supra at 608C-D.
[137] For a discussion of s 29 see chapter 8.
[138] *Raman v Barlow Motor Investments (Pty) Ltd T/A Natal Motor Industries, Prospecton* supra at 608D-G.
[139] The section provides:

> 'A court may, after the hearing of an action, grant –
> . . .
> *(b)* judgment for the defendant in respect of his defence or counterclaim in so far as he has proved it'.

[140] Section 35(1) deals with the situation where a defendant has confessed to liability or failed to appear, and ends with the words, '. . . and the court may dismiss any counterclaim by the defendant.'
[141] The section provides:

> '. . .(T)he court may, on application by the defendant –
> . . .
> *(b)*with regard to a counterclaim, grant judgment for the defendant in so far as he has proved the plaintiff's liability and the amount of the counterclaim to the satisfaction of the court.'

[142] *Raman v Barlow Motor Investments (Pty) Ltd T/A Natal Motor Industries, Prospecton* supra at 609D-609G.

the possibility of the claim and the "counterclaim" being decided by two different courts, each dealing with precisely the same set of facts.'[143] It consequently appeared 'most consonant with the concepts of justice and of achieving the intention of the legislator' to hold that a juristic person can bring its counterclaim simultaneously with the plaintiff's claim in convention.[144]

Significantly, the court held:

> 'It must be borne in mind, in deciding precisely what the Legislator meant by using the words 'only as defendant' in s 7(1), that the basic object of the Small Claims Courts Act is to provide an expeditious, inexpensive and final decision of small claims without the problems ordinarily created by the more sophisticated forms of litigation available in the magistrate's court or High Court. This object would, in my view, be defeated if a claim in reconvention lodged by a juristic person had in every instance to be removed to the arena of another court.'[145]

(a) The view of the Hoexter Commission

The Hoexter Commission (after surveying foreign law) acknowledged that there were divergent positions as regards whether juristic persons should be permitted to sue in the small claims courts. In its *Report*[146] the Commission stated:

> 'The Commission considers that a South African small claims court should serve primarily (or perhaps even exclusively) the interests of the individual claimant. For purposes of launching the pilot projects[147]…the Commission agrees with the suggestion made in the Kentridge Memorandum[148] …that only natural persons should be permitted to sue. Any final decision as to whether the range of plaintiffs should be extended, and if so, to what extent, ought in the Commissions opinion to be deferred until the results obtained from the operations of the pilot projects have been carefully monitored.'

The Commission did not shut the door on the possibility of juristic persons suing in the small claims courts. The Commission proposed that at the inception of the small claims courts pilot project[149] juristic persons should have a limited right to appear in the small claims courts. A revised position

[143] *Raman v Barlow Motor Investments (Pty) Ltd T/A Natal Motor Industries, Prospecton* supra at 608I-609A.
[144] *Raman v Barlow Motor Investments (Pty) Ltd T/A Natal Motor Industries, Prospecton* supra at 609A-B.
[145] *Raman v Barlow Motor Investments (Pty) Ltd T/A Natal Motor Industries, Prospecton* supra at 608H-I.
[146] *Report* §13.16.
[147] The small claims courts were first introduced on a pilot basis. See chapter 2.
[148] Adv Schreiner SC (as he then was) made the 'Kentridge Memorandum' .entitled *Small Claims Procedure in the USA'* which was prepared in 1976 by Adv S L Kentridge SC at the request of the General Council of the Bar available to the Commission. See *Report* §5.6.
[149] See chapter 2.

was to follow after the pilot phase. Sadly, the pilot phase was never properly evaluated, and over time the prohibition on allowing juristic persons to sue became concretised. The literature on South African small claims courts is silent on the issue. At the 2003 Small Claims Court Conference[150] and in the subsequent National Action Plan,[151] the issue of juristic persons being allowed to sue in the small claims courts did not come up. This is a matter that is thus ripe for consideration.

(b) Arguments for and against juristic persons suing in the small claims courts

Proponents and opponents of allowing juristic persons to sue in the small claims courts are equally vociferous when it comes to stating their positions. The following arguments and counter-arguments are raised in the literature.

(i) Juristic persons will have an unfair advantage as 'repeat-players'

It is argued that if juristic persons are permitted to sue in the small claims courts, it will give them an unfair advantage because even if legal representation is not permitted, employees with formal legal training will represent them. Over time these representatives, and accordingly, the juristic persons they represent, will acquire expertise in litigating in the small claims courts. Their proficiency will prejudice natural person litigants who are not frequent users of the courts. Juristic persons are notorious 'repeat-players'[152] in the courts, whereas natural person litigants are classic 'one-shotters',[153] and hence need protection.[154] The lack of representation for individuals will result in corporations working the system to their advantage. There is also a possibility that they will build a rapport with presiding officers who may become inclined to go easy on them.[155]

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[150] See §3.6.
[151] See §3.7.
[152] See chapter 1 for a discussion of Galanter's hypothesis.
[153] See chapter 1 for a discussion of Galanter's distinction between 'one-shotters' and 'repeat-players'.
[154] For a discussion of the 'repeat-player' and the 'one-shotter' dichotomy, see chapter 1.
[155] See Moulton 'The Persecution and Intimidation of The Low-Income Litigant as Performed by the Small Claims Court in California' (1968-1969) 21 *Stanford Law Review* 1667.

However, even if juristic persons are 'repeat-players' in the courts, and may acquire a certain level of expertise if they litigate, the limited jurisdiction of the small claims courts makes it unlikely that the types of matters that come before them will be of such a nature so as to give juristic persons a substantial advantage. With the simplified processes and procedures of the small claims courts, 'repeat-players', who usually exploit the technicalities of litigation rules,[156] will be unable to do so. Furthermore, if mediation is introduced in the small claims courts, this will further reduce the potential for commercial parties to exploit their frequent use of the courts to their advantage.[157]

At present, juristic persons are permitted to be represented by *officers*.[158] Nothing precludes an officer from having legal qualifications. In the South African context, therefore, it would be contradictory to overemphasise the privilege that a juristic person would enjoy if it were the plaintiff in a matter, as a juristic person already enjoys the benefit of having legal expertise, if it so wishes, as a defendant or as a plaintiff in reconvention. The benefit would apply irrespective of whether the juristic person is the plaintiff or the defendant. The presiding officer who proceeds inquisitorially[159] will act as the buffer to ensure that both sides have equal opportunities in court. The expertise of a company official will be balanced by the participation of the presiding officer who will ensure that the natural person's interests are protected.[160] Furthermore, the relaxed procedural and evidential rules, and the absence of adversarialism in small claims courts will ensure that the environment is not unduly litigious. If there is real concern about juristic persons acquiring a substantial advantage, the SCCA can be amended to expressly provide that a juristic person must be represented in court by *a duly authorised director or officer, who shall not have been admitted to the attorneys' or advocates' professions.*

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[156] See Galanter 'Why the "Have" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9:1 *Law and Society Review* 98.
[157] See Sarat 'Alternatives in Dispute Processing: Litigation in a Small Claims Court' (1975-1976) 10 *Law & Society Review* 341 at 366. See also chapter 10.
[158] SCCA, s 7(4). For the provisions of the subsection see §7.2.
[159] See chapter 8.
[160] See also Moulton (n155) 1665.

Admittedly, such a provision will not exclude the possibility of the officer having paralegal training or being a legal graduate. It is thus difficult to restrict an officer from having some legal knowledge, especially since legal training is often regarded as a useful attribute for an executive position.

(ii) Juristic persons will change the character of the small claims courts

Fear is expressed that if juristic persons are permitted to sue in the small claims courts, they will change the character of small claims courts from people's courts to debt-collecting agencies.[161] They will clog up the court rolls and affect the quality of justice in the small claims courts.

There is a counter-argument to this. In the large city centres, commercial enterprises may dominate the small claims courts. But, studies have shown that in rural areas, commercial parties are less prevalent and the character of small claims courts would remain unaffected if juristic persons were permitted to sue. International studies also show that public usage can vary significantly between courts and that claimants in larger communities are more evenly distributed.[162] However, limitations can be placed on juristic persons. For example, legislation can direct that juristic persons may institute a limited number of actions per year in a particular small claims court or that they cannot have more than a certain number of matters enrolled at any particular time.[163] In some jurisdictions, such

[161] Moulton (n155) 1658ff; RA Kagan 'The Routinization of Debt Collection: An Essay on Social Change and Conflict in the Courts' (1984) 18 *Law & Society Review* 323 at 333.
[162] Moulton (n155) 1658 fn 7; Pagter (n46) at 876ff.
[163] This was the case in Ohio, Maine and New Hampshire. The discretion a small claims judge had to limit the number of claims a corporation could bring in the small claims court was, however, repealed in the 1950s for Maine and New Hampshire, and in 1999 in the case of Ohio. Formerly, the Ohio Revised Code §1925.08 provided:

> 'No more than twenty-four (24) claims may be filed by a single person, firm, or cooperation within the calendar year except the County Treasurer, to which the limit does not apply.'

Today commercial parties can sue unrestricted in these jurisdictions. For more US States which placed limitations on the number of actions that could be brought in the small claims court see Weller, Ruhnka, Martin 'Success in Small Claims: Is a Lawyer Necessary' (1977) 61 *Judicature* 176 at 178. One other possibility is to have two divisions in the small claims court: one for commercial claims and one for individual claims. See in this regard CD Robinson 'A Small Claims Division for Chicago's New Divisional Court' (1963) *Chicago Bar Review* 421 at 424. This suggestion cannot be supported in the South African context. Two divisions will add to administratative problems within the courts (see chapter 4) and will make little practical difference.

limitations have proved quite effective, and there is no reason why other jurisdictions cannot implement similar measures.[164]

The National Credit Act[165] ('NCA') is applicable to all credit providers in South Africa. The NCA has exacting requirements to protect the rights of credit receivers.[166] Currently, the SCCA permits credit providers to sue in the small claims courts as long as they are not juristic persons.[167] If juristic persons were permitted to sue in the small claims courts, there is a real danger that credit providers might see the small claims courts as cheaper, speedier and less exacting forums to recover debts. If presiding officers are not adequately trained, the protections offered by the NCA could be compromised. At present, it is unclear whether presiding officers are in fact abiding by the complex provisions of the NCA.[168] If the recommendation in chapter 6 that small claims courts should not have jurisdiction to deal with any matter that falls under the NCA is implemented,[169] these concerns will be alleviated.

The possibility of debt collection agencies appearing in the small claims courts – a concern in other jurisdictions[170] – is remote. Section 14(4) of the SCCAprovides:

> 'A court shall not have jurisdiction in respect of any claim or counterclaim based in whole or in part upon the cession or assignment of rights.'

Following international practice,[171] the Hoexter Commission precluded claims based on cession from being heard in the small claims courts. The prohibition on the cession and assignment of rights is a successful mechanism for keeping debt collection agencies out of the small claims courts.[172]

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[164] Anonymous Author 'Small Claims Courts as Collection Agencies' (1952) 4 *Standford Law Review* 237 at 242.
[165] 34 of 2005.
[166] See discussion in §6.10.
[167] SCCA, s 15*(d)*.
[168] See discussion in §6.10.
[169] See discussion in §6.10.
[170] Pardum 'Examining the Claims of a Small Claims Court: A Florida Case Study (1981) 65 *Judicature* 25 at 26; Ruhnka, Weller with Martin **'**Small Claims Courts – A National Examination' (1981) 41ff.
[171] See, for example, The Code of Civil Procedure of California, Part I, Chapter 5.5, Article 4, s 116.420; Weller et al (n163) 178.
[172] Ruhnka et al (n170) at 43.

With effective court management, court rolls are unlikely to be burdened by corporate plaintiffs. South Africa has capacity to service a myriad of parties in the small claims courts. There are more than 405 small claims courts in the country.[173] City centres have multiple small claims courts. There are approximately 25000 attorneys in the country and 5000 advocates. [174] A significant proportion of these professionals are eligible to preside in the small claims courts. Many law academics from the 17 law schools and many retired magistrates can serve in the small claims courts.[175] There may be difficulties with infrastructure, but small claims courts are not anchored to court buildings. Court proceedings can be conducted in public buildings such as schools, church halls and community centres.

(iii) Small claims courts are consumer courts

The third argument against allowing juristic persons to sue in the small claims courts is allied to the second argument above. The view is sometimes expressed that small claims courts were designed to cater for the consumer rights movement. If one allows juristic persons to sue in the small claims courts, the historical rationale for the courts will be lost.[176]

However, it can be argued that the history of the courts should not permanently anchor them to a particular design. The purpose of the courts is to provide cost-effective and speedy access to justice for litigants with small claims. If a juristic person cannot sue in the small claims court, it has to sue in another court in a matter that may fall within the small claims courts' substantive and monetary

[173] See §3.8.
[174] As at April 2015 there were 23712 attorneys in the country. There were approximately 5000 registered law students in the country. Of the qualifying students, approximately 3000 go on to register articles in a given year: Manyathi-Jele 'Latest Statistics on the Legal Profession' (August 2015) *De Rebus* 13. It is fair to conclude that there are ±25000 attorneys in the country at the present time. As at 26 April 2012 there were 4762 advocates in the country: Department of Justice and Constitutional Development *National Assembly Question for Written Reply: Parliamentary Question No 947 of 26 April* 2012. It is thus safe to speculate that there are ± 5000 advocates in the country at the present time.
[175] See chapter 5.
[176] Elwell, Carlson 'The Iowa Small Claims Court: An Empirical Analysis' *Iowa Law Review* 75 (1989) 433 at 444, 465, 503.

jurisdiction. The natural person defendant will have to face higher legal costs in defending the matter. From a cost-benefit perspective, it makes sense to allow juristic persons to sue in the small claims courts.

If juristic persons are allowed to sue in the small claims courts, it may benefit larger corporations, but it most certainly will also benefit small businesses.[177] It is in the interest of economic development for small businesses to be able to bring claims in the small claims courts.

The consumer rights movement was not the cause of the development of small claims courts in South Africa. From the Hoexter Commission *Report* it is clear that the purpose of the courts was to provide deracialised platforms to hear small claims matters and to improve access to the courts for all citizens.[178] Mindful of the limited number of pilot courts, the Commission sought to limit the categories of small claims court plaintiffs. Given that small claims courts today are prevalent in the overwhelming majority of magisterial districts in South Africa, the original motivation for limiting the appearance of juristic persons has fallen away.

Access to justice is a problem in South Africa. Many juristic persons have deep pockets and can afford to litigate matters to the hilt in the magistrates' courts. Many poorer litigants and middle-income litigants cannot afford to defend proceedings because of the high cost of legal representation.[179] It makes sense, therefore, to open the doors of the small claims courts so that people's prospects of achieving justice can be expanded. Mouton, who is critical of corporation plaintiffs in the Californian small claims courts, concedes:

> 'If business … were barred from small claims court, where would these claimants go? If they simply filed in municipal or justice courts and obtained default judgments – which in these courts can be entered by the clerk – with higher costs attached, would a low-income defendant be any better off? The greater expense and complexity of standard court procedure might result in some of the smaller claims not being sued on at all. Others, however,

[177] Pagter (n46) 891.
[178] See §2.4.
[179] See chapter 1.

> might be assigned to collection agencies, whose intentional harassment could subject the low-income debtor to even greater abuse than that resulting from somewhat inadvertent malfunctioning of small claims courts.'[180]

The prohibition against legal representation, the informality of court procedures and the relaxation of evidence rules assist to level the playing field between the 'one-shotter' natural litigant and the 'repeat-player' juristic person. The inquisitorial process, the presence of legal assistants, multilingual presiding officers,[181] and well-trained staff will also ensure that natural person litigants are adequately prepared to defend cases. If mediation is introduced in the small claims courts,[182] it will prevent 'repeat-players' from using their litigation experience to overpower less frequent users of the courts.

(c) Why juristic persons and other entities should be permitted to sue in the small claims courts and recommendations for reform

Twenty-three years into democracy, the civil justice system faces challenges. The rule of law remains relatively intact. However, access to the rule of law is compromised.[183] Socio-economic marginalisation is at the heart of the issue.[184] The gap between the rich and poor keeps growing and the cost of litigation prevents even the middle class from accessing the courts.[185] The time has come for bold measures to level the playing field between 'the haves' and 'the have nots'.[186] A radical rethinking of the theoretical framework of procedure is required to address some of the problems.[187]

Having regard to the *context* within which South African small claims courts exist, juristic persons should be permitted to sue in the small claims courts. It is more affordable for the ordinary citizen to defend proceedings in the small claims courts. Why should a litigant have to defend a small claim in a magistrate's court at a greater cost?

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[180] Moulton (note 155) 1674-1675. See also Whelan 'Small Claims Courts: Heritage and Adjustment' in Whelan (ed) *Small Claims Courts – A Comparative Study* (1990) 213.
[181] See chapter 5.
[182] See chapter 10.
[183] See chapter 1.
[184] See discussion in chapter 1.
[185] See §6.7 fn 90, 91. See also chapter 1.
[186] See Galanter (note 156) 98ff.
[187] Theophilopoulos 'Constitutional Transformation and Fundamental Reform of Civil Procedure' (2016) *TSAR* 68.

If businesses were permitted to sue in the small claims courts, small business owners could pursue claims more cheaply and much more expeditiously.[188] This would be consonant with access to justice for all.[189] Currently, commercial matters are diverted to other courts at greater cost to the poorer litigant.[190] This not only prejudices low income individuals, but also small businesses. To encourage the establishment of small businesses for job creation, the procedural system should reduce the cost of doing business in South Africa. As McGill notes:

> 'Allowing business plaintiffs access to the small claims court can be defended on consumer protection, commercial market efficiency, and historical grounds. Forcing business to take its disputes to a more expensive, complicated, or slower forum does not serve the interests of the consumer defendant or the public at large. Consumers will be placed in higher jeopardy and will be unable to defend without representation. Even for undefended actions, increased costs ultimately will be borne by the consumer.'[191]

As discussed earlier, non-juristic business entities should be permitted to sue in their own names in the small claims courts as a matter of procedural convenience.[192] The SCCRs must provide a mechanism for the names of the natural persons behind the entities to be identified. It is, therefore, proposed that in the small claims court summons,[193] the names of such persons must be stipulated. Each person on the list must be served a copy of the summons. To this extent the rules for service of process must be changed and simplified.[194]

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[188] Axworthy 'Controlling the Abuse of Small Claims Courts (1976) 22 *McGill Law Journal* 480 at 482; Coates, Gantz, Heathcote 'Small Claims in Indiana' (1969-1970) *Indiana Legal Forum* 517 at 535.

[189] In New Zealand corporations can sue and be sued in small claims courts. Spiller 'The Small Claims System: A Comparison of the South African Small Claims Court and the New Zealand Disputes Tribunal' (1997) 5 *Waikato Law Review* 35 at 45 states:

> 'It is submitted that the New Zealand approach which allows access to applicants that are corporations better reflects the underlying philosophy of the small claims system as the provider of access to justice for all.'

In Canada only Quebec restricts corporations and provinces from being plaintiffs. All the other provinces allow juristic entities to sue. This is in keeping with the idea of 'justice for all'. See McGill 'Challenges in Small Claims Design' in Trebilcock, Duggan, Sossin (eds) *Middle Income Access to Justice* 357.

[190] Prujiner 'L'ambiguité "small claims courts" et ses effets sur leur adaptation québecoise' (1971) 12 *C de D* 175 cited in Axworthy (n188) 490 argues that a model whereby small claims matters are simply diverted to other courts does not address the difficulties confronting the poor litigant. Diversion impoverishes the poor litigant and is, therefore, a flawed model.

[191] McGill (n189) 358.

[192] See §7.4.

[193] In chapter 8 it is argued that the small claims 'summons' should be called the 'statement of claim' to introduce further simplicity to the procedure.

[194] Service of summons is discussed in chapter 8.

A plaintiff commercial entity (whether incorporated or unincorporated) should be precluded from proceeding in a small claims court unless a representative has been authorised by resolution of all its members to appear in court. These mechanisms will ensure that the *audi alteram partem* principle is satisfied. An entity that does not comply with these requirements must face the prospect of its claim being struck out by the court. It must also be borne in mind that a presiding officer will always have the discretion to halt proceedings where the claim is deemed to be too complex or where fairness compels the matter be heard in a magistrate's court.[195] This discretion should exist even when a magistrate's court refers a matter to a small claims court.[196]

Finally, the significant number of small claims courts in South Africa,[197] together with the renewed enthusiasm of the legal profession for its members to serve as commissioners in the courts[198] must dispel uncertainties about the ability of small claims courts to cope with an increased workload if juristic persons and other non-juristic entities are allowed to sue in them.

7.6 LEGAL REPRESENTATION

(a) The Hoexter Commission

In its *Report*, the Hoexter Commission was 'strongly of the view that in the South African small claims courts the requirements of justice would best be served by imposing a total bar on legal representation of either party at trial.' The Commission felt that to have legal representation would increase 'the cost to litigants' and that the reduction of costs is the 'very problem which small claims courts were designed to solve.'[199]

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[195] SCCA, s 23.
[196] See the discussion in chapter 8 where it is proposed that the magistrates' courts must be empowered to transfer matters to the small claims courts where a judicial officer believes that the matter should be litigated in the small claims court.
[197] See §3.8.
[198] See §3.8.
[199] *Report* §13.9.

Drawing on experiences in the United States,[200] Australia and the United Kingdom,[201] the Commission found that the absence of legal representation goes hand-in-hand with inquisitorial proceedings, and when the two are coupled together, the result is an 'easier and speedier fact-finding process.'[202] To introduce legal representation at inquisitorial small claims proceedings would create an 'insidious temptation to the [presiding officer] to relinquish his [or her] inquisitorial role, and to lapse into a more familiar adversary system of resolving disputes.' The Commission went on to state that legal representation has the uncanny ability to 'infuse into proceedings that air of formality and technicality which is fundamentally alien to the real spirit of the small claims procedures.' Legal representation would 'give to the rich litigant an improper advantage over the poor opponent.'[203]

As a caveat to its recommendation the Commission stated:

> 'The Commission wishes to state quite unequivocally that in South Africa a small claims court will operate successfully only if, at the stage of the filing of the claim by the plaintiff, and thereafter during the entire process of pre-trial preparation, specialised assistance of full-time and salaried legal and paralegal staff is available both to the plaintiff and the defendant.'[204]

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[200] The Commission referred to the California Small Claims Court. The position in California today is still that legal representation is not permitted. To this extent The Code of Civil Procedure of California, Part I, Chapter 5.5, Article 5 provides:

> '116.530.
> *(a)* Except as permitted by this section, no attorney may take part in the conduct or defense of a small claims action.
> *(b)* Subdivision (a) does not apply if the attorney is appearing to maintain or defend an action in any of the following capacities:
> (1) By or against himself or herself.
> (2) By or against a partnership in which he or she is a general partner and in which all the partners are attorneys.
> (3) By or against a professional corporation of which he or she is an officer or director and of which all other officers and directors are attorneys.
> *(c)* Nothing in this section shall prevent an attorney from doing any of the following:
> (1) Providing advice to a party to a small claims action, either before or after the commencement of the action.
> (2) Testifying to facts of which he or she has personal knowledge and about which he or she is competent to testify.
> (3) Representing a party in an appeal to the superior court.
> (4) Representing a party in connection with the enforcement of a judgment.'

The Californian position accords with the South African position as regards the type of involvement that a legal practitioner may have in small claims matters.

[201] *Report* §13.10.

[202] *Report* §13.10.

[203] *Report* §13.11.

[204] Report §13.14.

While the SCCA has always precluded legal representation, sadly the government has done very little to fulfil the expectations of the Commission as set out in the caveat. At the 2003 Small Claims Court Conference, delegates lamented the lack of legal assistants in the small claims courts.[205] For a short while the Department of Justice, together with the Cape Law Society, embarked on a project to involve law students in the small claims courts. It was envisaged that senior law students would fulfil the role of legal assistants as contemplated in s 11(1) of the SCCA[206] read with SCCR 5.[207] Regrettably, nothing came of the endeavour.[208]

(b) A constitutional right to legal representation?

Neither the common law[209] nor the Constitution guarantees a right to legal representation in civil proceedings.[210] Even if the right is implied by s 34, the right would not be absolute.[211] In appropriate circumstances, a limitation of the right would be justified. Presumably, a limitation would be justified 'in proceedings which are conducted simply in order to facilitate access to justice by saving costs and time.'[212] As Currie and De Waal note:

> 'In the case of the Small Claims Court, for example, the recognition of the right to legal representation would undermine the purpose of the [Small Claims Court] Act.'[213]

Notwithstanding the statement above, a blanket rule against legal representation in the small claims courts may not withstand constitutional scrutiny in every case. A court may very well find that in some circumstances legal representation is necessary to ensure procedural fairness.[214] For example,

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[205] See §3.7.
[206] For the provisions of s 11(1), see the discussion below.
[207] For the provisions of SCCR 5, see the discussion below.
[208] See §3.8.
[209] *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* 2002 (5) SA 449 (SCA) para [5]; *Dabner v South African Railways and Harbours* 1920 AD 583 at 598.
[210] *Commission for Conciliation, Mediation and Arbitration and Others v Law Society of the Northern Provinces* 2014 (2) SA 321 (SCA) para [19].
[211] *Commission for Conciliation, Mediation and Arbitration and Others v Law Society of the Northern Provinces* **supra** [26].
[212] Currie, de Waal *Bill of Rights Handbook* 742 (hereinafter referred to as *Handbook*)
[213] *Handbook* 742.
[214] In *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee* supra the court stated at para [11]:

if children were permitted to sue in small claims courts, they may need legal representation.[215] A particularly poorly educated litigant who is unable to motivate his or her case to the presiding officer may also need legal assistance.

Field studies[216] have shown that a prohibition against legal representation in small claims courts, though not a violation of the right to due process,[217] can prejudice some litigants, most notably the poorly educated litigant. Even though the processes and procedures of the small claims courts are less formal, poorly educated litigants can find the environment intimidating. Their negative experience can be exacerbated by a particularly intimidating presiding officer. Even where the presiding officer creates a welcoming environment, poorly educated litigants are known to struggle with even the most basic court processes and procedures.[218] No matter how relaxed the small claims courts procedures may be when compared to regular litigation, for the lay litigant who is also poorly educated, they may still appear complex. A typical problem is that of pleading a case. If a case is not pleaded properly, the court may be unwilling to countenance new evidence or may draw adverse inferences on the credibility of witnesses, especially where the paper version of events contradicts

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> 'There has always been a marked and understandable reluctance on the part of both legislators and the Courts to embrace the proposition that the right to legal representation of one's choice is always a sine qua non of procedurally fair administrative proceedings. However, it is equally true that with the passage of the years there has been growing acceptance of the view that *there will be cases in which legal representation may be essential to a procedurally fair* administrative proceeding. In saying this, I use the words 'administrative proceeding' in the most general sense, ie to include, inter alia, quasi-judicial proceedings. Awareness of all this no doubt accounts for the cautious and restrained manner in which the framers of the Constitution and the Act have dealt with the subject of legal representation in the context of administrative action. In short, there is no constitutional imperative regarding legal representation in administrative proceedings discernible, other than flexibility to allow for legal representation but, even then, *only in cases where it is truly required in order to attain procedural fairness*.' (Italics inserted for emphasis).

See also *WABZ v Minister for Immigration & Multicultural & Indigenous* [2004] FCAFC 30; Latimer, Hocken, Marsden 'Legal Representation in Australia before Tribunals, Committees and other Bodies' (2007) 14 *Murdoch University E Law Journal* 122.

[215] See also s 28(1)*(h)* of the Constitution, which provides:

> 'Every child has the right to have a legal practitioner assigned to the child by the state, and at the state expense, *in civil proceedings* affecting the child, *if substantial injustice would otherwise result*.' (Italics inserted for emphasis).

[216] Moulton (n155) 1975ff.

[217] *Prudential Insurance Co v Small Claims Court* 76 Cal. App. 2d 379 at 383-384.

[218] Weller et al (note 163) 182ff; Ruhnka et al (n170) 59ff.

the oral testimony in court.[219] The rules of evidence can also present a challenge. While the small claims court system relaxes the rules of evidence, the evidential burden is not relaxed. The claimant still has to prove his or her case on a balance of probabilities relying on credible evidence.[220] While the hearsay rule may be relaxed, for example, a court will be disinclined to rely solely on hearsay evidence. The court will want some sort of supporting evidence. Documentary evidence must also be properly introduced. Courts rely on different types of documentary evidence to deliberate certain claims. The larger the claim is, the more exacting the court may be about the evidence required to prove the claim. The poorly educated litigant might not have the knowledge, skill or appreciation to present the proper standard of evidence.[221] The problem is magnified when the proceedings are conducted in a language that is not the litigant's home language. Even if translation services are provided, the litigant may still feel overawed by court proceedings.[222]

Literacy and education levels in South Africa remain a problem. There are significant amounts of people who have difficulty reading and writing.[223] For them, access to the courts is a challenge even with the simplified small claims court procedures. The small claims courts' public education programme, which was a 'key result area' of the National Action Plan has, by and large, failed.[224] It is thus unclear how people are expected to navigate the small claims courts when they are highly reliant on third party assistance. Of course, nothing precludes litigants from obtaining the services of a trained legal professional to help them to prepare court documents and evidence properly. But once they appear in court they are required to fend for themselves. For the poorest of the poor, the services

[219] Pleadings in the South African small claims courts are still too formal. See discussion in chapter 8.
[220] See chapter 8. In a civil case, the court has to be satisfied on a 'balance of probabilities' (the civil standard of proof): Schwikkard, Van der Merwe (n111) 580. On credible evidence, see Schwikkard, Van der Merwe (n111) 534.
[221] Lewis 'Litigants in Person and their Difficulties in Adducing Evidence: A Study of Small Claims in an English County Court' (2007) 11 *International Journal of Evidence and Proof* 24ff.
[222] Language in the small claims courts is discussed in chapter 4.
[223] See §3.8.
[224] See §3.7, 3.8.

of a legal professional – even a low-level one, such as a candidate attorney – are not something they can easily afford.

In legal systems where well-trained, patient, competent and professional people staff the courts, the lack of legal representation does not translate into prejudice.[225] They provide support to litigants every step of the way. Support includes helping litigants to fill in court papers, and providing guidance on the collection of evidence and case presentation. Every aspect of the pre-trial process is covered. As the hearing date approaches, members of staff educate litigants on court etiquette to reassure them if they are feeling intimated by the process.[226]

The lack of dedicated clerks of the small claims courts,[227] the absence of legal assistants (as contemplated by the Hoexter Commission), and the general chaotic nature of the offices of the clerks of many magistrates' courts – which is where small claims litigants presently file their claims[228] – makes approaching the courts a less than pleasurable experience.[229]

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[225] *Report* §3.13.

[226] Frame 'Fundamental Elements of the Small Claims Tribunal System in New Zealand' in Whelan (n170) 81

[227] See chapter 4.

[228] See chapter 4.

[229] In the attorneys' magazine, *De Rebus* (December 2010) 5, an attorney writes:

> 'I read the letter of a Sandton attorney in *De Rebus* (October 2010) 7 regarding the state of the High Court with feelings, *inter alia*, of sorrow, anger, disappointment, embarrassment, frustration, annoyance, helplessness and not an inch of surprise. The writer quite rightfully points out the dismal state of the South Gauteng High Court in Johannesburg. Even on writing this I feel a sense of annoyance that the Department of Justice apparently felt it helpful to change the name of the court from the former "Witwatersrand Local Division" to the "South Gauteng", yet, as with so many other things in this sunny country nobody bothers with making sure anything underneath the pretty new name works...It is indeed not only the South Gauteng High Court that suffers from this infectious, ravaging disease, but most of the courts, including the lower courts around the country. Although I cannot speak for many courts in other provinces, I certainly have experience in and around most of the courts in Gauteng and from what I hear from my colleagues elsewhere, the situation in other provinces is not much better...By far the worst court I have ever set my foot in is the Johannesburg Magistrates' Court. Not only are the staff exceedingly unpleasant, rude and unhelpful, but they are also probably the laziest, most incompetent people I have ever come across. The so-called admin "system" (system? where?) is an absolute farce.'

The views of this writer are echoed by an attorney writing in *De Rebus* (January-February 2011) at 6 who says:

> 'Our profession, and more importantly, the public are frustrated and prejudiced by the long delays caused by the failure of administrators of many magistrates' courts to carry out their duties properly...The shambles is a serious indictment on the administration of justice in South Africa. If it is not reversed South Africa could be regarded as not a good place to do business.'

See also Editor 'Law Society of South Africa Speaks Out on Conditions in Johannesburg and on Errant Magistrates' (January-February 2011) *De Rebus* 17, Welgemoed 'Echoing "Enough is Enough"' (August 2011) *De Rebus* 4.

The Department of Justice needs to urgently appoint legal assistants in the small claims courts. Section 11(1) of the SCCA provides:

> 'The magistrate of the district in which the seat of a court is situated, shall appoint so many clerks and assistant clerks of the court, interpreters and *legal assistants* for that court as may be necessary for the performance of the prescribed functions.'[230]

Small Claims Court Rule 5 fleshes out the duties of a legal assistant in the following terms:

> '(1) The legal assistant shall render to any person who has so requested him advice in regard to any action which falls within the jurisdiction of the court.
> (2) If he [or she] is so requested, the legal assistant shall render assistance with the drafting of the process of court…'

The legal assistants could be volunteer attorneys or candidate attorneys wanting to do *pro bono* work.[231] They could even be senior law students wanting to do community service.[232] But, there is also no reason why they cannot be lay people[233] who are properly trained as paralegals.[234]

(c) Legal representation should not be permitted in the small claims courts

Despite all the challenges mentioned above, it is submitted that formal legal representation must not be permitted in the small claims courts. Aside from the costs associated with legal representation, the presence of lawyers will slow down the operation of the courts. They will make the process of litigating in the courts overly technical and litigious.[235] Well-heeled litigants will obtain counsel and low-income litigants will forgo representation in the belief that the less technical procedures will level

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[230] Italics supplied.
[231] The Legal Practice Act 28 of 2014 envisages that legal professionals will in the future be required to perform community service as part of their vocational training and also on a continuing basis to meet their professional obligations: see ss 6(5)*(b),* 26(1)*(c)*, 29, 85(5). In terms of s 29(2)*(e)* of the Legal Practice Act, community service is broadly defined and includes 'any other service which the candidate legal practitioner or the legal practitioner may want to perform, with the approval of the Minister.'
[232] See §3.8.
[233] Neither the SCCA nor the SCCRs stipulate the qualifications of a legal assistant.
[234] Moulton (n155) 1682 argues:

> 'The small claims court is one forum in which or "lay advocates" could serve an important function. An informed layman – who would become as familiar with the court's procedures and with the issues involved in typical contract or landlord-tenant proceeding as the "experienced claims agent" who appears for the plaintiff – could go a long way toward making the hearing a fair one.'

Even though Moulton envisages the use of lay people to serve as lay advocates, there is no reason why legal assistants could not be lay people. See also Weller, Ruhnka, Martin 'American Small Claims Courts' in Whelan ((n170) 14.
[235] Moulton (n155) 1680.

the playing field. The inquisitorial nature of proceedings will be a farce. Presiding officers, who serve as volunteers,[236] will be browbeaten by the legal profession. Consequently, presiding officers may be intimidated to take less robust approaches to dispute resolution and decision making. The air of informality will fly out the window, as hordes of gowned counsel descend upon the small claims courts. The litigant will once more become the passive spectator on the stage of justice, on which the lawyers will reign supreme.

The legislature should remain resolutely on the path of barring legal representation in the small claims courts. All effort should be made to breathe life into the recommendation of the Hoexter Commission to appoint legal assistants in the courts. The Department of Justice should send a directive to every senior magistrate and court manager to embark on a programme to appoint legal assistants to serve on a *pro bono* basis, until the government can budget for at least one permanently employed legal assistant at every small claims court. Long-serving commissioners in the small claims courts must train assistants to provide pre-trial advice to small claims litigants.

The availability of neutral, non-partisan, non-adversarial legal assistants is key to bridging the competency gap between non-regular ('one-shotters') and more frequent ('repeat-players') court users.

7.7 CONCLUSION

This chapter has shown that the issue of *locus standi* to sue and to be sued in the small claims court is a topical one requiring careful analysis and evaluation. In the process of re-imagining the court to meet contemporary access to justice challenges, the legislature cannot hold itself bound to the conceptualisation of the small claims courts at their establishment. The courts have to serve a cross-section of society; they have to meet the economic and social challenges in the country; and they

[236] See chapter 5.

must satisfy the demands of all citizens for access to the law. Limiting access to the small claims courts by narrowly construing who may and may not sue does not address contemporary access to justice challenges.

At the same time, some of the original aspirations of the small claims courts, such as limiting legal representation, are worth retaining, because they are consonant with the objective of the small claims courts, which is to provide an inexpensive form of justice.

To better facilitate the broader use of the small claims courts, to improve efficiency and the overall quality of justice, the processes and procedures of the courts also require attention. Chapter 8 considers this aspect.

CHAPTER 8

THE PROCESSES AND PROCEDURES OF THE SMALL CLAIMS COURTS

8.1 INTRODUCTION

South African civil procedure is characterised by three distinct procedures: the action procedure, the application procedure and the provisional sentence procedure. The distinction between actions, applications and provisional sentence is partly based on Roman-Dutch law but is mostly influenced by Victorian English law.[1] Following the English litigation style, proceedings in all the courts, other than the small claims courts, are adversarial.[2]

The action procedure is initiated by summons; the application procedure by notice of motion; and the provisional sentence procedure by provisional sentence summons. Actions are used to hear both liquid and illiquid claims. Applications are mainly used to grant injunctive relief. But, applications can also be used where statute or the common law authorises litigation in that manner. The provisional sentence procedure is a hybrid procedure. It is an amalgam of the action procedure in that the process starts with the issuing of summons, but once the defendant defends the matter, the process mutates to an application-style procedure. The trial is replaced by a hearing. The provisional sentence procedure is said to provide speedy relief in claims based on liquid documents where the issues are simple to prove.[3]

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[1] Cilliers, Loots, Nel *Herbstein & van Winsen: The Civil Practice of the High Courts of South Africa* 1313 (hereinafter referred to as *Herbstein & van Winsen*). See also Paleker 'Civil Procedure in South Africa: the Past, the Present and the Future' ZZP Int (2011) 343.

[2] Paleker 'Fact and Truth-Finding in the South African Civil Procedure' in van Rhee, Uzelac (eds) Truth and Efficiency in Civil Litigation – Fundamental Aspects of Fact-finding and Evidence-taking in a Comparative Context 189 at 190.

[3] For a general discussion of applications and actions see Theophilopoulos, van Heerden, Boraine *Fundamental Principles of Civil Procedure* 129-143, 159, 173-174 (hereinafter referred to as '*Fundamental Principles*').

In the magistrates' courts and the High Courts, the action procedure is the dominant procedure. It has three phases: the pleading stage, the pre-trial stage and the trial. During the pleading stage, the parties exchange pleadings according to a strict timetable. In the pre-trial stage, discovery, pre-trial conferences and inspections of certain types of evidence (mostly documentary) take place to enable the parties to prepare for trial. The trial is a formal occasion where parties, through their legal representatives, appear before the court. Depending on the court in which the action is brought, the legal representatives are attorneys or advocates of various ranks and expertise.[4] The trial consists of opening statements followed by evidence. Witnesses deliver their testimony through the process of examination-in-chief, cross-examination and re-examination. Before the court adjourns to deliberate on its decision, legal representatives present formal legal arguments to persuade the court as regards how it should rule on a matter.

The average duration of an action from inception to judgment in the magistrates' courts is approximately one year. In the High Court, the duration could be anywhere from two to ten years, depending on the locality of the court.[5] The cause of such delays is primarily the length of court rolls and the technical nature of the litigation rules, which encourage all sorts of interlocutory procedures.[6]

The small claims courts are unique in that the distinction between applications, actions and provisional sentence do not feature in the processes and procedures. The small claims procedure

[4] Following the English tradition, South Africa has a split bar system consisting of attorneys and advocates.
[5] In 'Norms and Standards for the Performance of Judicial Officers' in *GG* 37390 of 28 February 2014, the Chief Justice issued directive 5.2.5 stipulating that depending on the complexity and magnitude of a civil case, in the High Court a matter must be finalised within one year of the date of issue of summons, and in the magistrates' courts within nine months. Anecdotal evidence reveals that these time periods have not been achieved. However, the judiciary is working on various strategies to expedite civil matters. One such initiative is judicial case-flow management, which has been piloted in a few divisions of the High Court. See Manyathi-Jele 'Progress on Judicial Case-Flow Management' *De Rebus* (May 2014) 65; Anonymous 'The Slow of Pace of Justice in South Africa's Court System': http://www.enca.com/south-africa/slow-pace-justice-south-africas-court-system (last accessed on 15 July 2017); Pule 'New System to Improve Access to Justice' *Vuk'uzenzele* (July 2015): http://www.vukuzenzele.gov.za/new-system-improve-access-justice (last accessed on 15 July 2017).
[6] Such as exceptions, special pleas, applications to compel and irregular step proceedings.

is essentially an action. But, unlike in the magistrates' courts and the High Courts, the small claims action procedure is significantly streamlined. All matters commence by way of a letter of demand, followed by a summons, and then proceed to trial. Small claims courts, by and large, cannot hear applications, as they do not have jurisdiction to grant orders of specific performance and injunctive relief.[7] Because small claims courts pleadings are kept to a minimum, and there is no pre-trial procedure, the plaintiff does not have to wait long for a trial date. The defendant is informed of the trial date in the summons.[8] The most outstanding feature of the small claims court procedure is that the presiding officer is directed to proceed inquisitorially. The presiding officer is not a neutral umpire. He or she descends into the arena to gather facts and evidence from the unrepresented parties. The normal adversarial trial process thus does not apply in the small claims courts.

This chapter considers the processes and procedures of the small claims courts as explicated in the SCCA and SCCRs. The chapter consists of several parts. Part I considers the letter of demand. Part II looks at the summons and the service rules. In Part III, the written statement of defence is discussed. Part IV is dedicated to the small claims courts' trial procedure. Here issues of evidence and the inquisitorial role of the commissioner come under the spotlight. In each section, the current procedures of the small claims courts will be discussed, problems will be identified, and suggestions for reform will be made. Where applicable, reference will be made to comparative law for solutions.

[7] SCCA, s 16*(d)* and 16*(g)*.
[8] See SCCRs, Form 1.

PART I

THE LETTER OF DEMAND

8.2 THE RELEVANT PROVISIONS

Section 29(1)*(a)* of the SCCA provides:

> 'The plaintiff shall deliver a summons as prescribed personally or through his[9] authorized representative to the clerk of the court, together with a copy of a written demand which was on a prior occasion delivered to the defendant by the plaintiff by hand or by registered post and in which the defendant was, notwithstanding anything to the contrary in any law contained, allowed at least 14 days, calculated from the date of receipt of that demand by the defendant, to satisfy the plaintiff's claim.'

Section 29(2) provides:

> 'Upon production of the prescribed proof that the reminder contemplated in subsection (1) was delivered to the defendant, and if the clerk of the court is satisfied that the plaintiff is a natural person and that his summons complies with the prescribed requirements, the clerk of the court shall set a date and time for the hearing of the action and issue the summons and hand it to the plaintiff or his authorized representative, who shall personally serve it on the defendant, or deliver it to the messenger[10] of the court for service on the defendant.'

In the magistrates' courts and the High Courts, service of a letter of demand is generally not required for the initiation of legal proceedings. However, letters of demand are frequently sent as it is said that they serve the purpose of encouraging a party to settle a claim before summons is issued.[11] A letter of demand may also be required under statute or the common law. This usually occurs where a statute or the common law requires notice of proceedings. For example, the Institution of Legal Proceedings Against Certain Organs of State Act ('PACOS')[12] requires the plaintiff to give the defendant organ of state notice of an intention to sue before summons can be issued. Furthermore, under the common-law rules of contract, the plaintiff is sometimes required to put the defendant on terms to abide by the contract. If the defendant fails to comply, the contract can be cancelled and legal proceedings can be instituted.[13] In both instances, the purpose of the letter of demand is to place the defendant on notice.

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[9] In future, gender-neutral language should be used.
[10] The term 'messenger' must be replaced with 'sheriff': see Sheriffs Act 90 of 1986.
[11] Paleker 'Letters of Demand (*Interpellatio Extraiudicialis*): Form and Substance' (2005) 30 *Journal for Juridical Science* 68 at 69.
[12] 40 of 2002. This Act is discussed at §7.3(*d*).
[13] Paleker (n11) at 79ff.

Under s 29(1)*(a)* of the SCCA, a letter of demand is required in *all* cases. At least 14 calendar[14] days must elapse from the date when the defendant *receives* the demand before the clerk of the court can issue a small claims summons. Presumably, the purpose of the letter of demand is to inform the defendant of the plaintiff's claim so that the defendant has an opportunity to resolve the dispute. In terms of s 29(2) the clerk of the court will issue the summons if there is proof of the following: *(a)* that the letter of demand was 'delivered' to the defendant, *(b)* that the plaintiff is a natural person, and *(c)* that the plaintiff's summons complies with the prescribed requirements.

8.3 THE LETTER OF DEMAND IS A PROCESS

Because the letter of demand is a mandatory step, the letter is the first *process* in terms of the SCCA. This is significant because whereas a summons generally interrupts the running of prescription in the other courts, in the small claims courts prescription is interrupted by service of the letter of demand on the defendant.

Section 15(1) of the Prescription Act[15] provides:

> 'The running of prescription shall, subject to the provisions of subsection (2),[16] be interrupted by the service on the debtor of any *process* whereby the creditor claims payment of the debt.'[17]

The legislature defines 'process' in s 15(6) as follows:

> 'For the purposes of this section, 'process' includes a petition, a notice of motion, a rule *nisi*, a pleading in reconvention, a third party notice referred to in any rule of court, and *any document* whereby legal proceedings are commenced.'[18]

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[14] Section 4 of the Interpretation Act 33 of 1957 provides:
'When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or on any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.'

[15] 68 of 1969.

[16] Subsection (2) provides:
'Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside.'

[17] Italics supplied.

[18] Italics supplied.

The reference to 'any document' includes a letter of demand where the letter commences proceedings. Support for this view is found in *Cape Town Municipality v Allianz Insurance Co Ltd*[19] where the court held:

> 'Bearing in mind that some of the key wording of s 15 must be given a wide and general meaning, consistent with a legislative intention to speak broadly rather than to define, and having regard to the spirit, scope and purpose of the Act, I conclude that s 15 must be interpreted as follows:
> 1. It is sufficient for the purposes of interrupting prescription if the process to be served is one whereby the proceedings begun thereunder are instituted as a step in the enforcement of a claim for payment of the debt…'[20]

The above dictum was quoted with approval by the Supreme Court of Appeal in *Peter Taylor & Associates v Bell Estates (Pty) Ltd.*[21] In *Peter Taylor*[22] the court also drew attention to *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality*[23] where the latter court stated:

> 'Where the creditor takes judicial steps to recover the debt, and thereby to remove all uncertainty about its existence, prescription should obviously not continue running while the law takes its course.'

For prescription to be interrupted, three requirements must be met: *(a)* There must be a process; *(b)* the process must be served on the debtor; and *(c)* in the process the creditor must claim payment of a debt.[24] Clearly, the courts do not require service of a summons for the interruption of prescription. The reference to 'any document' in s 15(6) includes one that serves as a 'step in the enforcement of a claim'. Within the context of the SCCA, the letter of demand is a 'judicial step to recover a debt' and consequently, a 'process' for the purposes of the Prescription Act.[25] In the letter of demand, the plaintiff demands payment of a debt and the plaintiff is required to serve the letter on the defendant.

[19] 1990 (1) SA 311 (C) at 334H-335B.
[20] This dictum was quoted with approval in *Huyser v Quicksure (Pty) Ltd* 2017 (4) SA 546 (GP) para [35].
[21] 2014 (2) SA 312 (SCA) para [9].
[22] Ibid [10].
[23] 1984 (1) SA 571 (A) at 578H.
[24] *Peter Taylor & Associates v Bell Estates (Pty) Ltd* supra [8.]
[25] 68 of 1969.

A further argument for holding that the letter of demand is indeed a process is that if the letter of demand were not a process, this would give rise to an absurd result in that the plaintiff's claim would be susceptible to prescription while the plaintiff waits 14 calendar days before the issuance and service of the summons.

8.4 PROBLEMS WITH REGISTERED POST

According to the SCCA, the letter of demand may be delivered by hand or by registered post. While there is no problem with hand delivering a letter, in most cases[26] letters of demand are posted. The reason for this is that the plaintiff may fear that he or she will be met with reprisals if the letter is hand delivered to the defendant. The defendant could also be uncooperative and refuse to accept delivery of the letter.[27] Furthermore, it may be expensive to engage the services of the sheriff to deliver the letter.[28]

Since time immemorial, legal notices have been sent by registered post. However, this form of service is no longer convenient or practically effective. The protracted and recurring strikes within the South African Post Office have made it extremely difficult to deliver processes by registered post.[29] Furthermore, there is evidence which indicates that debtors do not collect their registered post from the post office. In *Absa Bank Ltd v Mkhize*[30] the court articulated how letters of demand are handled by the post office:

> '*(a)* Letters to be sent by registered post are brought to the sender's post office and handed in there, where an acknowledgment of receipt is provided. (This acknowledgment is the proof of despatch typically provided by attorneys.)
> *(b)* The registered items are then sorted according to the post office to which they are to be directed, and sent to that destination post office accompanied by a 'despatch bill' for that post office.
> *(c)* When the letters arrive at the destination post office an employee writes and sends out a first notification slip to the intended recipient's address. If the address is a street address, the notification is sent as if it is ordinary mail, and placed in the post box at that address. If it is a PO Box address, it is placed in the appropriate box at the post office.

[26] Of course, if the claim is about to prescribe the plaintiff should personally hand deliver the letter of demand or the plaintiff should employ the sheriff to do so.
[27] The prevalence of so-called 'gated communities' in South Africa has also made physical delivery of legal notices quite difficult. See §8.13.
[28] See discussion in §8.13. See also fn 90.
[29] Surty 'Section 65A(1) Notice to Appear for a s 65 Hearing of the Magistrate's Court Act' *De Rebus* (January/February 2016) 22.
[30] 2012 (5) SA 574 (KZD).

(d) If the mail remains uncollected for a further ten days a second and final collection notice is prepared and sent the same way. (This second notification is not shown on the internet track and trace report.)

(e) If the mail is collected proof of identity must be provided by the person concerned and that is recorded on the post office system. It sometimes happens that the addressee attends but, after having sight of the letter, refuses to accept it. In that case the track and trace report will include the word 'refused' when the item is returned to the sender.

(f) Uncollected mail is returned to the sender after it has remained at the receiving post office for thirty days from date of despatch... The various events are recorded on the track and trace report. There is normally a delay of between one and two days between the occurrence of each event (for instance, the arrival at the destination post office) and the availability of that information on a track and trace report.'[31]

In *Absa Bank*, the applicants placed evidence before the court to the effect that over 70% of registered letters are returned 'unclaimed'.[32] The court noted that even though past courts endorsed registered mail as a reliable form of service, the postal service is less reliable today than it was in the past. Consumer behaviour patterns have also changed. When people see legal trouble on the horizon, they are less likely to collect registered mail.[33] The court thought that currently it is more effective to serve legal notices by ordinary mail than by registered post. To this extent, the court opined:

> 'But I do not think that I overreach the boundaries of judicial notice by suggesting that, in the case of post directed at consumers in financial distress, ordinary post is by a substantial margin more reliable than registered post. The country would be in an uproar if anything like 50% (let alone 70%) of ordinary mail went astray. Indeed, it seems reasonable to suppose that the proportion of ordinary mail lost is lower than 50% by a very considerable margin.'[34]

In light of the problems with registered post, it seems prudent to move away from this form of postal service. Aside from hand-delivered letters of demand, other forms of service should be contemplated, such as service by email, facsimile or other electronic means. Social media applications must not be discounted.[35]

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[31] Ibid [24].
[32] Ibid [26].
[33] Ibid [31].
[34] Ibid [35].
[35] See s 65(2) of the NCA, which makes provision for six forms of service, including facsimile, email and service on a printable webpage. The latter would include, for example, service on a social media platform such as Facebook.

8.5 SHOULD THE LETTER OF DEMAND BE 'DELIVERED', 'RECEIVED' OR 'SENT'?

Section 29(1)*(a)* is confusing to interpret. It provides that a letter of demand must be 'delivered' to the defendant by hand or by registered post. The defendant has 14 calendar days calculated from the date of 'receipt' of the letter to satisfy the plaintiff's claim. The subsection thus uses both the words 'delivered' and 'receipt' in relation to the letter of demand.

The word 'delivered' should be distinguished from the word 'receipt'. When a letter is sent by registered post, the addressee, on collecting the letter from the post office, must bring an identification document to show that he or she is the person to whom the letter is addressed. The addressee will sign to evidence that he or she received the letter. It is at that point that the addressee is considered to have 'received' the letter. The post office will notify the addressor that the letter was received by the addressee. While it is not impossible to prove 'receipt', the difficulty associated with proof is highlighted in *Absa Bank*,[36] where the court accepted as fact that many addressees do not collect registered letters.

The word 'delivered', on the other hand, is a far more pragmatic word from a procedural perspective. In *Sebola v Standard Bank of South Africa Limited,*[37] the Constitutional Court was required to determine the meaning of the word 'delivered' in s 130 of the National Credit Act ('NCA'). In terms of the provision, a credit grantor is required to 'deliver' a s 129 notice to a credit receiver. The notice in question may be sent by *inter alia* registered post.[38] After careful analysis, the court concluded that the notice would be 'delivered' if the notice was sent 'by registered mail to the address stipulated by the consumer in the credit agreement, and … was delivered to the post office of the intended recipient for collection there.' The court stated:

[36] Supra.
[37] 2012 (5) SA 142 (CC).
[38] Ibid [62].

> 'Where the credit provider posts the notice, proof of registered despatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivery to the consumer, will in the absence of contrary indication constitute sufficient proof of delivery.'[39]

The above dictum confirms that, in the context of the NCA, 'delivery' of a notice does not mean that a notice must come to the actual attention of the recipient. Section 29(1)*(a)* of the SCCA has not been judicially interpreted. Because of the difficulty caused by the word 'receipt', it is submitted that for the purposes of the section it would be more appropriate if the letter was required to be 'delivered' and for the Act to define the word 'deliver'. To prove 'delivery', the plaintiff would have to obtain a trace and track report from the post office.

To require 'receipt' of the letter makes it more difficult for the plaintiff to issue summons in the small claims court as he or she would have to prove that the letter came to the attention of the defendant. The more relaxed approach is supported by s 29(2), where the word 'delivered' is used.[40]

Section 29(2) states that the clerk of the court can set a matter down for trial and issue a summons on the defendant if the plaintiff proves that the letter of demand was 'delivered' to the defendant. Section 29(2) is thus to a certain extent in conflict with s 29(1)*(a)*. It is submitted that for the purposes of access to justice, s 29(1)*(a)* must be read with s 29(2) so that an interpretation is taken that expedites the issuance of process in the small claims courts. The letter of demand should not stand in the way of the plaintiff getting his or her day in court.

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[39] Ibid [87].

[40] Bredenkamp *The Small Claims Court* 31 states:
'When determining the date of receipt of the letter of demand sent by registered post, it is submitted that Magistrates' Court Practice should be followed in this regard. In other words, 3 days after the letter of demand has been posted, it is deemed to have been received by the defendant.'
With respect the above method cannot be adopted because the SCCA does not contain a deeming provision. Furthermore, the above method of calculation does not accord with the dicta in the *Absa Bank Absa Bank Ltd v Mkhize and Two Similar Cases* supra and *Sebola v Standard Bank of South Africa Limited* supra cases. Both cases are discussed in the main text above.

Section 29(1)*(a)* requires amendment in several respects. First, the word 'receipt' in the subparagraph should be deleted and replaced with the word 'delivery'. This will make the subparagraph consistent with s 29(2) and will remove any potential confusion.[41]

Secondly, to promote efficiency, a plaintiff should be able to serve the letter by hand, ordinary post, registered post, facsimile, or electronic means. A myriad of forms of service will address the issue of defendants not collecting letters of demand.[42] As long as the plaintiff can show that the letter was delivered by reasonable means to the defendant, the requirement of service will have been fulfilled. For electronic service, Part 2 of Chapter III of the Electronic Communications and Transactions Act[43] should be applicable.[44]

Thirdly, the court must be empowered, at the trial, to condone non-delivery of the letter of demand unless the defendant can show prejudice. An example of prejudice would be if the defendant was precluded from raising the defence of prescription,[45] or if the plaintiff did not afford the defendant an opportunity to rectify a breach where, for example, the contract required the plaintiff to place the defendant on terms before issuing summons. Difficulties may, of

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[41] It is submitted that the provision should read as follows:
'The plaintiff shall deliver a summons as prescribed personally or through his authorized representative to the clerk of the court, together with a copy of a written demand which was on a prior occasion delivered to the defendant by the plaintiff by hand or by registered post and in which the defendant was, notwithstanding anything to the contrary in any law contained, allowed at least 14 days, calculated from the date of [**receipt**] <u>delivery</u> of that demand by the defendant, to satisfy the plaintiff's claim.' (Words in square brackets signify deletions from the existing provision, and words in underline signify insertions).

[42] See NCA, s 65(2), where various forms of service have been written into the Act.

[43] 25 of 2002.

[44] Of particular relevance is s 23, which provides:
'A data message –
(a) used in the conclusion or performance of an agreement must be regarded as having been sent by the originator when it enters an information system outside the control of the originator or, if the originator and addressee are in the same information system, when it is capable of being retrieved by the addressee;
(b) must be regarded as having been received by the addressee when the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee; and
(c) must be regarded as having been sent from the originator's usual place of business or residence and as having been received at the addressee's usual place of business or residence.'
See also HCR 4A, MCR 9(9)*(c)*(ii).

[45] For the interruption of prescription, the letter of demand must be served on the defendant. If the court determines that the letter was not served on the defendant and the time for instituting the claim has expired, the court would not be able to condone non-delivery of the letter. However, if at the time when the trial commences the claim has not prescribed, there is no reason why the court cannot exhibit the letter of demand to the defendant and condone non-compliance with the 14-day period. Alternatively, the court could postpone the matter to comply with the waiting period. The court should have flexibility.

course, arise where a letter of demand is required in terms of legislation and the legislation prescribes service by registered mail. It is fortunate though for the small claims courts[46] that the NCA allows for service of notices by facsimile, email, 'delivery'[47] by registered post, or 'by printable webpage'.[48] Similarly, PACOS stipulates in s 4(1):

> 'A notice must be served on an organ of state by *delivering* it by hand or by sending[49] it by certified mail, or subject to subsection (2), by sending it by electronic mail or by transmitting it by facsimile…'.[50]

8.6 THE DISCRETIONARY POWERS OF THE CLERK OF THE COURT SHOULD BE REMOVED

The clerk of the small claims court should *not* have the discretion to refuse to issue a summons where proof of 'delivery' of the letter of demand is absent. It is submitted that the clerk must simply check to see that the letter was 'sent'.[51] The presiding officer must determine whether there was proper service. However, failure to deliver a letter of demand should not render the proceedings void. The *presiding officer* must determine whether the failure to deliver the letter has caused the defendant prejudice.[52] The presiding officer should have the discretion to condone non-compliance if the letter of demand is immaterial to the claim, in which case the *summons* must be deemed to be the process initiating the proceedings.[53] Alternatively, where

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[46] Section 15*(d)* of the SCCA provides that the court may hear actions arising from the NCA.
[47] See definition of 'delivered' in Regulation 1 of the Regulations made in terms of the NCA published under GN R489 in *GG* 28864 of 31 May 2006.
[48] NCA, s 65(2).
[49] The word 'send' means something less than 'delivery'. In *Sebola v Standard Bank of South Africa Limited* supra [70], in the context of the NCA, the court held that to send a document by registered post means that the document must be 'despatch[ed]' to the 'last known address' of the person. A document 'delivered' in terms of the SCCA will thus include a document that must be 'sent' in terms of other legislation.
[50] Italics inserted for emphasis. When a letter is sent by means other than hand delivery or registered mail, s 4(2)*(b)* provides: 'within seven days after the date upon which that notice was so sent or transmitted, [the creditor must] *deliver* by hand or send by certified mail a certified copy of that notice…' (Italics inserted for emphasis). For a discussion of the relevance of the Act to the small claims courts see §7.3*(d)*.
[51] For the definition of 'send' see fn 49 above.
[52] See fn 48 above.
[53] It is in any event debatable whether it is necessary to have both a summons and a letter of demand. In many jurisdictions, the statement of claim is the initiating document. It appears as if the South African legislature might have over complicated the small claims courts procedure by requiring a double-barrel procedure. While the Law Society of South Africa does not dispute the need for the letter of demand it does lament that many letters of demand are poorly drafted and the nature of the claim and the relief sought are not discernible from the letter. It seems that a pro forma letter of demand is required to address this issue. See Law Society of South Africa *Annual Report* (2017-2018) 59.

the defendant is prejudiced[54] by the non-delivery of the letter, the presiding officer should be empowered to stay the proceedings until proper notice is given.[55] To this extent, it is recommended that s 29(2) of the SCCA should be amended as follows:

> **'29(2)***(a)* **[Upon production of the prescribed proof that the reminder contemplated in subsection (1) was delivered to the defendant, and if]** If the clerk of the court is satisfied that the plaintiff is a natural person[56] and that **[his]** the plaintiff's summons complies with the prescribed requirements, the clerk of the court shall set a date and time for the hearing of the action and issue the summons and hand it to the plaintiff or his or her authorised representative, who shall **[personally]**[57] serve it on the defendant in accordance with the rules for service, or deliver it to the **[messenger]** sheriff[58] of the court for service on the defendant.
>
> *(b)* If the court determines that the plaintiff has not delivered the written demand contemplated in subsection (1), the court may condone non-compliance if the defendant is not prejudiced and the court shall regard the summons as the process initiating proceedings, or the court may stay the action until the written demand is delivered to plaintiff and make an appropriate order as regards the continuation of proceedings.'[59]

The small claims court commissioner should have a general power to condone non-compliance with time periods and rules. Unlike the position in the magistrates' courts and the High Courts, the SCCRs do not give the commissioner a general power to condone non-compliance with procedural rules. It is submitted that the following rule should be introduced in the small claims courts:

> 'A failure to comply with these rules does not render a proceeding, step, document or order a nullity, and

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[54] For example, the defendant may be prejudiced where there is a statute that requires prior notice, and the statute mentions that the letter must be 'delivered' or 'received' by the defendant. There is no reason why the small claims court commissioner cannot stay proceedings to comply with the statute.

[55] A similar position is to be found in s 130 of the NCA. Section 130(4)*(b)* provides:
'In any proceedings contemplated in this section, if the court determines that —
(b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3)*(a)*, or has approached the court in circumstances contemplated in subsection (3)*(c)*, the court must –
(i) adjourn the matter before it; and
(ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed…'
In *Sebola v Standard Bank of South Africa Limited* supra, the Constitutional Court para [53] had the following to say about the above provision:
'[W]hile section 129(1)*(b)* appears to prohibit the commencement of legal proceedings altogether ('may not commence'), section 130 makes it clear that where action is instituted without prior notice, the action is not void. Far from it. The proceedings have life, but a court 'must' adjourn the matter, and make an appropriate order requiring the credit provider to complete specified steps before resuming the matter. The bar on proceedings is thus not absolute, but only dilatory. The absence of notice leads to a pause, not to nullity.'
The court had no problem with the above approach. A similar approach may thus be adopted in the small claims courts.

[56] The reference to 'natural person' presupposes that only natural persons will be sued in the small claims courts. However, see the discussion at §7.5 where it is argued that perhaps the SSCA should be amended to allow juristic persons to sue. See also §7.5*(b)*.

[57] The word 'personally' should be deleted so that the all the rules of service are applicable. See discussion in §8.13.

[58] The word 'messenger' must be replaced by the word 'sheriff': see Sheriffs Act 90 of 1986.

[59] Words in square brackets signify deletions from the existing provision, and words in underline signify insertions.

the court may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the dispute.'[60]

The purpose of small claims courts is to provide expedited justice to the person in the street. People should not be turned away at the doors of the courts because of minor technical infractions. The procedures of the court should permit parties to make mistakes and for the court to fill in the gaps where necessary. After all, the parties are unrepresented and cannot be expected to understand the technicalities of procedure. The nature of small claims does not justify perfect adherence to procedure. The presiding officer must have the discretion to rectify procedural mistakes so that the requirements of natural justice are met.

PART II

SUMMONS AND SERVICE RULES

8.7 CONTENT OF THE SUMMONS

Small Claims Court Rule 9(1) provides that a summons corresponding with Form 1 of Annexure 1 of the SCCRs must be served on a defendant not less than ten calendar days before the trial. The summons must contain the following information:

- Details of the court out of which the summons is issued;
- a description of the parties;
- notice of the date and time of the trial;
- a notice informing the defendant that the plaintiff's claim may be defended and that a statement of defence may be tendered for this purpose;
- particulars of claim containing the nature and amount of the claim(s). Where the summons contains more than one claim, the particulars of each claim and the relief sought in respect

[60] This provision is an adaptation of rule 2 of the Ontario Small Claims Courts Rules (Ontario Regulation 258/98 as last amended by Ontario Regulation 488/16 with effect from 1 January 2017) which states:
'2.01 A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute.'

of each claim must be stated separately;

- a notice drawing the defendant's attention to the possibility that the plaintiff may have abandoned a portion of the claim or admitted a debt[61] to bring the matter within the monetary jurisdiction of the court;
- a notice informing the defendant that failure to defend the summons could lead to default judgment;
- a notice informing the defendant that where judgment is granted, any monies owing must be paid by the defendant directly to the plaintiff;
- an instruction to the effect that the defendant can consent to judgment by contacting the plaintiff;
- a suggestion that the defendant can pay the debt in instalments by contacting the plaintiff;
- a notice drawing the defendant's attention to the landlord's tacit hypothec and an automatic rent interdict in respect of movable property if the claim is for arrear rental;
- instructions informing the defendant that if the judgment is left unsatisfied or if there is a default in payment of agreed instalments, the defendant's movable property may be attached and sold in execution. If there are insufficient movables, immovable property may be attached and sold in execution;
- an instruction to the defendant to notify the plaintiff (judgment creditor) of a change of address, business, or employment and to supply the new details;
- information that a financial enquiry may be conducted if the defendant does not pay the judgment debt; and
- details of the sheriff's fees for services rendered.

In the summons, there is also a pro forma consent to judgment form, which the defendant can fill in and hand to the plaintiff or the clerk of the court.[62]

[61] See §6.6.
[62] See Appendix 2 to this thesis.

To cite the plaintiff and defendant, SCCR 10(4) provides that the summons must:

> '*(a)* show the surname of the defendant by which he is known to the plaintiff, the defendant's sex and residence or place of business, and, where known, his first name or initials, and, in the case of a woman, her marital status; and, in the case of a legal person, partnership, club, association, business, church or syndicate it shall be summoned under the name by which it is known to the plaintiff;
> *(b)* show the first name, surname, sex and the residence or place of business of the plaintiff.'

8.8 THE 'STATEMENT OF CLAIM'

Neither the SCCRs nor the pro forma summons explains how a small claims summons must be pleaded – for example, is the distinction between *facta probanda* and *facta probantia* relevant?[63] Some commentators think that the small claims summons must be pleaded similarly to the summons in the magistrates' courts.[64] With respect, such commentators are wrong. The absence of formal pleading rules like the ones found in the MCRs[65] and the HCRs[66] means that the particulars of claim in the small claims courts can be stated in a relaxed fashion. This is in keeping with the ethos of small claims courts. Be that as it may, the fact that the commentators seem to equate small claims pleadings with magistrates' courts pleadings suggests that Form 1 is overly technical, and indeed, when one looks at Form 1, the summons is not particularly simple for the lay litigant to use. The summons contains legal jargon. The summons is also outdated, misleading and is in some respects wrong because it does not reflect the current law.[67] But fundamentally, the summons does not cater for the small claims courts' inquisitorial process. The form of the summons seems to support the adversarial process.

One would have thought that the legislature would have adopted the German model of pleading

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[63] In an action the summons must contain the *facta probanda* of the claim and not the *facta probantia*. The *facta probanda* are the materials facts to establish a cause of action. The *facta probantia* are the particulars of evidence that corroborate the material facts. Because evidence is led at trial in an action, there is no need to present it in the summons. In an application, because evidence is presented on the papers, the facts and the evidence must appear in the pleadings (the notice of motion and the affidavits). See van Blerk *Legal Drafting: Civil Proceedings* ;10-11 Paleker (n2) 192.

[64] Bredenkamp (n40) 87ff.

[65] MCRs 5,6.

[66] HCRs17 and 18.

[67] For example, the summons does not take into account the provisions of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998, which ousts the jurisdiction of the small claims courts to grant eviction orders in respect of residential property occupied by natural persons. See further Appendix 3 to this thesis.

in the small claims courts. In Germany, where proceedings are inquisitorial, the summons must contain both facts and the evidence corroborating the facts. Parties are encouraged to attach documentary evidence if available. The court uses the summons to plan proceedings so that it can identify the material issues in dispute, which once resolved, will permit the court to apply the law to the facts. The court identifies the legal rules that are likely to be applicable in the case and compares them to the factual allegations. Through this process, the court determines whether the case is capable of easy resolution or whether further evidence is required.[68] The current small claims summons is attached in appendix 2 to this thesis. Notes have been inserted to reflect problems with the summons. Suggestions for improvement are highlighted. Appendix 3 contains a proposed new summons.

8.9 PROPOSALS FOR A NEW 'STATEMENT OF CLAIM'

Appendix 3 to this thesis contains the new proposed summons, styled as a *statement of claim*. The new terminology is in keeping with international trends to embrace plain English in pleadings.[69] Legal jargon and convoluted and pompous language are discarded. The positive features of the statement of claim are pointed out in the notes to appendix 3.

The small claims statement of claim should be available in all official languages. Currently, the small claims summons is only available in English and Afrikaans. Clerks of court and legal assistants should help litigants to complete the statement of claim in their home languages if

[68] Maxeiner 'Pleading and Access to Civil Procedure: Historical And Comparative Reflections on Iqbal, a Day in Court and a Decision According to Law' (2010) 114 *Penn State Law Review* 1257 at 1286; Langbein 'The German Advantage in Civil Procedure' (1985) 52 *The University of Chicago Law Review* 823 at 826ff.

[69] Collins 'The Use of Plain-Language Principles in Texas Litigation Formbooks' (2005) 24 *The Review of Litigation* 430; Stephenson '"Harry Potter Language?" The Plain Language Movement and the Case Against Abandoning "Legalese"' (2017) 68 *Northern Ireland Law Quarterly* 85-90. It is also interesting to note that s 23 of the Kenyan Small Claims Court Act 2 of 2016 (hereinafter referred to as "Kenyan Small Claims Court Act") refers to a 'statement of claim'.

they are unable to do so themselves. It is therefore important for clerks and legal assistants to reflect the language demographic profile of a particular province.[70]

The statement of claim must encourage the plaintiff to give a narrative of the claim in his or her own words. In some jurisdictions, the plaintiff is required to provide a sworn statement in affidavit form.[71] This is not recommended in the South African context. Poorly educated people have difficulty articulating their thoughts in writing – even when transcribed by a third party. An illiterate person is at a greater disadvantage, as he or she cannot appreciate the content of the document other than by what he or she is told it contains. A sworn statement would tie the case to the papers before the court. In a small claims court, the oral testimony of the parties and the inquisitorial role of the presiding officer to establish the facts and evidence must not be curtailed by pleadings. The purpose of the statement of claim must be to assist the court and the defendant to understand the plaintiff's claims and what relief is sought. It should *not* crystalise the cause of action.[72]

8.10 CONTENT OF FORM 1 – SOME PROBLEMS

The content of Form 1 (appendix 2 to this thesis) presupposes that the plaintiff has a working knowledge of law and procedure. For example, it mentions that a portion of the claim can be abandoned and that a debt can be admitted. A lawyer will appreciate that the purpose of abandonment or deduction is to bring the claim within the monetary jurisdiction of the small claims court.[73] However, the unrepresented lay litigant will not know this. Form 1 as it currently stands is scant and does not provide the litigant with context or an explanation. To remedy this

[70] In the Western Cape, for example, the dominant languages are English, Afrikaans and Xhosa. The clerk's office should consist of assistant clerks and legal assistants who can communicate in these languages. See discussion at §4.6.
[71] See, for example, Salt Lake City Small Claims Courts: http://www.slcgov.com/courts/forms (last accessed on 16 December 2017); Michigan Small Claims Courts: http://courts.mi.gov/Administration/SCAO/Forms/courtforms/dc84.pdf (last accessed on 16 December 2017).
[72] Ison 'Small Claims' (1972) 35 *Modern Law Review* 18 at 28.
[73] See §6.6.

deficiency, the pro forma statement of claim must contain information that contextualises the purpose of abandonment or deduction. In this regard, see appendix 3 to this thesis.

Form 1 contains the following notice:

> '5. Take notice that you and all other persons are hereby interdicted from removing or causing or suffering to be removed any of the furniture or effects in or on the premises described in the particulars of claim endorsed hereon which are subject to the plaintiff's hypothec for rent until an order relative thereto shall have been made by the court.'

The notice above activates the landlord's tacit hypothec[74] and creates an automatic rent interdict precluding the defendant from removing movable assets from the premises. At the time of serving the summons, the sheriff is required to make an inventory of the furniture and other items on the premises. The effect of the inventory is to render what has been written up subject to an attachment 'in the wide sense.' The attachment is in the 'wide sense' because the mere fact that property has been interdicted from removal does not mean that the sheriff can remove it from the premises. The property must remain on the premises. In terms of the common law, only the court can order removal of the goods from the premises.[75]

In the magistrates' courts, where an automatic rent interdict summons also features, s 32 of the MCA specifically empowers the magistrate's court, as a creature of statute, to order the removal of goods that are subject to the automatic rent interdict.[76] In the small claims courts there are two problems. Firstly, the SCCA does not contain a provision similar to s 32 of the MCA. If the defendant decides to remove the goods that were inventoried by the sheriff before the trial, the plaintiff does not have a remedy to enforce the interdict.[77] Secondly, and more significantly,

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[74] For more on the landlord's tacit hypothec see van Loggerenberg *Jones & Buckle The Civil Practice of the Magistrates' Courts in South Africa* Vol 1 at Act 219 (Service 10) (Hereinafter this work will be referred to as '*Jones & Buckle*').

[75] Paleker The South African Sheriffs' Guide – Practice and Procedure (original service) 6-12 (Hereinafter this book will be referred to '*South African Sheriffs' Guide*').

[76] MCA, s 32(1).

[77] Section 106 of the MCA provides:
'Any person wilfully disobeying, or refusing or failing to comply with any judgment or order of a court or with a notice lawfully endorsed on a summons for rent prohibiting the removal of any furniture or effects shall be guilty of contempt of court and shall, upon conviction, be liable to a fine, or to imprisonment for a period not exceeding six months or to such imprisonment without the option of a fine.'
There is no equivalent provision in the SCCA.

it appears that Form 1, in so far as it makes provision for an automatic rent interdict, is defective and *ultra vires*. Section 16*(g)* of the SCCA provides that the court has no jurisdiction in a matter in which an interdict is sought. Furthermore, unlike the MCA, which specifically empowers the magistrates' courts to issue an automatic rent interdict summons,[78] the SCCA is silent. Form 1 cannot confer jurisdiction on the court. Jurisdiction is a substantive issue and cannot be conferred on a court in a pro forma summons attached to delegated legislation.[79]

Form 1 makes provision for a consent to judgment, which the defendant can agree to and sign. In the magistrates' courts, the defendant can also consent to a judgment upon receiving a summons.[80] The purpose of the consent is to obviate the need for the court to hold a trial where the defendant does not wish to contest the action. Notwithstanding the magistrates' courts' procedure, it is submitted that a consent to judgment in the small claims court should not in itself ground a judgment. Defendants are unrepresented. Many are unsophisticated people who do not have legal knowledge of any kind. They can be easily influenced or pressured to consent to judgments by plaintiffs or unscrupulous court officials. Furthermore, before a court can grant judgment in an action arising out of the NCA, the court has to determine whether the relevant pre-action steps were taken by the plaintiff to recover the debt.[81] A consent to judgment, especially where the defendant is a natural person, undermines the rights that consumers have in terms of the NCA. It is advisable, therefore, that all matters be placed before a commissioner for judgment. The court must be satisfied that there is enough evidence to order judgment against the defendant. Fortunately, s 35 of the SCCA provides:

> '(1) If a defendant, upon a summons having been served on him in terms of section 29 –
> *(a)* admits liability and consents to judgment in writing; or
> *(b)* fails to appear before the court on the trial date or on any date to which the proceedings have been postponed,
> the court may, on application by the plaintiff, grant judgment for the plaintiff in so far as he has proved the defendant's liability and the amount of the claim to the satisfaction of the court, and the court may dismiss any counterclaim by the defendant.'

[78] MCA, s 31.
[79] The pro forma summons is attached to the SCCRs. The Rules are delegated legislation.
[80] MCA, s 58.
[81] NCA, ss 129 and 130.

It is patently clear that the court will not grant judgment by consent unless the plaintiff has proven its claim.

8.11 CITATION OF PARTIES

In chapter 7[82] SCCR 10(4)[83] was discussed and found to be unconstitutional because it falls foul of s 9 of the Constitution. Consequently, the rule must be redrafted as follows:

> *(a)* show the surname and first names or initials of the defendant by which the defendant is known to the plaintiff, the defendant's residence or place of business and, where known, the defendant's occupation and employment address;
> *(b)* show the full names, gender (if the plaintiff is a natural person[84]), occupation and the residence or place of business of the plaintiff.

The above redraft will bring the SCCRs in line with the MCRs and the HCRs.[85] Similarly, Form 1 should also be amended because it also requires that a female defendant's marital status be stated – see appendix 2 to this thesis.

8.12 AMENDMENT OF SUMMONS

Small Claims Court Rule 11 permits a plaintiff to amend a summons. If a summons is amended before it is served, the plaintiff can effect the amendment as he or she deems fit. However, the clerk of the court must initial the amendment. The SCCRs do not contain provisions relating to the amendment of a summons after service of the summons.[86] This is not insurmountable, as there is no reason why a summons cannot be amended at the trial. A relaxed process for amendments is in line with the general idea of keeping the processes and procedures of the small claims courts informal.

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[82] See §7.4.
[83] The rule is set out above in §8.7.
[84] Of course, in the small claims court a plaintiff can only be a natural person. Juristic persons cannot sue. The phrase 'if the plaintiff is a natural person' is thus redundant. However, if juristic persons are allowed to sue in the small claims courts, then the phrase must remain. See also §7.5.
[85] HCR 17(4), MCR 5(4). It is interesting to note that the plaintiff is required to state his or her gender, whereas the plaintiff is not required to state the defendant's gender. The distinction occurs because the plaintiff is not always in the position to state the defendant's gender simply because the plaintiff does not have that information and a person's name can be ambiguous in this regard.
[86] There is thus no equivalent in the SCCRs to MCR 55A or HCR 28.

8.13 SERVICE OF SUMMONS

It is a cornerstone of our legal system that a person is entitled to proper notice of legal proceedings.[87] If proceedings are initiated and pursued without the defendant being informed of the steps taken, all subsequent proceedings are either void or can be set aside on the basis of a procedural irregularity.[88]

(a) Forms of service

It is not necessary for a small claims summons to be served by the sheriff of the court. The plaintiff may personally serve it, at either the defendant's residence or his or her place of business. However, if the defendant makes it impossible for the plaintiff to serve the summons – for example, if the defendant refuses to accept service or keeps his or her premises closed – the plaintiff is then required to use the services of the sheriff of the court.[89]

When the sheriff is involved, SCCR 13(2) is applicable. The sub-rule provides that any process[90] may be served in the following ways:

> '*(a)* To the said person[91] personally or to his duly authorised agent;
> *(b)* at the said person's residence or place of business to some person apparently not less than 16 years of age and apparently residing or employed there: Provided that for the purpose of this paragraph, when a building is occupied by more than one person or family, 'residence' means that portion of the building occupied by the defendant;
> *(c)* at the said person's place of employment to some person apparently not less than 16 years of age and apparently in authority over him or, in the absence of such person in authority, to a person apparently not less than 16 years of age and apparently in charge at the said person's place of employment;
> *(d)* if the person to be served has chosen a *domicilium citandi* at the *domicilium* so chosen;
> *(e)* in the case of a body corporate at its local office or principal place of business within the area of jurisdiction of the court concerned to a responsible employee thereof or in any other lawful manner;
> *(f)* by registered post: Provided that where such service has been effected in the manner prescribed by paragraphs *(b)* , *(c)* or *(e)* , the sheriff shall indicate in the return of service of the process the name of the person to whom it has been delivered and the capacity in which such person stands in relation to the person, body corporate or institution affected by the process, and where

[87] *Steinberg v Cosmopolitan National Bank of Chicago* 1973 (3) SA 885 (RA) at 892C.
[88] See *Dada v Dada* 1977 (2) SA 287 (T) at 288C–E and the authorities there cited.
[89] SCCR 13(3).
[90] The use of the word 'process' means *any process of the court* and is not limited to the summons. It includes the letter of demand. The phrase 'delivered to the defendant by the plaintiff by hand' in s 29(1)*(a)* does *not* mean *by the plaintiff's own hand*. The sheriff can serve the letter of demand by hand to the defendant on the plaintiff's behalf. However, this hardly happens, as the cost of service by the sheriff is high.
[91] The 'said person' includes the defendant. However, the 'said person' also includes any other person who is required to be served with a document in terms of small claims court procedure.

> such service has been effected in the manner prescribed by paragraphs *(b)* , *(c)* or *(f)* , the court may, if there is reason to doubt whether the process served has come to the actual knowledge of the person to be served, and in the absence of satisfactory evidence, treat such service as invalid.'

Moreover, where the defendant keeps his or her residence or place of business closed and thereby prevents the sheriff from serving the process, it is sufficient according to SCCR 13(4) to affix a copy of the summons to the outer or principal door of the plaintiff's residence or place of business.

(b) Service by registered post requires reconsideration

Earlier in this chapter, the problems attendant to service of a letter of demand by registered post were discussed. The comments made in respect of the letter of demand are apposite for service of a summons by registered post. It is submitted that the Rules Board for Courts of Law should in the future give serious consideration to whether it wishes to persist with this form of service.

Small Claims Court Rule 13(10) provides:

> '(10) *(a)* Where service of process may be effected by registered post such service shall, unless otherwise provided, be effected by the sheriff placing a copy of such process in an envelope and addressing and posting it by prepaid registered letter to the address of the party to be served and making application at the time of registration for an acknowledgment by the addressee of the receipt thereof as provided in regulation 44(5) of the regulations published under Government Notice R550 of 14 April 1960.[92]
> *(b)* A receipt form completed as provided in regulation 44(8) of the said regulations shall be a sufficient acknowledgment of receipt for the purposes hereof.
> *(c)* If no such acknowledgment be received the sheriff shall state the fact in his return of service of the process.
> *(d)* Every such letter shall have on the envelope a printed or typewritten notice in the following terms: "This letter must not be readdressed. If delivery is not effected before.....19[*sic*][93]....., this letter must be delivered to the sheriff of the small claims court at.....".'

From the above rule, the following is discernible. Firstly, where service of any process is effected by registered post, the sheriff must place the process in an envelope and write the address of the addressee on the envelope. The envelope must have a printed or typewritten notice with specific wording. The sheriff must thereafter make 'application at the time of registration for an acknowledgement by the addressee of the receipt thereof as provided in regulation 44(5) of the regulations published under Government Notice R550 of 14 April

[92] Government Notice R550 of 14 April 1960.
[93] The '19' should be amended to '20'.

1960.'[94] Regulation 44(5) provides:

> 'The sender of any registered postal article may upon application either at the time of the registration thereof or at any time within two years thereafter and upon payment of the prescribed fee in addition to the fee for registration, require *to be furnished with an acknowledgement by the addressee of the receipt of such article*, and any registered article, for delivery within the Union, which has been applied for at the time of registration, shall not be delivered until such acknowledgment has been obtained by the department.'[95]

The purpose of the acknowledgement is to determine whether the addressee has received the process in question. If an acknowledgement is not received, the sheriff must state this fact in the return of service.[96] It is unclear from the SCCRs what inference the court should draw from a *non*-acknowledgement by the addressee. Should the court consider the service as defective? Or should the court consider the service as valid because the process was 'delivered', albeit not received?[97] It would appear from SCCR 13(10) read with regulation 44(5)[98] that service of a summons is only valid once the addressee receives the summons. Why else would the sheriff have to record this fact?[99]

Where a summons is served by registered post on a postal address, SCCR 13(10)*(b)* provides that there should be compliance with regulation 44(8) of Government Notice R550 of 14 April 1960.[100] This regulation provides:

> 'In effecting delivery of a registered postal article through a private post office box rented from the Postmaster-General, a printed receipt form bearing the registered number and the address of such registered article shall be placed in such a box, and the presentation at the proper post office of the said receipt signed either by the addressee or the person presenting the same purporting to sign for shall be a sufficient warrant for the delivery of such registered article to the applicant.'

The above provision serves to confirm that 'receipt' constitutes proper service of the summons in terms of the SCCA and SCCRs. Given that addressees can, and often do, ignore registered post notices and do not collect their post from the post office, service of small claims courts summons by registered post is problematic and must be reconsidered. It is also unclear why

[94] SCCR 13(10)*(a)*.
[95] Italics inserted for emphasis.
[96] SCCR 13(10)*(c)*.
[97] To this extent, see the proviso to MCR 9(3), where the court is directed as to how to treat improper service. According to this proviso, the magistrate's court has to treat the service as invalid.
[98] Note 92.
[99] SCCR 13(10)*(c)*.
[100] Note 92.

proof of actual receipt of the summons is necessary if the summons is not the initiating legal process in the small claims courts.[101]

(c) Service on domiciliary address is problematic

Service on a domiciliary (*domicilium*) address is well recognised.[102] In the past, the courts were prepared to accept service on a domiciliary address even if that address turned out to be a vacant plot. In this regard, the Appellate Division in *Amcoal Collieries Ltd v Truter*[103] held:

> 'It is a matter of frequent occurrence that a *domicilium citandi et executandi* is chosen in a contract by one or more of the parties to it. Translated, this expression means a home for the purpose of serving summons and levying execution. (If a man chooses *domicilium citandi* the *domicilium* he chooses is taken to be his place of abode: see *Pretoria Hypotheek Maatschappij v Groenewald* 1915 TPD 170.) It is a well-established practice (which is recognized by rule 4(1)*(a)*(iv) of the Uniform Rules of Court) that if a defendant has chosen a *domicilium citandi*, service of process at such place will be good, even though it be a vacant piece of ground, or the defendant is known to be resident abroad, or has abandoned the property, or cannot be found (Herbstein & Van Winsen *The Civil Practice of the Superior Courts of South Africa* 3rd ed., p210. See *Muller v Mulbarton Gardens (Pty) Ltd*1972 (1) SA 328 (W) at 331H - 333A, *Loryan (Pty) Ltd v Solarsh Tea & Coffee (Pty) Ltd*1984 (3) SA 834 (W) at 847D - F.)'

Recently – probably under the influence of the Constitution – the correctness of the above approach has been questioned. Debtors usually choose domiciliary addresses in contracts and other standard form documents. Even though contracts invariably allow a debtor to change his or her domiciliary address by giving the creditor notice, debtors frequently forget to do so. To expect people to scrupulously abide by administrative provisions in a contract takes freedom of contract too far. People enter into far more contracts these days than they might have in the past. From mobile phone contracts to credit card agreements, the person in the street enters into a vast array of service-related contracts. It is unreasonable to expect people to remember all the contracts they entered into so that a change of address can be given for legal proceedings that might arise sometime in the future.[104]

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[101] See discussion at §8.3.

[102] In *Muller v Mulbarton Gardens (Pty) Ltd* 1972 (1) SA 328 (W) the court stated at 332G:
'Our Courts adopt the view that normally where a person chooses a *domicilium citandi et executandi*, the *domicilium* so chosen must be taken to be his place of abode within the meaning of the Rule of the Rules of Court which deals with the service of a summons. *Downey v Downey*, 16 S.C. 475; *Pretoria Hypotheek Maatschappij v Groenewald*, 1915 T.P.D. H 170; *Botha v Measroch*, 1916 T.P.D. 142; *I'ons v Freeman & Frock*, 1916 W.L.D. 64; *Hollard's Estate v Kruger*, 1932 T.P.D. 134; *Lindrup v Lowe*, 1935 NPD 189 at pp. 192 to 193; *Goldberg and Another v Di Meo*, 1960 (3) SA 136 (N) at p. 143.'

[103] 1990 (4) SA 1 (A) at 5J-6A (hereafter referred to as '*Amcoal Collieries Ltd'*).

[104] See *Rossouw v First Rand Bank Ltd t/a FNB Homeloans* 2010 (6) SA 439 (SCA) para [32].

In *Firstrand Bank Ltd v Gazu,*[105] service on the defendant took place in terms of HCR 4(1)*(a)*(iv). This rule in the High Court allows service on a chosen domiciliary address. The court, after citing *Amcoal Collieries Ltd*,[106] and having regard to the facts of the case, held:[107]

> '...this Court has a discretion with regard to the provision of service. In this matter it is clear that:-
> *(a)* Miss Gazu was contracting with a banking institution; and
> *(b)* the provision of the *domicilium citandi et executandi* is stated in clause 20 of the mortgage bond to be at the hypothecated property; and
> *(c)* those words "THE HYPOTHECATED PROPERTY" have been typed into the mortgage bond which was a document obviously prepared by the bank; and
> *(d)* it is notorious that in dealing with the banks, mortgage bonds and other formal documents are presented to their clients on a "*take it or leave it*" basis and the ability of the other contracting party to balance out the unequal bargaining power in the mortgage bond is extremely limited if not entirely excluded; and
> *(e)* given the requirements with which banks have to comply in order to meet their obligations in terms of the provisions of the Financial Intelligence Centre Act, 2001, it is inevitable that the bank will have a great deal of personal information concerning the applicant. This information will almost certainly include matters such as a residential address, a home and cell telephone number and even probably the e-mail address of Miss Gazu.
>
> In those circumstances it seems unfair that the bank made no further effort whatsoever to contact Miss Gazu and notify her that it was taking such drastic action against her.'

The above dictum illustrates that some courts[108] are disinclined to accept a lazy reliance on a *domicilium* clause in a contract. The plaintiff needs to satisfy the court that its method of service is appropriate in the circumstances.[109]

Small Claims Court Rule 13(2)*(d)* read with SCCR 13(5) permits service on a domiciliary address. The potential prejudice associated with service on a domiciliary address is ameliorated by SCCR 13(6). According to this rule, when the sheriff comes to know that a defendant has a new residential address, the sheriff is duty-bound to serve the process at the new residential address. This sub-rule is of general application and applies in all instances where the sheriff serves a process and discovers information about the defendant's actual residence. A problem arises where the sheriff does not discover such information or fails to make proper enquiries.

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[105] 2011 (1) SA 45 (KZP).
[106] *S*upra.
[107] *Firstrand Bank Ltd v Gazu* supra paras [12]-[13].
[108] Other courts follow the common law to a tee. See, for example, *Shepard v Emmerich* 2015 (3) SA 309 (GJ) where the court stated at para [6]:
'The significance of the changed circumstances is this: had the service been effected in accordance with the *domicilium* clause, even though the summons did not come to the attention of the respondent due to the changed circumstances, it would have constituted good service.'
[109] See also HCR 4(10) which provides: 'whenever the court is not satisfied as to the effectiveness of the service, it may order such further steps to be taken as to it seems meet.'

In the magistrates' courts, MCR 9(3)*(d)* provides for service on a domiciliary address. To remedy the potential prejudice that could befall a defendant, the Rules Board for Courts of Law introduced a proviso to the rule. The proviso appears at the end of MCR 9(3) and reads as follows:

> 'Provided that where … service has been effected in the manner prescribed by paragraphs *(b)*, *(c)*, *(d)* or *(f)*, the court may, *if there is reason to doubt whether the process served has come to the actual knowledge of the person to be served, and in the absence of satisfactory evidence, treat such service as invalid*…'.[110]

According to the proviso, a magistrate can treat service on a domiciliary address as 'invalid' if he or she doubts that the process has come to the 'actual knowledge' of the defendant. The sheriff must be reasonably sure that the process will come to the defendant's attention. The sheriff has to record the basis of holding that belief in the return of service. Accordingly, there is little scope for a process to be left at some spot or with some nondescript person in the hope that it will come to the defendant's knowledge.

The difficulty with the proviso, however, is that the discretion conferred on the judicial officer may not be consistently applied. Some presiding officers may be more meticulous than others. In particularly busy districts, the court could forget to exercise the discretion to the detriment of the defendant, who may be subject to default judgment.[111] Be that as it may, there is no doubt that having the proviso ameliorates the unsavoury aspects of service on a domiciliary address. It is recommended, therefore, that the proviso should apply in the small claims courts as well. To achieve the same result as in the magistrates' courts, the Rules Board for Courts of Law[112] must in the future amend the proviso in SCCR 13(2)*(f)*. The proviso should be a general one in respect of the whole of SCCR 13(2) and should state:

> 'Provided that where such service has been effected in the manner prescribed by paragraphs *(b)*, *(c)* or *(e)*, the sheriff shall indicate in the return of service of the process the name of the person to whom it has been delivered and the capacity in which such person stands in relation to the person, body corporate or institution affected by the process, and where such service has been effected in the manner prescribed by paragraphs *(b)*, *(c)*, ***(d)*** or *(f)*, the court may, if there is reason to doubt whether the process served has come to the actual knowledge of the person to be served, and in the absence of satisfactory evidence, treat such service as invalid.'[113]

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[110] Italics inserted for emphasis.
[111] SCCA, s 35.
[112] See chapter 4.
[113] Insertion reflected in bold underline.

It must be noted that the Rules Board is currently exploring the possibility of doing away with service on a domiciliary address altogether. On 6 April 2017, the Rules Board invited public comment on the issue.[114] According to the Rules Board's public statement:

> 'The Rules Board has considered that the rules providing for service on a *domicilium citandi* where the person sought to be served is no longer at the chosen *domicilium* may result in unfairness and in certain circumstances be contrary to public policy.
> The Board therefore considered that the rules … should not be left as they are, but should instead be addressed so as to remove possible prejudice …
> There are different possibilities by which the service rules providing for service on a *domicilium citandi* may be addressed. These include but are not limited to:
> *(a)* Repealing service on a *domicilium citandi* entirely;
> *(b)* Allowing for service on a *domicilium* but requiring that service must be effected on a person at the *domicilium;*
> *(c)* Allowing for service on a *domicilium* provided that if the court is not satisfied with the service it may require further or better service or another form of service.'

Irrespective of how the issue of service on a domiciliary address is resolved in the future, it is axiomatic that the SCCRs require amendment. Aside from SCCR 13(2), it appears that SCCR 13(5) also requires amendment. According to this sub-rule:

> 'Where the sheriff is unable after diligent search to find at the residence or *domicilium citandi* of the person to be served either that person or a person referred to in subrule (2)*(b)* or, in the case of a body corporate referred to in subrule (2)*(e)*, a responsible employee, it shall be sufficient service to affix a copy of the process to the outer or principal door of such residence, local office or principal place of business or to leave a copy of the process at such *domicilium*.'

If the suggested proviso is introduced in SCCR 13(2), all references to a *domicilium* address in SCCR 13(5) must be deleted. The consequence of this would be to bring SCCR 13(5) in line with MCR 9(3)*(e)* and HCR 4(1)*(a)*(v).

(d) Affixing to doors and gates

Whether SCCR 13(5) should permit processes to be affixed to the outer or principal door of a 'local office or principal place of business' of a defendant is debatable. In terms of MCR 9(3)*(e)* and HCR 4(1)*(a)*(v), a simple affixing is possible if the defendant is a close corporation or a company. It has been held[115] that these rules are in conformity with s 170(1)*(b)* of the Companies Act of 1973,[116] s 23(3) read with s 220 of the Companies Act of 2008,[117] and s 25(1)

[114] http://www.justice.gov.za/rules_board/comment.html (last accessed on 30 October 2017).
[115] *Arendsnes Sweefspoor CC v Botha* 2013 (5) SA 399 (SCA) paras [7] and [9].
[116] 61 of 1973.
[117] 71 of 2008.

read with s 25(2) of the Close Corporations Act.[118] According to these legislative provisions every company and close corporation is obliged to have a postal address and a registered office to which all notices may be addressed and at which all processes may be served. If service by affixing is retained, then for the sake of harmonisation, SCCR 13(5) should read the same as MCR 9(3)*(e)* and HCR 4(1)*(a)*(v).

In the case of natural persons, SCCR 13(4) provides:

> 'Where the person to be served keeps his residence or place of business closed and thus prevents the sheriff from serving the process, it shall be sufficient service to affix a copy thereof to the outer or principal door of such residence or place of business.'

A similar provision can be found in MCR 9(5). There is no analogous provision in the HCRs. It is submitted that despite the absence of a similar rule in the High Court, it may be useful to retain SCCR 13(4). The rule has limited application. For the rule to apply, the sheriff must state facts in the return of service from which it can be determined that the defendant deliberately evaded the sheriff or prevented the sheriff from serving the process. For example, that 'he or she peeped through the window but kept the door locked', ran away at the sight of the sheriff, or 'in any other way indicated to the sheriff that he or she was not prepared to accept service.'[119]

(e) Other modes of service

In the technological age, it is startling that the rules of service do not make provision for electronic service of court documents. Email,[120] Facebook[121] and other social media platforms[122] are common forms of communication. Many platforms allow people to

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[118] 69 of 1984.

[119] See *South African Sheriff's Guide* (original service) Annexure 2-52.

[120] As at 14 July 2017 there were 21 million internet users in South Africa. According to a recent study, it was anticipated that there would have been 22,5 million users by the end of 2017: Shapshak 'South Africa has 21 Million Users, Mostly on Mobile' *Forbes* (19 July 2017): https://www.forbes.com/sites/tobyshapshak/2017/07/19/south-africa-has-21m-internet-users-mostly-on-mobile/#513efde51b2d (last accessed on 21 July 2017).

[121] As at 30 June 2016, there were 14 million Facebook users in South Africa: http://www.internetworldstats.com/stats1.htm (last accessed on 14 April 2017).

[122] WhatsApp is the most popular social media platform in South Africa. It is estimated that a third of South African internet users have WhatsApp accounts: http://www.htxt.co.za/2016/04/29/the-stuff-south-africa-26-8-mil-internet-users-spend-most-their-time-doing-online/ (last accessed on 14 July 2017); Vermeulen 'This is Why South Africa Fell in Love with WhatsApp' *Mybroadband* (29 April 2016): https://mybroadband.co.za/news/columns/157611-this-is-why-south-africa-fell-in-love-with-whatsapp.html (last

communicate with others directly in encrypted[123] environments to ensure that a message or document reaches the intended user.[124]

The traditional service methods are for many reasons ineffectual and expensive. Personal service is a cumbersome process. The sheriff is expected to travel to the defendant's residence or place of business. This takes time. The sheriff must locate the defendant or an appropriate person on whom the process can be served. It often takes several attempts before the sheriff manages to serve the process. This is costly because for each attempt the plaintiff has to pay the sheriff a fee. The tariff for serving a summons is set out in Annexure 2, Part II of the SCCRs. In terms of the tariff, the sheriff is entitled to claim a fee for every attempted service and for the actual service of the summons. Fees are adjusted depending on how far the sheriff has to travel. The sheriff can also charge for drawing up the return of service.[125]

In the busy city centres, it can take the sheriff weeks to deliver a summons on account of the volume of court processes that the sheriff has to serve. A sheriff's office does not just serve small claims summonses; the sheriff must also serve magistrates' courts and High Court processes. Aside from serving process, the sheriff has many other duties.[126]

In *New England Merchants National Bank v Iran Power Generation and Transmission Company,*[127] the United States District Court for the Southern District of New York declared:

> 'Courts … cannot be blind to changes and advances in technology. No longer do we live in a world where communications are conducted solely by mail carried by fast sailing clipper or steam ships. Electronic communication via satellite can and does provide instantaneous transmission of notice and information. No longer must process be mailed to a defendant's door when he can receive complete notice at an electronic terminal inside his very office, even when the door is steel and bolted shut.'

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accessed on 14 July 2017); Anonymous 'WhatsApp Dominates in South Africa' *BusinessTech* (5 August 2014): https://businesstech.co.za/news/mobile/64778/whatsapp-dominates-in-south-africa/ (last accessed on 14 July 2017).

[123] This means that nobody but the sender and receiver of the message or call will be able to access the contents – not even the employees of an electronic data platform.

[124] Murgia 'WhatsApp Adds End-to-End Encryption: What Is It and What Does It Mean for You?' *The Telegraph* (6 April 2016).

[125] Item 7, Annexure 2, Part II of the SCCRs. The *return of service* has to be handed to the court as it evidences the manner in which the sheriff carried out the service.

[126] See generally *South African Sheriff's Guide* (revision service 1, 2016).

[127] 495 F.Supp 73 (S.D.N.Y) at 81. This is a seminal case because it triggered the debate about the use of technology in civil proceedings in the United States.

Implicit in the above statement is an appreciation that electronic service allows a plaintiff to reach a defendant where physical access to the defendant would otherwise be impossible. This is particularly relevant in South Africa. Sheriffs struggle to serve summonses on people living and working in 'gated communities' and informal settlements. With the appalling safety situation in the country, many people live and work in security complexes and estates – the so-called 'gated communities'.[128] Sheriffs struggle to access these. Informal settlements present a particular problem as they evolve organically into sprawling townships. There are no street names or home numbers in these informal settlements. Houses are arranged chaotically to maximise space. To serve a court process in an informal settlement can be near impossible. Some sheriffs refuse to enter some settlements out of fear for their personal safety.[129] But, many people in gated communities or in informal settlements have mobile phones. Many of them will have access to email by mobile phone or to a social media platform like Facebook, WhatsApp or Skype. It is easy these days to see if a defendant is using a social media platform on a regular basis. For example, one can see how often the user posts information, or what their online status is. There are different ways of checking whether someone has checked their email or whether they communicate by email. Because litigation evolves from a relationship, it is not far-fetched to assume that the plaintiff might have communicated with the defendant using a particular platform or combination of platforms in the past and would be in a good position to give the sheriff advice about the best means of electronic service.

Many electronic and social media platforms allow documents to be attached. They also allow for voice and video messages to be recorded and posted. Voice and video messages are particularly beneficial for people who are blind or illiterate. There is no reason why a sheriff cannot exhibit a summons to the defendant in a video message and read the contents of the

[128] Dawson 'Geography of Fear: Crime and the Transformation of Public Space in Post-Apartheid South Africa' in Low, Smith *The Politics of Public Space* (2006) 123ff.
[129] I am grateful to Messrs J Fourie (Sheriff of Simon's Town, Western Cape) and Mr H van Nieuwenhuizen (Sheriff of Witbank, Gauteng) for this information. Both sheriffs have more than 30 years' experience as sheriffs and have shared their professional expertise with the sheriffs' profession for many years.

claim to him or her with an instruction to appear at court on a particular date. The insatiable attachment that people have to their mobile phones is well-documented, making this form of service quite effective.

The South African legislature and courts are not averse to using technology to serve legal documents. PACOS,[130] for example, currently allows for service of notices by email and facsimile. The MCRs[131] and the HCRs[132] allow for pleadings, other than a summons or notice of motion, to be served by electronic means if the opposing party has consented thereto.[133] Following the decision in *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens*[134] the courts permit service of pleadings, including summonses and notices of motion, by electronic means (including WhatsApp, Skype and Facebook) as a form of substituted service[135] – if service according to the traditional means is not possible. The procedural rules of the courts have not, however, mainstreamed electronic service of court documents that initiate proceedings. This is likely to change on account of s 44 of the SCA.[136] Section 44(1) provides:

> '*(a)* In any civil proceedings before a Superior Court, any summons, writ, warrant, rule, order, notice, document or other process of a Superior Court, or any other communication which by any law, rule or agreement of parties is required or directed to be served or executed upon any person, or left at the house or place of abode or business of any person, in order that such person may be affected thereby, may be transmitted by fax or by means of any other electronic medium as provided by the rules.
> *(b)* The document received or printed as a result of the transmission contemplated in paragraph *(a)* is of the same force and effect as if the original had been shown to or a copy thereof served or executed upon the person concerned, or left as aforesaid, as the case may be.'[137]

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[130] See §7.3.
[131] MCRs 5(3)*(a)* and 13(3)*(a)*.
[132] HCR 4A.
[133] This is similar to Practice Directive 6A of the Civil Procedure Rules of England and Wales.
[134] 2012 (5) SA 604 (KZD).
[135] In terms of the MCRs and the HCRs, where service cannot be effected by one of the methods prescribed by the rules of court, the party seeking to serve a court document can make application to court for substituted service. For more on substituted service see Peté, Hulme, du Plessis et al *Civil Procedure: A Practical Guide* 108ff.
[136] 10 of 2013 (hereafter referred to as the 'SCA').
[137] Section 40 of the Judicial Matters Amendment Act 8 of 2017 amends s 44 of the SCA as follows:
'Section 44 of the Superior Courts Act, 2013, is hereby amended –
(a) by the substitution for the heading of the following heading:
''Electronic transmission of summonses, writs and other process [**and of notice of issue thereof**]'';
(b) by the substitution in subsection (1) for paragraphs *(a)* and *(b)* of the following paragraphs, respectively:
''*(a)* In any civil proceedings **[before a Superior Court]**, any summons, writ, warrant, rule, order, notice, document or other process of a Superior Court, or any other communication which by any law, rule or agreement of parties is required or directed to be served or executed upon any person, or left at the house or place

The Rules Board for Courts of Law will in due course draft rules to facilitate service of processes in the Superior Courts[138] in terms of the aforementioned provision. There is no reason why the SCCA and the MCA cannot be amended to achieve a similar objective. Sceptics might rely on two arguments against electronic service of processes in the lower courts. The first is that the defendant has not been given an opportunity to choose service of a summons by electronic means. The second is that there is a likelihood that the summons may go astray (either intentionally or negligently) so that it never comes to the defendant's attention.

However, choice of method of service should not be an obstacle for service by electronic means. Even with the traditional service methods, the plaintiff exercises a choice. The defendant cannot prescribe the manner of service. There is no reason why the same should not apply to electronic service. To allow electronic service would expand the range of options open to the plaintiff to effect service. The potential of a summons going astray exists even when the traditional modes of service are used. Service on a domiciliary address is inherently risky as there is no guarantee that the defendant resides or works at the service address. Service on an individual, other than on the defendant personally, also has its perils. A summons can go missing when it is left with a person 'apparently not less than 16 years of age and apparently residing or employed'[139] at the place of service or served upon a person 'apparently not less than 16 years of age and apparently in authority' over the defendant or 'in charge [at the defendant's] place of employment'.[140] The courts have the discretion to determine whether there has been proper

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of abode or business of any person, in order that such person may be affected thereby, may be transmitted by **[fax]** facsimile, or by means of any other electronic medium [**as provided by the rules**], to the person who must serve or execute such process or communication.
(b) The document received or printed as a result of the transmission contemplated in paragraph *(a)* is of the same force and effect as **[if the original had been shown to or a copy thereof served or executed upon the person concerned, or left as aforesaid, as the case may be]** the original thereof.''; and
(c) by the substitution in subsection (2) for the words preceding paragraph *(a)* of the following words:
''A notice **[sent by fax]** transmitted by facsimile, or any other electronic medium [**authorised by the rules**] as contemplated in subsection (1)— ''.'
[Words in square brackets signify deletions from the existing provision, and words in underline signify insertions].

[138] 'Superior Court' means the 'Constitutional Court, the Supreme Court of Appeal, the High Court, and any court of a status similar to the High Court': SCA, s 1.

[139] SCCR 13(2)*(b)*.

[140] SCCR 13(2)*(c)*.

service and to treat service as invalid if there is reason to believe that the process has not come to the actual knowledge of the defendant.[141] In the High Court, HCR 4(10) permits a court to order a different form of service if the court is not satisfied with the traditional mode of service used. There is no reason why the courts would be any less qualified to determine the effectiveness of service of a summons by electronic means.

The potential for a court process to go astray always exists. However, fraud and other nefarious activities can be ameliorated if the *sheriff* continues to be responsible for service of the summons by electronic means. The sheriff will state his or her reasons for using a particular form of electronic service in the return of service, the steps taken to verify the appropriateness of that mode of service, and the defendant's conduct after service. As technology improves, it will become easier to see if people receive electronic messages. Furthermore, their behaviour may provide tell-tale signs that they have received a court document.

For the small claims court litigant, electronic service of a summons will reduce the cost of service. The sheriff will not have to claim the cost of travel in addition to the fee for actual service of the document.[142] In many small claims matters, the cost of service of a summons is a deterrent to parties wishing to institute claims because the sheriff expects the small claims litigant to pay for service in advance. Alternatively, the sheriff sometimes refuses to provide the return of service if the defendant does not pay. [143] Without the return of service, the court

[141] See SCCR 13(2) proviso.
[142] See discussion below.
[143] In theory, these actions by the sheriff are unacceptable. Section 14(7) of the MCA provides:
'A messenger receiving any process for service or execution from a practitioner or plaintiff by whom there is due and payable to the messenger any sum of money in respect of services performed more than three months previously in the execution of any duty of his office, and which notwithstanding request has not been paid, may refer such process to the magistrate of the court out of which the process was issued with particulars of the sum due and payable by the practitioner or plaintiff; and the magistrate may, if he is satisfied that a sum is due and payable by the practitioner or plaintiff as aforesaid which notwithstanding request has not been paid, by writing under his hand authorize the messenger to refuse to serve or execute such process until the sum due and payable to the messenger has been paid.'
Even though the SCCA does not have a similar provision, anecdotal evidence reveals that sheriffs often refuse to serve small claims summonses unless the plaintiff pays upfront. The reason for this is that the plaintiff is unrepresented and there is thus no law firm that the sheriff can turn to for payment.
There is no similar provision in the SCA or in the SCCA. Given that only a judicial officer can exonerate a sheriff from serving process in the magistrates' courts, it would be unwise for a sheriff to take unilateral action in the

will not know if the summons has been served. Sometimes the cost of serving the summons is more than the value of the claim, causing some litigants not to seek justice.[144]

The environmental advantages of electronic service are also not difficult to appreciate: less paper, less printing, and less travel by the sheriff translate to a smaller carbon footprint when it comes to the service of court processes.

There are plans to introduce 'e-filing' in all the High Courts in South Africa. It is only a matter of time before e-filing is introduced in the lower courts. Although electronic service of processes and e-filing at court are complimentary to each other, they are not dependent on each other for implementation. Until e-filing is introduced, there is no reason why documents that have been manually issued at the courts cannot be served on litigants by electronic means, as document scanners are commonplace these days. In fact, there are free software applications that allow one to scan documents using a mobile phone or a tablet device.[145]

(f) Substituted service

Where a plaintiff cannot serve a summons by one of the traditional methods, SCCR 13(9) makes provision for substituted service. The presiding officer can order service by another means, for example, by publication in a newspaper or by electronic means. Since there is no formal application or interlocutory application procedure in the small claims courts, the presiding officer would make such an order on the date of the trial indicated in the summons. The wording of SCCR 13(9) is wide enough for the court to consider the issue of substituted service *mero*

small claims court and refuse to serve process where the litigant is indigent. See *South African Sheriffs' Guide* (revision service 1, 2016) § 7.19, 7.2; SCA, s 43(1).

[144] I am thankful to Mrs N Ndlovu for this information. Mrs Ndlovu has served as a commissioner in the small claims court in Eastern Cape for more than 15 years. She knows of many cases where the value of the claim was less than the cost of the service of the summons. See also Law Society of South Africa *Annual Report* (2007-2008) 38.

[145] Heaton 'Tablets Help Court Go Paperless in Texas' (12 June 2012): http://www.govtech.com/public-safety/Tablets-Help-Court-Go-Paperless-Texas.html (last accessed on 16 May 2018)**;** Farrell, Tipping, Woodward 'Trialling the use of Tablets in Australian Courts: The Jury is Still Out' (2015) *Proceedings of the Annual Meeting of the Australian Special Interest Group for Computer Human Interaction* 483 ; Dixon 'Technology and the courts: a futurist view' (2013) 52 *Judges Journal.* 36.

motu.

(g) Sheriff's costs

Part II of Annexure 2 to the SCCRs is titled 'Fees and Travelling Expenses for Sheriffs.' In keeping with the aims and objectives of small claims courts, the tariffs were set at a lower rate than the magistrates' courts.

The problem with the tariffs is that the Minister of Justice last amended them 27 years ago.[146] The tariffs are out of kilter with the reasonable costs incurred by sheriffs when performing their functions. For example, the tariffs stipulate that the sheriff may claim R15 for service of a small claims summons if service takes place within 20 kilometres of the courthouse.[147] The sheriff can claim the cost of travel if service takes place more than 20 kilometres from the courthouse at a rate of 70 cents per kilometre for each kilometre travelled beyond the 20-kilometre mark.[148] When compared to the magistrates' courts' tariffs, which allow the sheriff to claim a fee of R63 for service of a court document within 20 kilometres of the courthouse, and a travelling allowance of R5 per kilometre for every kilometre travelled (i.e. going and returning), the small claims courts' tariffs do not make economic sense.[149] Consequently, sheriffs simply replace the tariff amounts in the SCCRs with the appropriate tariffs drawn from the magistrates' courts tariffs. Although this may not be an ethically sound practice,[150] one can see why the sheriffs adopt this approach.[151] For a small claims court litigant, the current situation is not ideal. It

[146] The last amendment was by GN R851 in *GG* 13178 of 19 April 1991.
[147] Annexure 2, Part II, Item 1*(a)*(ii) of the SCCRs.
[148] According to Annexure 2, Part II, Item 3 of the SCCRs, if it is necessary for the sheriff to travel more than 20 kilometres from the courthouse of the magisterial district within which a process must be served or executed, a travelling allowance of 70 cents per kilometre may be charged for every kilometre travelled or part thereof 'further than the aforesaid distance to and from the place of service or execution.' The qualifying part of the rule suggests that the sheriff can only start charging a traveling fee from the 20 kilometre mark. If service or execution takes place within a 20 kilometre radius of the courthouse, the travelling fee may not be charged. It must be noted that the travelling charge may be levied for the forward and return journey. See also Paleker at 13-57 fn 4.
[149] See Item 1B(a)(iii) read with Item 5(a) of Annexure 2, Part II of Table C of the MCRs.
[150] Sheriffs do not have the authority to amend delegated legislation of their own accord. As officers of the court, they must abide by legislation.
[151] I am thankful to Mr Allan Murugan, the sheriff of Durban North, for information on how sheriffs charge. Mr Murugan trains members of the sheriffs' profession on sheriffs' costs.

explains why the cost of serving a summons can be an obstacle to accessing the small claims courts.

When the Rules Board for Courts of Law becomes the responsible authority for regulating the fees and tariffs of the small claims courts in the future,[152] it must urgently amend Annexure 2 of the SCCRs. In consultation with the sheriffs' profession, the Rules Board must increase the tariff amounts. While the fee for service should be less than the magistrates' courts rate, it is unlikely that the sheriffs' travelling costs can be lower. The cost of petrol and the fuel levy have escalated dramatically over the years and sheriffs should receive full compensation for their disbursements.[153]

The key to reducing the sheriff's cost, especially when it comes to serving processes, is to stipulate alternative service methods. Service by electronic means, for example, will reduce costs. The sheriff will not have to travel to the place of service and will not have to expend a

[152] See discussion in chapter 4.

[153] The travelling cost of R5 in the magistrate's court compensates the sheriff for petrol expenses and for the wear and tear expenses incurred by the sheriff for the use of a vehicle. It has to be noted, however, that where the sheriff has to serve multiple processes in the same vicinity the cost of travel is apportioned between all the processes served. The same principle applies in the small claims courts. Item 4*(c)* of Part II of Annexure 2 of the SCCRs provides:

'A travelling allowance shall be calculated in respect of each separate service, except that –

(i) where more services than one can be done on the same journey beyond a radius of 20 kilometres from the court-house concerned, the distance of the radius of 20 kilometres to the first place of service may be taken into account only once and shall be apportioned equally to the respective services, and the distance from the first place of service to the remaining places of service shall likewise be apportioned equally to the remaining services; and

(ii) where service of the same process has to be effected on more than one person by a sheriff within the area served by him, only one charge for travelling shall be made.'

For illustrative examples see *South African Sheriffs' Guide* 13-7 to 13-12. The following table sets out the extent to which the petrol price increased during the period 2006-2016.

Year	Unleaded 93	Unleaded 95	Diesel 0.05%
2006	R6.92	R7.04	R6.54
2007	R6.88	R7.01	R6.51
2008	R10.20	R10.40	R11.27
2009	R7.52	R7.69	R6.65
2010	R8.02	R8.17	R7.38
2011	R9.91	R10.09	R9.30
2012	R10.83	R11.04	R10.25
2013	R13.32	R13.55	R12.48
2014	R14.08	R14.33	R12.84
2015	R13.01	R13.26	R10.94
2016	R12.08	R12.35	R10.96

Source: https://businesstech.co.za/news/energy/134400/petrol-vs-diesel-prices-in-south-africa-2006-2016/ (last accessed on 20 July 2017).

lot of time trying to effect service of a document.

(h) Not necessary for the sheriff to exhibit the original summons

Small Claims Court Rule 13(3) provides:

> 'The sheriff shall, on demand by the person upon or against whom process is served, exhibit to him the original of the process except where service has been effected by post, in which case the original may be inspected where it is filed of record.'

This rule is similar to MCR 9(4), which requires the sheriff to exhibit the original process or a certified copy of the process to the party being served. In addition, the sheriff has to explain the nature and the content of the process to the person concerned. In terms of the HCRs, the sheriff is not required to exhibit the original process. The sheriff only has to serve a copy of the process and explain the contents thereof. It is unclear why sheriffs' duties in the lower courts are different to those in the High Court.

The requirement that the sheriff exhibits the original process must be removed if electronic service is introduced. The original process should be presented to the defendant at court if he or she wants to see it. In any event, the original summons would be in the court's file for perusal by the presiding officer who will determine its authenticity.[154] The sheriff should, however, explain the contents of the summons where possible. Small Claims Court Rule 13(3) must be amended as follows:

> 'The sheriff [shall] must, as far as it is practically possible, explain the contents of a process **[**on demand by] to the person upon or against whom the process is served, **[exhibit to him the original**] and hand a copy of the process to the person: Provided that the person may inspect the original at court **[except where service has been effected by post, in which case the original may be inspected where it is filed of record]**.'[155]

The SCCRs should contain a definition of the word 'copy' as 'an exact reproduction of an original, certified copy of an original, or duplicate original of a document, notice or process.'

[154] In all matters, the sheriff is responsible for returning the original summons to the plaintiff who has to ensure that the original is filed at court.

[155] Words in square brackets signify deletions from the existing provision, and words in underline signify insertions.

This definition will cater for documents that have been faxed, scanned, photocopied, SMSed, emailed, or attached as documents in PDF format or otherwise to a social media webpage.

PART III

THE STATEMENT OF DEFENCE

8.14 THE STATEMENT OF DEFENCE IS NOT A PLEA

In the magistrates' courts and the High Court, the defendant must within 20 days of delivering the notice of intention to defend deliver a plea.[156] If the defendant fails to deliver the plea after receiving notice to do so, the plaintiff may apply for default judgment.[157] In the plea, the defendant has to set out its factual defence to the plaintiff's claim. The plea is a technical document: the defendant must admit, deny, confess and avoid or plead no knowledge of the allegations contained in the plaintiff's summons (particulars of claim) and plead facts to exhibit a defence.[158] If a plea does not follow the technical drafting rules, it may be challenged in terms of the rules of court.[159]

In the small claims court, a defendant is not required to do anything to defend a matter. The defendant is simply required to pitch up at court to defend the case. If the defendant wants, he or she can deliver a 'written statement' in anticipation of the trial. The statement can be delivered[160] at any time prior to the trial.

Section 29(3) of the SCCA provides:

> 'Apart from the summons no pleadings shall be required of the parties, but the defendant may at any time before the hearing lodge with the clerk of the court a written statement setting forth the nature of his defence and particulars of the grounds on which it is based, and a copy of that statement shall be furnished to the plaintiff by the defendant.'

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[156] MCR 17(1); HCR 22(1).
[157] MCR 12(1)*(b)*; HCR 35(5)*(a)*.
[158] MCR 17(2); HCR 22(2).
[159] MCR 17(6); HCR 22(5).
[160] The word 'deliver' is defined in SCCR 1 as follows:
'"deliver" (except in rules 8 and 13) means to file with the clerk of the court and serve a copy on the opposite party and 'delivery' and 'delivered' and 'delivering' have a corresponding meaning'.

The 'written statement' must contain the nature of the defendant's defence and particulars of the grounds on which it is based. It is interesting to note that some commentators seem to think that the defendant's 'statement' has to follow the usual formal format of the plea and that allegations must be admitted, denied, etc.[161] With respect, they are wrong. The absence of formal rules for the written statement indicates that it is a relaxed document in which the defendant should give a narrative of the defence. To follow the plea format would introduce technicality into the small claims procedure, which could not have been intended by the legislature.[162]

If the defendant wishes to counterclaim, a statement of defence must be tendered. In this regard, SCCR 14(3) provides:

> 'A claim in reconvention shall be made by stating in the written statement of defence such particulars of the claim in reconvention as are required in terms of rule 10 in respect of a claim.'

Like the summons, the defendant (plaintiff in reconvention) has to give a narrative of the facts upon which the counterclaim is based. Thereafter the defendant must state the relief sought. The defendant can abandon a portion of its counterclaim to bring it within the jurisdiction of the court or admit a debt owed to the plaintiff.

Small Claims Court Rule 14(2) is a strange rule. It provides:

> 'For the purposes of this rule 'defendant' includes any person upon whom a summons has been served and who alleges that he is not the defendant cited in the summons *and enters appearance to defend on that ground*.'[163]

According to the above rule, it seems that a party who is joined to proceedings but believes that he or she should not have been joined can raise the misjoinder by delivering a statement of defence. Of course, defendants may appear at trial and tender the defence orally without filing a statement of defence. The statement is thus optional in this instance. The rule refers to an 'appearance to defend.' This is nonsensical, as there is no formal notice of intention to defend

[161] Fundamental Principles 258-262.
[162] The Hoexter Commission's *Report* §13.20 states: '…no formal plea by the defendant should be required…'
[163] Italics inserted for emphasis.

in the small claims courts (as there is in the magistrates' courts and the High Court).[164] The drafters of the rules seem to have inadvertently lapsed into the procedures of the magistrates' courts when drafting this rule.[165] The rule should be replaced with the following:

> 'For the purposes of this rule "defendant" includes any person upon whom a summons **[has been]** is served and who [**alleges**] delivers a statement of defence alleging that he or she is not the defendant cited in the summons [**and enters appearance to defend on that ground**].'[166]

8.15 DELIVERY OF THE STATEMENT OF DEFENCE TO THE CLERK OF THE COURT AND TO THE DEFENDANT

Section 29(3) of the SCCA provides that the statement of defence may be submitted 'at any time before the hearing'. Presumably, the reason for the stipulation is to afford the presiding officer time to read the statement and to reconcile him or her to the contents thereof. That said, because the small claims procedure is not rigid, the presiding officer cannot refuse to accept a statement of defence at trial. But, if the defendant wants to raise a counterclaim, the statement of defence must be tendered. This is clear from SCCR 14(3).

The SCCRs do not contain clear information on how a statement of defence has to be delivered to the plaintiff. The small claims summons does not give the defendant clear directions about where to serve the 'statement.' In the magistrates' courts and the High Courts, the plaintiff has to appoint in the summons an address within 15 kilometres of the courthouse at which the defendant may serve notices and other pleadings after the summons is served.[167] In small claims courts' procedure, the legislature does not stipulate a similar requirement. Perhaps the legislature thought that this would be too onerous for the plaintiff to comply with. But, the lack of direction creates a practical problem for the defendant. Is the defendant expected to serve the

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[164] HCR 19; MCR 13.
[165] The Hoexter Commission's *Report* §13.20 states: '…the defendant should not be required to make any appearance at the small claims court before the day of the actual trial.'
[166] Words in square brackets signify deletions from the existing provision, and words in underline signify insertions.
[167] MCR 5(3)*(a)*; HCR 17(3)*(a)*.

statement of defence on the plaintiff at the address cited by the plaintiff in the summons? What if that address is far from where the defendant lives or works? The issue of inconvenience is compounded further because the defendant is also expected to file the statement at court. Would the defendant employ the services of a sheriff to serve the statement and to file it at court? On a reading of the SCCRs, it would appear that the 'statement' does not fall neatly[168] into SCCR 13,[169] as it is not a 'process' per se.[170] Notwithstanding SCCR 13, there is nothing to preclude the defendant from engaging the services of the sheriff if the defendant can afford to do so. It seems unlikely that a defendant will be able to recover the cost of service of a statement. Even though s 34*(d)* read with s 37(*c)* of the SCCA empowers the court, on conclusion of a case, to award sheriffs' fees and travelling expenses if it is 'just' to do so, it is clear that the costs order will be in favour of a successful plaintiff, and not for an out-of-pocket defendant.

There are several possible solutions to the above problem. Firstly, if e-filing is introduced,[171] the defendant should be able to file its statement of defence with the court online.[172] Secondly, the plaintiff should be required to state in the summons (see appendix 3 to this thesis) whether it is prepared to accept service of the statement of defence via email or via a mobile telephone platform (for example, WhatsApp). Thirdly, the SCCA should be amended to enable the court to apportion between the parties the costs of service of court documentation at the end of a trial. This will encourage people to agree to easier document exchanges out of fear that if they do not facilitate effective and expeditious document handling, the court can hold them liable for costs.

[168] It can be argued that if the statement of defence contains a counterclaim, it is elevated to a 'process' within the meaning of SCCR 13.
[169] SCCR 13 deals with service of process by the sheriff. See §8.13 above.
[170] *Garrett v Lea Hobbs Milton & Co* 1979 (4) SA 922 (W).
[171] 'Digital to Transform Court Filing System' *Bizcommunity* (21 June 2016): http://www.bizcommunity.com/Article/196/546/146658.html (last accessed on 18 January 2018).
[172] Section 23(7) of the Kenyan Small Claims Court Act provides: 'Any party may lodge his or her statement of claim or defence by electronic means.' 'Electronic' is defined in s 2 of the Act: 'includes electrical, digital, magnetic, optical, biometric, electromechanical, wireless or electromagnetic technology'.

8.16 RECOMMENDED AMENDMENTS

Section 29(3) should be amended in several respects. First, the subsection should be gender neutral. Secondly, the 'written statement' should be called the *statement of defence.* This is the better descriptor of the 'written statement'. There should be a pro forma statement of defence attached to the SCCRs to assist the defendant (see appendix 4 to this thesis). Thirdly, the phrase 'and particulars of the grounds on which it is based' should be deleted. The statement of defence should contain the defendant's defence in his or her own words. In the pro forma statement of defence, the defendant should be informed that he or she may attach any documentary evidence, such as emails, letters, receipts, invoices or contracts, which have not been attached to the plaintiff's statement of claim and which the defendant wishes to rely upon. However, the defendant should not be precluded from handing up documents to the court during the trial. To this end, the pro forma statement of defence must be worded in a permissive and encouraging tone. Requiring the defendant to state the *particulars of the grounds on which the defence is based* is redundant and does not add to or detract from the nature of a statement of defence.

In some jurisdictions,[173] it is mandatory to file a statement of defence before the small claims court trial. The statement assists the presiding officer to prepare for trial and gives the plaintiff an indication of what the defendant will say in court. Having the statement gives the presiding officer vital information about the nature of the defence and the types of evidence that the defendant will rely upon. The presiding officer can use the information to narrow issues and to strategise about how he or she will approach the trial. The statement of defence provides insight into whether the matter can be resolved by simple application of the law to the facts, or whether

[173] Section 25(1) of the Kenyan Small Claims Court Act provides that the respondent 'shall lodge' with the court a written response to the claimant's claim in a prescribed form within 15 days. Section 27(1) provides that if the respondent fails to respond to the claim in the prescribed period, the court may enter judgment for the claimant and order the relief sought in the statement of the claim.

the defence introduces aspects that could best be resolved through a process of mediation.[174] Clearly, there are many advantages to filing a statement of defence.

However, in the South African context, it is not advisable to make the statement of defence mandatory. Having a mandatory statement of defence will make the small claims procedure more complicated for litigants because it will add a further procedural step to the doors of the court. Unsophisticated defendants who have neither the capacity nor the resources to file the statement of defence will be prejudiced by a mandatory step. It seems inimical to the nature of small claims courts for the presiding officer to discount the defendant's oral defence just because a written defence was not filed. Consequently, it makes more sense to leave the statement of defence as an optional step.

As regards the bringing of counterclaims, SCCR 14(3) should be amended. Often unsophisticated people do not know that they have a counterclaim to the plaintiff's claim. In many cases, the counterclaim becomes apparent to the presiding officer from the oral testimony of the witnesses in court. There is no reason why a small claims court should refuse to recognise a counterclaim just because the defendant has not stated it in a written statement. The small claims procedure and indeed the trial process should be robust enough to admit defences at the trial. If necessary, the commissioner should call for further evidence to prove the counterclaim and adjourn the case for a short time. This will prevent a multiplicity of actions and strengthen access to justice. Mere technicalities should not block the small claims court from dealing holistically with cases. To this extent, SCCR 14(3) should be amended as follows:

> 'The defendant's counterclaim **[A claim in reconvention shall]** may be made by stating in the written statement of defence the facts giving rise to the counterclaim and by attaching such evidence as may be required to prove the counterclaim **[such particulars of the claim in reconvention as are required in terms of rule 10 in respect of a claim]**.'[175]

[174] See chapter 10.
[175] Words in square brackets signify deletions from the existing provision, and words in underline signify insertions.

The amendment draws attention to the acceptability of raising a counterclaim in the statement of defence. However, the deletion of mandatory language gives the court the latitude to consider a counterclaim at the trial and to take a more flexible approach to the gathering of evidence. It is interesting to note that in Saskatchewan, Canada a counterclaim may be raised either by notice or orally at a case management conference or the trial.[176] If a defendant raises a counterclaim orally and the judge is of the opinion that the plaintiff has been taken by surprise, the judge may:

> '*(a)* adjourn the case management conference or trial, as the case may be; and
> *(b)* order[177] the defendant to file the counterclaim with the court by a specified date.'[178]

The flexibility of raising a counterclaim at the trial should be introduced in the South African small claims courts.

PART IV

THE TRIAL

8.17 INQUISITORIAL PROCEDURE

The SCCA contains just three sections articulating the nature of the trial in the small claims courts.[179] The SCCRs do not contain any further provisions in this regard. The lack of legislative provisions is not necessarily a disadvantage. It illustrates the simplicity and flexibility of the small claims courts' trial process.[180]

In conformity with the Hoexter Commission's recommendations, s 26(3) of the SCA provides that the court must proceed inquisitorially.[181] Unlike in adversarial court procedure, the

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[176] See fn 178 below.
[177] If a court orders a defendant to file the counterclaim by a specific date, the clerk of the court or a legal assistant should assist the defendant to file the counterclaim properly.
[178] The Small Claims Act, 1997 (Chapter S-50.11 of the Statutes of Saskatchewan, 1997), s 12(4) read with s 12(3).
[179] SCCA, ss 26-28.
[180] In the Hoexter Commission *Report* §13.6 it is stated that:
'The [presiding officer] will adopt any method of procedure which he [or she] considers to be convenient, and to afford a fair and equal opportunity for each party to present his case…'.
[181] *Report* §13.6.

presiding officer is not an umpire; he or she descends into the litigation arena.[182] The commissioner is both the fact finder and the truth finder. He or she must question the parties and their respective witnesses. After weighing the facts and evidence, a finding is made. According to the SCCA, the parties are expressly precluded from cross-examining each other or questioning witnesses.[183]

To appreciate the difference between the inquisitorial procedure and the adversarial procedure, the following statement by Devlin is instructive:

> 'The essential difference between the [adversarial and inquisitorial] systems…is apparent from their names: the one is a trial of strength and the other is an enquiry. The question in the first is: are the shoulders of the party upon whom is laid the burden of proof…strong enough to carry and discharge it? In the second the question is: what is the truth of the matter? In the first the judge or the jury are arbiters; they do not pose questions and seek answers; they weigh such material as is put before them, but they have no responsibility for seeing that it is complete. In the second the judge is in charge of the inquiry from the start; he will of course permit the parties to make out their cases and may rely on them to do so, but it is for him to say what it is that he wants to know.
> …
>
> The English say that the best way of getting to the truth is to have each party dig for the facts that help it; between them they will bring all to light. The inquisitor works on his own but has in the end to say who wins and who loses…[I]n the adversary system the judge in his quest for the truth is restricted to the material presented by the parties while in the inquisitorial system the judge can find out what he wants to know. Put in a nutshell, the arbiter is confined and the inquisitor is not.'[184]

The choice of the inquisitorial procedure in the small claims courts is appropriate given that legal representation is not permitted.[185] Furthermore, the inquisitorial procedure supports the expeditious nature of the small claims trial because it enables a presiding officer to get to the nub of the dispute quickly. The difficulty, however, is that if the parties get an impatient or

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[182] The following statement reflects the characteristics of the adversarial litigation system:
'The parties are responsible for taking charge of and driving litigation forward. They formulate cases and present evidence in court. During trial, the judge simply sits as a neutral umpire who does not descend into the litigation arena. The judge may, from time to time, ask a witness who has been called to the stand a question for the sake of clarification, but the judge does not have an investigative role per se. The judge has no discretion about which witness comes to court. This is a matter for the parties to decide. The key function of the judge at trial is to ensure that courtroom decorum is maintained, that parties keep to the rules of evidence and procedure and that the court process is not abused. Thus, when it comes to fact and truth-finding, the judge has a very limited role to play. The judge relies on facts alleged in pleadings and patiently waits for the appropriate evidence to be tendered during trial.'
See Paleker (n2) 189 at 190. See also Greer, Mulvaney 'Small Claims: The Northern Ireland Experience' (1987) 6 *Civil Justice Quarterly* 56 at 66.
[183] Section 26(3).
[184] Devlin *The Judge* 54.
[185] See chapter 7.

abrasive commissioner, they can easily feel as if they have not received their day in court. Telling one's story can be cathartic. It enhances the court experience.[186] It is thus essential for judicial officers to receive proper training. Part of their legal training should entail some sensitivity training for identifying the expectations of the parties when appearing before the court.[187] The problem-solving skills of lawyers are specific: identify the legal issues from the relevant facts, analyse the relevant law, and apply the law to the facts of the case to arrive at a just outcome. To the lay person, the clinical nature of law can seem disempowering. In the usual litigation process, a party's legal representative is the sympathetic ear and reassuring voice. In the small claims court, the court itself fulfils this role. An impatient or unmindful court can leave the parties feeling unfulfilled. A negative court experience can affect perceptions of access to justice.

To supplement the inquisitorial small claims court procedure, mediation must be introduced in the courts. If the presiding officer sees that the nature of the dispute is such that it can be resolved by mediation, he or she should be at liberty to make the referral. Chapter 10 makes recommendations for incorporating mediation into the small claims court procedure. The idea is not to displace the inquisitorial trial process but to give presiding officers an alternative dispute resolution mechanism. It will be argued in chapter 10 that mediation is more beneficial in terms of achieving lasting solutions, because a serious problem with the small claims process is the enforcement of judgments.[188]

It is interesting to note that the SCCA does not provide for the possibility of the presiding officer interviewing witnesses over the telephone. In many jurisdictions, the possibility of holding telephonic interviews is written into legislation.[189] Some argue that taking evidence by

[186] Ruhnka, Weller with Martin *Small Claims Courts – A National Examination* 21-22.
[187] Ibid at 37.
[188] See discussion in chapter 9.
[189] Kenyan Small Claims Court Act s 29(1). The Saskatchewan Small Claims Courts Act, 1997 (n178) contains a particularly comprehensive provision. Section 28(1) provides:
'28(1) A judge may order that the oral evidence of any witness may be taken by telephone where:
(a) the parties consent; or

telephone is risky because the presiding officer cannot observe the demeanour of witnesses.[190] However, it is submitted that there are good reasons for allowing the practice. Sometimes witnesses are far away or suffer from some medical condition precluding them from coming to the seat of the court. In many instances, a telephonic interview will not be the only evidence that the court will rely upon.[191] The telephonic interview is used to corroborate testimony in court. With the ability to hold video phone calls it is easier these days to observe the demeanour of witnesses[192] than it might have been in the past. It is therefore recommended that the SCCA and SCCRs should make express provision for the taking of evidence by telephone. This will expand the inquisitorial powers of the court.

8.18 RULES OF EVIDENCE DO NOT APPLY

The SCCA provides that the rules of evidence do not apply.[193] Following the Hoexter recommendations,[194] the legislature opted for a free system of evidence, consistent with the Continental European tradition of evidence taking, rather than selecting the Anglo-American tradition that focuses on the weight of the evidence that is presented to the court.[195]

(b) in the opinion of the judge, it is necessary to ensure a fair hearing.
(2) Where taking evidence by telephone is or becomes unsatisfactory or the personal attendance of the witness is desirable, the judge may:
(a) refuse to hear or to continue hearing that evidence;
(b) receive or reject the evidence that has been heard; and
(c) make any order, including an order respecting costs, that the judge considers appropriate.
(3) Unless the judge orders otherwise, the party who intends to call a witness whose oral evidence is to be taken by telephone shall file with the court, before the trial, all written material to which the witness intends to refer.
(4) The party on whose behalf a witness is called shall pay all of the telephone charges of calling that witness.'

[190] Weller, Ruhnka *Practical Observations on the Small Claims Court* 25.

[191] In fact in the jurisdictions that Weller, Ruhnka (n190) surveyed it was established that the court would only rely on telephonic testimony if three conditions were met: (i) the testimony of the missing witness was essential to the trial; (ii) the witness was a disinterested third party who had no stake in the outcome of the case, either directly or because of friendship with one of the parties; and (iii) both parties agreed to the procedure.

[192] In any event there is there is a growing scepticism regarding the reliability of demeanour as an indicator of veracity.

[193] Section 26(1).

[194] *Report* §13.41.

[195] Kunert 'Some Observations on the Origin and Structure of Evidence Rules under the Common Law System and the Civil Law System of "Free Proof" in the German Code of Criminal Procedure' (1966-1967) 16 *Buffalo Law Review* 122ff.

Consequently, the usual exclusionary[196] and cautionary[197] rules of evidence do not apply in the small claims courts.

Given the extent to which the Anglo-American evidentiary tradition is embedded in the South African litigation system, one might be inclined to perceive the small claims courts' free system of evidence as an inferior fact-finding mechanism. Schwikkard and Van der Merwe are critical of this view.[198] Referring to Paton and Derham – who state that the 'functional test to which all procedural rules should be subjected is the practical efficiency in providing machinery for the prompt and reasonably cheap settlement of disputes on lines that do justice to both parties' – Schwikkard and Van der Merwe support the small claims courts' evidentiary system. They see the relaxation of the rules of evidence in the small claims courts as being consistent with the theoretical objectives of the courts and the inquisitorial role of the presiding officers.[199]

It must also be noted that other jurisdictions[200] also relax evidentiary rules in small claims courts. Studies abroad show that the law of evidence often frustrates lay witnesses who come to courts holding the belief that they will be able to tell their stories. Litigants frequently feel dissatisfied because the trial process and the rules of evidence preclude them from telling their sides of the case. To many litigants the exclusion of certain types of evidence (for example, hearsay evidence) is inconsistent with the conventions of everyday life.[201] It is thus a particular strength of the small claims procedure in South Africa, as well as in foreign jurisdictions,[202]

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[196] For the exclusionary rules see Schwikkard, Van der Merwe *Principles of Evidence* 4ed 281-283 (hereinafter referred to as *Fundamental Principles of Evidence 4ed*)
[197] For the cautionary rules see Ibid 558ff.
[198] Ibid at 10.
[199] Schwikkard, Van der Merwe *Principles of Evidence* 3ed 13
[200] See for example rule 9*(b)* of The County Court (Amenment No. 2) Rules (Northern Ireland) 2009; Article 9 and Preamble paras 9, 12, 20 of Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.
[201] Carlen *Magistrates' Justice* (1976) 85; O'Barr, Conley 'Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives' (1985) 19 *Law and Society Review* 661 at 666-667.
[202] Section 32 of the Kenyan Small Claims Court Act 2 provides:
'32. (1) The Court shall not be bound wholly by the Rules of evidence.
(2) Without prejudice to the generality of subsection (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the Court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.'

that litigants are afforded the opportunity to relay their testimony in an unconstrained way. Many litigants find their small claims appearances cathartic because the free system of evidence allows them to 'let off steam', thereby neutralising conflict.[203]

A particularly attractive feature of the free system of evidence in the small claims courts is that hearsay evidence may be heard by the court. The hearsay evidence rule is notoriously difficult to understand and to apply. Since time immemorial the feasibility of excluding hearsay evidence has been debated in Anglo-American systems. In the South African context, the definitional requirements of hearsay evidence have caused some confusion in the law.[204] Therefore, it must have been a source of relief to commissioners to discover that they do not have to apply this aspect of the law of evidence in the small claims courts.

In 1988 the legislature passed the Law of Evidence Amendment Act.[205] The Act clarifies the definition of hearsay evidence[206] and gives the courts the power to admit hearsay evidence in certain circumstances. Section 3 of the Act provides:

> '(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –
> *(a)* each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
> *(b)* the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
> *(c)* the court, having regard to –
> (i) the nature of the proceedings;
> (ii) the nature of the evidence;
> (iii) the purpose for which the evidence is tendered;
> (iv) the probative value of the evidence;
> (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
> (vi) any prejudice to a party which the admission of such evidence might entail; and
> (vii) any other factor which should in the opinion of the court be taken into account,
> is of the opinion that such evidence should be admitted in the interests of justice.

See also Zucker, Her 'The People's Court Examined: A Legal and Empirical Analysis of the Small Claims Court System' (2003) 37 *University of San Francisco Law Review* 315 at 328.

[203] Abel The Politics of Informal Justice (1982) 284.

[204] Hoffmann, Zeffertt *The South African Law of Evidence* 623-649. The learned writers give a detailed exposition of the confusing nature of the hearsay evidence rule under the common law.

[205] 45 of 1988.

[206] Section 3(4) provides:
'For the purposes of this section –
"hearsay evidence" means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence'.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.
(3) Hearsay evidence may be provisionally admitted in terms of subsection (1)*(b)* if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph *(a)* of subsection (1) or is admitted by the court in terms of paragraph *(c)* of that subsection.…'

A commissioner must be careful not to subconsciously apply the provisions of the Law of Evidence Amendment Act[207] in the small claims court. Even though the Act gives a court wide latitude to admit hearsay evidence, the discretion of the presiding officer is nevertheless constrained by the way in which the section is interpreted.[208] In the small claims court, the commissioner has an unfettered discretion to admit hearsay evidence.[209]

In Anglo-American jurisdictions where the rules of evidence (in particular the hearsay rule) are relaxed in the small claims courts, commentators argue that the relaxation of the rules does not mean that the court will fail to consider the weight to be accorded to evidence. The court will still look for indicators of reliability [210] because ultimately the court has to be satisfied that the plaintiff has met the burden of proof.[211] This requires the court to look for quality evidence that supports the plaintiff's case. Hearsay evidence may be tendered. However, if the court questions the credibility of the witness giving the evidence, the hearsay evidence may be discounted. It is also debatable whether the courts will ever, as a general proposition, decide cases by just relying on hearsay evidence because even if the admissibility of hearsay evidence is unproblematic, the

[207] 45 of 1988.
[208] For the interpretation of the section see *Fundamental Principles of Evidence* at 293ff.
[209] Because the small claims courts preside over civil claims, the unfettered discretion is not unconstitutional. It has been argued in academic circles that an unmitigated reliance on hearsay evidence to convict someone in criminal proceedings violates s 35(3)*(i)* of the Constitution. Section 35(3)*(i)* provides: 'Every accused person has a right to a fair trial, which includes the right to adduce and challenge evidence'. Because the admission of hearsay evidence makes the cross-examination of the witness providing the hearsay evidence difficult, it is argued that the lack of cross-examination and the concomitant admission of extensive hearsay evidence prevent the accused from 'challenging' the hearsay evidence as envisaged in s 35(3)*(i)*. In this regard see Mujuzi 'Hearsay Evidence in South Africa: Should Courts Add the "Sole and Decisive Rule" to their Arsenal' (2013) 17 *International Journal of Evidence and Proof* 347, and see the authorities there cited. It is submitted that since s 35(3)*(i)* does not apply to civil proceedings, the SCCA, in so far as it permits reliance on extensive hearsay evidence, is not unconstitutional.
[210] Van der Merwe 'The Inquisitorial Procedure and Free System of Evidence in Small Claims Courts: An Examination of Principles' *De Rebus* (September 1985) 447 at 448.
[211] Kunert (n195) at 125. See also Bredenkamp (n40) at 36.

court will inevitably engage in a process of evaluating all the evidence to arrive at the truth. [212] In some sense, therefore, the SCCA gives a false impression about how the court approaches evidence. It creates the impression that the court proceeds in a free-wheeling fashion, when in fact this will not occur. Perhaps, the SCCA needs to incorporate a provision that is similar to s 28.1 of the Saskatchewan Small Claims Courts Act, 1997.[213] According to the provision:

> 'If a judge considers the evidence to be credible and trustworthy, the judge may admit as evidence any oral or written testimony or report.'[214]

The reference to 'credible and trustworthy' evidence paints a better picture of the thought process employed by a presiding officer in the small claims court when deciding whether to rely on a particular piece of evidence.

It is vital that commissioners understand their duties as fact finders and evidence gatherers. Because commissioners are drawn from the ranks of the attorneys' and advocates' professions there is always the risk that they might be influenced by the dominant adversarial mode of thinking. Proper training is thus essential to ensure that they understand their roles in gathering the facts and evidence.[215]

8.19 DOCUMENTARY EVIDENCE

Documentary evidence is necessary in the small claims courts. Parties are expected to bring evidence in the form of contracts, invoices, photographs, and so on to prove their claims. Case preparation is thus vital. Unfortunately, the lack of legal assistants[216] means that first-time court users are not adequately informed and assisted to gather evidence. One can only imagine that

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[212] Ibid 142.
[213] Chapter S-50.11 of the Statutes of Saskatchewan, 1997.
[214] See also s 32(2) of the Kenyan Small Claims Court Act, which provides:
'Without prejudice to the generality of subsection (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the Court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.'
[215] Bredenkamp 'Due Hof van Klein Eise en die Reëls van die Bewysreg' *De Rebus* (October 1989) 772 at 773.
[216] See §4.5.

clerks do not have the time to sit with litigants and explain to them how the court process works and how to prove their claims or defences.[217] This is a stumbling block that requires attention.

The involvement of legal assistants can solve the problem. Furthermore, public education in the form of online videos and brochures may be of assistance. The parties should be encouraged at the time of issuing a summons or filing a defence to attach the appropriate evidence to prove the claim or defence. Not only will this assist the parties in understanding the claim or defence of the other side better, but it will allow them to prepare for trial properly. See appendix 3 and appendix 4 to this thesis.

Sometimes documentary evidence or objects are in the hands of third parties. There is no mechanism in the SCCA for compelling third parties to provide the evidence in their possession or to subpoena them to come to court with the evidence. In the High Courts and the magistrates' courts, the subpoena *duces tecum* enables a party to compel a third party to bring documentary evidence or objects to court.[218] Perhaps a similar provision should be introduced in the small claims courts.[219] If the witness fails to appear, the court can hold the witness in contempt of court.

8.20 SUBPOENAS

At the 2003 Small Claims Courts Conference[220] delegates lamented that the small claims courts do not have the power to subpoena witnesses to provide oral testimony or to bring evidence to court. Sometimes a litigant knows of a witness who can shed light on a case. However, unless

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[217] In its 2015-2016 *Annual Report,* the Law Society of South Africa makes the following observation:
'The Committee took note of the fact that the current training of the clerks operating in the Small Claims Courts was not sufficient and that much time was wasted by commissioners in court when trying to ascertain what the exact nature of the dispute is as set out in the summons. The Committee recommended that senior and experienced commissioners be utilised to assist in the training of the clerks.' See also Settle 'Blame Department for Small Claims Problems' *De Rebus* (September 2009) 5.

[218] HCR38; MCR 26(3).

[219] See also s 20(1) of the Saskatchewan Small Claims Courts Act, 1997 (n178), which provides:
'Any party may apply to have a judge or clerk issue a subpoena to compel a person to give evidence or a subpoena to compel a person to give evidence and bring documents directed to a witness.'

[220] See §3.6.

the litigant can persuade the witness to come to court voluntarily, the witness can, and often does, refuse to do so. It makes sense, therefore, to confer power on the court to subpoena a witness. The Law Society of South Africa supports the proposal.[221]

The difficulty with subpoena powers is what happens when the witness fails to appear. The easy answer is that the court may hold the witness in contempt of court. To this end, s 48 of the SCCA provides:

> '(1) Any person who wilfully insults a commissioner during the session of his court, or a clerk or messenger or other officer present at that session, or who wilfully interrupts the proceedings of a court or otherwise misbehaves himself in the place where the session of a court is held, shall, without prejudice to the provisions of section 4 (3), be liable to be sentenced summarily or upon summons to a fine not exceeding R500 or to imprisonment for a period not exceeding six months, or to such imprisonment without the option of a fine.
> (2) When a commissioner sentences any person under this section, he shall without delay transmit to the registrar of the Supreme Court having jurisdiction for consideration and review by a judge in chambers, a statement, certified by him to be true and correct, of the grounds and reasons for the action taken by him, and shall also furnish to the person sentenced a copy of that statement.'

If witness subpoenas are introduced in the small claims courts, s 48 must be amended. First, there would have to be some mechanism for securing the witness' attendance at court when he or she wilfully fails to appear, or where the witness absents himself or herself from court without a reasonable excuse. Second, the court should be empowered to hold the witness in contempt and to impose an appropriate fine in the absence of a reasonable explanation for his or her dilatoriness. The notion of imprisonment for contempt in the small claims courts should be revisited in its entirety. If imprisonment is ordered, incarceration for a short period is appropriate. The commissioner must be satisfied that the witness can be held in a safe environment. To order imprisonment for up to six months in the small claims court context is harsh. South African prisons are dangerous places.[222] To hold a witness in prison should not be a light decision. A short imprisonment of a few daylight hours can impress on people the importance of complying with a court subpoena. Imposing a fine would also be appropriate..

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[221] Law Society of South Africa *Annual Report* (2015-2016) 61.
[222] Makou, Skosana, Hopkins 'Fact Sheet: The State of South Africa's Prisons' *Daily Maverick* (17 July 2017): https://www.dailymaverick.co.za/article/2017-07-18-fact-sheet-the-state-of-south-africas-prisons/#.WrOjbmaB1qc (last accessed on 14 February 2018).

Section 47 of the Kenyan Small Claims Court Act[223] contains a comprehensive contempt of court provision. It provides:

> '47. A person who—
> [1] *(a)* assaults, threatens, intimates or wilfully insults an Adjudicator, judicial officer or a witness, involved in a case during a sitting or attendance in a court, or while the Adjudicator, judicial officer or witness is travelling to and from a court;
> *(b)* wilfully and without lawful excuse disobeys an order or direction of the court in the course of the hearing of proceedings;
> *(c)* within the premises in which any judicial proceedings are being heard or taken, or within the precincts of the same, shows disrespect, in speech or manner, to or with reference to such proceedings, or any person before whom such proceedings are being heard or taken;
> *(d)* having been called upon to give evidence in a judicial proceeding, fails to attend, or having been sworn or affirmed, refuses without lawful excuse to answer a question or to produce a document, or remains in the room in which such proceedings are being heard or taken after the witnesses have been ordered to leave such room;
> *(e)* causes an obstruction or disturbance in the cause of judicial proceedings;
> *(f)* while judicial proceedings are pending, makes use of any speech or writing misrepresenting such proceedings or capable of prejudicing any person in favour of or against any parties to such proceedings, or calculated to lower the authority taken;
> *(g)* publishes a report of the evidence taken in any judicial proceedings that has been directed to be held in private;
> *(h)* attempts wrongfully to interfere with or influence a witness in judicial proceedings, either before or after he or she has given evidence in connection with such evidence;
> *(i)* dismisses a servant because he or she has given evidence on behalf of a party to judicial proceedings; or
> *(j)* commits any other act of intentional disrespect to any judicial proceedings, or to any person before whom such proceedings are heard or taken,
> commits an offence.
> (2) A police officer may, by order of the Court, take into custody and detain a person who commits an offence under subsection (1) until the court adjourns.
> (3) A person who commits an offence under subsection (1) shall on conviction be liable to imprisonment for a term not exceeding five days, or to a fine not exceeding one hundred thousand shillings, or to both.
> (4) In exercise of its powers under this section, the court shall observe the principles of fair administration of justice set out in Article 47 of the Constitution.'

The above provision is comprehensive for articulating the circumstances under which a litigant or witness that is summoned to appear can be held in contempt of court. The duration of imprisonment, namely five days, indicates that the Kenyan legislature, too, believes that contempt of court should attract short prison sentences. If the South African legislature adopts the Kenyan formulation, s 47(4) of the Kenyan Small Claims Court Act[224] should be adapted in the South African context to refer to s 35 of the Constitution. This section deals with the rights of arrested and accused persons. Furthermore, the maximum fine that a court should impose for contempt of court should be a nominal fee

[223] 2 of 2016.
[224] Ibid.

Section 48(2) of the SCCA is a particularly useful feature to retain even if s 48 is modelled after s 47 of the Kenyan legislation, as it enables a High Court judge to review whether a commissioner has acted appropriately. This will ensure that commissioners do not in moments of frustration impose harsh sentences on people.

PART V

8.21 CONCLUSION

While many aspects of the small claims court procedure are defensible and should be retained, this chapter has shown that there is room for vast improvements. The processes and procedures of the court must be receptive to technological advancements, the influence of the Constitution, and the practical difficulties that litigants face. Procedural bottlenecks must be addressed as these affect access to justice.

CHAPTER 9

ENFORCEMENT OF JUDGMENTS, APPEAL AND REVIEW, AND MISCELLANEOUS ISSUES

9.1 INTRODUCTION

Justice is eroded if a judgment cannot be enforced. It is thus a matter of concern that since the inception of the small claims courts people have complained that it is difficult to enforce a judgment.[1] At the 2003 Small Claims Courts Conference[2] delegates drew attention to the provisions of the SCCA that require small claims courts' judgments to be transferred to the magistrates' courts for enforcement.[3] They argued that the transfer is slow and costly. It was recommended that the small claims courts should have greater power to enforce their judgments.[4]

A hallmark feature of the small claims procedure is that an order that the court makes is final and cannot be appealed. Yet, for a considerable time commissioners and lawyers have argued that an appeals mechanism should be introduced in the small claims courts.

This chapter considers the two issues above. In addition, it considers certain miscellaneous procedural issues, which are often overlooked as being unimportant, but have a bearing on the overall efficiency of small claims courts. The enforcement of judgments of the small claims courts is discussed in part I. The question of whether decisions of the small claims courts should be appealable is confronted in part II. Miscellaneous procedural issues are discussed in part III.

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[1] Scott-MacNab 'The Legal Profession's Declining Image: Is There A Better Way?' *De Rebus* (January 1987) 27.
[2] See §3.6.
[3] See §9.4.
[4] Department of Justice *The Guidelines and National Action Plan for the Small Claims Courts in South Africa* 4

9.2 THE JUDGMENT CREDITOR MUST BE PAID DIRECTLY

Section 38 of the SCCA optimistically provides:

> 'Money payable in terms of a judgment or order of a court, shall be paid by the judgment debtor direct to the judgment creditor.'

At the time of granting judgment, the presiding officer must determine whether the judgment debtor is able to pay the judgment creditor. If the judgment debtor indicates that he or she can pay, the court will direct that payment takes place 'without delay'.[5] Presumably, this means on the same day or on the next business day. Ideally, the judgment debtor should pay the money to the clerk of the court so that the latter can monitor the enforcement of the court's judgment. However, in terms of s 38, the court does not have an oversight function. It seems that the court is required to take the judgment debtor's word and to assume that payment will be made.

The lack of court-connected oversight probably explains why many judgment creditors do not receive any money from judgment debtors or wait a long time before they are paid. On account of thefts at court-based cash offices, it is very unlikely that the SCCA will be amended to task the clerk of the court with receiving money. Surely, a solution needs to be found because the parties are unrepresented. Perhaps the legislation should require that money be paid to the sheriff of the district falling within the jurisdiction of the relevant court. It is common cause that sheriffs operate trust accounts and that money deposited with them is insured against theft.[6] For receiving and transferring money, the sheriffs can be paid a small fee regulated by the tariffs of costs of the small claims courts. Should the money not be paid to the sheriff, the sheriff should inform the court so that the court can take further steps against the judgment debtor.

[5] SCCA, s 38 read with s 39(1).
[6] Sheriffs Act 90 of 1986, s 22(1).

Some official oversight function seems better than none. It also reduces the likelihood of disputes arising about payments received.

9.3 FINANCIAL INQUIRY

Section 39 of the SCCA provides:

> '(1) When a court grants judgment for the payment of a sum of money, the court *shall enquire* from the judgment debtor whether he is able to comply with the judgment without delay, and if he indicates that he is unable to do so, the court *may*, *in camera,*[7] *conduct an inquiry* into the financial position of the judgment debtor and into his ability to pay the judgment debt and costs.
> (2) After such an inquiry the court may –
> *(a)* order the judgment debtor to pay the judgment debt and costs in specified instalments or otherwise;
> *(b)* .....
> *(c)* suspend the order under paragraph *(a)* either wholly or in part on such conditions as to security or otherwise as the court may determine.'[8]

If at the time that judgment is granted, the judgment debtor indicates that he or she cannot pay the judgment debt, the court *may*, in terms of s 39, hold a financial inquiry *in camera.* Although the initial *enquiry* by the court is mandatory, the subsequent financial *inquiry* is not. The purpose of the enquiry is to ask whether the judgment debtor has the means to satisfy the judgment and costs in full.[9] If the enquiry reveals that the judgment debtor is too impoverished to do so, the court has the discretion to hold an inquiry to determine if the debt can be paid in instalments, or if it should suspend the enforcement of the judgment on such conditions as to the payment of security or otherwise as the court may determine.[10]

The idea of interrogating the judgment debtor at the time of granting a judgment was first proposed by the Hoexter Commission. In its *Report*, the Commission stated:

> 'The Commission is firmly of the opinion…there should be provided at the time of the judgment itself a procedure for the immediate determination of the debtor's financial position; and in addition, that the first two stages in the execution process (the issue of the writ and the attachment of the judgment debtor's attachable movable assets) should be made an integral part of the small claims process.' [11]

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[7] *In camera* means that the court will hold the inquiry in private.
[8] Italics and underline supplied to emphasise the distinction between the court's duty to *enquire* from the judgment debtor whether he or she can pay the debt and the *inquiry* into the financial position of the judgment debtor.
[9] SCCA, s 39(1).
[10] SCCA, s 39(2).
[11] *Report* §13.27.

The difficulty with the way that s 39(1) is phrased is that it mandates a court to conduct an *enquiry* without obliging the court to hold the subsequent *inquiry* as contemplated by the section. While the failure to make an enquiry constitutes a breach of the 'categorically imperative provisions of s 39(1)' and thus amounts to 'a gross irregularity that renders proceedings reviewable under s 46*(c)* of the Small Claims Courts Act',[12] the non-holding of what should be the follow-on financial inquiry does not per se impact on the validity of small claims proceedings. However, the failure to hold the financial inquiry may be inconsistent with the spirit of the National Credit Act.[13] In this regard Moosa argues:

> 'Accordingly, the failure to conduct a financial inquiry and the refusal to grant an order under s 39(2)*(a)* for the payment of the debt in instalments is not *per se* an irregularity. However, it is certainly prejudicial to a litigant who is in financial difficulty and is willing but unable to settle the judgment debt without delay. In my view, a gross irregularity would only be present if the cumulative effect of the court's conduct is such that it can be concluded that, based on the facts known to the court, no reasonable decision-maker would have declined to conduct such a financial inquiry or grant an order under s 39(2)*(a)* for the payment of the debt in certain instalments (as the case may be). In such circumstances, the decision is arbitrary or unreasonable and is thus reviewable (see *Geldenhuys v Resident Magistrate, Sutherland* 1914 CPD 62; *Nigrini v Resident Magistrate, Sutherland* 1914 CPD 661).'[14]

The above problem is easy to address. The legislature must amend s 39(1) and replace the word 'may' with 'shall'.

In terms of s 40 of the SCCA, if a financial inquiry is not held, the judgment debtor may within ten calendar days of the court granting the judgment make a written offer to the judgment creditor to pay the debt in instalments. If the latter consents, the clerk of the court 'shall … order the judgment debtor to pay the judgment debt and costs in accordance with his [or her] offer'. The order that is made by the clerk of the court is 'deemed to be an order of the court in terms of section 39.'[15] From s 40 read with s 39(1), it is clear that unless a financial inquiry is held at the time of granting judgment or the judgment debtor requests an instalment arrangement within ten days of the judgment, there is no mechanism for flexibility regarding the payment of the judgment debt. Furthermore, there is no prospect of holding another

[12] Moosa 'Paying a Small Claims Court Judgment Debt in Instalments' *De Rebus* (September 2012) 34.
[13] Ibid 34.
[14] Ibid.
[15] SCCA, s 40.

financial inquiry in the small claims court if the judgment debtor fails to satisfy the judgment after undertaking to do so, or if the judgment debtor fails to abide by an instalment plan. And finally, it seems that if the judgment creditor fails to consent to the written offer in terms of s 40, the court cannot override the judgment creditor's decision, even if it thinks that the judgment creditor is acting unreasonably.

In terms of s 65A of the MCA, if a judgment of a magistrate's court remains unsatisfied for a period of ten days, or if the judgment debtor fails to abide by an instalment plan ordered by the court, the judgment creditor can issue a notice calling on the judgment debtor to appear at court[16] on a specified date for a financial inquiry.[17] If the judgment debtor fails to appear, the court may issue a warrant of arrest to secure the attendance of the debtor at the financial inquiry.[18] The arrest must be conducted 'in accordance with section 35(1)*(d)*[19] of the Constitution'.[20] The purpose of the arrest is to place the judgment debtor on terms and secure the judgment debtor's attendance at court to hold the financial inquiry, and not to incarcerate the judgment debtor for an extended period. The judgment debtor must be brought before a court 'as soon as reasonably possible'[21] to explain[22] his or her non-attendance at the financial inquiry. At the inquiry, the judgment creditor bears the onus of proving the extent to which the judgment debtor is in default of the court's judgment. To this extent, the judgment creditor must file an affidavit supported by documentary evidence, if any.[23]

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[16] The 'court' is not necessarily the court that granted the original judgment, but the court where the debtor resides, carries on business or is employed.
[17] MCA, s 65A(1)*(a)*.
[18] MCA, s 65A(6).
[19] Section 35(1)*(d)* of the Constitution provides:
'Everyone who is arrested for allegedly committing an offence has the right to be brought before a court as soon as reasonably possible, but not later than –
(i) 48 hours after the arrest; or
(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day'.
[20] MCA, s 65A(8)*(a)*. The words 'in accordance with' refer to the principle against delay: see *Jones & Buckle* Act416 (Service 11, 2016). It is submitted that it is unconscionable to hold a person who has been arrested in terms of s 65A overnight. The person should be arrested on the same day as the court hearing.
[21] MCA, s 65A(8)*(a)*.
[22] Section 65A(10) provides that the court may establish the judgment debtor's guilt in a 'summary manner.'
[23] S 65A(4).

There is no reason why s 65A of the MCA cannot be incorporated into the SCCA with the appropriate modifications. This will give the small claims courts more teeth to enforce their judgments. Presently, when a small claims matter is transferred to a magistrate's court in terms of s 41[24] of the SCCA, s 65A of the MCA can be activated, and a financial inquiry can be conducted by the magistrate's court. The problem, however, is that the magistrate's court can award legal costs[25] for holding the financial inquiry and the judgment debtor is entitled to legal representation.[26] This seems to be contrary to the aims and objectives of the small claims courts, which include offering speedy and inexpensive justice.

A judgment debtor should be able to approach a court *at any time* to pay a judgment in instalments. Section 73 of the MCA provides:

> 'The court may, upon application of any judgment debtor…and if it appears to the court that the judgment debtor is unable to satisfy the judgment debt in full at once, but is able to pay reasonable periodical instalments towards satisfaction thereof…,suspend execution against that debtor either wholly or in part on such conditions as to security or otherwise as the court may determine.'

A similar provision should be incorporated into the SCCA. The beauty of such a provision is that s 40 of the SCCA can be deleted because there will be no need to hold the judgment debtor to a time limit, and furthermore, there will be no need for the judgment debtor to obtain the judgment creditor's consent to pay the debt in instalments. The proposed new s 40 should read as follows:

> '40 **[Offer by judgment debtor]** Financial inquiry after judgment
>
> If no order has been made in terms of section 39 (2), **[the judgment debtor may within 10 days after the court has granted judgment for the payment of a sum of money, make a written offer to the judgment creditor to pay the judgment debt and costs in specified instalments or otherwise, and if such an offer is accepted by the judgment creditor, the clerk of the court shall, at the written request of the judgment creditor, accompanied by the offer, order the judgment debtor to pay the judgment debt and costs in accordance with his offer, and such an order shall be deemed to be an order of the court in terms of section 39]** and if the judgment debtor is unable to satisfy the judgment debt in full, a court shall upon notice[27] by the judgment debtor hold a financial inquiry to determine:
> *(a)* whether that judgment debtor should pay the judgment in periodical instalments and the amount thereof; and

[24] See §9.4.
[25] MCA, s 65A(1)*(c)*.
[26] Ibid; see also s 65A(1)*(b)*.
[27] Proceedings on notice are less formal than applications. The judgment debtor would not have to draft a notice of motion or have supporting affidavits. The judgment debtor would give *notice* of proceedings to the court and to the judgment creditor. Of course, the SCCRs should contain a form that sets out the content of the notice.

(b) whether to suspend execution of the judgment against that judgment debtor either wholly or in part and on such conditions as to security or otherwise as the court may determine.'[28]

Furthermore, s 39(2) of the SCCA should be amended to make reference to s 40. At the moment, both sections cover financial inquiries and employ identical wording, but without the cross-reference it creates the impression that the two sections are referring to different things, when in fact the two sections are complementary of each other.

9.4 EXECUTION OF JUDGMENTS BY THE MAGISTRATES' COURTS

Aside from making provision for the judgment debtor to pay the judgment creditor directly and providing for a financial inquiry to determine the judgment debtor's ability to pay the judgment debt, the small claims courts have no further mechanisms to enforce a judgment. Section 41 of the SCCA mandates the magistrates' courts to take the matter further:

'(1) When a court has granted judgment for the payment of money or made an order for the payment of money in instalments, that judgment, in the case of failure to pay the money within 10 days, or that order, in the case of failure to pay an instalment at the time and in the manner determined by the court, shall be enforceable by execution in the magistrate's court having jurisdiction in accordance with the provisions of the Magistrates' Courts Act, 1944 (Act 32 of 1944), and the judgment creditor may proceed as if the judgment was granted in the magistrate's court in his favour for the amount mentioned in the affidavit referred to in subsection (2).

(2) The clerk of the court shall, upon the written application of the judgment creditor accompanied by an affidavit specifying the amount and the costs still owing under the judgment or order and how that amount is arrived at, transmit that affidavit, together with a certified copy of that judgment or order reflecting the nature of the cause of action, to the clerk of the magistrate's court of the district in which the judgment debtor resides, carries on business or is employed, or, if the judgment debtor is a juristic person, of the district in which its registered office or main place of business is situated.

(3) Upon receipt of the documents referred to in subsection (2) the clerk of the magistrate's court concerned shall record the details of the judgment or order concerned and the amount owing mentioned in the affidavit in his registers.'

If the purpose of the small claims courts is to provide speedy and inexpensive justice, then it seems strange that the legislature should so readily relinquish the enforcement of a small claims court judgment to the magistrates' courts, where court processes are significantly more complex, and where legal representation is permitted. As a matter of theory and practice, all the gains made in taking a matter to the small claims court fall flat in the process of enforcing the judgment. It is interesting to note that the Hoexter Commission in its recommendations thought

[28] Words in square brackets signify a deletion from the existing provision and words underlined signify an insertion into an existing provision.

that the small claims courts should, in addition to holding a financial inquiry, issue warrants for the attachment of movable property.[29] In fact, in the original version of the SCCA, s 41 read differently. The section provided:

> '(1) When a court has granted judgment for the payment of money or made an order for the payment of money in instalments, that judgment, in the case of failure to pay the money within 10 days, or that order, in the case of failure to pay an instalment at the time and in the manner determined by the court, shall be enforceable by execution against the movable property and, if insufficient movable property is found to satisfy the judgment or order or the court on good cause shown so orders, against the immovable property of the party against whom such judgment has been given or such order has been made.
> (2) Upon failure to pay an instalment in accordance with an order of court, execution may be levied in respect of the whole of the judgment debt and costs then still unpaid, unless the court, on application by the party that is liable, orders otherwise.'

Section 44 went on to provide:

> '(1) If a court has granted judgment for the payment of a sum of money and the clerk of the court is satisfied that such judgment has remained unsatisfied after the judgment debtor has acted in terms of all the provisions of this Chapter available to him, the clerk of the court shall, upon the written application of the judgment creditor accompanied by an affidavit specifying the amount still owing under the judgment and how that amount is arrived at, transmit a certified copy of that judgment, together with that affidavit, to the clerk of the magistrate's court of the district in which the judgment debtor resides, carries on business or is employed, or, if the judgment debtor is a juristic person, of the district in which its registered office or main place of business is situated.
> (2) Upon receipt of the documents referred to in subsection (1) the clerk of that magistrate's court shall record the details of the judgment concerned and the amount owing mentioned in the affidavit, whereupon the judgment creditor may proceed as if it were a judgment granted in that magistrate's court in his favour for the amount mentioned in the affidavit, subject to the right of the judgment debtor to dispute the correctness of the amount.'

It is clear that the legislature initially empowered the small claims courts to levy execution against movable and immovable property. It went one step further than what was recommended by the Hoexter Commission. Section 44 – the transfer provision – kicked in when the judgment creditor was unsuccessful in recovering a judgment debt and needed to go beyond attachments of property to, for example, obtaining an emoluments attachment order or a garnishee order. In those instances, due to the complex nature of those procedures, the magistrate's court was deemed to be the appropriate forum.[30] To give effect to s 41 of the SCCA, rules 17 to 21 of the SCCRs of 30 August 1985[31] contained detailed provisions to execute against movable and

[29] *Report* §13.27.
[30] See MCR 46 and 47. See also Nienaber *Emoluments Attachment Orders in the South African Law* (Unpublished LLM dissertation, University of Pretoria, 2015).
[31] GN R1893 in *GG* 9909 of 30 August 1985.

immovable property in the small claims courts. The rules also contained Form 3 titled 'Warrant of Execution Against Property.'

By Act 63 of 1989,[32] s 41 of the SCCA was amended to the current version and s 44 was deleted. To match the legislative amendments, the SCCRs were also amended. Rules 19 to 21 and Form 3 were deleted. However, the legislative amendments were not tidy. For example, s 42 of the SCCA was not deleted and still provides:

> '42. Property exempt from execution
> The provisions of section 67 of the Magistrates' Courts Act, 1944 (Act 32 of 1944), shall apply *mutatis mutandis* in respect of a warrant of execution in terms of this Act.'[33]

It is unclear what prompted the policy change that led to the amendment of the SCCA. However, the amendments were not welcomed. Members of the legal profession expressed the opinion that the small claims courts were left toothless to enforce their own judgments.[34] Consequently amendments were sought, but nothing happened. It is time that the SCCA is amended to give the court more teeth to enforce its judgments.

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[32] Small Claims Courts Amendment Act 63 of 1989. The Act came into operation on 20 May 1991.

[33] Section 67 of the MCA provides:

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

(a) the necessary beds, bedding and wearing apparel of the execution debtor and of his family;

(b) the necessary furniture (other than beds) and household utensils in so far as they do not exceed in value the amount determined by the Minister from time to time by notice in the *Gazette*;

(c) stock, tools and agricultural implements of a farmer in so far as they do not exceed in value the amount determined by the Minister from time to time by notice in the *Gazette*;

(d) the supply of food and drink in the house sufficient for the needs of such debtor and of his family during one month;

(e) tools and implements of trade, in so far as they do not exceed in value the amount determined by the Minister from time to time by notice in the *Gazette*;

(f) professional books, documents or instruments necessarily used by such debtor in his profession, in so far as they do not exceed in value the amount determined by the Minister from time to time by notice in the *Gazette*;

(g) such arms and ammunition as such debtor is required by law, regulation or disciplinary order to have in his possession as part of his equipment:

Provided that the court shall have a discretion in exceptional circumstances and on such conditions as it may determine to increase the amounts determined by the Minister in respect of paragraphs *(b)*, *(c)*, *(e)* and *(f)*.'

[34] Department of Justice *Small Claims Court Evaluation* (2 May 2010) 19.

9.5 EXECUTION AGAINST MOVABLES SHOULD BE PERMITTED BUT IT SHOULD NOT BE PERMITTED AGAINST IMMOVABLES

If the SCCA is amended in the future, it should permit the issuing of warrants of execution against movable property.[35] The SCCRs must flesh out the execution process. The rules must stipulate the responsibilities of the sheriff when executing against movable property, as well as the process that must be followed to arrange a sale in execution. The sale in execution must comply with the provisions of the Consumer Protection Act[36] so that the execution debtor is protected from unscrupulous sheriffs and execution creditors. The interests of the execution debtor must be balanced against those of the execution creditor so that both parties are treated fairly. To ensure that the execution debtor is not left indigent, s 67 of the MCA should apply in the small claims courts. At present, s 42 of the SCCA incorporates the provisions of s 67 by reference. To make the SCCA user-friendly to the lay person, the provisions of s 67 should be contained in the Act.[37]

A small claim execution creditor should *not* be able to execute against the execution debtor's *immovable property* in the small claims court. At present, a magistrate's court can issue a warrant of execution against immovable property irrespective of the value of the claim.[38] Following pronouncements of the Constitutional Court,[39] the Rules Board for Courts of Law amended the MCRs[40] and the HCRs[41] to offer better protection to execution debtors when their immovable property is sold in execution. In particular, the sale of immovable property must be subject to judicial oversight.[42] A presiding judge has to determine: whether there is good cause

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[35] See also s 39(1)*(a)* of the Kenyan Small Claims Court Act 2 of 2016.
[36] 68 of 2008. Section 45(1) of the Act states that the term 'auction' includes a sale in execution pursuant to an order of court, to the extent that the order contemplates that the sale is to be conducted by auction. See *South African Sheriffs' Guide* 8/58-8/75.
[37] See n33.
[38] MCR 43 as amended by GN R1272 in *GG* 41257 of 17 November 2017 with effect from 22 December 2017.
[39] *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC); *Gundwana v Steko Development CC* 2011 (3) SA 608 (CC).
[40] MCR 43A.
[41] HCR 46A.
[42] In *Jaftha v Schoeman; Van Rooyen v Stoltz* supra [55] the court held:

to order execution; whether the immovable property in question constitutes the primary residence of the execution debtor; and, if it is the primary residence, whether the sale price of the immovable property pursuant to a sale in execution is fair.[43] Because of these important legislative interventions, it seems that the magistrates' courts are better suited to hear matters involving the execution of immovable property. The magistrates' courts have more time, resources and expertise to determine whether execution is in conformity with constitutional imperatives. Furthermore, the parties are also entitled to legal representation.

Notwithstanding the current powers of the magistrates' courts, it may be unjust to sell a primary residence (a person's home) to settle a trifling outstanding debt. Having a home is fundamental to one's human dignity, freedom and security.[44] Consequently, the SCCA as well as the MCA should be amended to specifically provide that a claim that falls within the monetary jurisdiction of the small claims courts cannot result in the sale in execution of immovable property which is the primary residence of a person. In *Standard Bank of South Africa Ltd v Dawood,*[45] the full bench of the Western Cape High Court drew attention to the following statement in *Jaftha v Schoeman; Van Rooyen v Stoltz:*[46]

> '…the size of the debt will be a relevant factor for the court to consider. It might be quite unjustifiable for a person to lose his or her access to housing where the debt involved is trifling in amount and significance to the judgment creditor.'

A small claims debt may be significant to the execution creditor in terms of obtaining justice. However, a small claim cannot be treated as anything other than 'trifling'. Even if the monetary jurisdiction of the small claims courts is increased as proposed in chapter 6, the reality is that it

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'Judicial oversight permits a magistrate to consider all the relevant circumstances of a case to determine whether there is good cause to order execution. . . . Even if the process of execution results from a default judgment the court will need to oversee execution against immovables. This has the effect of preventing the potentially unjustifiable sale in execution of the homes of people who, because of their lack of knowledge of the legal process, are ill-equipped to avail themselves of the remedies currently provided in the Act.'
See also du Plessis 'Judicial Oversight for Sales in Execution of Residential Property and the National Credit Act' (2012) *De Jure* 532.

[43] MCR 43A; HCR 46A.

[44] See Van der Walt 'Property Law in the Constitutional Democracy' (2017) *Stellenbosch Law Review* 8 at 13.

[45] 2012 (6) SA 151 (WCC) para [33].

[46] Supra.

will always be significantly lower than the other courts. It seems patently unjust for someone to lose his or her home for a few thousand rand. Homelessness does not serve justice: it creates social injustice. It places enormous burdens on the State, which are shared by the rest of society.

It is also debatable whether it is *generally* proper to sell *any* immovable property (primary or non-primary) to satisfy a small claims court judgment. The property clause[47] and the other rights in the Bill of Rights[48] have not been invoked in the case law to prevent the sale of immovable property to satisfy a small claims court judgment. However, one can conceive of a situation where the injustice of selling immovable property to satisfy a small claim is far greater than the injustice of not enforcing a judgment by those means, even if the property is not the execution debtor's primary residence. This issue is controversial however, it may be a useful area for lawmakers to explore as it might assist to prevent a further escalation of socio-economic problems in the country. Land and property rights are fundamental to economic prosperity and social equality. Depriving people of their land rights to satisfy a small claim should not be taken lightly.

9.6 EMOLUMENTS ATTACHMENT ORDERS

It is argued that if the small claims courts cannot execute against immovable property the solution is *not* to be found in the granting of emoluments attachment orders.

In *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services*[49] the Western Cape High Court confronted *inter alia*, the question whether certain provisions of the MCA relating to the granting of emoluments attachment orders were constitutional. In its judgment, the court noted that emoluments attachment orders are classically granted against low-income earners. The court held:

[47] Section 25.
[48] Constitution, Chapter 2.
[49] 2015 (5) SA 221 (WCC).

> 'For debtors who work in low paid and vulnerable occupations, their salaries or wages are invariably their only asset and means of survival. A substantial reduction of this asset has the potential of reducing human dignity.' [50]

The court went on to state that the government must take positive steps to prevent people from being 'impoverished or facing a life of "humiliation and degradation".'[51] Inability to maintain one's family is a limitation to human dignity. The court noted:

> 'Any court order or legislation which deprives a person of their means of support or impairs the ability of people to access their socio-economic rights constitutes a limitation of their right to dignity.'[52]

On a survey of foreign law, the court found that several jurisdictions either cap or place limits on the proportion of an execution debtor's salary that can be attached to satisfy a debt.[53] The court thought that it was opportune for South Africa to introduce similar measures by way of judicial oversight.[54] In this regard, the court held:

> '…the objective conditions in this country with its vast disparities of wealth may result in a "cap" or the proportion of a debtor's salary being attached, impacting differently on the various sectors of our society. If that proposition is correct, judicial oversight would be the only remaining mechanism for dealing with EAOs without compromising the dignity of the poor.'[55]

Following the *Stellenbosch Legal Aid Clinic* case, the legislature passed the Courts of Law Amendment Act.[56] Section 9 of the Act substitutes and replaces s 65J of the MCA. Section 65J deals with emoluments attachment orders. Section 9 of the Courts of Law Amendment Act[57] provides:

> '**Emoluments attachment orders**
> '65J. (1) *(a)* Subject to the provisions of subsection (2), a judgment creditor may cause an order (hereinafter referred to as an emoluments attachment order) to be issued from the court of the district in which the **[employer of the]** judgment debtor resides, carries on business or is employed**[, or, if the judgment debtor is employed by the State, in which the judgment debtor is employed].**
> *(b)* An emoluments *attachment* order –
> (i) **[shall]** must attach the emoluments at present or in future owing or accruing to the judgment debtor by or from his or her employer (in this section called the garnishee), to the amount necessary to cover the judgment and the costs of the attachment, whether that judgment was obtained in the court concerned or in any other court; and
> (ii) **[shall]** must oblige the garnishee to pay from time to time to the judgment creditor or his or her attorney specific amounts out of the emoluments of the judgment debtor in

[50] Ibid [45].
[51] Ibid [41]. The court cited *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA) paras [27]-[32].
[52] Ibid [41].
[53] Ibid [43]-[49].
[54] Ibid [84].
[55] Ibid [50].
[56] 7 of 2017. The Act has not yet come into operation.
[57] Ibid.

accordance with the order of court laying down the specific instalments payable by the judgment debtor, until the relevant judgment debt and costs have been paid in full.

(1 A) *(a)* The amount of the instalment payable or the total amount of instalments payable where there is more than one emoluments attachment order payable by the judgment debtor, may not exceed 25 per cent of the judgment debtor's basic salary.

(b) For purposes of this section, "basic salary" means the annual gross salary a judgment debtor is employed on divided by 12 and excludes additional remuneration for overtime or other allowances…'[58]

The Courts of Law Amendment Act[59] lays down a detailed procedure for the execution creditor to follow to obtain the 'authorisation' of the court before it can start the process of obtaining an emoluments attachment order. During the authorisation process, the court must determine whether the execution debtor is subject to other emoluments attachment orders, whether it is 'just and equitable that an emoluments attachment order be issued' and whether 'the amount is appropriate'.[60] Once the court authorises the emoluments attachment order, the execution creditor can start the process of having one issued. The execution debtor and all other creditors must be joined to the proceedings.[61] The execution debtor can object to the granting of an emoluments attachment order if he or she disputes the amount claimed or if he or she believes that '25 per cent of the judgment debtor's basic salary is already committed to other emoluments attachment orders and that the debtor will not have sufficient means left for his or her own maintenance or that of his or her dependants.'[62] The court is empowered to rescind emoluments attachment orders or adjust payment amounts if the court is satisfied that the execution debtor is overcommitted to such orders.[63]

The Courts of Law Amendment Act[64] introduces much needed changes to the law to protect execution debtors from unscrupulous execution creditors. The level of engagement required by the court is exacting, as well as time-consuming. Consequently, it would be inappropriate for small claims courts to be involved with emoluments attachment orders. The process is too

[58] Words in square brackets signify deletions from the existing provision, and words in underline signify insertions.
[59] 7 of 2017.
[60] MCA, s 57(2B) as amended by the Courts of Law Amendment Act 7 of 2017.
[61] Ibid.
[62] MCA, s 65J(2C) as amended.
[63] MCA, s 65J(2E) as amended.
[64] 7 of 2017.

complex for the small claims courts. The SCCA specifically provides that the small claims courts should not be involved in complex legal matters.[65]

9.7 CONCLUDING REMARKS

When it comes to the enforcement of small claims judgments, it appears that the small claims courts have limited options. Because of recent legislative amendments influenced by constitutional jurisprudence, it would be unwise to permit the small claims courts to order execution against immovable property or to grant emoluments attachment orders. This must be left to the magistrates' courts. However, small claims courts could order warrants of execution against movable property. To this end, the SCCA and the SCCRs must be amended to take into account the considerations mentioned earlier. The s 39 financial inquiry can be shored up to give the court wider latitude to call for such inquiries. Direct payments, too, can be improved either by involving the court – provided that safety concerns at court-based cash offices can be addressed – or by involving the sheriff of the court to receive money and to pay judgment creditors. Leaving payments in the hands of judgment debtors without some oversight is a recipe for laxity.

PART II

APPEAL AND REVIEW

9.8 NO APPEAL BUT REVIEW PERMITTED

One of the hallmark features of the small claims courts is contained in s 45 of the SCCA. According to the provision a decision of the court is 'final' and 'no appeal shall lie from it.'

Section 46 allows a party to take a matter on review and sets out the grounds of review. The section states:

[65] SCCA, s 23.

> 'The grounds upon which the proceedings of a court may be taken on review before a provincial or local division of the Supreme Court of South Africa are –
> *(a)* absence of jurisdiction on the part of the court;
> *(b)* interest in the cause, bias, malice, or the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, on the part of the commissioner; and
> *(c)* gross irregularity with regard to the proceedings.

Because the law relating to review is settled in our law and is uncontentious in the small claims courts,[66] there is no need to consider this aspect any further in this thesis, save to state that further recommendations were made in chapter 4 to shore up the review process.[67]

9.9 THE HOEXTER RECOMMENDATIONS

The Hoexter Commission *Report* paid considerable attention to the issue of appeal and review in the small claims courts. The Commission considered foreign jurisprudence and found that countries take different approaches. Some allow for appeals and others do not. Comparative law was thus unhelpful to definitively determine whether a right of appeal should be permitted. Ultimately, the Commission opted for an approach that was most pragmatic in the South African context. The Commission concluded:

> 'Having given anxious consideration to the matter, the Commission has arrived at the conclusion that there should be a strong element of finality about the decisions of the small claims court, and that there should be no right of appeal from its judgments.'[68]

The Commission noted that many small claims courts litigants are poor, ill-educated and unsophisticated.[69] In the mind of the Commission:

> 'To afford a system of appeal to a higher tribunal or to a series of higher tribunals would … inevitably transform a simple, swift and inexpensive legal process into a cumbersome, slow and costly one.'[70]

That the small claims courts are not courts of record was a further reason to limit the right of appeal.[71] As long as presiding officers apply their minds honestly to a matter and apply the rules

[66] For a full discussion of review see Cilliers, Loots, Nel *Herbstein & van Winsen The Civil Practice of the High Courts of South Africa* chapter 40 (hereinafter referred to as '*Herbstein & van Winsen*').
[67] See §4.3.
[68] *Report* §13.35.
[69] Ibid.
[70] Ibid.
[71] Ibid §13.35.

of natural justice by for example abiding by the *audi alteram partem* rule, the Commission felt that they should be free to decide cases in their own way.[72]

To mitigate the lack of the right of appeal, the Commission opted for a right of review because the denial of a proper hearing undermines the judicial process.[73] The Commission stated:

> '…the terms of paragraphs *(b)* and *(c)* of the section are sufficiently wide to provide adequate redress by way of review to an aggrieved litigant in a small claims court who complains that his case has not been fairly determined either because of the existence of some or other improper motive on the part of the adjudicator, or because the adjudicator has failed to apply his mind at all to the issue in the case.'[74]

The Commission treated the lack of jurisdiction of the court as a review issue as the Commission felt that it would result in a miscarriage of justice if the small claims court exerted influence over matters in which it lacked jurisdiction.[75]

9.10 CALLS FOR A RIGHT OF APPEAL

At the 2003 Small Claims Courts Conference [76] some legal practitioners serving as commissioners asked the Department of Justice to reconsider s 45 of the SCCA. They requested a *sui generis* appeal procedure. They proposed that a panel of three senior commissioners at each small claims court should hear appeals. When prompted for the reason for the submission, commissioners pointed out that many commissioners rendered incorrect decisions because they either lacked knowledge of the law or were improperly trained to conduct trials in the small claims courts.

The demand for an appeal procedure has not died away because on 28 November 2017 the Law Society of South Africa addressed a letter to the Rules Board for Courts of Law stating:

> 'The [Small Claims Courts] Act does not offer the parties a right to appeal against the Commissioner's decision. Section 46 of the Act makes provision for the proceedings of a small claims court to be taken on review before a provincial or local division on the grounds listed in the Act. This process may however be a costly exercise for a matter that falls within the jurisdiction of the small claims court. It is accepted that: "*in a South African small claims court many of the litigants will be poor, ill-educated and unsophisticated people*." (*Chrish v Commissioner- Small Claims Court- Butterworth and Others*

[72] Ibid §13.36.
[73] Ibid §13.37.
[74] Ibid §13.39.
[75] Ibid §13.37.
[76] See §3.6. Mndebele 'Small Claims Courts Not 100% Operational' *De Rebus* (July 2008) 7.

> (774/2005) [2007] ZAECHC 114) Given this, it is unlikely that an aggrieved litigant will be in position to take a judgment that has been issued in a small claims court on review.
>
> The LSSA recommends the inclusion of a *sui generis* type of appeal process whereby the decision of a Commissioner can be taken on appeal to a Tribunal consisting of two or three senior Commissioners who will then have the power to upset the decision of the first Commissioner and to replace it with a decision of its own, if necessary. The grounds for review are set out in section 46 of the Act and this can potentially remain unchanged. The implication is that litigants, who have approached the small claims court to resolve a dispute, will have a feasible option at their disposal to have a matter reviewed, if the grounds for review are present.
>
> The appeal can result in the re-hearing of a matter. New Zealand's Disputes Tribunal Act, 1988 introduces re-hearings as in [*sic*] addition to an appeal process. In essence, its Disputes Tribunal may in limited instances, upon the application of a party to any proceedings, order the rehearing of a claim, to be heard upon such terms as it thinks fit. Applications for re-hearings must be made within a specified period of the order having been made.'[77]

Apparently the legal profession is persisting with the idea of creating a panel of practitioners at each court to preside over appeals. The merits of the proposal will be discussed below.[78]

9.11 CONSTITUTIONALITY OF PRECLUDING APPEALS

(a) Crish v Commissioner Small Claims Court, Butterworth[79]

In *Crish* the applicant argued that s 45 of the SCCA was unconstitutional because it precludes a party from taking a matter on appeal. Instead of building an argument based on s 34 of the Constitution[80] – the constitutional peg on which many issues of procedure have been challenged[81] – the applicant inexplicably relied on s 35.[82] It is therefore unsurprising that the court expressed its dismay with the way in which the case was argued.[83] In any event, the court opted to determine whether s 45 constitutes an unjustifiable limitation of a constitutional right.

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[77] For the contents of the letter, see: http://www.lssa.org.za/upload/files/LSSA%20Comments/LSSA%20Comments%20%20SMALL%20CLAIMS%20COURTS%20ACT%20AND%20RULES%2029%20November%202017.pdf (last accessed on 7 January 2018).

[78] §9.12.

[79] [2007] ZAECHC 114 (26 July 2007) (hereafter referred to as '*Crish*').

[80] Section 34 of the Constitution provides:
'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.'

[81] For example, see *Malachi v Cape Dance Academy International (Pty) Ltd* 2010 (6) SA 1 (CC); *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* 2011 (3) SA 1 *(CC)*; *Bid Industrial Holdings (Pty) Ltd v Strang* 2008 (3) SA 355 (SCA).

[82] Section 35 deals with the rights of arrested, detained and accused persons.

[83] *Crish v Commissioner Small Claims Court Butterworth* supra [31].

In other words, the court applied the limitations analysis in s 36 of the Constitution.[84] The court referred extensively to the reasons advanced by the Hoexter Commission for excluding the right of appeal in the small claims courts.[85] After considering these reasons, the court found that the legislature acted reasonably in excluding the right of appeal.[86]

The difficulty with the *Crish* case is that the court did not do a particularly good job of interrogating the issues. Perhaps, blame must be attributed to the applicant arguing the matter before the court. The constitutionality of barring a right to appeal therefore requires further consideration.

(b) Does a litigant have a right of appeal?

A distinction must be drawn between civil cases and criminal cases. Because the SCCA bars a civil appeal, the question for the purposes of *this* discussion is whether a small claims court litigant can claim the right to a *civil* appeal.

Over the last century the United States Supreme Court has consistently refused to recognise a right to a civil appeal.[87] The Supreme Court takes the approach that US States do not have a constitutional obligation to offer a civil appeal. As noted in *Cobbledick v United States:*[88]

> 'Since the right to a judgment from more than one court is a matter of grace, and not a necessary ingredient of justice, Congress, from the very beginning, has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a

[84] Section 36 of the Constitution provides:
'(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, 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; and
(e) less restrictive means to achieve the purpose.
(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'
[85] *Crish v Commissioner Small Claims Court Butterworth* supra.
[86] Ibid [36].
[87] Robertson 'The Right to Appeal' (2013) 91 *North Carolina Law Review* 1219 at 1233.
[88] 309 U.S. 323 (1940) 325. See also *Pennzoil v. Texaco Inc* 481 U.S. 1 (1987) at 31fn4; *Griffin v Illinois* 351 U.S. 12 (1956) at 18.

> succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed.'[89]

In the US States where the right of appeal has been recognised as a *constitutional obligation*, the duty arises within the context of criminal cases and not civil cases. Most States, however, offer an appeal procedure in civil cases, because it encourages good decision-making and legitimises the administration of justice.[90] But it must be emphasised that an appeal procedure is not seen as a *sine qua non* for the right to due process in civil cases.[91]

There is no doubt that having a civil appeal procedure is a good thing. Appeals provide a safeguard to correct legal and factual errors;[92] encourage the development and refinement of legal principles;[93] increase uniformity and standardisation in the application of legal rules;[94] and promote respect for the rule of law.[95] However, it is clear that the overarching justification for an appeal procedure lies not in correcting errors of law in individual cases. The purpose of an appeal process is to advance the administration of justice as a whole. The vindication of an individual's rights is simply one aspect when determining whether to grant leave to appeal. The court has to be satisfied that it is in the interests of justice to permit a party to approach a second-tier court to reconsider a case. It is thus acceptable for the legislature and the court to impose limits on when matters may be appealed.[96] This explains why, for example, South African civil procedure requires a litigant to make application for leave to appeal in the magistrates' courts and the High Court and does not grant litigants an automatic right of appeal.[97]

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[89] Italics supplied.
[90] See Arkin 'Rethinking the Constitutional Right to a Criminal Appeal' (1992) 39 *UCLA Law Review* 503 at 505.
[91] Robertson (n87) and the authorities there cited.
[92] Oldfather 'Error Correction' (2010) 85 *Indiana Law Journal* 49.
[93] Bruhl 'Deciding When to Decide: How Appellate Procedure Distributes the Costs of Legal Change' (2011) 96 *Cornell Law Review* 203 at 214.
[94] Robertson (n87) 1225.
[95] Heise 'Federal Criminal Appeals: A Brief Empirical Perspective' (2009) 93 *Marquette Law Review* 825 at 827.
[96] It is interesting to note that Article 14 (5) of the International Covenant on Civil and Political Rights provides that '[e]veryone convicted of a crime shall have the right to his conviction being reviewed by a higher tribunal according to law.' The Covenant does not mention civil cases.
[97] *Herbstein & van Winsen* 1175ff.

In *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd,*[98] Schreiner JA had the following to say about the perceived right of appeal:

> 'Where a hierarchy of Courts exists it is perhaps natural to regard the denial of what we are accustomed to call the right of appeal from any order whatsoever made by a lower Court as, to some extent, a refusal of justice. Under an ideal system it might be expected that whatever error an inferior Court has committed would be promptly correctable by a higher Court, and so on until the highest tribunal in the pyramid had pronounced upon the matter. But history shows that it has generally been thought advisable to limit appeals in certain respects. A wholly unrestricted right of appeal from every judical pronouncement might well lead to serious injustices. For, apart from the increased power which it would probably give the wealthier litigant to wear out his opponent, it might put a premium on delaying and obstructionist tactics.'[99]

The statement above provides a cost-benefit perspective on the question of whether it is feasible to conduct an appeal. A cost-benefit analysis, it is submitted, is consistent with ss 34 and 9(1)[100] of the Constitution. In *Mathews v Eldridge,*[101] the Supreme Court of the United States adopted a three-factor balancing test for determining 'what process is due' in civil matters. According to *Mathews,* the court has to weigh: (i) 'the private interest that will be affected by the official action'; (ii) 'the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards'; and (iii) 'the Government's interest, including function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'[102] The *Mathews* test essentially applies a cost-benefit analysis to procedural due process because the court noted that:'[a]t some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased insurance that the action is just, may be outweighed by the cost.'[103]

The private interest that is protected by an appeal process is that the process allows errors to be corrected and, as such, protects litigants from being wrongfully deprived of their property (including money). There is no doubt that in the small claims court context, incorrect decisions

[98] 1948 (1) SA 839 (A).
[99] Ibid at 868-869.
[100] Section 9(1) provides: 'Everyone is equal before the law and has the right to equal protection and benefit of the law.'
[101] 424 U.S. 319 (1976) (hereafter referred to as '*Mathews'*).
[102] Ibid at 335.
[103] Ibid 348.

will deprive people of their property. This is even more problematic for the defendant because the plaintiff as the principal litigant chooses the forum and unilaterally deprives the defendant of the opportunity to appeal the decision.

However, there is no empirical or other hard evidence to prove that there is a significant risk of incorrect decision-making. There is no statistical or other information to suggest that incorrect decision-making affects defendants more than plaintiffs and vice versa. At most, there is anecdotal evidence to suggest that presiding officers make mistakes of law and incorrectly apply the law to the facts of a case. But anecdotal evidence in itself might not be sufficient to persuade a court that the lack of an appeal process poses a disproportionate risk of incorrect decision-making. It also seems that the risk of poor decisions can be significantly ameliorated if commissioners receive adequate training and mentoring. It has already been established that the training of commissioners is a fundamental problem in the small claims courts.[104] The process is thus not inherently problematic. It is the logistical arrangements to facilitate the optimal functioning of the courts that are shaky. Having regard to the aims and objectives of small claims courts, the legislature has acted reasonably to limit the right of appeal.

As far as defendants are concerned, it seems that if the MCA was amended to make provision for a small claims court track,[105] and if magistrates were permitted to refer matters to that track in appropriate cases, this will level the playing field between plaintiffs and defendants. The plaintiff will no longer have the exclusive choice to decide whether a matter should be heard by the small claims court, and therefore will not have a unilateral right to deprive the defendant of the ability to appeal. Like the position in England and Wales,[106] if the matter falls within the jurisdiction of the small claims court, the magistrate should be able to refer the matter to that court.

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[104] See chapters 3 and 5.
[105] See §4.7.
[106] Sime *A Practical Approach to Civil Procedure* 211-212.

If one applies a cost-benefit analysis, there is no doubt that the introduction of an appeal process in the small claims courts will escalate costs for the litigants and the State. Presently, only the High Court may review decisions of the small claims courts. The same would apply if appeals were permitted. A review application is already costly because the litigants have the option to instruct attorneys and advocates to represent them. Presumably, the same would apply if an appeal process was introduced. It is also not in the State's interest to tie up precious and costly judicial time to hear appeals emanating from the small claims courts.

On the *Mathews* test, it does not appear that the lack of an appeal process in the small claims courts interferes with litigants' right to equality before the law as contemplated in s 9(1) of the Constitution or the right of access to courts entrenched in s 34. It is safe to bet that even if there is some infringement, the infringement would survive the Constitution's s 36 limitations analysis for the reasons discussed above.

9.12 THE LAW SOCIETY'S RECOMMENDATIONS

The Law Society's recommendation to introduce a *sui generis* appeal process poses several challenges. Firstly, lower courts do not have appellate jurisdiction. Were the small claims courts to hear their own appeals, it would mark a fundamental departure from the way in which appeals are heard in South Africa. This does not suggest that the law cannot be changed, but it would mean that the SCCA and SCCRs would require amendment to facilitate such a process. One might also have to rethink the jurisdiction of lower courts to not only hear appeals but also review proceedings.

Secondly, it is unclear what impact appellate panels will have on the institutional culture of the small claims courts. It is already difficult to recruit volunteer commissioners in the small claims courts. There is a further risk that practitioners will be reluctant to serve as commissioners if

they know that their decisions are subject to appeal by their peers. Legal professionals are always concerned about reputational harm.

Thirdly, there is no indication what level of expertise members of the appellate panel should have and how they would determine which cases are ripe for appeal. Presumably, presiding officers would have to provide written reasons for their decisions. Would the requirement of written reasons not escalate the burden of serving in the courts?

Fourthly, the introduction of an appeal process raises the spectre that litigants will abuse the process, and that litigants will effectively expect their cases to be heard *de novo.* Every losing litigant might very well, for lack of understanding of the outcome of a case, want a second bite of the cherry.[107] This would cause enormous bottlenecks in a process predicated on the quick finalisation of matters.

One alternative is to empower the magistrates' courts to hear small claims court appeals, and to limit the right of appeal to mistakes of law only.[108] This may solve the problem addressed in the second point above. It may also partially resolve the problem in the fourth point because to limit an appeal to a question of law would not only reduce instances of appeal, but would also prevent a rehearing of evidence.[109] However, it would not solve the issue of the escalation of costs and how appeals would affect the duties of the presiding officer and the processes of the small claims court that hears a matter at first instance.

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[107] See Datnow 'A Sad Take of Harmful Business Practices in the Small Claims Court' *De Rebus* (September 1998) 26 at 27.

[108] Section 22 of the Zambian Small Claims Courts Act, Cap 47 provides that a decision of the small claims court may be appealed to the High Court on a question of law only. In New Brunswick, Canada, a small claims litigant can appeal a matter to the Queen's Bench on a question of law only. See New Brunswick Regulation 2012-103 under Small Claims Act (O.C 2012-383).

[109] It is interesting to note that in Ontario, Canada a party can request a new trial within 30 days of judgment, but only if he or she can show that there was arithmetical error in the calculation of damages, or if the applicant can show that it is in possession of new evidence that was not available at the time of the original trial and could not reasonably have been expected to be available at that time. See Rule 17.04 Ontario Regulation 258/98, Rules of the Small Claims Court.

A further limitation that could be placed on the right of appeal is to grant the right to the defendant only. In many jurisdictions, only the defendant (not the plaintiff) is permitted to appeal a small claims court judgment. In South Africa it would make sense to have such a rule, because currently the plaintiff has the exclusive right to unilaterally waive of the right of appeal by choosing to sue in the small claims court. By conferring a right to appeal on the defendant only would reduce the prejudice suffered by the defendant.

A key feature of the small claims court is that it provides speedy and cheap justice. The moment one introduces an appeal process, a salutary feature of the small claims court flies out of the window.

PART III

MISCELLANEOUS ASPECTS

9.13 JUDGMENT AND COSTS

According to s 34 of the SCCA:

> 'A court may, after the hearing of an action, grant –
> *(a)* judgment for the plaintiff in respect of his claim in so far as he has proved it;
> *(b)* judgment for the defendant in respect of his defence or counterclaim in so far as he has proved it;
> *(c)* absolution from the instance, if the court is of the opinion that the evidence does not enable it to give judgment for either party;
> *(d)* such judgment as to costs contemplated in section 37 as may be just;
> *(e)* an order, on such conditions as the court may deem fit, against the party for whom judgment has been granted, deferring wholly or in part further proceedings upon the judgment for a specified period pending arrangements by the other party for the satisfaction of the judgment.'

The small claims court can make limited costs orders, namely, 'court fees', the 'prescribed amount for the issue of the summons' and 'fees and travelling expenses of the messenger of the court.'[110] The reference to 'court fees' and the 'prescribed amount for the issue of the summons' is a throwback to a time when these fees were paid in revenue stamps. With the abolition of

[110] SCCA, s 37.

revenue stamps in 2009 these fees are no longer payable, and hence these provisions are redundant.[111] Furthermore, the reference to the 'messenger of the court' should be amended to read 'sheriff of the court' as the term 'messenger' is outdated.[112]

If the small claims court is given the power to subpoena witnesses,[113] it must be determined whether the court should grant witness fees. Witness fees are permitted in the magistrates' courts and the High Court. [114] In those courts witnesses are remunerated at a set rate to cover the cost of their travelling expenses and loss of income for having to attend court. To permit witness fees in the small claims courts will increase the cost of litigation. To counter this, the courts should only subpoena witnesses when it is necessary and if there are no other ways of taking the evidence, for example, by telephone[115] or other means.

9.14 DEFAULT JUDGMENT AND JUDGMENT BY CONSENT

Default judgment is a well-known concept in the South African law of procedure. Default judgment is usually granted where the defendant fails to participate in litigation or consents to judgment.[116] It should thus come as no surprise that s 35 of the SCCA provides:

> '(1) If a defendant, upon a summons having been served on him in terms of section 29 –
> *(a)* admits liability and consents to judgment in writing; or
> *(b)* fails to appear before the court on the trial date or on any date to which the proceedings have been postponed,
> the court may, on *application* by the plaintiff, grant judgment for the plaintiff in so far as he has proved the defendant's liability and the amount of the claim to the satisfaction of the court, and the court may dismiss any counterclaim by the defendant.
> (2) If a plaintiff fails to appear before the court on the trial date or on any other date to which the proceedings have been postponed, the court may, on application by the defendant –
> *(a)* *dismiss* the plaintiff's claim: Provided that the plaintiff may again institute an action for that claim with the consent of the court; and
> *(b)* with *regard* to a counterclaim, grant judgment for the defendant in so far as he has proved the plaintiff's liability and the amount of the counterclaim to the satisfaction of the court.'[117]

[111] Revenue stamps were demonetised by GN 360 in *GG* 32059 of 27 March 2009.
[112] See Sheriffs Act 90 of 1986.
[113] See §8.20.
[114] MCA, s 51*bis;* SCA, s 37.
[115] See §8.17.
[116] In the High Court and the magistrates' courts default judgment is granted where the defendant *(a)* fails to enter an appearance to defend the legal proceedings; *(b)* fails to deliver a plea after being asked to do so in terms of a notice of bar; *(c)* consents to judgment; or *(d)* fails to turn up at a trial: Peté, Hulme, du Plessis et al *Civil Procedure: A Practical Guide* at 206-212.
[117] Italics supplied.

The reference to 'application' in s 35 is confusing. In the magistrates' courts, a plaintiff seeking default judgment fills in a 'request' for default judgment[118] and attaches to the request documentary evidence to prove his or her claim.[119] If the magistrate[120] is satisfied that the requirements for default judgment have been met and that the plaintiff has a claim, the court will grant judgment in chambers. The plaintiff does not have to appear before the magistrate. The small claims courts procedure does not allow for applications in the traditional sense, because there is no equivalent to MCR 55 or HCR 6 in the small claims courts. Unlike the MCRs,[121] the SCCRs do not contain a pro forma 'application' for default judgment. From the tenor of the SCCA, it seems that the court hears the 'application' for default judgment in open court and the plaintiff is required to address the court orally and not on paper.[122] The reference to 'application' thus means something completely different to what one would expect in the magistrates' courts or the High Court. It is submitted that the word 'application' in the section should be replaced with the word request.

To obtain default judgment in the small claims court, the plaintiff has to come to court on the trial date. If the defendant does not appear at the trial, the court essentially determines whether default judgment should be granted and asks the plaintiff to satisfy the court that he or she has a claim. The court will not grant default judgment as an administrative process. Given that parties are unrepresented in the small claims court, having an open-court appearance at which the plaintiff's claim is interrogated is appropriate. The same applies where the defendant consents to judgment. As noted earlier, judgment against the defendant on the basis of consent

[118] MCR 12(1)*(a)*.
[119] Ibid.
[120] If the claim is for a debt or a liquidated amount, the registrar or clerk of the court will receive the request and may even grant judgment (MCR 12(3A)), provided that the claim is not based on the NCA or the Credit Agreements Act 75 of 1980. If these Acts apply, the matter must be referred to a magistrate (MCR 12(5)). A request for default judgment based on an illiquid claim must be referred to a magistrate.
[121] MCR 12(1)*(a)* provides that the 'request' for default judgment must be 'in writing similar to Form 5 of Annexure 1…'.
[122] Bredenkamp *The Small Claims Court* 38.

should not be granted lightly.[123] It is, therefore, important for the court to interrogate the soundness of the consent to judgment in open court and for the plaintiff to prove by oral and documentary evidence that he or she is entitled to judgment.

The use of permissive language in s 35(1) means that the court is not obliged to grant default judgment. Nothing precludes the court from, for example, postponing the case so that enquiries can be made as to why the defendant did not arrive at court, or to give the plaintiff an extension of time to bring appropriate evidence so that default judgment may be granted in due course. The permissive language should be supported and retained for another reason: if the court has the power to order alternative forms of service as was suggested in chapter 8,[124] the permissive language will enable the court to postpone an application for default judgment so that the summons may be served by alternative means, thereby securing the attendance of the defendant at court.

Section 35(2) seems pragmatic. It protects defendants from vexatious proceedings. In ordinary litigation, if the plaintiff fails to appear at court on the trial date, the court can dismiss the plaintiff's action and grant the defendant wasted costs. Because costs are not permitted in the small claims courts, the subsection provides that where the plaintiff's claim is dismissed for failure to appear on the trial date, the plaintiff may reinstitute the action if he or she obtains the 'consent' of the court. The consent thus serves as a mechanism to restrain plaintiffs from abusing the court process. However, it is unclear how the consent must be obtained, given that there is no formal application procedure in the small claims courts. Does the plaintiff write a letter to the court concerned seeking leave to reinstitute the action? What criteria will the court apply before granting such consent? The SCCRs must flesh this aspect out more clearly. A further and related problem would arise where the plaintiff simply takes the claim to another

[123] See §8.10.
[124] §8.13.

small claims court of concurrent jurisdiction and reinstitutes the action. Would the new court have a way of determining whether a previous claim on the same facts was instituted in another court? Presumably, the defendant would object to the reinstitution of the claim. However, would an unrepresented litigant know about this technical defence? Suddenly, the pragmatism of s 35(2) leaves more questions than answers. Perhaps, the way to overcome the difficulty is to delete '[p]rovided that the plaintiff may again institute an action for that claim with the consent of the court.'

9.15 RESCISSION AND VARIATION OF JUDGMENT

Section 36 of the SCCA provides:

> 'The court may, upon application by any person affected thereby or, in a case contemplated in paragraph *(c)* also *suo motu* –
> *(a)* rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted, provided the application for set-down for hearing is made on a date within six weeks after the applicant first had knowledge of the judgment;
> *(b)* rescind or vary any judgment granted by it which was void *ab origine* or was obtained by fraud or as a result of a mistake common to the parties, provided the application is made not later than one year after the applicant first had knowledge of the voidness, fraud or mistake;
> *(c)* correct patent errors in any judgment, provided, in the case of an application, the application is made not later than one year after the applicant first had knowledge of any errors.'

Section 36 is modelled after s 36 of the MCA. Consequently, the interpretation of s 36 of the MCA is apposite in the context of s 36 of the SCCA.[125] It is thus not necessary to discuss trite principles, save to state that the presiding officer will proceed inquisitorially in the small claims court to determine whether the party seeking rescission or variation of a judgment is entitled to the relief sought. The discussion below will be restricted to particular issues affecting the small claims courts.

Like s 35 of the SCCA,[126] s 36 makes reference to an 'application'. However, as noted before, neither the SCCA nor the SCCRs contain dedicated provisions for applications. It is thus unclear how the application in terms of this section must be brought before the court. In the

[125] *Jones & Buckle* Act 245ff (Service 14, 2017).
[126] See §9.14.

magistrates' courts and the High Court, an application for rescission of judgment is brought by notice and is supported by affidavit(s). The small claims courts' procedures, as they currently stand, are vague.

Unlike the position in the magistrates' courts,[127] there is no indication in the small claims courts' legislation as to what the party must show when making application for rescission or variation of a judgment. Presumably, the common-law requirements for rescission and variation of judgment would apply.[128] However, this comes as cold comfort to the unrepresented litigant, because the common-law principles in this area are quite complex. To assume that the unrepresented litigant will be able to extrapolate the common-law principles on his or her own is thus a tall order. The rules should give some guidance about what the 'application' should contain, for example, that the party must explain why he or she failed to appear at the trial and the nature of the defendant's defence to the plaintiff's claim.[129] It would also make sense for the rules to contain a pro forma 'application' for rescission or variation of a judgment. This recommendation is not far-fetched given that the legislature recently saw fit to include in the Courts of Law Amendment Act[130] a pro forma application for 'review of default judgment' in the magistrates' courts and the High Courts.[131] The legislature enjoined the Rules Board for Courts of Law to draft further pro forma precedents for rescission of judgment applications in the magistrates' courts and the High Courts.[132] Something similar could be formulated for the small claims courts.

A significant issue with s 36 of the SCCA is that the section does not make provision for rescission of judgment by consent or where the judgment debtor can show that the debt has

[127] MCR 49.
[128] See *Herbstein & van Winsen* 929ff.
[129] See MCR 49(3).
[130] 7 of 2017. This Act has not yet come into operation.
[131] Ibid, Schedule.
[132] Ibid, s 14.

been paid off. The Courts of Law Amendment Act[133] amends s 36(2) of the MCA[134] and inserts s 23A into the SCA.[135] In terms of the amendments, if a judgment creditor consents to a rescission of a default judgment, the court may rescind the judgment. Furthermore, even if the judgment creditor refuses to consent, the judgment debtor may nevertheless apply to the court to rescind the judgment if he or she satisfies the court that the debt plus interest was paid. The purpose behind these provisions is, firstly, to encourage judgment debtors to pay their debts and secondly, to assist judgment debtors to have their negative credit profiles expunged. Given the problems with enforcing small claims judgments, it seems like a good idea to align the

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[133] 7 of 2017.

[134] Section 2 of the Courts of Law Amendment Act provides:
'Section 36 of the Magistrates' Courts Act, 1944, is hereby amended –
(a) by the substitution for subsection (2) of the following subsection:
"(2) If a plaintiff in whose favour a default judgment has been granted has **[agreed]** consented in writing that the judgment be rescinded or varied, a court [**must**] may rescind or vary such judgment on application by any person affected by it."; and
(b) by the addition of the following subsections:
"(3)*(a)* Where a judgment debt, the interest thereon at the rate granted in the judgment and the costs have been paid in full, whether the consent of the judgment creditor for the rescission of the judgment has been obtained or not, a court may, on application by the judgment debtor or any other person affected by the judgment rescind that judgment.
(b) The application contemplated in paragraph *(a)* –
(i) must be made on a form which corresponds substantially with the form prescribed in the rules;
(ii) must be accompanied by reasonable proof that the judgment debt, the interest and the costs have been paid;
(iii) must be accompanied by proof that the application has been served on the judgment creditor, at least 10 court days prior to the hearing of the intended application;
(iv) may be set down for hearing on any day, not less than 10 court days, after service thereof; and
(v) may be heard by a magistrate in chambers.
(4) A court may make any cost order it deems fit with regard to an application contemplated in paragraph *(a)*."'
[Words in square brackets signify deletions from existing provisions and underlined words indicate an insertion.]

[135] Section 14 of the Courts of Law Amendment Act 7 of 2017 inserts s 23A into the SCA and reads as follows:
'"Rescission of judgment with consent of plaintiff or where judgment debt has been paid
23A. (1) If a plaintiff in whose favour a default judgment has been granted has consented in writing that the judgment be rescinded, a court may rescind such judgment on application by any person affected by it.
(2) *(a)* Where a judgment debt, the interest thereon at the rate granted in the judgment and the costs have been paid, whether the consent of the judgment creditor for the rescission of the judgment has been obtained or not, a court may, on application by the judgment debtor or any other person affected by the judgment, rescind that judgment.
(b) The application contemplated in paragraph *(a)* –
(i) must be made on a form which corresponds substantially with the form prescribed in the rules;
(ii) must be accompanied by reasonable proof that the judgment debt, the interest thereon and the costs have been paid;
(iii) must be accompanied by proof that the application has been served on the judgment creditor, at least 10 business days prior to the hearing of the intended application;
(iv) may be set down for hearing on any day, not less than 10 business days after service thereof; and
(v) may be heard by a judge in chambers.
(c) A court may make any cost order it deems fit with regard to an application contemplated in paragraph *(a)*."'

SCCA with the amended MCA and SCA.

9.16 CONCLUSION

This chapter illustrates the technical nature of procedure. It shows that there is vast room for the improvement of the small claims courts' procedures. Designing court procedures in a thoughtful and reflective manner is notoriously difficult. But the exercise is worth the effort because poorly designed court procedures affect the aims and objectives of the courts and impact on perceptions of justice.

Chapter 10 argues for the introduction of mediation and explains how and at what point mediation could be introduced into the small claims courts' procedure.

CHAPTER 10

SMALL CLAIMS MEDIATION

10.1 INTRODUCTION

Alternative dispute resolution (hereafter referred to as 'ADR') features in many jurisdictions across the globe. In fact, one will be hard-pressed to find a country where ADR is not endorsed in some or other form. Following the worldwide Access to Justice Project undertaken by Professors Cappelletti and Garth in the 1970s,[1] many common-law countries adopted different forms of ADR as alternatives to court litigation. Civil law countries were slightly slower to see the benefits of ADR,[2] but by the 1990s the pendulum firmly swung in favour of ADR.[3] Recently the European Parliament passed directives mandating the use of ADR across the European Union.[4] In his proposals for the reform of civil procedure, Lord Woolf espoused the merits of ADR. ADR was subsequently incorporated into the new Civil Procedure Rules[5] of England and Wales.[6] The Woolf reforms – as they came to be known –

[1] Cappelletti and Garth in their international study identified ADR as one of 'three waves of reform'. See Cappelletti, Garth 'Access to Justice: The Worldwide Movement to Make Rights Effective: A General Report' in Cappelletti, Garth (eds) *Access to Justice*. See also Garth, Cappelleti 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 *Buffalo Law Review* 181ff; Cappelletti 'Alternative Dispute Resolution Processes within the World-Wide Access to Justice Movement' 1993 (56) *The Modern Law Review* 282-296.

[2] Alexander 'From Common Law to Civil Law Jurisdictions: Court ADR On the Move in Germany' (2002) 4 *ADR Bulletin* 1; Alexander 'Global Trends in Mediation: Riding the Third Wave' in Alexander (ed) *Global Trends in Mediation* (2006) 1-36.

[3] See Taylor *The Dispute Resolution Review* for a discussion of 41 countries; Glasser, Roberts 'Dispute Resolution: Civil Justice and its Alternatives' (1993) 56 *The Modern Law Review* 277.

[4] See for example, Directive 2013/11/EU of the European Parliament and of the Council. For an instructive analysis of the use of ADR in the European Union, see Knudsen, Balina 'Alternative Dispute Resolution Systems Across the European Union, Iceland and Norway' *Procedia – Social and Behavioral Sciences* 109 (2014) 944-948. In some states, ADR (mediation and arbitration) is offered online. See in this regard Mania 'Online Dispute Resolution: The Future of Justice' (2015) 1 *International Comparative Jurisprudence* 76-86.

[5] The Civil Procedure Rules (the 'CPRs') are the rules of civil procedure used by the Court of Appeal, High Court of Justice, and County Courts in civil cases in England and Wales. They apply to all cases commenced after 26 April 1999, and largely replace the Rules of the Supreme Court and the County Court Rules. For the CPRs, see: https://www.justice.gov.uk/courts/procedure-rules/civil (last accessed on 7 August 2017).

[6] For a discussion on ADR in the CPRs see *Halsey v. Milton Keynes NHS Trust* [2004] 1 WLR 3002. See also Jackson 'Civil Justice Reform and Alternative Dispute Resolution' *Lecture delivered at the Chartered Institute of Arbitrators* London (20 September 2016); Woolf 'Civil Justice in the United Kingdom' (1997) 45 *The American Journal of Comparative Law* 709 at 722.

had the effect of influencing the shape of civil justice reform in many other parts of the world,[7] and more particularly in developing countries.[8] In Africa, countries such Nigeria,[9] Ghana,[10] Uganda,[11] Namibia[12] and Lesotho[13] led the way for other African states to incorporate ADR and more specifically mediation, into their litigation models. Most African countries inherited colonial litigation systems, but ADR, it has been argued,[14] has the potential to restore a sense of authenticity to the way that African people have traditionally resolved their disputes.

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[7] See for example: Department of Justice, Government of Hong Kong, Special Administrative Region *Report of the Working Group on Mediation* (2010); Irish Law Reform Commission 'Alternative Dispute Resolution: Mediation and Conciliation' *Report* (2010).

[8] Crook 'Alternative Dispute Resolution and the Magistrates' Courts in Ghana: A Case of Practical Hybridity' *Working Paper* (2012) at 2-3.

[9] In 1999, the Lagos State Ministry of Justice established the Citizens' Mediation Centre (the 'CMC') to provide free dispute resolution services to indigent Lagosians. With many Nigerians reportedly unable to pay the costs to pursue litigation, the new centre filled an evident gap. Targeting unresolved disputes over relatively small sums of money, the CMC focused on debt recovery, and quarrels between employers and employees, landlords and tenants, or among members of the same family. Its model has been replicated in 16 states – see Onyema, Odibo 'How Alternative Dispute Resolution Made a Comeback in Nigeria's Courts' *African Research Institute* (2017). In 2002, the Lagos Multi-Door Courthouse (the 'LMDC') was established. Its mission is to provide timely cost-effective and user-friendly access to justice through the use of ADR. The initiative proved so successful that the State legislature enacted the Lagos Multi-Door Courthouse Law. See further Lukman 'Enhancing Sustainable Development by Entrenching Mediation Culture in Nigeria' (2014) 21 *Journal of Law, Policy and Globalization* 19ff.

[10] Since 2005, the district courts (formerly magistrates' courts) have offered court-annexed mediation on a voluntary basis. The referral to mediation has proved to be very successful. Consequently, Ghana passed the Alternative Dispute Resolution Act 798 of 2010. This stand-alone pro-ADR legislation establishes ADR as an official mechanism to resolve disputes alongside the formal litigation system in the district courts and High Courts. It comprehensively deals with all aspects of ADR such as the establishment and registration of the mediator and arbitrator professions, the nature of ADR processes, as well as their relationship with the rules of evidence. By and large referral to mediation is consensual. However, a court has the discretion to refer a matter to mediation if it is of the opinion that a matter may be resolved this way (s 64). For more discussion see: Nolan-Haley 'Mediation and Access to Justice in Africa: Perspectives from Ghana' 21 (2015) *Harvard Negotiation Law Review* 59 at 81ff; Crook 'Alternative Dispute Resolution and the Magistrates' Courts in Ghana: A Case of Practical Hybridity' *Working Paper* (2012).

[11] In 1996, Uganda established a special commercial division of the High Court. In terms of the directives issued for the division, commercial judges had to be proactive. This resulted in the introduction of court-annexed ADR as part of a pilot scheme. The pilot proved to be successful and was extended several times. In 2013 The Judicature (Mediation) Rules, 2013 were promulgated (Supplement No 6 *The Uganda Gazette* No 13 Volume CVI dated 15 March 2013). In terms of the rules every civil case in the High Courts and the magistrates' courts must be referred to mediation 'before proceeding to trial' (rule 4). See further Kiryabwire 'The Development of the Commercial Judicial System of Uganda: A Study of the Commercial Court Division, High Court of Uganda' (2009) 2 *The Journal of Business, Entrepreneurship & the Law* 349-358.

[12] See Rules 38 and 39 of the High Court of Namibia: High Court Act, 1990, as amended (GN 44 in *GG* 5392 of 17 January 2014) together with the *Registrar's Notes Issued in Terms of PD 65 Incorporating Judge President's Practice Notes.* See also Damaseb 'Mediation Programme of the High Court of Namibia' *Outreach Paper No 1* (October 2014).

[13] The High Court (Mediation) Rules, 2011 (Supplement No 1, Gazette No 48 of 27 May, 2011).

[14] *Keynote Address By Lady Justice Georgina Theodora Wood, Chief Justice of The Republic of Ghana at The Catholic University, Fiapre, Sunyani on the Occasion of the Inauguration of the ADR Training Ins*titute (1 August 2011) - see http://mariancrc.org/wp-content/uploads/2011/09/MCRC_openingKeynote.pdf (last accessed on 5 August 2017); Dieng 'ADR in Sub-Saharan African Countries' in Ingen-Housz (ed) *ADR in Business: Practice Across Countries and Cultures* 611 at 614.

This chapter argues for the incorporation of mediation into the procedure of the small claims courts.[15] The chapter will first reflect on the history of mediation in civil litigation in South Africa. Thereafter 'mediation' will be defined. This is followed by a discussion of the arguments for and against mediation in the small claims courts. The challenges of ensuring the confidentiality of the mediation process and its outcomes within a litigation process will be discussed, as well as aspects relating to the training of mediators. Drawing on local and comparative experiences, a *sui generis* mediation model of mediation will be proposed for the small claims courts.

10.2 A BRIEF HISTORY OF MEDIATION IN CIVIL LITIGATION IN SOUTH AFRICA

(a) Mediation in Certain Divorce Matters Act and Short Process Courts and Mediation in Certain Civil Cases Act

Thirty years ago mediation hardly featured in the civil justice system. In 1990 mediation was introduced in certain divorce matters by the eponymous Mediation in Certain Divorce Matters Act.[16] In 1991 the ill-fated Short Process Courts and Mediation in Certain Civil Cases Act came into operation.[17] The Mediation in Certain Divorce Matters Act is used extensively in divorce proceedings involving minor children. The Short Process Courts and Mediation in Certain Civil Cases Act – though still on the statute book – has, by and large, been relegated to the scrap heap of history. It appears that the Act was hardly, if ever, used. Aside from its non-use, the Act is criticised for being cumbersome, inconsistent with mediation theory, and

[15] See also Scott-Macnab 'Mediation Prior to Small Claims Litigation: A Human Approach' (November 1987) *De Rebus* 619.
[16] 24 of 1987. The Act came into operation on 1 October 1990.
[17] 103 of 1991.

not particularly well thought out from a procedural perspective.[18] One commentator goes as far as to describe it as a 'curate's omelette'.[19]

(b) Voluntary Court-Annexed Mediation Rules

The years 1994 to 2017 saw significant legal developments. Many statutes made provision for ADR and in particular, mediation.[20] Unfortunately, ADR did not feature in the legislation governing the courts. Neither the MCA nor the SCA makes provision for ADR. The SCA stands as a monument to missed opportunity because the purpose of the Act was to repeal and replace the Supreme Court Act.[21] Unfortunately, while introducing some new innovations the Act reaffirms the traditional colonial litigation model. The transformative values of the Constitution, in relation to promoting access to justice,[22] are not evident in the Act.

Mediation has not been overlooked completely, however. On 1 December 2014, Chapter 2 of the MCRs was promulgated. The Chapter contains the Voluntary Court-Annexed Mediation Rules (hereafter referred to as the 'VCAMRs') for the magistrates' courts. Due to limitations imposed by legislation, the Rules Board for Courts of Law[23] could not mainstream mediation

[18] Paleker 'Mediation in South Africa: Here But Not All There' in Alexander (ed) *Global Trends in Mediation* 333 at 336-339.
[19] Brown 'A Visitor's Perspective on South African Mediation' (January 1994) *De Rebus* 61 at 63. See also Mowatt 'The High Price of Cheap Adjudication' (1992) 109 *South African Law Journal* 77 at 85.
[20] Health Professions Act 56 of 1974, s 42; Labour Relations Act 66 of 1995, Chapter 7; Development Facilitation Act 67 of 1995, s 16*(b)*(iii); Higher Education Act 101 of 1997, Extension of Security of Tenure Act 62 of 1997, s 31(1); National Water Act 36 of 1998, s 150; National Forests Act 84 of 1998, s 31(1); Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, s 7 subsections (1), (2), and (5); National Land Transport Transition Act 22 of 2000, s 10(15); Financial Advisory and Intermediary Services Act 37 of 2002, s 5*(a)*; Financial Services Ombud Schemes Act 37 of 2004, s 150; Children's Act 38 of 2005, ss 21(3) and 33(5); Electricity Regulation Act 4 of 2006, s 42(1)-(2); Companies Act 71 of 2008, Part C; Child Justice Act 75 of 2008, ss 53(7), 62, 73; Consumer Protection Act 68 of 2008, s 70; Land Transport Act 5 of 2009, s 46(2); Pan South African Language Board Act 36 of 1998, s 150 subsections (1), (2), (3), (7); Petroleum Pipelines Act 60 of 2003, s 4*(d)*; Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, 21(4)*(b)*; Public Protector Act 23 of 1994, s 6(4)*(b)*(i); Rental Housing Act 50 of 1999, ss 5, 13(1), 2*(c)*; National Credit Act 34 of 2005, s 134*(b)*(ii); Restitution of Land Rights Act 22 of 1994, s 13; Tax Administration Act 28 of 2011, ss 11(2), 13, 14, 15, 17, 19, 20, 25, and 31; Customs Duty Act 30 of 2014, ss 87(1)*(a)*, 88(1)*(b)*, 93*(b)*, 108*(e)*, 126(e), 161(e); Land Reform (Labour Tenants) Act 3 of 1996, s 18(3); National Environmental Management Act 107 of 1998, s 17; Protection of Investment Act 22 of 2015, s 13(1)-(2); Income Tax Act 58 of 1962, s 107*(a)*(2); Customs Control Act 31 of 2014, ss 827*(b)*, 835*(b)*(ii), 847-850.
[21] 59 of 1959.
[22] Constitution, s 34.
[23] Hereafter referred to as 'the Rules Board'. See §3.4.

in the magistrates' courts. Consequently, the application of the VCAMRs is entirely voluntary.[24]

The Department of Justice is responsible for the implementation of the mediation rules. The Department embarked on a pilot scheme and offered mediation at 12 district magistrates' courts.[25] In 2017, the Department announced that it would add up to 50 more regional and district magistrates' courts at which mediation will be available by 2020.[26]

Even though mediation is not available in the overwhelming majority of district and regional magistrates' courts, some courts have informally introduced mediation. In the Limpopo province, for example, mediation is used in the regional courts in family and matrimonial matters.[27] There are also courts in the Western Cape which offer mediation services, albeit on an informal basis.[28]

(c) Legislative intervention is needed

The MCA and the SCA require legislative intervention to make provision for mediation. As noted earlier, the Rules Board is constrained by the Rules Board for Courts of Law Act[29] and empowering statutes when exercising its functions.[30] Because the MCA does not make provision for mediation, the Rules Board could not give a magistrate the power to direct matters to mediation where he or she thinks that mediation may be the most appropriate dispute resolution mechanism. If the Act were amended to make provision for mediation, the Rules Board would presumably be able to give mediation more teeth.

[24] For a discussion of the powers of the Rules Board see §3.4.
[25] GN 855 in *GG* 38164 of 31 October 2014.
[26] Department of Justice and Constitutional Development *Annual Performance Plan 2017/2018* 38-39.
[27] I am thankful to Ms J Wessels, Regional Court President of Polokwane, for this information.
[28] For example, some magistrates at the Wynberg Magistrates' Court refer some matrimonial matters to mediation where the parties are amenable thereto.
[29] 107 of 1985 (hereafter referred to as 'Rules Board for Courts of Law Act').
[30] For more discussion see §3.4.

In the High Courts, there are currently no ADR rules. The lack thereof has not precluded some judicial officers from promoting the use of mediation. The judiciary encourages mediation in family-related matters[31] and in eviction cases.[32] In commercial litigation, the courts have not been as vociferous. This is because many commercial matters go to arbitration or to private mediation before litigation is instituted.[33] The King Committee on Governance in its *Draft Code of Governance Principles for South Africa* (2009) § 10 states:

> 'It is accepted around the world that ADR is not a reflection on a judicial system of any country, but that it has become an important element of good governance. Directors should preserve business relationships. Consequently, when a dispute arises, in exercising their duty of care, they should endeavour to resolve it expeditiously, efficiently and effectively. Also, mediation enables novel solutions, which a court may not achieve, as it is constrained to enforce legal rights and obligations. In mediation, the parties' needs are considered, rather than their rights and obligations. It is in this context that the Institute of Directors in Southern Africa (IoD) advocates administered mediation and, if it fails, expedited arbitration. Together with the Arbitration Foundation of Southern Africa, the IoD has developed an enforceable ADR clause for inclusion in contracts, the precedent of which is to be found in the Practice Notes to the report. The King Committee endorses the approach by the IoD…ADR is also in line with the principles of Ubuntu.'

The referral of disputes to mediation is regarded as part of the fiduciary duties of directors. Interestingly, the King Committee acknowledged that it is distinctly part of the African philosophy of *ubuntu*[34] to refer a dispute to mediation. In a comprehensive analysis of African dispute resolution mechanisms, Zartman concludes that formal adversarial litigation is alien to African culture. Across the African continent, as well as in South Africa, mediation was and is extensively used by communities to resolve their every-day disputes.[35] Of course, there are some negative aspects to African dispute resolution mechanisms, such as the prevalence of

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[31] *MB v NB* 2010 (3) SA 220 (GSJ); *FS v JJ* 2011 (3) SA 126 (SCA).

[32] *Le Riche v Psp Properties CC* 2005 (3) SA 189 (C); *Mtshali v Masawi* 2017 (4) SA 632 (GJ).

[33] Taylor *The Dispute Resolution Review* 593-594.

[34] Former Constitutional Court Judge JY Mokgoro in an instructive article 'Ubuntu and the Law in South Africa' (1998) 1 *Potchefstroom Electronic Law Journal* 1 at 2 describes the concept of Ubuntu as follows:

> 'It has also been described as a philosophy of life, which in its most fundamental sense represents personhood, humanity, humaneness and morality; a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with a scarcity of resources, where the fundamental belief is that *motho ke motho ba batho ba bangwe/umuntu ngumuntu ngabantu* which, literally translated, means a person can only be a person through others. In other words the individual's whole existence is relative to that of the group: this is manifested in anti-individualistic conduct towards the survival of the group if the individual is to survive. It is a basically humanistic orientation towards fellow beings.'

[35] Zartman (ed) *Traditional Cures for Modern Conflicts: African Conflict 'Medicine'* 1. See also Muigua 'Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010' (August 2016) *Retrieved* 1-16.

patriarchal structures that can have a silencing effect on women. But, ideologically African people like to resolve their disputes by consensus and joint decision-making.[36]

(d) Judicial case-flow management

Following international practice,[37] the Office of the Chief Justice initiated a project in 2012 for the introduction of judicial case-flow management rules in various divisions of the High Court on a pilot basis.[38] The pilot phase came to an end in 2015. On account of its success, the Practice Directives[39] of the various divisions of the High Court incorporated the pilot rules with certain modifications. Currently, the Rules Board is considering a uniform set of judicial case-flow management rules for inclusion in the HCRs, which would have the effect of streamlining the rules across all the courts. Draft rule 37A(11) of the proposed new uniform judicial case-flow management rules provides:

> 'Without limiting the scope of judicial engagement at a case management conference, the case management Judge shall –
> *(a)* explore settlement, on all or some of the issues, including, if appropriate, enquiring whether the parties have considered voluntary mediation…'

While the draft rule is a step in the right direction, there is no reason why a judge cannot *mero motu* direct the parties to mediate a matter. The High Courts have on occasion relied on their inherent jurisdiction[40] to regulate their processes and to prevent an abuse of the courts' procedures by imposing adverse costs orders on practitioners who had not advised clients to consider mediation. In *MB v NB,*[41] a case involving a particularly acrimonious divorce, the court held:

> 'This is but an instance of what mediation might have achieved. In fact, the benefits go well beyond it. In the process of mediation the parties would have had ample scope for an informed, but informal, debate on the levels of their estates, the amount of their incomes and the extent of their living costs. Nudged by a facilitative intermediary, I have little doubt that they would have been able to solve most of the monetary disputes that stood between them. The saving in time and legal costs would have been significant and, once a few breakthroughs had been made, I have every reason to believe that an overall solution would have been reached. Everyone would, in the process, have been spared the burden of two wasted days

[36] South African Law Commission 'Alternative Dispute Resolution' Project 94 *Issue Paper 8* (1997) Chapter 2.
[37] Glenn 'Judges and Civil Justice' in Glenn *The Hamlyn Lectures 2008 – Judging Civil Justice* at 173ff.
[38] Manyathi-Jele 'Progress on judicial case-flow management' (May 2014) *De Rebus* 65.
[39] Section 8(6)*(e)* read with s 8(3)-(4) of the SCA.
[40] On the inherent jurisdiction of the High Court see §6.2.
[41] 2010 (3) SA 220 (GSJ) paras [58-59]. See also *Brownlee v Brownlee*, unreported judgment 2008/25274 (GSJ).

> trying to settle in judge's chambers, and four further days in which the minutiae of assets and liabilities, and income and expenses, were interrogated.
>
> In short, mediation was the better alternative and it should have been tried. On the facts before me it is impossible to know whether the parties knew about the benefits of mediation, but I can see no reason why they would have turned their backs on the process, especially if they had been counselled on the matter by the attorneys. What is clear, however, is that the attorneys did not provide this counsel; in fact, in the course of the pre-trial conference they positively rejected the use of the process. For this they are to blame and they must, I believe, shoulder the responsibility that comes from failing properly to serve the interests of their clients.'

To demonstrate its displeasure, the court limited the fees that the attorneys *in casu* could charge. The court ordered that they could only recover fees on 'a party and party scale'[42] with the caveat that the 'client retains the right to pay more, but the attorney should not ask for this unless the client has obtained the advice of an independent practitioner.'[43]

In light of the direct and indirect strides towards mainstream mediation in the civil justice system, it seems only appropriate to consider the feasibility of introducing mediation in the small claims courts.

10.3 WHAT IS MEDIATION?

(a) The common characteristics

The majority of mediation theoreticians agree that mediation as a process has certain common characteristics. [44] These characteristics are also indicative of the mediation process:

- Mediation is a facilitative process in which parties arrive at mutually agreed upon solutions that can be more creative than what courts can impose.[45]
- Mediation is a confidential, without prejudice, process that encourages parties to engage with each other frankly and freely.[46]

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[42] For a discussion of what is meant by 'party-party' fees, see chapter 6 fn 71.
[43] *MB v NB* supra [60].
[44] Within mediation theory there are variations. For example, some commentators think that a mediator can have both a facilitative and an evaluative role, depending on the nature of the case and the attitude of the parties. Be that as it may, the common characteristics reflect mainstream mediation theory. See Stempel 'The Inevitability of the Eclectic: Liberating ADR from Ideology' (2000) 2 *Journal of Dispute Resolution* 247-293.
[45] Menkel-Meadow 'Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR"' (1991-1992) 19 *Florida State University Law Review* 1 at 7.
[46] Rosenberg 'Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws' (1994) 10 *Ohio State Journal on Dispute Resolution* 157.

- The mediator, an impartial, trained third party, oversees the mediation. The mediator is not a decision-maker but a thoughtful facilitator[47] who encourages the parties to resolve their dispute so as to achieve a mutually acceptable solution.[48]

(b) Mediation defined in the VCAMRs

Holding true to the common characteristics of mediation, MCR 73 – the definitions rule of the VCAMRs – defines 'mediation' as:

> 'the process by which a mediator assists the parties in actual or potential litigation to resolve the dispute between them by facilitating discussions between the parties, assisting them in identifying issues, clarifying priorities, exploring areas of compromise and generating options in an attempt to resolve the dispute.'

The above definition must be read with the definition of 'alternative dispute resolution', which is as follows:

> 'a process, in which an independent and impartial person assists the parties to attempt to resolve the dispute between them, either before or after the commencement of litigation'.[49]

Furthermore MCR 80, which sets out the 'role and functions' of the mediator, further explicates what mediation is:

> '(1) At the commencement of mediation the mediator must inform the parties of the following:
> *(a)* The purposes of mediation and its objective to facilitate settlement between the parties;
> *(b)* the facilitative role of the mediator as an impartial mediator who may not make any decisions of fact or law and who may not determine the credibility of any person participating in the mediation;
> *(c)* the inquisitorial nature of mediation proceedings;
> *(d)* the rules applicable to the mediation session;
> *(e)* all discussions and disclosures, whether oral or written, made during mediation are confidential and inadmissible as evidence in any court, tribunal or other forum, unless the discussions and disclosures are recorded in a settlement agreement signed by the parties, or are otherwise discoverable in terms of the rules of court, or in terms of any other law;
> *(f)* the mediator may during the mediation session encourage the parties to make full disclosure if in the opinion of the mediator such disclosure may facilitate a resolution of the dispute between the parties;
> *(g)* no party may be compelled to make any disclosure, but a party may make voluntary disclosures with the same protection referred to in subrule (1)*(e)*;
> *(h)* the mediator will assist to draft a settlement agreement if the dispute is resolved; and
> *(i)* if the dispute is not resolved, the mediator will refer the dispute back to the clerk or registrar of the court, informing him or her that the dispute could not be resolved…'.

[47] Brandon, Robertson *Conflict and Dispute Resolution – Guide for Practice* 212ff.
[48] See Fuller 'Mediation – Its Forms and Functions' (1970-1971) 44 *Southern California Law Review* 305 at 308, 322ff.
[49] MCR 73.

If the small claims courts were to cater for mediation, one could draw on the provisions of the VCAMRs to formulate a comprehensive definition of what mediation entails.

10.4 ARGUMENTS AGAINST AND FOR MEDIATION IN THE SMALL CLAIMS COURTS

(a) Mediation is unnecessary and slows down the finalisation of matters in the small claims courts

Some argue that there is no need for mediation in the small claims courts because the processes and procedures of the courts are already simplified and the cost of litigation is low.[50] Furthermore, naysayers argue that mediation slows down the resolution of small claims matters.[51]

There is merit in the above arguments because field studies[52] show that mediation takes time and, as a process, it can be slower than the robust inquisitorial style of adjudication in the small claims courts.[53] What the argument misses, however, is that the value of mediation is not limited to expediting processes and reducing costs – the so called 'quantitative-efficiency' aspect of mediation – it is also about providing good outcomes for people and communities – the 'qualitative justice' consequence of mediation.[54]

The Hoexter Commission's investigation into small claims courts placed considerable emphasis on the role of these courts to provide speedy, efficient and inexpensive justice.[55] The

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[50] Glasser, Roberts 'Dispute Resolution: Civil Justice and its Alternatives' (1993) 56 *The Modern Law Review* 277 at 278.
[51] Raitt, Folberg, Rosenberg, Barrett 'The Use of Mediation in Small Claims Courts' (1993) 9 *Ohio State Journal on Dispute Resolution* 55 at 80-81.
[52] A British Columbia study revealed that the typical small claims court case took one or two hours of mediation to reach settlement because the issues were simple and the claims uncomplicated, whereas a Superior Court matter took an average of thirty hours to mediate: see, Kessler, Finkelstein 'The Evolution of the Multi-Door Courthouse' (1988) 3 *Catholic University Law Review* 577 at 580.
[53] McFarlane 'Culture Change? The Tale of Two Cities and Mandatory Court-Connected Mediation' (2002) 2 *Journal of Dispute Resolution* 241 at 260.
[54] Menkel-Meadow (n45) 6.
[55] *Report* §14.3.

Commission surveyed and approached the small claims court as a legal institution operating within a strict process-driven environment. The Commission, however, did not evaluate the *social* impact of small claims courts. Aside from recommending the de-racialisation of the courts,[56] the Commission did not attempt to grapple with the potential influence of the courts on the promotion of social cohesion. It paid no attention to the prevalence of so-called 'community courts' or *magotla,* which were established in a few communities in South Africa, and what impact those courts had on every-day disputes.

In the 1970s and 1980s, many townships in South Africa established their own court systems. These courts provided alternative fora for justice to communities who regarded the formal court structures as extensions of the Apartheid regime. The community courts or *magotla,* as they were known, dispensed both civil and criminal justice. Community members presided over them. Presiding officials were either appointed by a community or identified as leaders/elders within the community. The community courts were sometimes criticised[57] for dispensing vigilante justice with serious consequences for people that were found guilty of crimes or civil wrongs.[58] For the purposes of this discussion, it is not necessary to consider that aspect of the community courts. What is important to note is the role of the courts for people who often felt socially, politically and economically marginalised.

The community courts provided spaces for people to vent their grievances in an informal environment. The victim could confront the wrongdoer.[59] The confrontation was not muted by formal court procedures and rules of evidence. The presiding officer who sometimes sat with other community appointees was required to mediate disputes. At the end of the process, a

[56] *Report* §13.45.
[57] Hund, Koto-Rammopo 'Justice in a South African Township: The Sociology of Makgotla' (1983) 16 *CILSA* 179.
[58] Choudree 'Traditions of Conflict Resolution'(1999) 1 *African Journal on Conflict Resolution* 9 at 24.
[59] Studies reveal that a particularly strong feature of mediation is the ability of the parties to directly engage each other: see, McFarlane (n53) 265. However, others note that depending on the nature of the dispute, mediation can have a silencing effect and can lead to secondary victimization: see Burman, Rudolph 'Repression by Mediation: Mediation and Divorce in South Africa' (1990) 107 *SALJ* 251.

settlement would be reached – sometimes consensually and sometimes with a fair amount of coercion.[60] The *modus operandi* of the courts was by no means ideal. However, the success of the courts lay in the fact that people felt comfortable with the outcomes that these courts offered. Strained relationships between community members and neighbours were rendered workable again. Social cohesion within communities was maintained. Alternative forms of compensation were sought. Different remedies could be explored. Settlement agreements were often enforced by social pressure. [61]

Given that virtually every magisterial district in South Africa has a small claims court, there is little doubt that these courts can make a difference in building relationships within communities and among people. The civil justice system polarises disputants. It does very little to bring people together at the end of a dispute. Neighbours, family members, work colleagues and partners are not encouraged to reconcile at the end of litigation. And yet, in the overwhelming majority of cases, people who sue and defend actions are familiar with each other and may have had long-standing relationships.[62]

The problem-solving mechanism of civil justice is blunt. A court hears a dispute and delivers a decision. Adjudication produces a win-lose situation.[63] It is hardly the case that the losing party feels that justice has been served. For him or her, the justice system has failed. Within this paradigm, there is little prospect of the parties reconciling. The winner feels vindicated and is unlikely to reunite with the loser. The loser is affronted and takes particular umbrage at the smugness of the winner. He or she will do everything possible to frustrate the winner's attempt to recover the debt owed. The psychological consequence of a court judgment adds to the rift between disputants and this extends from the micro level to the macro level within

[60] Grant, Schwikkard 'People's Courts?' 304-316 (1991) 7 *South African Journal on Human Rights.*
[61] Burman, Schärf 'Creating People's Justice: Street Committees and People's Courts in a South African City' (1990) 24 *Law and Society Review* 693-744.
[62] Sarat 'Alternative in Dispute Processing: Litigation in a Small Claims Court' (1975-1976) 10 *Law and Society Review* 339 at 353 and 359-360.
[63] McFarlane (n53) 248; Menkel-Meadow (n45) 6.

communities.[64] Because mediation is premised on empathy building and reconciliation,[65] a mutually accepted settlement hardly results in the psychological distress of feeling like a loser. The process tries to prevent the situation where parties feel judged for their conduct.[66] Mediation seeks to make people walk away from the process with their dignity intact, no matter how unreasonably they may have acted in the past.[67] This outcome seeks to preserve relationships[68] or terminate them amicably,[69] and builds co-operation.[70] For the community at large, it is preferable to have people who can tolerate one another, instead of people who are at loggerheads with each other.[71]

While mediation takes longer than adjudication in the small claims courts and can be viewed as unnecessary from the perspective of speed and costs, the social and psychological benefits of mediation as a problem-solving device serves people and communities better in the long run. Studies have shown that where people resolve disputes by mediation, they feel more upbeat about justice and they leave the court feeling positive about the level of service at the court.[72] They are also more likely to abide by the terms of the mediation settlement agreement because they had a direct hand in its fashioning.[73]

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[64] See Bush, Folger *The Promise of Mediation – Responding to Conflict Through Empowerment and Recognition*.
[65] Beer, Packard with Stief *Mediator's Handbook* 5; See also A Sarat 'Alternative in Dispute Processing: Litigation in a Small Claims Court' (1975-1976) 10 *Law and Society Review* 339 at 371.
[66] Fuller states: 'whereas mediation is directed towards *persons*, judgments of law are directed towards *acts*…' It is submitted that when courts pronounce on conduct, people can be left feeling judged for their conduct. See Fuller 'Mediation – Its Forms and Functions' (1970-1971) 44 *Southern California Law Review* 305 at 308. See also Eisenberg 'Private Ordering Through Negotiation: Dispute Settlement and Rulemaking' (1975-1976) 89 *Harvard Law Review* 637 at 652-659.
[67] Nolan-Haley 'Court Mediation and the Search for Justice Through Law' (1996) 74 *Washington University Law Review* 47 at 84; Eisenberg (n66) 652-659.
[68] J McFarlane 'Culture Change? The Tale of Two Cities and Mandatory Court-Connected Mediation' (2002) 2 *Journal of Dispute Resolution* 241 at 264; Bush, Folger(n64).
[69] Fuller 'Mediation – Its Forms and Functions' (1970-1971) 44 *Southern California Law Review* 305 at 308. See also the study undertaken by A Sarat (n65) 368.
[70] Menkel-Meadow (n45) 6.
[71] Van der Merwe with Mbebe 'Informal Justice: The Alexandra Justice Centre and the Future of Interpersonal Dispute Resolution' *Working Paper No 21* (1994) 5.
[72] Pearson 'An Evaluation of Alternatives to Court Adjudication' (1982) 3 420 at 432; Goerdt *Small Claims and Traffic Courts: Case Management Procedures, Case Characteristics, and Outcomes in 12 Urban Jurisdictions* 64-65, 103-104.
[73] McEwan, Maiman 'Mediation in the Small Claims Court: Achieving Compromise Through Consent (1984) 18 *Law and Society Review* 44; McEwen, Maiman 'Small Claims Mediation in Maine: An Empirical Assessment' 33 (1981) *Maine Law Review* 237 at 245-49. In their critical piece about the impact of out-of-court settlements, Galanter and Cahil concede:

(b) Mediation is bad because it forces people with good cases to make bad trade-offs

The argument is made that mediation influences people with good cases to make bad compromises in the process of achieving settlement.[74] This can be particularly problematic for unrepresented litigants.

In the High Courts and the magistrates' courts, litigants are known to make bad compromises to ward off expensive and lengthy litigation.[75] According to Galanter, 'repeat-players'[76] (whether plaintiffs or defendants) use their experience, knowledge of the litigation game, and access to resources and people (legal and financial) to strategically acquire better outcomes for themselves at the expense of their opponents who may have stronger claims.[77] The point is: *even in ordinary litigation, people with good cases make bad trade-offs*. Aside from bad compromises that are influenced by exorbitant legal costs and the time it takes to litigate a matter, studies[78] have shown that lawyers routinely encourage clients to make bad settlements

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> 'McEwen and Maiman, who compared small claims courts in Maine where cases were mediated with courts where cases were adjudicated, reported a higher level of satisfaction and sense of fairness among those whose cases were mediated. Mediation was less intimidating and more understandable, giving participants the opportunity to explain their side, to explore all issues, and to vent and dissipate anger. Some 66.6 percent of the mediated parties reported that they were completely or mostly satisfied with their overall experiences, compared to only 54 percent of the adjudicated parties. Mediated parties deemed their settlements fair 67.1 percent of the time; adjudicated parties only 59 percent of the time.'

See Galanter, Cahill '"Most Cases Settle": Judicial Promotion and Regulation of Settlements' (1993-1994) 46 *Stanford Law Review* 1339 at 1355-1356. See also Hermann, Lafree, Rack, West 'The Metro-Court Project' *Final Report* (1993) at 42ff; Wissler 'The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts' (1997) 33 *Willamette Law Review* 565 at 568; McEwan, Maiman 'Mediation in Small Claims Court: Achieving Compliance Through Consent' (1984) 18 *Law and Society Review* 11 at 47.

It is important for the mediator to ensure that a settlement is not unduly prejudicial to one party because studies have shown that people are less likely to abide by settlements that are unfairly weighted towards one party: see Van der Merwe with Mbebe (n71) 25.

[74] McEwan, Maiman (n73) 11; Glasser, Roberts (n50) 280.

[75] Silver 'Does Civil Justice Cost Too Much?' (2001-2002) 80 *Texas Law Review* 2073 at 2083.

[76] Galanter 'Why the "Haves" Come Out Ahead: Speculation on The Limits of Legal Change' (1974-1975) 9 *Law and Society Review* 95-160. See §1.7.

[77] In a study of settlements in several American federal courts, Galanter and Cahill show that over half of plaintiff litigants who settled their matters during the course of litigation thought that the settlement was unfair. They state:

> 'It is not only these hapless one-shot players who are unhappy with their settlements. In recent years, we have heard a litany of complaints from insurers and corporate and governmental defendants, telling us how they were forced into nuisance settlements or very large settlements that were not deserved.'

See Galanter, Cahill (n73) 1353.

[78] For a particularly instructive study see Heuman, Hyman 'Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What You Want"' (1997) 12 *Ohio State Journal of Dispute Resolution* 253.

during the course of litigation. Their motivations range from acquiring their fees more quickly to losing interest in a matter and preserving their own reputations. They also frequently misjudge the possibility of success and some are too hesitant to take calculated risks. In the small claims courts, however, the absence of legal representation and the simplified processes and procedures are supposed to place litigants on the same footing so that they do not have to make bad compromises. It would thus seem that, in this regard, untrammelled mediation has the potential of subverting the ideological basis of small claims courts. However, this does not discount the need for mediation in the small claims courts; it just means that if mediation is introduced, it would have to be regulated.

Bad trade-offs can be prevented in the small claims courts by giving the presiding officer a greater role in determining which cases should be mediated. For instance, if a presiding officer sees that a case turns on a simple and determinable question of law, the presiding officer may decide not to refer the matter to mediation. Prescription is a good example. If a presiding officer sees that a claim can be resolved by applying the law relating to the prescription of claims, there is no need to refer the matter to mediation.[79] However, if the presiding officer sees that a dispute turns on both questions of law and fact, he or she could refer the matter to mediation. Mediation is particularly useful if the presiding officer thinks that the relationship between the parties, if preserved, could reap long-term gains for both parties. Sometimes a short-term bad trade-off may be the opportunity to preserve or nurture future legal rights and mutually beneficial relationships.[80] Needless to say, presiding officers would require training to identify cases that are ripe for mediation.

The proposal above will not be a panacea to prevent every bad trade-off that could potentially occur, but a mediation screening process will reduce the likelihood of pervasive bad trade-offs

[79] Prescription is a set of black-letter principles encapsulated in the Prescription Act 68 of 1969.
[80] Elleman 'Problems in Patent Litigation: Mandatory Mediation May Provide Settlements and Solutions' (1997) 12 Ohio *State Journal on Dispute Resolution* 759 at 774; Silver (n75) 2084-2085.

in small claims matters. The screening process could be activated when the defendant delivers a statement of defence. The presiding officer will be in a position to compare the plaintiff's claim (as amplified in the statement of claim) and the defendant's defence, where a statement of defence is delivered.[81] If the defendant does not deliver a statement of defence or if the defence is scantily articulated, the appropriateness of mediation can be determined during the trial when the parties present their cases. The presiding officer should have the discretion to separate issues so that a finding can be made on certain issues, whilst others are referred to mediation. Of course, if the mediation fails, the matter would return to court.

A particularly attractive moment when a matter could be referred to mediation is when the presiding officer makes a finding but wants the parties to explore satisfaction of the court's judgment.[82] In other words, the *execution of the judgment* of the court could be referred to mediation. In chapter 9, it was argued that the execution of small claims court judgments is problematic. Where the execution debtor does not pay the judgment debt, the judgment must be transferred to the magistrate's court of the district where the debtor resides. The transfer takes time. Furthermore, if the debtor is in a good financial position he or she may appoint a legal representative to stave off execution. The process of execution is expensive, because the sheriff is paid for services rendered at the magistrates' courts rate. The sheriff may also require the judgment creditor to pay security before goods and other assets can be removed from the debtor's premises.[83]

Many disgruntled debtors go the extra mile to prevent the judgment creditor from successfully recovering the debt.[84] Perhaps, the success rate will be higher and the inconvenience of

[81] On the statement of defence, see chapter 8.
[82] See Raitt, Folberg, Rosenberg, Barrett (n51) 80-89.
[83] MCR38(1) provides that the sheriff may require the judgment creditor to provide security in money before the sheriff executes on a judgment. Because execution of a small claims judgment is carried out in the magistrates' courts, MCR 38(1) is applicable. See chapter 9 for a discussion on the execution of a small claims judgment.
[84] Fiss 'Against Settlement' (1984) 93 *Yale Law Journal* 1073 at 1982 notes:

> 'The parties may sometimes be locked in combat with one another and view the lawsuit as only one phase in a long continuing struggle. The entry of judgment will then not end the struggle, but rather change its terms and the balance of power. One of the parties will invariably return to the court and ask again for its

executing on judgments will be lower if issues regarding the payment of judgment debts are sent to mediation. With the intervention of the mediator, mediation might abate the dissatisfaction associated with losing a case. Mediation will afford the loser the opportunity to save face and perhaps, to reconsider his or her initial reaction to the court's judgment. Admittedly, mediation after judgment would be unique in South Africa. It must be noted, however, that mediation would not replace the financial inquiry[85] in s 39 of the SCCA, but would be a further tool to ensure that small claims courts' judgments are worth their salt.

(c) Mediation is unnecessary because the adjudicator in a small claims court helps both parties

The role of the presiding officer, as an inquisitor, in a small claims court is fundamentally different to the role of the presiding officer in the magistrates' courts or the High Courts.[86] The commissioner in a small claims court is an interventionist fact- and evidence-gatherer for the unrepresented litigant. He or she thus performs a dual role: that of non-partisan counsel to the litigants, and that of adjudicator. It can therefore be argued that there is no need for mediation in the small claims courts as the presiding officers by virtue of their non-partisan roles achieve similar outcomes to mediation. The argument is misplaced because it distorts the mediation process. Mediation finds its justification from its underlying ethos, which is to create an environment wherein the parties can openly discuss their dispute and explore settlement solutions. Irrespective of the specialised role of the commissioner in a small claims court, he or she is still actively adjudicating the matter. The court's duty is to conduct a trial by litigation. The parties do not have the autonomy to direct the dispute and they have limited opportunity to make recommendations to the presiding officer about how to resolve the matter. The presiding

assistance, not so much because the conditions have changed, but because the conditions that preceded the lawsuit have unfortunately not changed.'

[85] For the discussion on the financial inquiry see chapter 9.

[86] For the role of the judge in adversarial litigation see Paleker 'Truth and Fact-Finding in South African Civil Procedure' in Van Rheee, A Uzelac (eds) *Truth and Efficiency in Civil Litigation – Fundamental Aspects of Fact-finding and Evidence-Taking in a Comparative Context* 189 at 190ff.

officer is also not in a position to suggest remedies other than those prescribed by black-letter law.[87]

In mediation, the mediator does not decide the case. The parties arrive at mutually acceptable solutions. The mediator does not try the case. He or she facilitates discussions between the parties. The mediator does not impose rules on the parties but helps to arrive at 'a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions to one another.'[88] The mediator does not gather information. The parties are encouraged to disclose what they want to. Disputants are likely to be more forthcoming, because one of the tenets of mediation is that disclosures are confidential. This is not the case in a courtroom setting, because evidence is presented in a public forum.

A fundamental difference between adjudication and mediation is that mediation is private.[89] In many jurisdictions, communities with strong cultural preferences for privacy detest airing their dirty laundry in public.[90] People do not express themselves as openly in a courtroom as they might in mediation. In a mediation setting, parties are less exposed to criticism and mockery. While courtrooms with public galleries are lauded for their openness and transparency, many people find the experience embarrassing.

The parties can also express feelings, emotions and opinions during mediation.[91] Courts generally label these as irrelevant to the trial of a case. Yet in mediation, feelings and emotions assist to identify hidden assumptions, prejudices, biases, or reasons giving rise to a dispute – the proverbial 'gorilla in the room'.[92] This information is also useful to make parties understand

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[87] Menkel-Meadow (n45) 7; Hendricks 'The Trend Towards Mandatory Mediation in Custody and Visitation Disputes of Minor Children: An Overview' (1993) 32 *University of Louisville Journal of Family Law* 491 at 496.
[88] Fuller (n48) 325.
[89] Sarat (n62) 353.
[90] In a 1994 study involving the community of Alexandria in Johannesburg, 87% of residents preferred for family matters to remain within the family. In other words, they preferred that a family dispute be resolved quietly without attracting public attention. The overwhelming majority of residents interviewed favoured mediation because the process was confidential: see Van der Merwe with Mbebe (n71) 19-20.
[91] Hendricks (n87) 495.
[92] Bernard *The Dynamics of Conflict Resolution: A Practitioner's Guide* 41-46.

each other and their respective positions. Due to time constraints in court and the nature of court proceedings, the presiding officer cannot traverse as much circumstantial information during the trial as would be the case during mediation.[93]

Perhaps the most important difference between mediation and adjudication is that the mediator can explore different options with the parties as they approach settlement. When a person sues on a debt, the court usually makes a money order. This triggers a particular set of remedies. In mediation, the parties can explore their own redress measures. The remedy may take the form of the debtor repaying the money in instalments. But, it could also entail the debtor doing some work for the creditor. The remedial possibilities are wide.[94]

So, while the commissioner in the small claims court uses his or her non-partisan, inquisitorial and adjudicative powers to dispense justice to the benefit of the parties, mediation provides a more nuanced approach to problem-solving, fact- and truth-finding, and the achievement of outcomes. Parties can exercise their personal autonomy to achieve settlement in a manner that conforms to *their* sense of justice. In a liberal society, there is much to be said for achieving subjective party-tailored justice, as opposed to experiencing objective court-imposed justice in all cases and in all circumstances.[95]

(d) Some matters should not be mediated

Commentators argue that some matters are incapable of being mediated.[96] In certain instances substantive law precludes mediation and in others, the circumstances of the dispute might militate against the use of mediation.

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[93] All the circumstantial and contextual issues are considered necessary to 'map' the issues in dispute: see Riskin, Welsh 'Is That All There Is?: "The Problem" In Court-Orientated Mediation' (2008) 15 *George Mason Law Review* 863 at 905.
[94] Eisenberg (n66) 652-658.
[95] Landes, Posner 'Adjudication as Private Good' (1979) 8 *Journal of Legal Studies* 235-284.
[96] See also Lerman 'Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women' (1984) 7 *Harvard Women's Law Journal* 57.

Matters involving the validity and interpretation of wills cannot be mediated, as these can only be decided by a court of law.[97] Status matters, too, cannot be mediated. The court, as the upper guardian of incapacitated people, is best placed to make findings relating to status. There was a time when it was thought that many issues relating to children were incapable of being mediated.[98] However, the Children's Act[99] expands the use of mediation to matters involving children.[100] This development reflects how traditionally-held views about the use of mediation can change as the law and cultural norms mutate. It is thus difficult to predict how substantive dictates precluding the use of mediation will be viewed in the future.

Fortunately, the limited substantive jurisdiction of the small claims courts means that all of the substantive matters identified above and others identified in the literature do not apply in the small claims courts. The full range of contract and delict matters that are heard in the small claims courts *can* be mediated.

What one has to watch out for, however, are the circumstantial factors that weigh against the use of mediation. Mediation theory widely accepts that where there is a threat to the safety of persons or where there is actual or threatened physical or emotional abuse, mediation is not suitable. Mediation is also not kosher where there is an indication of criminal activity that is ongoing or anticipated.[101] In such instances, mediation can be harmful to people. If mediation were to be introduced in the small claims courts, the presiding officer would presumably identify instances where mediation is inappropriate. Again, this will require training on the part of the judicial officer.

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[97] See Wills Act 7 of 1953, s 2(3).
[98] Keenan 'Domestic Violence and Custody Litigation: The Need for Statutory Reform' (1985) 13 *Hofstra Law Review* 407.
[99] 38 of 2005.
[100] Ibid ss 21(3), 33(5)*(b)*, 34(3)*(b)*(ii)*(bb)*, 39(3), 46(1)*(h)*(iii), 49(1), 71(1), 150(3), 155(4)*(b)*. See also Paleker 'Mediation in South Africa's New Children's Act: A Pyrrhic Victory' *Asia Pacific Mediation Forum Conference* (2008) http://www.asiapacificmediationforum.org/resources/2008/7-Mohamed.Paleker.pdf (last accessed on 17 August 2017).
[101] See Brandon, Robertson *Conflict and Dispute Resolution* 89.

Within the context of small claims courts, there is an interesting question that must be addressed: *If the small claims courts are permitted in the future to hear matters involving the State, would the referral of the dispute to mediation pose a constitutional problem?* The Constitution calls for open, accountable and transparent government.[102] One of the ways in which citizens acquire knowledge of the activities of the State is by litigation, when the State's actions are laid bare in court. The confidentiality of mediation proceedings can have a chilling effect on open, accountable and transparent government. The State may use mediation to prevent information pertaining to corruption, inefficiency and maladministration from being exposed.

The difficulty with the above argument is that the State is already mediating many matters.[103] Nothing precludes the State from negotiating a matter and making it a term of settlement that the conclusion and various aspects of the dispute remain confidential between the parties. In fact, this happens all of the time. In terms of the Institution of Legal Proceedings Against Certain Organs of State Act,[104] the State must receive 30 days' notice of proceedings before a summons or application is issued against it.[105] The State frequently uses this period to negotiate and mediate matters.[106] The public is not privy to these negotiations and mediations. Parties are often required to enter into confidentiality agreements. It is said that the purpose of confidentiality is to limit the amount of information that other claimants can access, as it is not always in the interests of the public purse for would-be claimants to know if the State has conceded liability in a particular case, and what offers of compensation were made. Settlements can give rise to normative obligations and can in themselves be precedent-setting from the vantage point of other litigants with similar claims.[107]

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[102] Sections 1*(d),* 32 and 33. See also Currie, de Waal *The Bill of Rights Handbook* 691-709; 643-690.
[103] 'Africa: Could Mediation Cure South Africa's Medico-Legal Woes? *All Africa* (10 July 2017): http://allafrica.com/stories/201707100169.html (accessed on 29 September 2017);
[104] 40 of 2002.
[105] See §7.3(*d*).
[106] Manyathi-Jele 'Court-Annexed Mediation Launched' (April 2015) *De Rebus* 11.
[107] Eisenberg (n66) 652-653.

The ambit of confidential settlement negotiations would most certainly be subject to the Promotion of Access to Information Act.[108] It will thus be interesting to see how the courts will deal with issues of confidentiality in the future, not only as they relate to out-of-court settlements, but also settlements achieved by mediation where the State is a party. The courts may, for example, create a *public interest* exception to the confidentiality rule of mediation.

One should be careful to discount the use of mediation in litigation involving the State based on an overemphasis on suspicions of corruption and maladministration. Mediation can save the State a lot of money[109] by reducing the cost of litigation and allowing the State to negotiate its way out of large claims. It is in the public interest that the State reduces its liability. In chapter 7, it was argued that claims against the State in the small claims courts should be limited to local government. Mediation could be extremely useful in resolving local government disputes. It would allow local officials to engage directly with disgruntled citizens. Mediation can improve communication between communities and their local government officials, thereby fostering better relationships. It may also reduce the number of violent service delivery protests. During the period 2014-2017, the University of Cape Town's Law Faculty, under the auspices of its Law@Work Programme, offered mediation training to many local government officials in the Western Cape and beyond.[110] Clearly, local government officials are starting to appreciate the benefits of mediation, and the small claims courts, in playing a part in the resolution of disputes at local government level (as argued for in chapter 7), should be open to referring these disputes to mediation where appropriate.

[108] 2 of 2000.
[109] It is estimated that the Government spent a staggering one billion rand in legal fees for the period 2016/2017. See S Mkhwanazi 'Government Spends R1bn to defend lawsuits' *IOL* (18 October 2017): https://www.iol.co.za/news/crime-courts/government-spends-r1bn-to-defend-lawsuits-2080916 (last accessed 18 October 2017).
[110] I am thankful to Adv J Joubert for this information. He is one of the mediation trainers at UCT.

10.5 CONFIDENTIALITY

Confidentiality is a keystone feature of mediation because it seeks to encourage open discussion in a non-adversarial environment. Parties are encouraged to disclose information without fear that the information will be used against them if the mediation fails.[111] Mediation thus stands in stark contrast to adversarial litigation. In adversarial litigation:

> '[P]ractitioners are known to play a tactical game of cat-and-mouse. Too much openness and transparency is regarded as strategic suicide. Simulating a poker game, practitioners are known to hold their 'evidential cards' face down and will only expose the 'aces' up their sleeves when it is necessary or opportune to do so.'[112]

Mediation confidentiality is recognised in rule 80(1)*(e)* of the VCAMRs. The rule declares that oral discussions and written disclosures – other than those that would ordinarily be discoverable[113] in court – are confidential. Rule 80(1)*(e)* has not been judicially interpreted.

The confidential nature of mediation proceedings is also entrenched by agreement in clause 12 (headed 'confidentiality') of the 'Agreement to Mediate' contained in Form Med-6 of Annexure 3 of the VCAMRs. Clause 12 stipulates:

> '12.1 It is understood between the Parties and the mediator that mediation will be strictly confidential and without prejudice.'
> 12.2. Mediation discussions, written and oral communications, any draft resolutions, and any unsigned mediation agreements shall not be admissible in any court proceeding, unless such information is discoverable in terms of the normal rules of court. *Only a mediated agreement, so signed by the Parties may be so admissible*.' (Italics inserted for emphasis)

The mediation settlement agreement is admissible in court because in terms of the VCAMRs a settlement agreement can be made an order of court.[114] In instances where the settlement agreement is not made an order of court, it is enforceable like any other agreement. Hence, the agreement is admissible to establish a cause of action.

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[111] Mediation consists of three stages: (i) Mapping the problem i.e. identifying all the issues (manifest and hidden) giving rise to the dispute; (ii) Setting the problem i.e. selecting the issues that must be addressed in the mediation; and (iii) addressing the problem so that the needs of each party can be adequately met. The disclosure of information is essential for each of these stages: see L Riskin & NA Welsh 'Is That All There Is?: "The Problem" In Court-Orientated Mediation' (2008) 15 *George Mason Law Review* 863 at 905-909.
[112] Paleker (n86) 189.
[113] The rules of discovery are contained in MCRs 23 and 24. It is clear that the VCAMRs do not affect the application of these rules.
[114] MCR 82(4).

Currently, South Africa does not have substantive legislation dealing with mediation. The common-law rules of evidence do not expressly create mediation privilege. Furthermore, the mediators' profession is not recognized or formally regulated in South Africa. The issues pertaining to confidentiality and the limits thereof need to be determined by legislation. It is encouraging to note that the South African Law Reform Commission[115] is in the early stages of investigating the need for legislation regulating mediation.[116] The new legislation will undoubtedly deal with the issue of confidentiality.

If mediation is introduced in the small claims courts, the SCCA should be amended to deal with confidentiality. The provisions need not be expansive. They simply need to create a theoretical peg for the Rules Board to flesh out the nature of confidentiality. Of course, if the SALRC completes its work, its recommendations must be taken into account.

10.6 TRAINING OF MEDIATORS

There are no official and uniform industry standards for mediator training in South Africa. Rule 86 of the VCAMRs requires mediators serving in the courts to be accredited. On 31 October 2014 the Department of Justice published the Fees Payable to Mediators, Qualification Standards and Level of Mediators (hereinafter referred to as the 'FMQS'). According to clause 1 of Schedule 2 of the FMQS:

> 'Every applicant for accreditation as a mediator must complete 40 hours of contact training consisting of:
> *(a)* Theoretical training including—
> (i) basic civil procedure;
> (ii) a study of the court-annexed mediation rules;
> (iii) the role and function of the mediator;
> (iv) principles, stages and methodology of mediation;
> (v) social-context and diversity awareness;
> (vi) conflict management;
> (vii) decision-making;
> (viii) communication and diplomacy;

[115] Hereafter referred to as the 'SALRC'.
[116] The SALRC is currently engaged in an investigation into ADR (Project 94). Project 94 is one of the investigations approved by the Minister of Justice in terms of the South African Law Reform Commission Act 19 of 1973. The aim of the project is to consider the possible development of legislation to promote the use of ADR generally, and mediation in particular. The SALRC met on 30 October 2017 to chart the way forward for the drafting of legislation to formally recognise mediation and the mediation profession. The legislation will deal with various aspects, including the issue of confidentiality of mediation and its limits.

(ix) ethics and professional conduct;
(x) negotiation and influence;
(xi) interpersonal relations;
(xii) confidentiality, privacy and reporting obligations; and
(xiii) neutrality and impartiality.

(b) Practical training consisting of mock mediation sessions before a trained mediator.'[117]

In terms of clause 1.2 training must be received through an institution 'approved by the Minister'. The Minister approved *inter alia* all the South African universities to offer mediation training, as well as the various provincial law societies.

While the legislative authority for the FMQS is questionable, the qualifications criteria accord with international standards.[118] These criteria could be incorporated into the mediation provisions of the SCCA. There is thus no need to reinvent the wheel.

If mediation legislation is passed as a result of the efforts of the SALRC, there will be no need to amend the SCCA to incorporate qualification standards. Whatever standards are entrenched in mediation legislation would *ipso facto* apply to mediators operating in the small claims courts.

Clauses 7 to 9 of the FMQS contain a set of ethical rules and norms that mediators must abide by:

'7. Mediator ethics

Every Mediator must –

(a) Act with honesty, impartiality, due diligence and independence;
(b) Conduct himself or herself in a manner that is fair to all parties and must not be swayed by fear, favour or by self-interest;
(c) Not tout for a mediation assignment and thereby undermine the mediation process;
(d) Not accept a mediation appointment unless he or she is available to conduct the mediation promptly and competently;
(e) Avoid entering into any financial, business or social relationship, which is likely to compromise their impartiality, or which might reasonably create a perception of partiality or bias; and
(f) Not assert influence on any person involved in the court-annexed mediation processes by any improper means whatsoever, including the receipt of gifts or other inducements.
(g) Refrain from soliciting or negotiating any private arrangement relating to fees and must abide by the fee structure determined by the Minister.

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[117] GN 854 in *GG* 38163 of 31 October 2014.

[118] See *State-by-State Guide to Court Mediator Qualifications Standards* (Northern-Virginia, USA); *National Mediator Accreditation System* (Australia); *Mediation Accreditation Standards* as determined by the Mediation Accreditation Committee, established in terms of s 59A of the Civil Procedure Act (Chapter 21, Laws of Kenya); Mediation Act 8 of 2004 [Trinidad and Tobago], Third Schedule.

7. Duty to disclose conflict of interest
   8.1 Every mediator must disclose any interest or relationship that is likely to affect his or her impartiality or which might create a perception of partiality including:
      (a) Any direct financial or personal interest in the matter; and
      (b) Any existing or past financial, business, professional, family or social relationship which is likely to compromise impartiality.
   8.2 After disclosure the mediator may continue to mediate a matter if both parties agree: Provided that the mediator must withdraw if the conflict of interest may unduly influence the mediation process.

9. Mediator's conduct and obligations during mediation proceedings
   9.1 Every mediator must respect freedom of conscience, belief and expression and must avoid and dissociate himself or herself from comments or conduct that is racist, sexist or otherwise inconsistent with the Bill of Rights in the Constitution.
   9.2 Every mediator must respect the right to equality before the law and the right of equal protection and benefit of the law.
   9.3 Every mediator must observe religious, gender and cultural rights.
   9.4 Every mediator must conduct proceedings fairly, diligently and in a fair manner.
   9.5 A mediator must ensure that the parties and their representatives act in accordance with commonly accepted decorum.
   9.6 A mediator must be patient and courteous to legal practitioners, parties and the public and must respect the dignity of others.
   9.7 Every mediator must be punctual for a mediation session and keep to time limits, if any, set by the parties.
   9.8 Every mediator must be impartial and must not make any decisions or findings of law or fact or determine the credibility of any person participating in the mediation.
   9.9 A mediator must inform the parties that all discussions and disclosures, whether oral or written, made during the mediation session are confidential and inadmissible as evidence in any court, save for those that are included in a settlement agreement or are otherwise discoverable in terms of the rules of court or ordered by a court.
   9.10 Every mediator must at the beginning of the proceedings ensure that he or she understands the positions, needs, and expectations of the parties involved in a dispute.
   9.11 A mediator must understand the issues pertaining to the dispute before assisting the parties with the settlement of a dispute.
   9.12 Every mediator must prepare for mediation by inter alia understanding the issues in dispute beforehand and perusing all documentation pertaining to the matter.
   9.13 A mediator must decline an appointment to mediate or must withdraw or request technical assistance if he or she considers that a matter is beyond his or her competence or expertise.
   9.14 A mediator must not hold undisclosed discussions with any party or his or her representative without the consent of the other party: Provided that the mediator may in the interest of resolving the dispute hold discussions with the parties separately.
   9.15 A mediator must not permit parties or their representatives to record proceedings mechanically or electronically.
   9.16 A mediator must not delegate his or her duty to any other person without informing the mediation clerk/registrar, and obtaining the consent of the parties.
   9.17 A mediator must conduct mediation expeditiously and in such a manner so as to avoid an escalation of costs for the parties.
   9.18 A mediator must discourage unnecessary postponements, point-taking and undue formality.
   9.19 A mediator must not exert undue influence in order to promote a settlement or to obtain a concession from any party.
   9.20 Every mediator must upon resignation or the expiry of an appointment complete all part-heard mediations as soon as possible, unless directed otherwise by the parties or by the court.'

Again, the ethical rules above serve as a basis on which to model the ethical requirements expected of mediators in the small claims courts.[119] The question, however, is how to

[119] Mediation Act 8 of 2004 [Trinidad and Tobago], First Shedule; *Code of Practice for Mediators* (United Kingdom); and see generally McFarlane 'Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model' (2002) 40 *Osgoode Hall Law Journal* 49-87.

incorporate these ethical rules in the small claims courts, given that the Rules Board cannot legislate codes of conduct. Presumably, either the Rules Board for Courts of Law Act or the SCCA would have to be amended to extend the powers of the Rules Board or the Minister of Justice to legislate ethical rules for mediators.[120]

10.7 THE RECOMMENDED MODEL

(a) Mediation should be mandatory

It was recommended above[121] that a matter should only be referred to mediation if the small claims court presiding officer, after screening the case, is of the opinion that it should be mediated.[122] Aside from preventing mediation from unnecessarily slowing down small claims matters, a screening process will curb the possible problem of people instituting spurious claims in the hope of extracting a mediation settlement.[123]

A directive to mediate might be inconsistent with mediation theory. However, theorists differ on whether mediation, by its nature, is a *voluntary* process which must be agreed to by all the parties to a dispute, or whether mediation can be forced on the parties by an external actor (such as a judge) or by prescriptive laws.[124]

Under the VCAMRs, the parties must voluntarily decide to mediate a matter. The parties cannot be penalised for refusing mediation. If a mediation fails, the presiding officer cannot impose *ex post facto* sanctions on the party who caused it to fail, or who refused to submit to mediation. In terms of the VCAMRs, a magistrate may at any time during the course of litigation (but before judgment) 'enquire into the possibility of mediation' with the parties. The 'enquiry'

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[120] This suggestion is not unconventional. See s 16*(k)* of the Sheriffs Act 90 of 1986.
[121] See §10.4.
[122] Different jurisdictions make provision for mediation at various stages, for example, pre-filing mediation, pre-hearing mediation, mediation on the hearing date (also called 'same-day' mediation): see Raitt, Folberg, Rosenberg, Barrett (n82) 81ff.
[123] See Bebcbuk 'Suing Solely to Extract a Settlement Offer' (1988) 12 *Journal of Legal Studies* 437.
[124] Wissler *(*n73) 565.

should not be confused with a *directive*, as mediation remains fundamentally a voluntary process.

The decision by the Rules Board to keep mediation voluntary in the magistrates' courts was indeed correct. In keeping within its statutory powers and in light of the absence of a mediation provision in the MCA, the Rules Board drafted the VCAMRs as a set of facilitative voluntary rules instead of making them prescriptive.[125] One can only speculate how the rules would have read had the MCA made provision for mediation. Perhaps the Rules Board would have been adventurous enough to mainstream mediation as a process and would not have left the decision of whether to mediate to the parties.

Many argue that voluntariness is not an essential component of mediation.[126] The absence of mutual consent does not fundamentally alter the aims and objectives of mediation. In fact, in many jurisdictions,[127] court-annexed mediation is imposed on the parties by a court, or by legislation.[128] It is convincingly argued that because mediation is aimed at assisting the parties to arrive at a mutually acceptable solution, the initial process of getting the parties to mediate does not have to be voluntary.[129] Mandatory mediation does not violate the right of access to justice, because if the mediation fails, the parties can return to court. Mediation simply delays proceedings that have already been initiated so that parties can try to resolve the matter without a court's intervention, and in accordance with the laudable aims and objectives of mediation.[130]

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[125] See §10.2.
[126] See Sander 'Alternative Methods of Dispute Resolution: An Overview' (1985) 37 *University of Florida Law Review* 1 at 15.
[127] Hendricks (n87) 542. See also comparative analysis at §10.8.
[128] Kessler, Finkelstein 'The Evolution of the Multi-Door Courthouse' (1988) 3 *Catholic University Law Review* 577.
[129] Hendricks (n87) 491ff.
[130] *Goldberg v Goldberg* 691 S.W 2d 312 (Mo. Ct. App 1985); *Kurtz v Kurtz* 538 S0. 2d 892 (Fla. Dist. Ct. App 1989); *Carter v Sparkman* 335 So. 2d 802 (Fla. 1976), cert. denied, 429 U.S. 1041 (1977). In cases where a referral to mediation was deemed unconstitutional, the Americans courts had regard to the fact that the statute in question required mediation before the parties could institute a civil action. The courts found that mandatory pre-litigation mediation violated the right to due process or access to justice in so far as a state constitution expressly entrenched a right of access to the courts. While the American Constitution expressly mentions due process (the Fifth and Fourteenth Amendments), the Constitution makes no mention of the right to access to justice. See Loring 'Constitutional Law: Statutorily Required Mediation as a Precondition to Lawsuit Denies Access to the Courts' (1980) 45 *Misssouri Law Review* 316-325.

(b) Mediators should offer their services on a pro bono basis

Currently the overwhelming majority of presiding officers in the small claims courts are legal practitioners, appointed on a *pro bono* basis. If mediation is offered in the small claims courts, there is no reason why commissioners who have undergone mediation training cannot also offer mediation for free. Since the coming into force of the VCAMRs, many legal practitioners have been trained as mediators.[131] With the co-operation of the Association of the Law Societies and the Bar Councils, it should not be too difficult to staff the small claims courts with qualified mediators. The Department of Justice could also initiate a sponsorship programme with the various universities to provide mediation training for would-be small claims courts presiding officers.

Mediation does not have to be conducted by a trained *legal* professional. People in other professions, such as doctors, engineers, accountants etc. can also become mediators. There may be many professionals who are keen to do community service and to gain experience as mediators. Nothing precludes them from serving in the courts. To be eligible for registration as a court-annexed mediator under the VCAMRs, the FMQS provides in clause 5:

> '5. Every applicant for accreditation must produce –
> *(a)* A character reference, which is not older than 3 months from the date from when it was written;
> *(b)* Proof of South African citizenship, or in the case of a non-national, a valid work permit or permanent South African resident's permit;
> *(c)* A statement on oath or affirmation by the applicant that the applicant –
> (i) Is not an unrehabilitated insolvent;
> (ii) Does not suffer from a mental illness or a severe or profound intellectual disability in terms of the Mental Health Act (Act 17 of 2002)
> (iii) Has not been convicted of a crime involving fraud or dishonesty or violence, or has not been convicted of a crime where the sentence was imprisonment without the option of a fine.
> *(d)* Proof that the applicant has successfully completed the level of mediation training referred to in paragraph (1).
> *(e)* A certificate of good-standing by a professional body of which the applicant is a member, or by an institution referred to in paragraph 2*(b)*, if the applicant is not a member of a professional body.'

The FMQS recognises two levels of mediators:

[131] See Law Society of South Africa advertisement for a five-day mediation training program for all legal practitioners at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&ved=0ahUKEwiS1-aznvXWAhXDLMAKHW3TDboQFghyMAY&url=http%3A%2F%2Fwww.lssalead.org.za%2Fupload%2FCIVILMEDIATIONtrainingforattorneys2016.docx&usg=AOvVaw0WpvD7mGx2I2czXCzpoCnc (last accessed 2 October 2017).

'3.1 A level 1 mediator 1 must have a minimum of a NQF level 4 competence under the provisions of the National Qualifications Framework Act, 2008 (Act 68 of 2008) and should possess basic computer literacy skills.

3.2 A level 2 mediator must have NQF level 7 qualification or higher competency in terms of the National Qualifications Framework Act (Act 68 of 2008) plus a minimum of 5 years' mediation experience in general mediation or specific fields of mediation.'

Clearly, it is not necessary for a mediator to be legally qualified.

The FMQS provides a sound set of qualification requirements to ensure that court-annexed mediators are competent service providers in the courts and that they possess the intellectual acumen and strength of character to service the civil justice system. There is no reason why the same standards cannot apply to mediators in the small claims courts. Needless to say, mediators must be representative of a cross-section of the population so that the presiding officer in a particular case can choose the most appropriate mediator to conduct the mediation, having regard to the needs of the parties in terms of gender,[132] race, ethnicity and language proficiency of the mediator.[133] One gets the sense that when the Department of Justice enlisted mediators in terms of rule 86(2) of the VCAMRs to service the 12 pilot site magistrates' courts at which mediation is offered, it ensured that there was a representative cohort of mediators.[134] This is important because there is little value if the mediator in a case cannot engage with the parties on a personal level by at least speaking the language of the parties.[135] It is also beneficial to make use of mediators from the community where the court is situated so that there can be direct community involvement in dispute resolution.[136]

[132] The gender of the mediator is very important. It is important for women to serve as mediators: Van der Merwe with Mbebe (n71) 37-38.
[133] See RMoeketsi 'Understanding the Other: A Case of Mis-Interpreting Culture-Specific Utterances during Alternative Dispute Resolution' in J Cotterill *Language in the Legal Process* 231.
[134] See http://www.justice.gov.za/mediation/MediatorsList.pdf for a full list of court-appointed mediators for the magistrates' courts (last accessed 15 August 2017).
[135] Language diversity is important: Van der Merwe with Mbebe (n71) 34.
[136] Ibid 33.

(c) Presiding officer cannot mediate a matter

It seems obvious but necessary to point out that a presiding officer who refers a matter to mediation should not conduct the mediation.[137] If mediation fails, a matter will be referred back to court and presumably (but not necessarily) the presiding officer who made the initial referral to mediation may be required to adjudicate the matter. It is thus important to prevent a conflict of interest. The SCCA should explicitly state that the presiding officer and the mediator cannot be the same person.

(d) Settlement agreement should be made an order of court

The VCAMRs, in conformity with many other jurisdictions, allow for a mediation settlement agreement to be made an order of court. The same should apply in the small claims courts.[138] To this extent, the SCCA and SCCRs should be amended to make provision for such a possibility.[139]

10.8 COMPARATIVE PERSPECTIVES

A literature review reveals that there are a considerable number of jurisdictions that incorporate mediation as part and parcel of their small claims procedures.[140] In this section only a few jurisdictions will be considered as a matter of general interest. However, s 23 of the Saskatchewan Small Claims Act of 1997[141] will be specifically focussed on below because this

[137] Menkel-Meadow (n45) 43.
[138] For the requirements of a valid settlement agreement see: Payne 'Enforceability of Mediated Agreements' (1986) 1 *Ohio State Journal on Dispute Resolution* 385-405.
[139] The procedure of the court would have to be fashioned along the lines of HCR 41(4) and
[140] Whelan *Small Claims Courts – A Comparative Study*.
[141] Chapter S-50.11 of the Statutes of Saskatchewan, 1997.

provision could, with a few modifications, be incorporated into the South African SCCA as it conforms with the small claims model proposed above.[142]

(a) England and Wales

In 2005, the Small Claims Mediation Service pilot scheme was initiated at the Manchester County Court. The Department of Constitutional Affairs of the United Kingdom commissioned the pilot. The pilot scheme proved to be so successful that it was rolled out across the whole of England and Wales. Today mediation is offered at every county court.[143]

Once a matter is assigned to the small claims track[144] of the county court, parties are presented with a questionnaire in which they are *inter alia* asked whether they would like to refer the matter to mediation. The parties can choose to have the matter mediated privately or by a court-appointed mediator. The file is referred to a district judge who considers whether the case is suitable for mediation. The determination is made on the papers. Statistics reveal that around 80% of matters are considered suitable for mediation.

If one of the parties wants mediation and the other does not, the judge considers arguments for not wanting mediation. Depending on the nature of the objection, the judge can either refer the matter for an 'allocation hearing' or the judge can refer the matter to trial. At an allocation hearing, the judge has discretion to refer the matter to mediation. The court mediation officer is tasked with arranging the mediation.[145]

According to a 2009 study, customer satisfaction surveys revealed that 95,8% of litigants who engaged in mediation felt satisfied with their participation level during mediation. 94,6% of litigants were happy with the amount of time allowed for mediation and 98,1% felt pleased with

[142] See §10.4 and §10.7.
[143] *Civil Court Mediation Service Manual* Publication (United Kingdom) 2. See also Doyle 'Evaluation of the Small Claims Mediation Service at the Manchester County Court' *Final Report*. The *Report* was commissioned by the Department of Constitutional Affairs, UK: see *Report* 5.
[144] See §4.7 for a discussion of the 'track' system in England and Wales.
[145] *Civil Court Mediation Service Manual* (UK) 11-18.

the level of professionalism displayed by the mediator. Of 3000 users surveyed, 94,5% of litigants said that they would use mediation again.[146] People commented positively about the informality of the mediation process and about how comfortable they felt during the actual mediation. Significantly, the settlement rate of disputes referred to mediation was 71%.[147]

(b) Kenya

Section 18 of the Kenyan Small Claims Court Act[148] provides:

> '(1) In the exercise of its jurisdiction under this Act, the Court may, with the consent of the parties, adopt and implement any other appropriate means of dispute resolution for the attainment of the objective envisaged under section 3 of the Act.
> (2) The Court may adopt an alternative dispute resolution mechanism and shall make such orders or issue such directions as may be necessary to facilitate such means of dispute resolution.
> (3) Any agreement reached by means of an alternative dispute resolution mechanism shall be recorded as a binding order of the Court.'

Even though the Act does not define 'alternative dispute resolution', there is little doubt that a presiding officer will most certainly be able to refer a matter to mediation. On account of the fact that it has only been recently promulgated, the Kenyan Small Claims Court Act has not been evaluated. It will thus be interesting to see how the Act will be implemented in the future and how exactly mediation will work.

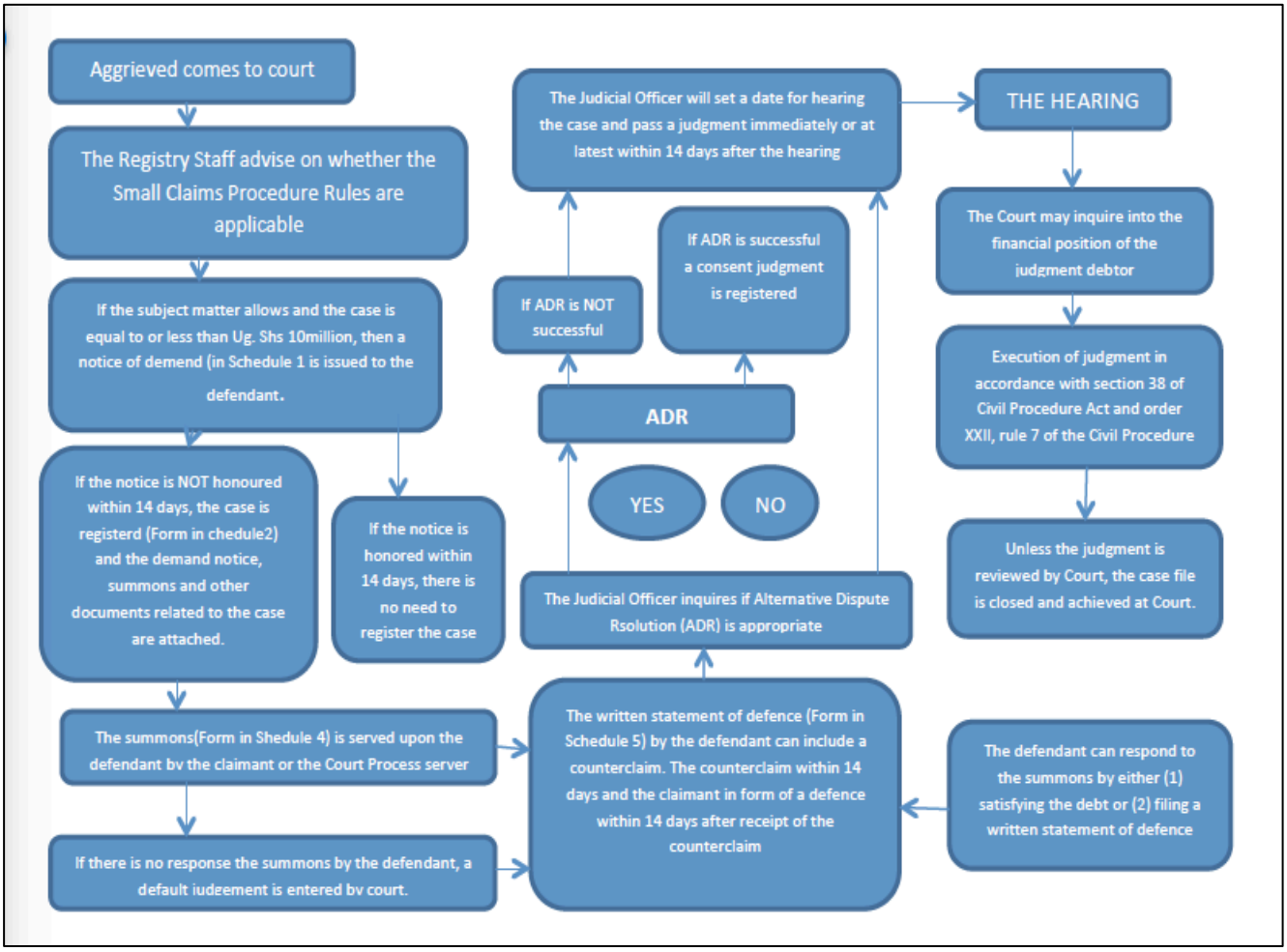
(c) Uganda

Uganda was one of the first countries in Africa to introduce mediation in small claims courts matters. This is hardly surprising as Uganda is the leading country in Africa for its use of alternative dispute resolution in civil justice. According to the Judicature (Mediation Rules) 2011, a small claims court judge can refer a matter to mediation 14 days before the hearing of

[146] Ibid 28.
[147] Ibid 14.
[148] Act 2 of 2016.

a case. If the mediation fails, the matter will be heard at trial. Where settlement is reached, the signed settlement agreement will be made an order of court.

The following illustrative diagram[149] explains the process:



(d) Saskatchewan, Canada

Section 23 of the Saskatchewan Small Claims Act, 1997 provides:

> '23
> (1) This section applies only at the court locations designated in the regulations.
> (2) A judge at a court location mentioned in subsection (1) may, at any time, direct the parties to participate in a mediation session.
> (3) In a direction pursuant to subsection (2), the judge shall set out the procedures to be taken to discontinue the mediation and have the matter brought before the court if the mediator and the parties are unable to resolve the matter.
> (4) Unless all of the parties and the mediator consent in writing, the following types of evidence are not admissible in any civil, administrative, regulatory or summary conviction proceeding:
> *(a)* evidence directly arising from anything said in the course of mediation;

[149] The illustrative diagram is from 'Courts of Judicature: Small Claims Procedure – User's Guide' (undated). Spelling and other errors are part of the illustrative diagram.

(b) evidence of anything said in the course of mediation;
(c) evidence of an admission or communication made in the course of mediation.

(5) If any fees or expenses of a mediator are payable, a judge may:
(a) direct the proportion of the mediator's fees and expenses that each party is to pay; or
(b) direct one party to pay all of the mediator's fees and expenses if the judge is satisfied that paying part of those fees and expenses would cause serious financial hardship to the other party.

(6) No action lies or shall be instituted against a mediator for any loss or damage suffered by a person by reason of anything in good faith done, caused, permitted or authorized to be done, attempted to be done or omitted to be done by the mediator in the carrying out or supposed carrying out of:
(a) any power or duty conferred by this section; or
(b) any direction made pursuant to this section.'

This provision is comprehensive enough to be incorporated into the South African SCCA.

For the purposes of the South African SCCA, subsection (1) of the Saskatchewan Small Claims Act, 1997 could be duplicated if mediation is incrementally rolled out. The Minister of Justice would then designate sites on an ongoing basis in regulations. Subsection (2) confirms that mediation is at the discretion of the judicial officer. The provision accords with the mediation model proposed above.[150] Subsection (3) is apposite because the judicial officer will, after screening a matter for mediation, make directions for the mediation. Having regard to the facts of a case, the judicial officer could use his or her directive powers to stipulate that a mediator with special expertise must conduct the mediation, or that mediation must be completed within a specified period, failing which the matter must return to court. Directions will expedite matters and prevent unnecessary delays in the small claims courts. The reference to 'administrative, regulatory or summary conviction' in subsection (4) must not be duplicated in the South African context. The phrase is inconsistent with the jurisdiction and the processes and procedures of the South African small claims courts. The rest of the subsection is satisfactory as it entrenches the confidentiality of the mediation process. The Rules Board should provide specimen mediation and settlement agreements in the SCCRs as examples for the parties to use. Subsection (5) must not be duplicated, as mediation should be offered on a *pro bono* basis by legal and other professionals. Subsection (6) is an excellent provision. It provides a blanket indemnity for the mediator provided that he or she acts in good faith. Where

[150] See §10.4 and §10.7.

a mediator fails to disclose a conflict of interest, for example, the mediator may be disciplined or sued if a party suffers prejudice. A code of conduct for mediators would further amplify their ethical and professional responsibilities.

10.9 CONCLUSION

During the period August to October 2013, the University of Limpopo, in consultation with the Department of Justice, initiated a student-led mediation service in the small claims court of Mankweng. Mediation was offered on an informal and voluntary basis. By all accounts,[151] the pilot project returned positive results with many people successfully mediating their matters.[152] This project illustrates that mediation can work in the small claims courts. It simply needs to be formalised and extended to every small claims court in the country.

Litigation, whether in the small claims courts or in the other courts, is an emotional experience for most people. Court procedure and court appearances, no matter how simple lawyers perceive them to be, are daunting to the lay public. For the under-educated and unsophisticated, the experience is particularly challenging. Mediation offers a different approach to dispute resolution. It is consonant with African values and marks a fundamental shift from the inherited colonial[153] litigation system.

[151] I am thankful to Ms J Wessels, of the Regional Court of Polokwane for her positive feedback with regard to the University of Limpopo mediation project. Ms Wessels believes that mediation should be a permanent feature in the small claims courts.

[152] http://photos.state.gov/libraries/southafrica/56706/pdf-docs/AlumniConnexIssue8-March2014.pdf. (last accessed on 14 November 2016). See also §3.8.

[153] See Paleker 'Civil Procedure in South Africa: the Past, the Present, and the Future' (2011) *ZZPInt* 343-468.

CHAPTER 11

CONCLUSION

Poverty is the most significant challenge facing South Africa. Twenty-four years into democracy, the guarantee of the new dawn promised to the nation in 1994 has not reached millions. One in four people are jobless, and the gap between the rich and the poor keeps growing.

Civil justice reform is vital. Without access to quality justice, the rule of law might as well be written in water. The integrity of the legal system and the dignity of the courts are in peril if people feel alienated from the court system. If people feel connected to the justice system, they are more likely to value it and to respect the officers of justice.

To address the legal costs crisis in South Africa, the inefficiencies in the litigation system and the day-to-day frustration felt by court-users who experience poor service, proceduralists must exert themselves to find creative and innovative solutions. This thesis has shown that while the small claims courts are not the panacea for all the challenges facing the civil justice system, they *can* make a valuable contribution from an access to justice perspective if they are 're-imagined' fundamentally and creatively (see chapter 1).

This thesis makes many recommendations for reform (see chapters 4 to 10). The main suggestions for reform are the following:

(a) To enhance access to justice, the small claims courts should also operate during business hours and not only after hours as is presently the case in the overwhelming majority of courts;
(b) The courts must be staffed by dedicated personnel consisting of trained clerks, legal assistants and interpreters. There is no reason why final year law students, members of the

legal profession, and other interested people with appropriate training cannot offer assistance to litigants;

(c) Presiding officers should consist of a combination of members of the legal profession, academics and retired magistrates who serve the courts on a part-time and on a voluntary basis. However, full-time presiding officers should also be appointed to ensure that the courts can function during business hours. It is essential that all presiding officers to receive adequate training and for them to be multilingual;

(d) The monetary jurisdiction of the courts must be dramatically increased to cater to the needs of poor and middle-income litigants who cannot afford to litigate in the magistrates' courts because of high legal costs;

(e) The rules of jurisdiction must be relaxed to make it easier for people to access the courts. The principles of territorial jurisdiction should be flexible enough to allow litigants to approach a particular court on the basis of convenience;

(f) Given the number of small claims courts in South Africa, consideration should be given to the possibility of juristic persons and trusts being able to sue in the small claims courts. This would assist small businesses to litigate inexpensively and will reduce litigation costs for litigants generally. If it is feared that business entities will swamp the courts, limitations should be imposed on corporate parties such as for example, limiting the number of times that a business can sue in the small claims court in a given year.

(g) As a general rule, the State should not sue and be sued in the small claims court. However, it should be possible for local government to be sued in the small claims courts. This might improve service delivery at local government level and instil public confidence in the justice system and the rule of law;

(h) The small claims courts should be able to enforce their judgments without having to transfer a matter to the magistrates' courts. The SCCA and the SCCRs should be amended to make provision for this;

(i) A small claims track should be introduced in the magistrates' courts to enable a magistrate to refer a matter to the small claims court where the claim is not complex and falls within the jurisdiction of the small claims court. This will prevent wealthy plaintiffs from forcing poorer defendants to defend matters in the magistrates' courts. To this extent, the MCA should be amended;

(j) Alternative dispute resolution in the form of mediation should be introduced in the small claims courts;

(k) The legislation governing the small claims courts should be overhauled to improve the processes and procedures of the courts;

(l) Technology must be used to make it easier for litigants to file claims in the small claims courts and to serve processes;

(m) Court documents must be user-friendly and not formalistic.

Ultimately, the hope is that the re-engineering of small claims courts might set into motion the overhaul of the entire civil justice system so that it satisfies the aspirations and needs of the modern-day court user.

ACKNOWLEDGEMENTS

Thanking people is a perilous affair; there is always the possibility of excluding someone who should have been acknowledged. I thus apologise in advance for inadvertently excluding people who should be thanked.

First and foremost, thanks go to the supervisor of this thesis, Prof PJ Schwikkard. It was a pleasure to work with her because of her deep understanding of adjectival law and its application to substantive law.

Second, I must thank the colleagues at the Department of Justice: Mesdames F Thema, C Naude, and T Ramnarain and all the other officials I had the opportunity to interact with. Their willingness to help me over the years was appreciated. Their dedication to the administration of civil justice was not lost on me.

Third, I acknowledge with gratitude the Rules Board for Courts of Law and in particular, the Regional Court President of Polokwane, Ms J Wessels; Ms N Ndlovu; Senior Magistrate E De Klerk; Mr D Neke; Mr G Bellairs, Mr R Daya and Mr J Balkishun, and so many others. My time with them was a source of inspiration and an unforgettable experience. They taught me aspects of adjectival law that is not found in textbooks.

Fourth, I thank the Small Claims Courts Steering Committee and the committed commissioners I had the privilege of meeting, as well the sheriffs who explained to me how they do their jobs.

Fifth, a heartfelt thanks to Mr Michael Crystal who read and critiqued my work. Michael has an exceptional eye for the minutiae.

Sixth, gratitude goes to my best friends, Erik, Sasha, Misha and Fatimah. You did what good friends do.

I dedicate this thesis to my parents.

APPENDIX 1

Small Claims Court

Institute your own claim!

the doj&cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

STAND TOGETHER FOR RIGHTS

GUIDELINES FOR LODGING A CLAIM IN THE SMALL CLAIMS COURT

the doj&cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

J141E (81/808188)

REPUBLIC OF SOUTH AFRICA

Issued by ..... Case No. .....
..... Date .....

Clerk of *the Small Claims Court*

No. 1 SUMMONS COMMENCING ACTION

The summons should be called the 'statement of claim'.

Name and address of plaintiff.....
.....
.....
.....
.....

This section gives no indication to supply telephone numbers, facsimile numbers, or an email address. All of these are useful to expedite communications. Furthermore, there is no indication that the plaintiff can choose a form of service other than physical service for other documents that may have to be served such as the statement of defence.

.....

Signature of Plaintiff

In the Small Claims Court for the District of .....

held at .....

Between ..... Plaintiff

and ..... Defendant

..... (gender and if female also marital state)

This is unconstitutional. See the discussion in Chapter 8 §8.4c.

TO .....
.....
.....
.....
.....

This section gives no indication to supply telephone numbers, facsimile numbers, or an email address. If the plaintiff has this information, the plaintiff should supply it. The additional information can be useful to the clerk of the court or to the court itself.

1. You are hereby summoned to appear personally before this court on the .....

day of ..... year ..... at ..... h ..... to admit or deny your liability for the undermentioned claim.

2. If you deny liability, you may at any time before the trial deliver to the clerk of the court at .....

…… address at a written statement setting out the nature of your defence and the particulars upon which it is based and a copy of the statement must then be delivered to the plaintiff.

The defendant should be advised to set out documentary evidence. Ideally a pro forma statement of defence should be attached to the summons for the defendant to fill out.

J141E

3. Particulars of claim:

Plaintiff's claim is for-

(a) payment of the sum/balance of R …. of

…… ….

…… ….

……

……

……

The plaintiff should be encouraged to narrate all the facts at his or her disposal relating to the claim. This will be of assistance to the court as it prepares for trial and determines what further evidence is required. The plaintiff should be encouraged to attach contracts, invoices and so on if the plaintiff has these in his or her possession.

(b) (i) for arrears of, rent due in respect of the defendant's tenancy of ……

……

It is unclear why arrear rental is singled out in the summons. Surely, legal assistants should explain the nature of the claim for arrear rental and assist people to fill in the statement of claim if the claim is based on arrear rental.

Date	*Period*	*Amount* **R** .
……	……	……
……	……	……
……	……	……

and

(ii) for ejectment,

Particulars …… ……

…… ……

…… ……

This is misleading because in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, a plaintiff would not be able to obtain ejectment in the small claims court if the property in question is used for residential purposes. The matter would have to be heard by a magistrate's court.

(c) Notice of *abandonment of part of claim / deduction the admitted debt.

Take notice that the plaintiff hereby *abandons the undermentioned part of the claim/deducts the admitted debt set up by him in his summons.

Particulars ……

……

……

……

A lay-litigant would not understand the purpose of the abandonment or the deduction of the admitted debt. Some explanation is required.

Dated at …… this …… day of …… year ……

……

Plaintiff

4. (a) Take notice that if you fail to appear in Court on the trial date after a summons has been served on you, judgement may be obtained against you by the plaintiff unless you have previously admitted liability to the plaintiff.
   (b) Money payable in terms of a judgment or order of court shall be paid directly to the judgement creditor.
   (c) If you admit the claim and wish to consent to judgment[1] or wish to undertake to pay the claim in instalments or otherwise you may approach the plaintiff.

5. Take notice that you and all other persons are hereby interdicted from removing or causing or suffering to be removed any of the furniture or effects in or on the premises described in the particulars of claim endorsed hereon which, are subject to the plaintiff's hypothec for rent until an order relative thereto shall have been made by the court.[2]

6. *Notice.*

If any person against whom a judgment for the payment of money [3]has been given or an order for the payment of money in instalments has been made fails to satisfy the judgment or order –

(a) such judgment or order may be enforced against movables and, if the movables are found to be insufficient then against the immovables of the party against whom the judgment or order has been issued;
(b) execution may be taken against the whole judgment debt and costs which have not yet been paid in default of an instalment being paid;
(c) such a person is liable to notify the judgment creditor fully and correctly, within 14 days after he has changed his place of residence, business or employment of his new place of residence, business or employment;
(d) and if he has let it be known that he is not in a position to comply with the judgment, the court may in chambers institute an investigation into the judgment debtor's financial position and his ability to pay the judgment debt and costs.

7. The Messenger's [4]fees are ..... R .....

8. *Consent to judgment*:

I admit that I am liable to the plaintiff as alleged in this summons (or to the amount of R ..... and costs to date) and I accordingly consent to judgment.

Dated at .... this …… day of .... year …....

..... ……

Date *Defendant*

Because small claims litigants are unrepresented, a judgment should be granted at trial after the presiding officer has listened to both parties and studied the evidence. Judgments based on mere consent can lead to fraud and undue influence being exerted on the unwitting defendant. If the defendant does not appear at the trial, the court can, in any event, grant default judgment after the plaintiff has satisfied the court that he or she is entitled to judgment.

[1] Defendants should not be allowed to consent to judgments. They should be allowed to agree with the plaintiff to pay off the debt in instalments. Judgments should only be granted by a court at trial. This prevents the situation where undue influence is exerted on defendants by bolshie plaintiffs. This is especially relevant if the small claims court in the future allows commercial parties to bring claims. See Chapter 8 §8.5.

[2] This provision creates an automatic rent interdict and activates the landlord's tacit hypothec. However, in the greater scheme of things, the interdict is toothless because the SCCA does not have a provision that is equivalent to s 32 of the MCA. See Chapter 9 §9.9.

[3] It may be better for this wording to be directed at the defendant to improve readability (i.e. 'if you fail to satisfy the judgment…').

[4] The reference to 'messenger' should read 'sheriff'. See Sheriffs Act 90 of 1986.

J141E (81/808188)

REPUBLIC OF SOUTH AFRICA

Issued by _____ Case No. _____

Date _____

_____

Clerk of the Small Claims Court

Telephone number:

Email address:

There must be some mechanism for the parties to contact the clerk of the court.

FORM 1

SMALL CLAIMS COURT

Modern terminology

STATEMENT OF CLAIM

In the Small Claims Court for the District of _____

held at _____

User-friendly instructions

INSTRUCTIONS: THE PLAINTIFF MUST COMPLETE PARTS A, B, C AND D BELOW.

PART A

DETAILS OF THE PLAINTIFF

Full name and surname: _____

Sex and occupation: _____

Residential/business/employment address: _____

_____

_____

_____

Postal address: _____

_____

_____

_____

Telephone number (if any): _____

Fax number (if any): _____

Email address (if any): _____

Further details

If you are prepared to accept further correspondence by fax, email, or any other means (for example, WhatsApp), please provide the relevant numbers, addresses etc.

_____

This allows the plaintiff to indicate alternative forms of service other than physical service. This accords with the HCRs and the MCRs.The reference to social media platforms has been added as people frequently use these platforms. See also Form 125 'Notice of Application for a Small Claim' compiled in terms of Order 26, Rule 5 of the Northern Ireland Small Claims Court Rules.

DETAILS OF THE DEFENDANT

Full name and surname: _____

Sex and occupation (where known): _____

Residential/business/employment address: _____

_____

_____

_____

Telephone number (if any): _____

Fax number (if any): _____

Email address (if any): _____

PART C

PLAINTIFF'S FACTS

(Kindly state the facts relating to the claim in your own words, and if you have any evidence relating to the claim, such as contracts, invoices etc, attach those to the statement of claim)

This encourages people to complete the summons themselves and mandates the use of everyday language.

If you cannot fit all the facts here, or you want to type the statement of claim, you can attach pages but make sure that: you sign every page; the clerk of the court initials every page; and you staple the pages to this form)

PART D

THE PLAINTIFF'S RELIEF/REMEDIES

(In this section, you must state what you want the court to grant: for example, a money amount plus interest or ejectment from commercial premises)

Again, the instruction encourages the use of everyday language. The court can decide at trial whether the plaintiff is entitled to the relief that he or she seeks.

PLEASE NOTE: The maximum amount you can claim from the court is R15 000 plus interest. You cannot claim more. If your claim is more than R15 000, you can abandon a portion of the claim or you can admit that you owe the defendant another debt, so that the abandoned amount or the other debt can be deducted from your claim to bring the claim within R15 000. If this is what you want to do, please give the court details:

This explanation contextualises the nature of an abandonment or a deduction of an admitted debt in order to bring a claim within the monetary jurisdiction of the small claims court.

NOTICE TO THE DEFENDANT

1. You[1] must appear personally before this court on the _____day of _____ _____ at _____ to admit or deny your liability in respect of the plaintiff's claim. (Note: if you cannot come to the court on this date, you must immediately inform the clerk of the court who will give you another suitable date).[2]

2. If you deny liability, you may at any time before the trial file with the clerk of the court a written statement in your own words setting out the nature of your defence. A copy of the written statement must be filed[3] with the clerk of the court and must be sent[4] by **registered mail** to the plaintiff's

[1] The instructions are directed at the defendant to improve readability.
[2] It is important to tell the defendant what to do if he or she cannot attend court. The clerk will inform the plaintiff of the new date.
[3] Currently, 'filing' entails physical delivery to the clerk of the court. It could be argued that parties should be able to file documents at court by email or through an online electronic platform. Unless these facilities are available, filing would unfortunately have to take place by physical delivery.

postal address mentioned in Part A. If the plaintiff has indicated in Part A that he or she is willing to accept service at an email address, fax address or by other means, you can use that method to serve your statement of defence on the plaintiff. You can collect a specimen statement of defence from the clerk of the court. You can also download the statement of defence from the following website:……[5]

3. If you do not want to deliver the statement of defence in (2) above, you must still come to court on the date mentioned above. The court will listen to your defence orally. If you have a claim against the plaintiff, you must bring your documents to prove your claim.

4. If you fail to appear at court on the trial date, judgment can be taken against you. This will entitle the plaintiff to demand payment from you and you will be required to pay the plaintiff directly or through the office of the sheriff of the district.[6]

5. Before the trial date, you can contact the plaintiff to arrange payment in instalments. If you reach agreement, make sure that the agreement is in writing. If you reach agreement, you do not have to come to court on the trial date. The court will make the agreement an order of court.

6. If the court grants judgment against you at the trial and you cannot pay the judgment plus interest, the court may:
   (a) in chambers institute an investigation into your financial position and your ability to pay the judgment debt and costs;[7]
   (b) grant a warrant for the execution of movable assets;[8] or
   (c) transfer the judgment to the magistrate's court for further proceedings which may include an emoluments attachment order or a garnishee order.[9]

7. The sheriff's fee payable by you is R .....

Dated at _____on this _____day of _____.

_____

Signature of Plaintiff

[4] The defendant does not have to show that the statement of defence was 'delivered'. The defendant merely has to prove that it was dispatched by registered post by giving the court, in the event of a dispute, the postal slip for registered post. See Chapter 9 §9.4 footnote 46.
[5] The statement of defence could be attached to the summons. However, if this proves too cumbersome, these alternative ways of obtaining the statement of defence should be mentioned.
[6] See the recommendations in Chapter 9 §9.21.
[7] See the recommendations in Chapter 9 §9.22.
[8] See the recommendations in Chapter 9 §9.24.
[9] See the recommendations in Chapter 9 §9.25.

The checklist ensures service delivery in the small claims court and ensures that the matter is procedurally ready to come before the court.

THE CLERK'S CHECKLIST BEFORE ISSUING THE STATEMENT OF CLAIM:

THE CLERK MUST ENSURE THAT THIS CHECKLIST IS PLACED IN THE COURT FILE

The clerk should only establish if the letter was sent (i.e. dispatched) and not whether it was delivered. See §8.5.

(a) Has the plaintiff sent the defendant a letter of demand and have the 14 days elapsed since the letter was sent? ☐

(b) Has the plaintiff filled in all the sections of the statement of claim as required? ☐

(c) Has the plaintiff explained the facts of the case in the statement of claim? ☐

(d) If the plaintiff has documentary evidence, has the evidence been attached? ☐

(e) Has the plaintiff received the assistance of the clerk of the court or a legal assistant to fill in the statement of claim? YES ☐ NO ☐

_____	_____	_____
NAME OF CLERK IN BLOCK LETTERS	SIGNATURE	DATE

Names and signatures ensure that the responsible clerk can be held accountable for poor work performance.

REPUBLIC OF SOUTH AFRICA

FORM 2

SMALL CLAIMS COURT

STATEMENT OF DEFENCE

In the Small Claims Court for the District of _____

held at _____

User-friendly instructions

CASE NUMBER:

INSTRUCTIONS: THE DEFENDANT MUST COMPLETE PARTS A, B, C AND D BELOW.

PART A

DETAILS OF THE DEFENDANT

Full name and surname: _____

Sex and occupation: _____

Residential/business/employment address: _____

_____

_____

_____

Postal address: _____

_____

_____

_____

Telephone number (if any): _____

Fax number (if any): _____

Email address (if any): _____

Further details

If you are prepared to accept further correspondence by fax, email, or any other means (for example, WhatsApp), please provide the relevant numbers, addresses etc.

_____

PART B

DETAILS OF THE PLAINTIFF

Full name and surname[1]: _____

PART C

DESCRIPTION OF THE DEFENCE

(a) State whether you agree or disagree with the plaintiff's statement of claim.

(b) If you deny the claim, explain your version. If you have documentary evidence (such as invoices, contracts etc) to prove your version, and this evidence has not been attached to the plaintiff's statement of claim, then attach it to this statement of defence.

(c) If you feel that the matter can be settled, state your proposal for settlement.

Gives the defendant directions about what to statement must contain. It is especially useful to request further documentation.

If you cannot fit all the facts here, or you want to type the statement of defence, you can attach pages but make sure that: you sign every page; the clerk of the court initials every page; and you staple the pages to this form)

Signed at _____on this _____day of _____.

[1] This is for administration purposes. The plaintiff's full details will be stated in the statement of claim.

_____

SIGNATURE OF THE DEFENDANT

PLEASE NOTE: THIS STATEMENT OF DEFENCE MUST BE SERVED ON THE PLAINTIFF PERSONALLY OR WITH THE ASSISTANCE OF THE SHERIFF OF THE COURT IN ACCORDANCE WITH THE SERVICE METHOD CHOSEN BY THE PLAINTIFF IN THE STATEMENT OF CLAIM. THE STATEMENT OF DEFENCE MUST ALSO BE FILED WITH THE CLERK OF THE ABOVE SMALL CLAIMS COURT BEFORE THE TRIAL.[2]

[2] Ideally, the defendant should be able to file the statement of defence with the court via email or through some other online platform. However, until such time such facilities become available, physical filing will still be necessary. This is not ideal because it means that the defendant must travel to the seat of the court during business hours to file the document.

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