THE SMALL CLAIMS COURT : A COURT WITH A HUMAN FACE?

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This research dissertation is submitted in partial fulfilment of the regulations for the LLM Degree. This dissertation is an original piece of work which has not been submitted for a degree in any other University and is made available for photocopying and for inter-library loan.

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CHAPTER ONE

INTRODUCTION

On the 29th November 1979 the State President appointed a Commission of Inquiry into the structure and functioning of the Courts of Law of the Republic of South Africa under the Chairmanship of Mr Justice G G Hoexter.[1] Its purpose was to report and make recommendations on the efficacy of the structure and functioning of the Courts and on the desirability of changes which may lead to the more efficient and expeditious administration of justice and the reduction in the cost of litigation.[2]

Included in the directions to the Commission (hereinafter referred to as the "Hoexter Commission") was a direction to look into the provision of special machinery for the settlement of minor civil disputes in an informal manner.[3]

The ordinary courts are inaccessible to a large portion of the population, many of whom are poor, illiterate and

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[1]Proc 286 GGE 6761 of 30 November 1979.

[2]Ibid.

[3]Paragraph (f) of Proc 286 supra.

uneducated.[4] The procedures are expensive, complicated, time consuming and intimidating.[5]

Small Claims Courts and Tribunals whose aims were to provide an accessible, swift, inexpensive and informal procedure for determining minor civil disputes existed in other countries of the world.[6]

At the time of the Fourth Interim Report[7] the Republic of South Africa had no special small claims procedures.[8]

Prior to Union in 1910 there were laws in the majority of the Provinces which provided for a simplified procedure for the determination of certain disputes.[9] [10] In both the Cape and

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[4]Commission of Inquiry into the Structure and Functioning of the Courts; Fourth Interim Report, paras 2.3-2.6 12-15.

[5]Fourth Interim Report, supra, paras 2.3-2.4 12-13.

[6]Fourth Interim Report, supra, 4 and 16.

[7]May 1982.

[8]Fourth Interim Report, supra, 21-29.

[9]Die Wet op Invorderen van Kleine Schulden 10 of 1897 (Transvaal); The Small Debts Recovery Act 15 of 1905 (Cape); Petty Debts Recovery Ordinance 2 of 1906 (Orange River Colony).

the Orange Free State the procedure was limited to claims for liquidated amounts.[11] A condition precedent to the issue of summons was the filing with the Clerk of the Court of a letter of demand.[12] Summons would be issued if the Clerk was satisfied that a reasonable time had been allowed for the defendant to react to the demand.[13] Judgment could be granted against the defendant without any evidence where there had been personal service of the summons and the defendant had failed to enter an appearance to defend within the prescribed time limit. Where personal service had not been affected, a provisional judgment could be granted.[14] In such a case the defendant had the right to reopen the judgment. If reopened, the case would proceed as if a notice to defend had been entered timeously.[15] Where an appearance had been entered a date would be set for the appearance of the parties and witnesses for the hearing of the claim. The matter would then proceed in terms of the normal rules.[16]

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[10](...continued)
[10]Fourth Interim Report, supra, 22.

[11]Fourth Interim Report, supra, 22-23.

[12]Ibid.

[13]Ibid.

[14]Ibid.

[15]Ibid.

[16]Fourth Interim Report, supra, 23.

In the Orange Free State the plaintiff was not entitled to the costs of legal fees in respect of an action instituted under the Ordinance.[17]

In the Transvaal the procedure was not limited to claims for liquidated amounts.[18] Upon payment of the prescribed fee, the claimant could make application to the Registrar of the Court of the Landdrost for a citation. The Registrar would issue a citation calling upon the debtor to make payment of the claim at the office of the Landdrost within 72 hours of the service of the summons and informing him that his default would result in a writ of execution being issued against him.[19] Where no written or verbal defence was lodged, the Registrar could grant default judgment immediately.[20] Where a defence was filed or made, the Registrar was required to inquire into the validity of the defence. Where the defence was not well founded, judgment could be entered against the defendant.[21] Where there was a good defence, the matter would proceed to trial on a date to be determined.[22] A

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[17]Fourth Interim Report, supra, 23.

[18]Fourth Interim Report, supra, 21.

[19]Ibid.

[20]Ibid, section 3 of Law 10 of 1897.

[21]Fourth Interim Report, 22.

[22]Ibid.

warrant of execution could be issued immediately after judgment.[23]

There was no provision for the recovery of small debts in the Magistrate's Court Act which repealed the pre-Union Law, Act and Ordinance.[24]

The subsequent Magistrate's Court Act[25] when first promulgated contained simplified procedures which provided for the granting of judgment in respect of claims for certain liquidated amounts up to R20,00 where the defendant failed to enter an appearance to defend or where he consented to judgment.[26] Prior to issue of summons, a copy of a written demand sent to the defendant allowing him at least 7 days to comply with the demand had to be filed with the Clerk of the Court.[27] These sections fell into disuse and were repealed in 1976.[28]

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[23]Ibid.

[24]Act 31 of 1917.

[25]Act 32 of 1944.

[26]Section 55 of Act 32 of 1944, Fourth Interim Report, 23.

[27]Section 55 of Act 32 of 1944, Fourth Interim Report, ibid.

[28]Act 63 of 1976.

In terms of the present provisions of the Magistrate's Court Act[29] the plaintiff may apply for judgment against the defendant where:

1. a defendant who has received a letter of demand or summons in respect of any liquidated amount has admitted liability in writing of the amount claimed or any other amount;

2. he has offered to pay the debt in instalments;

3. he has agreed that the plaintiff may apply for judgment in the event of his failure to comply with the offer.[30]

Where the defendant has consented in writing to judgment in favour of the plaintiff after receipt of a letter of demand or summons claiming a liquidated amount, the Clerk of the Court may, at the written request of the plaintiff, enter judgment in his favour in accordance with the request.[31]

In considering these provisions of the Magistrate's Court Act, the Hoexter Commission emphasised that they had limited application.[32] They applied only to debts or liquidated

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[29]Section 57 of Act 32 of 1944, as amended.

[30]Section 57 of Act 32 of 1944, as amended.

[31]Section 58 of Act 32 of 1944, as amended.

[32]Fourth Interim Report, 27-29.

amounts where the defendant had admitted liability or consented to judgment.[33] There was no special limit on the amounts in respect of which they applied. The provisions relating to the jurisdiction of the Magistrate's Court Act applied.[34]

The provisions were used primarily as a means of debt collection.[35]

Small Claims Courts were not intended to be forums for debt collection, but as a means to provide a speedy and informal adjudication of disputed claims.[36] It was on this basis that the Hoexter Commission set about its task.[37]

A delegation of the Commission comprising Mr Justice G G Hoexter and the Chief Researcher J J Noeth[38] went to various places, both in the United States of America and England, in order to observe Small Claims Courts in action.[39]

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[33]Ibid.

[34]Ibid, section 29 of Act 32 of 1944.

[35]Fourth Interim Report, 27.

[36]Fourth Interim Report, 28-29.

[37]Fourth Interim Report, 29.

[38]Now the Director-General : Justice.

[39]Fourth Interim Report, 4-5.

Discussions were also held with the various presiding officers, court officials, academics and other experts abroad.[40] In South Africa submissions were received from Judges, legal practitioners, court officials, teachers of law, representatives of the business community and other interested parties.[41]

In May 1982 the Hoexter Commission submitted its report.[42] It found that there was an urgent need for a Small Claims Court in South Africa where an informal, inexpensive and simple procedure in respect of minor claims could be applied.[43]

Its proposals included the following:[44]

1. Only natural persons be allowed to institute action. The jurisdiction in respect of defendants would not be so limited but would include other legal entities.[45]

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[40]Fourth Interim Report, 8-11.

[41]Fourth Interim Report, 30-49.

[42]Fourth Interim Report, 174.

[43]Fourth Interim Report, 174 and 197.

[44]Details of some these proposals are discussed and analysed in subsequent chapters below.

[45]Fourth Interim Report, 198.

2. The plaintiff could choose whether or not to institute action in the Small Claims Court whose jurisdiction the defendant was obliged to submit to.[46]

3. There be no representation at the hearing.[47]

4. The presiding officers be chosen from a panel of qualified lawyers who had legal experience of practice as advocates or attorneys. They would not be members of the Public Service.[48]

5. Claims involving complex questions of law and fact would not be tried in the Small Claims Court and the Commissioner would be entitled to refuse to entertain the action.[49] The plaintiff could then institute action out of the Magistrate's Court.[50]

6. The Court would not be a court of record and paperwork would be limited. The only pleading required would be a notice of claim served personally on the defendant calling upon him to appear in person at the Small Claims

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[46]Ibid.

[47]Fourth Interim Report, 199.

[48]Ibid.

[49]Fourth Interim Report, 198.

[50]Ibid.

Court on the date of the trial in order to present his case. Included in the notice would be advice that unless he appears judgment by default would be granted against him.[51]

7. The defendant's place of residence, employment or where he carries on business would determine which Court had jurisdiction.[52]

8. Legal assistance and advice be available free of charge to both parties at all stages during the pre-trial period. Full-time salaried members of the Small Claims Courts would be responsible for the furnishing of such advice.[53]

9. The procedure in the Small Claims Courts would be inquisitorial and not adversarial. The chief function of the Presiding Officer would be to actively investigate the dispute. He would not be bound by the rules of evidence but would be free to adopt any method of procedure which he considered to be convenient in a particular case and fair to both parties.[54]

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[51]Fourth Interim Report, 197-198.

[52]Fourth Interim Report, 198.

[53]Fourth Interim Report, 199.

[54]Fourth Interim Report, 200.

10. The primary task of the Presiding Officer would be to determine the dispute by a process of adjudication. However, in appropriate cases he would fulfil the role of mediator.[55]

11. Judgment by default in undefended cases would be possible but only after the plaintiff had proved the liability of the defendant and the quantum of his damages.[56]

12. After judgment the Presiding Officer would have the power to require that the debtor give evidence as to his financial position and to authorise the Clerk of the Small Claims Court to issue a provisional writ in order to secure the attachment of the debtor's movable assets in case he should default in payment.[57]

13. There should be no appeal from a decision of a Small Claims Court.[58]

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[55]Ibid.

[56]Fourth Interim Report, 200.

[57]Ibid.

[58]Fourth Interim Report, 201.

The Hoexter Commission proposed that pilot projects be undertaken in certain metropolitan areas.[59] These could be monitored in order to determine their effectiveness.[60] If successful, further Small Claims Courts could be established in those areas where they were required.[61]

The Legislature accepted the majority of the proposals and on the 19th of April 1984 the Small Claims Court Act[62] was assented to by the State President.[63]

It was intended that the Small Claims Court Act come into operation during April 1985.[64] Owing to financial circumstances and the curtailment of State expenditure, it was not possible to launch the pilot project during that period.[65] An Implementation Committee was appointed on the 1st of March 1985 to investigate and report on the

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[59]Fourth Interim Report, 202.

[60]Ibid.

[61]Ibid.

[62]Act 61 of 1984.

[63]The Act has since been amended by Act 92 of 1986, Act 63 of 1989 and Act 14 of 1990.

[64]Report : Department of Justice, 1st July 1985-30 June 1986, 4.

[65]Ibid.

implementation of pilot projects at specific centres at the lowest cost to the State.[66] The pilot projects of the Small Claims Courts were approached as community projects with the aim that they would function with the minimum or even no government involvement or financing.[67] Favourable reaction was received from the legal profession and universities. Over 250 advocates, attorneys and academics offered their services as Commissioners free of charge.[68] Universities, local authorities and certain private bodies made venues available to accommodate the court sessions.[69] Legal Aid clinics at universities undertook to co-operate with officials of the Department of Justice in providing the necessary legal assistance and the Federation of Associations of Messengers of Court of South Africa offered to serve summons on people having to appear in the Small Claims Courts free of charge for the first year.[70] This period was later extended.[71]

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[66] Ibid.

[67] Ibid.

[68] Ibid.

[69] Ibid.

[70] Ibid.

[71] Ibid.

The pilot projects were launched on the 1st of October 1985 in seven cities and towns.[72] [73] Two further Small Claims Courts were established in early 1986.[74] The pilot projects were a success and demands were made for Small Claims Courts in other areas.[75]By the 30th of June 1987 there were 17 Small Claims Courts in the country.[76] During the next year a further 26 courts were established.[77] During the 1988-1989 year the number increased by a further 18.[78] At present[79] there are 84 Small Claims Courts in the Republic.[80]

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[72]Ibid.

[73]Durban, Pietermaritzburg, Pretoria, Springs, Rustenburg, Bloemfontein and Port Elizabeth.

[74]Cape Town (1st January 1986) and Johannesburg (1st February 1986), Report : Department of Justice, supra.

[75]Report : Department of Justice, 1st July 1986-30 June 1987, 69.

[76]Ibid.

[77]Ibid.

[78]Report : Department of Justice, 1st July 1988-30 June 1989.

[79]30 November 1990.

[80]Figures supplied by the Department of Justice.

The increase in the number of Small Claims Courts over the years does indicate an acceptance by the Department of Justice that the Courts serve an important function in the administration of justice in the community. It is therefore essential that the Court proceedings are seen to be fair, the decisions of the Commissioner just and the assistance rendered by the Court staff efficient. This requires knowledge, experience, diligence and a positive approach on the part of the Commissioners, the Clerks of the Court and the legal assistants. It also requires legislation which provides a proper framework within which these objectives can be achieved.

My aim in this thesis is to determine the extent to which the Small Claims Court Act[81] provides such a framework, to analyse its provisions relating to procedure and evidence and to describe the nature of the proceedings of the Court. Alternative forms of minor dispute resolution and Small Claims Court systems in other countries are compared and the important roles of Commissioners and court staff is discussed and emphasised.

Different countries handle small claims differently.[82] In continental European countries and in the Socialist States,

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[81]61 of 1984, as amended.

[82]W Fashing, "Small Claims", in Marcel Storme and Helene Casman, eds. Towards Justice with a Human Face, 1978, 347, 354-355.

the trend was to allocate small claims to the ordinary courts. In these countries there was during the late 19th and early 20th centuries a development towards the general development of the total civil process.[83] An exception was in Germany. The original provisions of the Reichzivil-prosess-Bordnung[84] contained a free, informal and simple small claims procedure. Early on, however, this procedure was abandoned and brought into conformity with that of the ordinary civil courts.[85] In these countries the Judge has an active inquisitorial role during the proceedings. The procedure is generally more simple than that found in the common law countries.[86] It was therefore not necessary to have special procedures to deal with small claims.[87] There are in some of these countries slight modifications to the standard procedure.[88] The hearings take place before a single judge rather than a collegiate, legal representation is not mandatory and the hearings are generally more informal, giving the presiding officer even greater

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[83]Ibid.

[84]1877.

[85]W Fashing, "Small Claims", 354-355.

[86]Ibid.

[87]W Fashing, 356-357.

[88]W Fashing, 360.

discretion than his counterparts who preside over other cases.[89]

The civil procedure and the law of evidence of France and Germany are discussed in the next chapter.

In the common law countries where the purpose of civil procedure is mainly to regulate the dispute between the parties and the presiding officer has a passive role, greater differences exist between the procedure of the normal courts and that relating to small claims.[90]

In the United Kingdom special courts were not established to deal with small claims. Small claims are tried in the normal courts. In England, Wales and Northern Ireland the cases are tried in the county courts, while in Scotland the trial takes place in the sheriff courts.[91] Special procedural rules apply in respect of small claims in these countries. The rules of evidence do not apply and the presiding officers, usually the Registrar of the country courts and the Sheriff in Scotland, are encouraged to play an active role in the conduct of the proceedings.[92]

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[89]Ibid.

[90]Ibid.

[91]Infra.

[92]Infra.

In certain States of the USA, Australia, New Zealand and South Africa, special courts have been created to deal with small claims.[93]

Aspects of the small claims procedures referred to above are discussed in the chapters which follow. A comparison is made between these procedures and the customary civil procedure of traditional tribal courts and the Primary Courts in Zimbabwe.[94] This procedure is relatively simple and informal.[95] Suggestions are made as to how certain aspects of customary procedure can and should be incorporated into the regulation of small claims in the Republic of South Africa.

Alternative methods for the resolution of small claims disputes have been suggested by certain writers.[96] Mediation and arbitration have been used in some countries as a means of resolving small claims disputes.[97] In New York, arbitration is an alternative to adjudication. Whether or not to proceed to arbitration is left to the parties to

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[93]Infra.

[94]Infra.

[95]Infra.

[96]D Scott Macnab, "Mediation Arbitration. A Better Way to Justice". (1985) LLM Thesis, 118.

[97]Infra.

decide.[98] In Pennsylvania, on the other hand, arbitration alone is available to the parties.[99] Mediation takes place in Maine and Ontario in the USA.[100] The statutes establishing small claims tribunals in New Zealand, Australia and Singapore emphasise the court's conciliatory role in determining disputes. The relevance, advantages and disadvantages of mediation and arbitration are discussed in the chapters which follow.[101]

In the Small Claims Courts in South Africa, the Commissioner has a wide discretion in fact gathering and finding. He is empowered to act inquisitorially and is free to take into account any evidence he may deem fit.[102] The nature of his role, his powers and his duties to the parties are analysed. How the problems of legal assistance and the courts role have been addressed in other countries is discussed. Improvements, both in the manner the Commissioner handles the trial and in the furnishing of legal advice by the court staff, are suggested.

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[98]Infra.

[99]Infra.

[100]Infra.

[101]Infra.

[102]Section 26 Small Claims Court Act 61 of 1984.

The Hoexter Commission was enjoined to determine what changes were necessary to lead it to a more efficient and expeditious administration of justice.[103] The Small Claims Court was a consequence of their recommendations.

My object in this thesis is to analyse the extent to which these objects have been achieved in respect of small claims and to determine whether it can be said that the Small Claims Court is a court with a human face.

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[103] Supra.

CHAPTER TWO

CIVIL PROCEDURE IN CIVIL LAW COUNTRIES

1. CIVIL PROCEDURE IN GERMANY

In 1987 a German jurist stated:

> "One must ask, however, how the need of all modern societies to provide effective justice 'for the little guy' can be satisfied without giving the Judges a power to pursue a more active and dominant course in the interests of the litigant. If there is a desire for procedural reform in common law jurisdictions either by making changes within the adversary system or by developing alternative methods of dispute resolution, the Continental experience may be worth studying."[1]

Peter Gottwald has stated:

> "(The) results (relating to statistics of the Courts of Bavaria with regard to the speedy finalisation of disputes) indicate that the length of proceedings can be reduced according to due process of law. The figures of the local Courts, moreover, demonstrate that the present day procedure meets all the requirements of small claims and consumer protection. Hence there is no need to establish special claims courts."[2]

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[1]Hein Kotz "The Role of the Judge in the Courtroom : The Common Law and Civil Compared". (1987) TSAR 38, 43.

[2]Peter Gottwald "Simplified Civil Procedure in West Germany". (1985) 31. American Journal of Comparative Law, 687, 700.

The civil procedure of the Federal Republic of Germany has been incorrectly described as inquisitorial.[3] Rather, the procedure should be described as judicial.[4]

The philosophies of the common law system and the continental or civil system are different. According to Ziedler the object of English procedure is the due and equitable process of law, whereas in German law the object is the uncovering of the truth.[5]

In Germany the Judge plays an active part in the proceedings. He controls the time of the hearing, other time periods, the gathering of evidence, the calling of witnesses and their questioning. The parties determine the limits of the action and the plaintiff has the choice whether or not to institute an action. However, it is the Judge who gathers, investigates and produces the facts.[6] Unlike the common law

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[3]D E van Loggerenberg "Hof Beheer en Partyebeheer in die Burgelike Litigasieproses 'n Regshervormingsondersoek". (1987) (Unpublished LLB thesis UPE) 35-41, Chapter 3; Kotz 37-38; W Ziedler "Evaluation of the Adversary System : A Comparison, Some Remarks on the Investigatory System of Procedure". (1981) 55 Australian Law Journal 390.

[4]Ziedler, 390.

[5]Ziedler, 392; Kotz, 37-38.

[6]Van Loggerenberg, Chapter 3; Kotz, 36-38; Ziedler, 391-393; John H Langbein, "The German Advantage in Civil Procedure", (1985), 52 University of Chicago Law Review, 823.

procedure, there is no distinction between the pre-trial and the trial phase, the discovery of evidence and its presentation:

> "The trial is not a single continuous event. Rather the Court gathers and evaluates evidence over a series of hearings, as many as the circumstances require."[7]

The proceedings are episodic and more informal than in the common law.[8]

The action is commenced by a summons drafted by the plaintiff, which not only contains allegations of fact necessary to sustain a cause of action, but also details of witnesses, evidence and copies of documents which will be relied upon. The summons is issued by the court which has a discretion to order an early hearing at which the defendant is to appear to disclose the evidence.[9] The order will specify whether the defendant is to appear before the court itself or a single reporting Judge appointed by the Presiding

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[7]Langbein, 826.

[8]Langbein, 826.

[9]Van Loggerenberg, 146.

Officer for that purpose.[10] This order, known as an order of evidence, has been described as the first important step taken by the court in the proceedings.[11] This order can include directions to the defendant to answer the allegations in the summons by a certain date and to disclose the evidence which supports the defence. If the defendant has not complied with the order at the time of the initial hearing, the court or reporting Judge may order compliance therewith within specified time periods. The object of the hearing is to ensure that the matter will be able to be disposed of at a later single hearing.[12] The initial hearing can be used to determine the issues in dispute and promote settlement.[13] Where a preliminary hearing is not ordered, the Judge has a discretion to furnish written directions for the preparation of the trial. After receipt of the defence and accompanying documents, it is the Registrar's duty to ensure that the evidence referred to in the documents is available at the hearing.

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[10]Benjamin Kaplan, Arthur Ivon Mehren, Rudolf Shaeffer, "Phases in German Civil Procedure", (1957-1958), 71 Harvard Law Review, 1193, 1203; Van Loggerenberg, 154.

[11]E J Cohn, M Bohndorf, O C Giles, and J Tomass, "Manual of German Law", Vol II, 2nd Edition, (1971), 221.

[12]Van Loggerenberg, 147-150.

[13]Van Loggerenberg, 150.

After pleadings have closed, the Registrar hands the case file or dossier to the Presiding Judge who may appoint a reporting Judge. If one is appointed, he studies the file and if necessary he can issue further orders.[14] Where a reporting Judge is not appointed, the Presiding Judge performs these functions.[15]

> "Die instruksies is ... leidinggewend van aard en gewoonlik daarop gemik op verder inligting, dokumente, en diesmeer van partye te kry ten einde onduidelikhede in die saak uit die weg te ruim. Sodoende kry die partye geleentheid om hulle saak behoorlik bloot te lê en aan te bied. Die Hof is gebond om sy instruksies binne die raamwerk van die aard en omvang van die aksie, soos daardie partye bepaal, op te stel."[16]

After the directions have been complied with the Court takes steps to set the matter down, subpoena witnesses and obtain the relevant documents. The trial officer can appoint someone to take statements from witnesses. The Judge may also issue a statement at this stage wherein his views on the

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[14]Danie van Loggerenberg, "Die Rol van die Hof en Partye in die Wesduitse Burgelike Litigasieproses", (1989), Tydskrif van Suid-Afrikaanse Reg, 33, 39.

[15]Ibid.

[16]Van Loggerenberg, "Hofbeheer en Partybeheer", 155.

facts and the law is set out thus indicating to the parties his attitude.[17]

During the hearing the Judge has certain duties. These are laid down in section 139 of the Civil Procedure Code.[18] Section 139 provides that the Judge:

> "1. ... shall ensure that the parties make full statements regarding all relevant facts and make appropriate motions in particular that the parties enlarge upon insufficient statements regarding the facts which they plead and that they indicate means of proof. For this purpose, so far as may be necessary, he shall discuss the case and the issues in both the factual and legal aspects with the parties and ask questions.
>
> 2. The presiding officer shall point out doubts arising with regard to any point that has to be considered ex officio.
>
> 3. He shall permit any member of the court who wishes to ask questions to do so."[19]

In terms of section 279 of the Code, the Judge has a duty to lead the parties to an agreement if possible. The Court has

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[17]Van Loggerenberg, "Hofbeheer en Partyebeheer in die Burgelike Litigasieproses", 159-160.

[18]Ziviprozessordining, 1877 as amended.

[19]Ziedler, 394.

the power to attempt a settlement at any time and at any stage of the proceedings.[20]

The proceedings are to some extent paternalistic:

> "Always in examining the case as it progresses with understanding of the probable applicable norms, the Court puts questions intended to mark out areas of agreement or disagreement, to elucidate allegations and proof offers and the meaning of matters elicited in proof takings. In this way the Court enlightens itself about the issues and at the same time broadens the understanding of counsel and the parties. The Courts leads the parties by suggestion to strengthen their respective positions, to improve them, change and amplify the allegations and proof offers and to take other steps."[21]

The proceedings during the course of the trial are informal. The Judge not only speaks to the legal representatives but may have discussions directly with the parties.[22] The atmosphere that prevails is like that of a business meeting where important matters are discussed.[23]

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[20]Ziedler, 394.

[21]Benjamin Kaplan et al, 1251.

[22]Van Loggerenberg, "Die Rol van die Hof en Partye in Wes-Duitse Westerlike Litigasieproses", 1989 TSAR 43.

[23]Ibid.

A verbatim record of the evidence or proceedings is not kept. The judicial officer will during the course of the proceedings dictate a summary of the evidence to his clerk. At the end of the evidence of a witness his summary is read out, and the witnesses or lawyers are given an opportunity to comment and suggest changes.[24]

Although the Judge may not have the power to call witnesses mero motu which have not been referred to in the papers, he does exercise the power indirectly by pointing their necessity to the parties. The parties are unlikely to disregard a suggestion to call the evidence of witnesses.

The German lawyer does little with regard to the questioning or preparation of witnesses for trial, or the questioning of the witnesses at the hearing itself. However, in other spheres, the lawyer plays a vital role during the proceedings. The Court is bound by the pleadings of the parties. Thus it cannot substitute one cause of action for another or grant relief which has not been requested:

> "Die Hof moet sy funksie binne die raamwerk van die keuse bevoegtyds-beginsel uitoefen. Die Hof kan dus leiding verskaf in verband met die moontlike wysigings aan die aard en ontvang van die aksie maar mag nie uit eie beweging so 'n wysiging aanbring, nog die partye dwing om dit te doen nie."[25]

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[24]Kaplan, et al, 1236.

[25]Van Loggerenberg, 168.

The Judge is also prohibited from digging out and presenting evidence of his own.[26] It is therefore important that the summons, defence and other pleadings are properly drawn to contain references to the relevant evidence and witnesses. The Judge calls for the evidence that is referred to. Where the evidence does not appear from the document vital information may be missed. It is also for the lawyers to direct the Court to the points they wish to be covered. Counsel must specify what facts the witnesses should be examined on and what evidence should be given. Witnesses are first invited to give evidence in narrative form. Thereafter the judicial officer questions the witnesses in order to ascertain any remaining relevant facts.[27] It is incorrect to state that the witnesses called are witnesses for the plaintiff or defendant. Rather they are the witnesses of the Court. Counsel rarely questions them during the proceedings and then only in relation to those matters not covered by the Court. Even so, the questions to be put by Counsel are usually given to the Court who subsequently puts them to the witness.[28]

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[26]Kaplan, 1225.

[27]Cohn, et al, 223; John Ratcliff, "Civil Procedure in Germany" (1983) 2 Civil Justice Quarterly 257; Kaplan et al, 1234-1235.

[28]Cohn et al, 224; Ratcliff, 263-265; Kaplan et al, 1235.

Langbein states:

> "Apart from fact gathering, however, the lawyers for the parties play major and broadly comparable roles in both German and American procedure. Both are adversary systems of civil procedure. There as here, the lawyers advance partisan positions from first pleadings to final arguments. German litigants suggest legal theories and lines of factual enquiry, they superintend and supplement judicial examination of witnesses, they discuss and distinguish precedents, they interpret statutes and they formulate views of the law that further the interests of their client."[29]

1.1 Law of Evidence in Germany

The Small Claims Court Act[30] provides for an active role on the part of the Commissioner as does the German system. It is thus useful to take cognisance of the method by which the presiding officers in the Federal Republic of Germany perform their functions. The Small Claims Court Act also provides for the free evaluation of evidence.[31] The German system also follows a system of free evaluation of evidence.[32]

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[29]Langbein, 824.

[30]Act 61 of 1984.

[31]Section 26 (2) Act 61 of 1984.

[32]Ratcliff, 257.

There are no rules classifying the quality of evidence according to form or exclusionary rules in Germany.[33] Formal corroboration is not required.[34] All material and relevant evidence is taken into account. Accordingly hearsay and opinion evidence are admissible. In accordance with the principle of the free evaluation of evidence, the Court gives weight to the evidence and happenings in the courtroom "as it deserves in reason".[35]

The principle of the free evaluation of evidence has led to the belief that there is no law of evidence in West Germany. This according to Cohn is erroneous.[36] The German law of evidence deals with the burden of proof, the various kinds of evidence, and the mode by which it is presented to and taken by the Courts. The law of evidence cannot therefore be said to be only procedural in character. The burden of proof and presumptions which play an important role in the proof of facts, depend upon, or are rules of, the substantive law.[37] The Court may draw inferences and conclusions of fact from certain other events or facts. This has the effect

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[33]Cohn et al, 219.

[34]Cohn et al, 219.

[35]Kaplan et al, 1244-1245.

[36]Cohn et al, 179.

[37]Cohn et al, 219-221.

of shifting the burden, and in the absence of rebuttal, such proof becomes final.[38]

Although as a general rule the principle of immediate or direct evidence applies, there are instances where some of the evidence is not taken by the Court which has to determine the issues or the reporting Judge appointed by the Court. In such cases the evidence will be taken before a District Court or other agency and thereafter transmitted to the judicial officer. In some cases the lawyer will appoint correspondents to appear at the place where the evidence is taken.[39] This may happen, for instance, where such evidence is taken at a place too difficult or costly for the witnesses to travel to or where it is some distance from the court.[40]

Witnesses' affidavits are also sometimes used. These are affidavits by witnesses who do not give direct evidence. Even though they may be of poor quality their admission may cut the time and cost of taking evidence. The Court, however, must take their probative value into account.[41]

The standard of proof is the personal conviction of the Judge. Before reaching a conclusion the judicial officer

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[38]Cohn et al, 220.

[39]Cohn et al, 178; Ratcliff, 265.

[40]Ibid.

[41]Ibid.

must be convinced that the evidence is the truth, not that it is probably true.[42]

Although the free evaluation of evidence principle applies, there is "a flourishing body of law regarding privilege in civil cases".[43] Spouses and relatives of the parties may refuse to give evidence. Privilege extends to such professions as the clergy and doctors, as well as lawyers. The privilege covers all persons who, by virtue of their occupation, have been entrusted with confidential information. Likewise the privilege against self-incrimination is wider than in Common law countries. It extends to answering any question which may dishonour, create a risk of criminal prosecution, or cause direct pecuniary loss to a person, spouse or relative.[44]

In 1982 Richard Thomas in discussing the Small Claims Court procedure in England proposed that officers who presided over small claims hearings be given the power to issue certain orders similar to the orders of evidence in German civil procedure.[45]

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[42]Ratcliff, 263.

[43]Kaplan et al, 1237.

[44]Kaplan et al, 1238.

[45]Richard Thomas, "A Code of Procedure for Small Claims: A Response for the Demand of Do-It-Yourself Litigation", (1982) 1 Civil Justice Review 52.

It is therefore, it is submitted, not only useful but also necessary to examine the German Law of Civil Procedure and Evidence in order to determine how it can be adapted and applied to the Small Claims Court procedure in South Africa.

2. CIVIL PROCEDURE IN FRANCE

Civil procedure in France is now governed by the New Civil Procedure Code which came into force on the 1st of January 1976.[46]

Like the system of civil procedure in the Federal Republic of Germany, the system in France is adversarial in character with the Court or Judge taking an active role in the proceedings.[47] It is for the parties to determine whether or not to institute, defend, withdraw or settle the action.[48] The parties must be represented by a representative in the Tribunaux de Grande Instance (the Supreme Court of France).[49] Process is initiated by a "l'assignation" which is a document containing full details

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[46]Decree No 75/1123 of 5th December 1985; C N Ngwasiri "The Role of the Judge in French Civil Proceedings" (1990) 8 Civil Justice Quarterly 167, 168.

[47]W L R de Vos, "Die Grondslae van Sivieleprosesreg" (1988) unpublished LLD thesis Unisa, 106.

[48]De Vos, 111.

[49]De Vos, 111.

of the complaint. The complaint contains the plaintiff's first "conclusions" which consist of his submissions of fact and law on which he intends to rely.[50] Thus, like the summons of the Federal German Republic, the first document contains not only the facta probanda as the summons in the Common law systems does, but also the facta probantia. In the "conclusions" the parties request whatever investigatory measure they would like the Judge to order.[51] The parties may also request the production of any document that has not been produced voluntarily.[52] The defendant after receipt of the l'assignation is given an opportunity to reply to the claims. An uninterrupted trial is unknown in French law. Although there is a distinction between the pre-trial phase and the trial phase, there is no clear distinction between the assembling of the evidence and its presentation. All evidence, once obtained, is collected in a dossier under the control of the Judge who has been assigned the duty to investigate the case.[53]

As opposed to the German system, great emphasis is placed on written proof in the French system. There seems to be a

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[50]De Vos, 112.

[51]C N Ngwasiri, 168.

[52]Ibid.

[53]De Vos, 112.

reluctance on the part of the Court to rely on oral evidence.[54] If oral evidence is required the Court appoints one of its members, or a third person, to record the evidence required. This is then collected in the dossier.[55] The parties bear the onus of proving their allegations. It is therefore important for the parties and their legal representatives to give the Court details of witnesses they wish to be interviewed and evidence of which they wish the Court to take cognisance.[56] It is both parties' duty to ascertain the truth. They are also enjoined to exchange all relevant documents.[57] Although they have the power to obtain a court order for the production of documents in the possession of their opponent or third parties, this is seldom exercised.[58] The President of the court can order that the matter be referred to trial immediately or else he can appoint an Investigating Judge or Magistrate to take further steps.[59]

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[54]James Beardsley, "Proof of Fact in French Civil Procedure", (1986) 34 American Journal of Comparative Law 459.

[55]Beardsley, 478-480; De Vos, 113.

[56]De Vos, 114.

[57]De Vos, 114-117.

[58]Beardsley, 474; De Vos, 116.

[59]De Vos, 122.

2.1 Pre-Trial Procedure

Pre-trial proceedings are conducted by the juge de mise en etat (the Investigating Judge). His duty is to prepare the case and bring it to the state where it can go to the full court.[60] The Investigating Judge has the power to:

1. attempt to bring the parties to a settlement;

2. ensure that procedural steps take place without delay;

3. determine all interlocutory matters;

4. take all steps relevant to the investigation;

5. report to the President of the Court if required;[61]

6. issue various orders in order to ensure that the proceedings are properly conducted.[62]

2.2 Investigatory Powers

Civil proceedings are conducted in France on the basis of the rule that in order to render justice the Court should find

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[60]Ngwasiri, 169.

[61]De Vos, 122.

[62]Ngwasiri, 169.

out the truth of the case.[63] In so doing it exercises its investigatory powers which include the power to procure evidence not provided for in the pleadings. Although the Investigating Judge has no power to go beyond the cause of action, he has certain powers within the limits of the action to collect the relevant evidence which enables him to make a contribution to the determination of the truth.[64] De Vos states:

> "Die Hof is geroepe om 'n besonder aktiewe, selfs ondersoekende rol betreffende die versameling van bewysmateriaal te vervul en tot die effektiewe verloop van die proses toe te sien."[65]

The Judge's investigatory powers include:

1. personal investigation of the facts;

2. the appointment of experts to investigate matters requiring specialised knowledge;

3. ordering the parties to appear personally before them for questioning;

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[63]Ibid.

[64]De Vos, 122.

[65]De Vos, 119.

4. the examination of witnesses.[66]

Every investigatory measure has to be contained in a court order which contains the terms of reference of the measure.[67]

1. Personal investigation by the Judge.

   The Judge has the power to investigate the scene where relevant or hold inspections in loco. He may, if necessary, be accompanied by an expert during the course of his investigations. He may also speak to and interview persons on the scene.[68]

2. Conduct of expertise.

   Where expert evidence is necessary, an expert is appointed by the Judge to investigate the facts which have to be determined. The parties and legal representatives are entitled to appear at the investigation (expertise).[69]

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[66]Ngwasiri, 169.

[67]Ibid.

[68]Ngwasiri, 170.

[69]Ibid.

3. Personal appearance of the parties.

As with all the other investigatory measures, a court order is required before the parties can be compelled to appear before the Investigating Judge. The purpose of inviting the parties to appear is in order to enable the Judge to obtain answers in the question and answer sessions to a series of questions prepared by the Judge.[70] The parties do not actually give evidence.[71] Either party may also submit a list of questions which the Judge may put to his opponent.[72]

4. Examination of witnesses.

This is done by a procedure known as the enquéte.[73] The witnesses and the facts which the parties want proved must be identified by the parties and their representatives.[74] Although the scope of the enquéte is contained in the court order, the Judge has the power to determine the terms of the enquéte and to widen its scope if

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[70]Ngwasiri, 171.

[71]De Vos, 124-125,

[72]Ngwasiri, 171.

[73]Ngwasiri, 172; De Vos, 118; Beardsley, 478-480.

[74]Ibid.

need be.[75] The witnesses give their evidence to the Judge who dictates the substance of the testimony to the Registrar for inclusion in the final report. The record is not recorded verbatim. The Judge may determine the order of the witnesses. He may also call witnesses not referred to by the parties.[76] This power, however, is subject to the audi alterem partem rule or the principe du contradictoire.[77] De Vos states:

> "Hy is selfs by magte om uit eie beweging getuienis op te roep wat nie deur die partye aangewys is nie, solank hulle getuienis nuttig voorkom om die waarheid vas te stel. Ooreenkomstig die principe du contradictoire moet die partye van die datum en plek van die verrigtinge in kennis gestel word sodat hulle teenwoordig kan wees."[78]

It would seem therefore that the Investigating Judge's powers in this regard are greater than those of his counterpart in Germany.[79] Beardsley indicates that notwithstanding the powers of the Court or Judge, the Court will seldom order an

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[75]Ngwasiri, 172.

[76]Ibid; De Vos, 127.

[77]De Vos, 127.

[78]Ibid.

[79]Supra.

enquéte meru motu, or ex officio take into account evidence not referred to by the parties. Likewise they will seldom call witnesses on their own accord.[80] During the enquéte the legal representatives do not play an active role. They have no right of questioning or cross-examination. They only question the witnesses through the Judge. They propose questions to be put to their client's opponent.[81] The legal representatives neither interview any of the witnesses prior to questioning by the Judge, nor play a role in obtaining statements for their clients.[82] This is the duty of the parties themselves.[83]

Whenever the Investigating Judge considers that the case is right for hearing he closes the proceedings and refers it to the Collegiate or Court for trial.[84]

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[80]Beardsley, 484-486.

[81]Ngwasiri, 173; De Vos, 118; Beardsley, 479-480.

[82]Beardsley, ibid; De Vos, ibid.

[83]Beardsley, 476.

[84]Ngwasiri, 174.

2.3 Trial

During the trial the Trial Judge or Collegiate has the same powers of investigation as the Investigating Judge.[85] The guiding principles of the trial process are as follows:[86]

1. The object of the suit is determined by the respective cases of the parties through their statements of claim and defence.[87] The object of the suit is therefore not restricted by the plaintiff's claim.[88]

2. The Judge must confine his decision to what is claimed.[89]

3. He must assign the appropriate legal classification to the claim in disregard to the formulation adopted by the plaintiff even if not contested by the defendant.[90]

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[85]Ngwasiri 176.

[86]Chapter I of the New Civil Procedure Code.

[87]Article 4 New Civil Code.

[88]Ibid; Ngwasiri, 176.

[89]Article 5 New Civil Code; Ngwasiri, 177.

[90]Article 12(2) New Civil Code; Ngwasiri, 177.

4. The parties must allege the proper facts in support of their case.[91]

5. The Judge may consider facts which have not been specifically pleaded but cannot go beyond the facts in dispute.[92] "Among matters in dispute the Judge may take into consideration facts which the parties have not specifically pleaded in support of their cases."[93]

6. The Judge is required to decide each case in conformity with the rules of law applicable thereto.[94] He can raise points of law with regard to certain matters arising from the parties' pleadings notwithstanding the legal basis invoked by them.[95]

7. The principle of contradiction (the audi alterem partem rule) must be strictly complied with.[96]

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[91]Article 6 New Civil Code; Ngwasiri, 177.

[92]Article 7(2) and 7(3) New Civil Code; Ngwasiri, 181.

[93]Article 7(2) New Civil Code; Ngwasiri, 183.

[94]Article 12(2) New Civil Code; Ngwasiri, 181.

[95]Article 12(2) New Civil Code; Ngwasiri, 183.

[96]Article 12(1) and 16(2) New Civil Code; Ngwasiri, 181.

This principle does not, however, apply where the provisions of Article 7(2) have been invoked.[97]

8. While the legal representatives have almost no role to play in the collection, (other than referring the Court to it), or presentation of the evidence, they do play an active role before the Court which hears the matter after all the evidence has been collected and presented. They present argument on the facts and the law and take part in the debate before the Court.[98] Their importance in this regard can be compared to that of the legal representatives in Germany.[99]

The Court in France is entitled to take both facts and law into consideration which have not been offered, produced or referred to by the parties.[100] There is, however, some dispute as to the scope and extent of this power especially with regard to the Court's power to clarify and modify the plaintiff's claim.[101] This follows from the practice of including law and quoting legal provisions in the pleadings

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[97]Ngwasiri, ibid.

[98]Beardsley, 486-488.

[99]Supra.

[100]Supra; De Vos, 136.

[101]Ngwasiri, 177-181.

and the lack of any clear definition of the Court's or Judge's power.[102]

2.4 Conciliation

Although the Court and Judge are obliged in the normal course of the trial to apply the law, the parties to a dispute may by agreement consent to the Judge determining the case "not in keeping with the law applicable thereto, but according to the justice of an arbitrator".[103] Reconciliation has not proved successful in France for a number of reasons.[104] These include:

1. Silence on the part of the Civil Procedure Code with regard to the procedure to be followed.

2. The litigants and counsel prefer to rely on rules of law rather than the uncertainty of the Court's perception of justice.

3. The written system of French Civil Proceedings is not conducive to any process which discards codified rules.[105]

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[102]Ngwasiri, 179.

[103]Ngwasiri, 184; Article 21 New Civil Code.

[104]Ngwasiri, 184.

[105]Ibid.

The importance of the French civil procedure insofar as the Small Claims Court is concerned is:

1. The power of the Judge to investigate of his own accord.

2. The Court's duty to apply the correct law regardless of the views or attitudes of the litigants.

3. Their reliance on documentary evidence as opposed to an oral procedure.

As appears below, these aspects have an important bearing on the procedure prescribed by the Small Claims Court Act.[106]

3. SMALL CLAIMS IN GERMANY AND FRANCE

In both Germany and France there are lower courts which have general jurisdiction in cases where the amount in dispute is below a specified limit.[107] In Germany these are the Amtsgericht, while in France they are known as the Tribunaux

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[106]61 of 1984.

[107]Cohn, 170; Mauro Capelletti (ed.) "International Encyclopedia of Comparative Law : Civil Procedure" (1984) para 6.1-4.

d'instance.[108] The majority of civil cases are heard by these courts.[109] The proceedings are more simple than those of the superior courts and legal representation is not required.[110] There are similarities between the procedure of the two different courts. A written summons is not required. In Germany the parties may appear in person at the office of the court and state their respective cases before the Clerk who thereafter drafts a minute. This serves as a pleading.[111]

In France the proceedings may be commenced by either depositing an agreed case stated with the court office or by both parties appearing before a Judge.[112] The Germany Civil Procedure Code imposes a duty on the Court to attempt to induce the parties to affect an amicable settlement at all stages of the proceedings.[113] This is sometimes resented by the parties.[114] This provision can have the effect that the matters are settled to the detriment of the plaintiff. A

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[108]Capelletti, para 6, 124.

[109]Capelletti, para 1, para 6.1-5.

[110]Capelletti, para 6, 124 and 125; Cohn, 229.

[111]Cohn, 229.

[112]Capelletti, para 6, 126.

[113]Cohn, 229.

[114]Ibid.

matter may be settled for less than the plaintiff is entitled or would obtain than if the matter were adjudicated upon.[115] In the Tribunal d'instance action is commenced by summons for conciliation, or failing that, judgment. A plaintiff may however choose to attempt conciliation before the issue of summons.[116] The summons requiring conciliation may be in the form of a letter from the Clerk of the Court calling upon the defendants to appear for a settlement attempt.[117] Where the defendant resides in the same court district, a conciliation attempt is compulsory. Where the defendant resides outside the court district or otherwise in cases of urgency conciliation is not required.[118] Where an attempt at conciliation has failed and a summons for conciliation has not been issued, the plaintiff must serve the defendant with a citation served by the Hussier or the Messenger of the Court.[119] Fifteen days must lapse between the date of service and the date of trial.[120] The particulars required to be stated in the summons are similar to those required in the summons of the Tribunal Grand d'instance. The summons, however, need not contain the appointment of counsel or an

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[115]Ibid.

[116]Capelletti, para 6, 126.

[117]Peter Herzog, "Civil Procedure in France" (1967) 297.

[118]Ibid.

[119]Ibid.

[120]Capelletti, 6, 126.

address for service as legal representation is not required and pleadings are not exchanged.[121] The summons states the time, date and place of the hearing at which the attempt at conciliation will be made if it has not already taken place. Where conciliation has failed the summons states the time of the hearing.[122]

In Germany, even where the complaint is recorded orally by the Clerk, it must meet all the requirements of a preparatory written statement. It designates the Court, the parties, the cause of action, the facts on which the claim is based and indicates the object of and the grounds for the claim. It must also indicate the supporting evidence.[123] Like the position in France, no pleadings are exchanged. Unlike the Superior Court in Germany, in the Amtsgericht there is no need to read out the contents of the summons before the commencement of the trial.[124] The proceedings are heard before only one Judge in France and Germany. In France no enquéte is held and no Investigating Magistrate or Officer is appointed.[125] Also unlike the position in the Tribunal Grand d'instance the proceedings are mainly oral. There is

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[121]Capelletti, ibid.

[122]Ibid.

[123]Ibid.

[124]Capelletti, 6, 166.

[125]Capelletti, 6, 166.

no provision for written proceedings. The course of the proceedings is "simplified in the extreme".[126]

Even in the Amtsgericht there are special provisions relating to very small claims. Where such a dispute is to be determined, the Court may determine its procedure in its own free discretion.[127] In terms of section 128 (2) of the Civil Procedure Code[128] the Amtsgericht may either mero motu or on the application of one of the parties, order that the case before it proceed on documents only.[129] This is limited to cases where the claim is under DM500[130] and where it is impossible or difficult for the parties or witnesses to attend a formal hearing.[131] Witnesses' statements may be collected or submitted without the consent of the parties. The court order may be set aside upon the application of the usuccessful party or where a dispute of fact renders it impossible for the Court to determine the issues.[132]

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[126]Capelletti, 6, 126.

[127]Cohn et al, 229.

[128]1877 as amended.

[129]W Fashing, "Small Claims Courts", 364.

[130]Ibid.

[131]Ibid.

[132]Ibid.

According to Cohn:

> "In general the Judge of the Amtsgericht will try to influence the conduct of the case by the parties, to an even higher degree than is usual at the Landgericht with the effect that - particularly in small courts - proceedings become remarkably informal and the position of the Judge may to some extent acquire a patriarchal character."[133]

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[133]Cohn, 229.

CHAPTER THREE

PRE-TRIAL PROCEDURE IN RESPECT OF SMALL CLAIMS

1. INTRODUCTION

The intention of this chapter is to discuss the steps required by the various small claims systems to bring the dispute to trial. The advantages and disadvantages of the various systems are discussed, the object being to determine the best pre-trial procedural system for South Africa.

2. PRE-TRIAL PROCEDURE IN ENGLAND AND WALES

2.1 Introduction

Prior to 1972 there was no special procedure for the institution or hearing of small claims in England and in Wales. In March 1972 a procedure known as the pre-trial review was introduced in the County Courts. The pre-trial review was based on the summons for direction procedure of the High Court. The purpose of this procedure is to ensure that all relevant documents are discovered. The Master also estimates the length of the hearing and sets the matter down for trial.[1]

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[1]J Neville Turner "Small Claims Courts in England : Some Recent Developments" (1974) 48 Australian Law Journal, 345, 347.

A pre-trial review normally had to precede a County Court trial.[2] The Registrar could exercise certain judicial powers during the course of the review. If the defendant failed to enter a defence or attend the review, a Registrar was empowered to grant judgment by default. Where a defence had been filed but the defendant failed to appear, the Registrar could grant judgment after the plaintiff had proven his case. This could be by affidavit.[3]

In October 1973 the County Courts were given greater powers to refer the case to arbitration.[4] Whereas prior to this date matters could only be referred to arbitration by a Judge with the consent of the parties, in terms of the new amendments the Registrar was granted a discretion to refer certain claims to arbitration when he thought it was just and reasonable to do so. Initially the maximum value of the claim was £75 but this was increased to £100 and finally £200.[5] No specific rules were laid down as to the conduct of the arbitration hearing. However, certain guidelines were laid down by the Lord Chancellor on the 21st of September 1973 in order to secure uniformity of practice and to give the parties and their advisors an indication of the course

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[2]Ibid.

[3]Commission of Enquiry into the Structure and Functioning of the Courts : Fourth Interim Report 73.

[4]Section 7 of the Administration of Justice Act 1973.

[5]4th Interim Report, 73.

likely to be taken under the provisions of the Administration of Justice Act 1973.[6] These guidelines however were not binding on the Registrar.[7] The terms referred to in the direction were aimed at an informal, speedy and inexpensive procedure. Accordingly included in the list of directions were provisions stating that the rules of evidence shall not apply and providing for a decision on the basis of statements and documents by the parties.[8] That they were intended to have a conciliatory purpose is evident from the direction that the proceedings could be ordered to be held in private. Like the Registrar's powers in the pre-trial review, the arbitrator had the power to grant a judgment in the defendant's absence.[9]

Although no longer in existence, England had voluntary schemes for arbitration of small disputes. In England the Manchester Scheme operated between 1971 and 1980, while the Westminster Small Claims Court (known as the London Small Claims Court) operated in London between 1977 and 1979. According to White:

> "The schemes were generally inquisitorial. The claimant indicated the nature of the dispute and the onus

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[6][1973] 3 All ER 448, Lord Chancellor's Office.

[7]J Neville Turner, 346.

[8]Ibid.

[9]Turner, 348.

> was then on the scheme to elicit all relevant information from the parties and if necessary to obtain an expert report."[10]

Representation was not allowed. Their jurisdiction was limited to claims arising out of contract and tort by private individuals. However, there was a discretion to allow small businesses to bring actions.[11]

The Westminster or London scheme was sponsored by the City of Westminster Law Society. In addition to contract and tort, landlord and tenant cases were also accepted.[12] The jurisdiction was £350.[13] There was no geographical limitation on the use of the scheme.[14] There was a discretion under the scheme to refuse to entertain a claim if the Court felt that the matter was too complex.[15] The arbitrators were selected by the Law Society and were barristers or solicitors. The Court took upon itself the responsibility of ensuring that the case was ready for trial. The scheme was administered by a secretary/investigator whose

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[10]R C A White "The Administration of Justice" (1985) 151.

[11]Ibid.

[12]J Neville Turner, 349.

[13]Ibid.

[14]Ibid.

[15]Ibid.

duty it was thoroughly to research the case and ensure that it was ready for presentation to the arbitrator.[16]

The Manchester scheme operated as a conciliation and arbitration service to private individuals.[17] The ultimate jurisdiction of the scheme was £500. An attempt was made at negotiating a settlement before setting the scheme in motion by lodging an application.[18] Only individual claimants who lived in the geographical boundary of Manchester were covered by the scheme. The proceedings were informal and the rules of evidence were not applicable. The scheme had no jurisdiction unless the defendant consented.[19] The success of the two schemes was the cause of the amendments to the Small Claims Court procedures in the County Courts in 1981.

On the 21st of April 1981 a new procedure came into effect in the County Courts. All claims under £500 would, with certain exceptions,[20] be referred to arbitration automatically upon receipt of a defence from the defendant.

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[16]Ibid.

[17]J Neville Turner, "Small Claims Courts and the County Court in England : A Contrast to the Australian Approach" (1980) Anglo American Law Review 150, 165-168.

[18]Turner (1980) Anglo American Law Review, 166.

[19]Turner (1980) Anglo American Law Review, 166-167.

[20]See below.

Certain terms of reference were also prescribed.[21] These terms were similar to those contained in the Practice Direction of 1973. These, like those contained in the Practice Direction, contained provisions facilitating an informal hearing and the finalisation of the dispute by a quick and inexpensive procedure.

2.2 Commencement of Action

Legal proceedings in respect of small claims are instituted out of the County Court.[22] A plaintiff desiring to institute proceedings must file a request for the issue of summons containing the names and addresses of the defendants together with sufficient copies of the particulars of claim for the Court and the defendants.[23] A choice must be made between a request for a default summons and a fixed date summons. A default summons is issued in respect of all claims for money. A fixed date summons relates to any claim other than a money claim, such as for the recovery of goods or an interdict. Summons is issued by the Registrar of the County Court or his officials in accordance with the request. Service of the summons may be affected by the Bailiff, the Plaintiff or an officer of the Court by registered post where requested to do so by the plaintiff.[24] Service by the

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[21]Count Court Rules (1981), Ordinance 19 Rule 1.

[22]J Neville Turner, Australian Law Journal (1974), 345.

[23]R C A White, 146.

[24]R C A White, 146.

plaintiff must be personal service.[25] Unless the defendant reacts within fourteen days of the service of the summons, the plaintiff may request default judgment.[26] A form of admission, defence and counterclaim accompany the summons.[27] This form is set out in questionnaire form and enables the defendant to:

1. admit the claim in full and make proposals as to payment, either in full by a given date or by instalments;

2. admit part of the claim, dispute the rest and make proposals as to the payment of the admitted amount;

3. deny the whole claim and file a defence;

4. add a counterclaim in appropriate circumstances.[28]

The formal response must be returned to the Court within fourteen days of service of the summons. If the defendant

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[25]Ibid.

[26]Ibid.

[27]Ibid.

[28]R C A White, 147.

fails to do so the plaintiff may request default judgment.[29] A copy of the response must be delivered to the plaintiff. If the defendant admits the claim he may offer to liquidate the claim in instalments. The plaintiff must advise the defendant whether or not the offer is accepted within fourteen days of receipt thereof.[30] If the offer is accepted judgment is entered in accordance with the agreement.[31] Where the plaintiff does not accept the offer the matter is set down before the Registrar in order to determine an appropriate order.[32] These hearings are referred to as "disposals". Where a defence to the claim has been filed or where a fixed date summons is involved, the proceedings are referred to arbitration by the Registrar or by a person of the parties' choice.[33] Unless the size and nature of the claim or other circumstances make such a course undesirable or unnecessary, all arbitrators must appoint a date for the preliminary consideration of the dispute and ways of resolving it.[34]

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[29]Ibid.

[30]Michael Birks, "Small Claims in the County Court" (1984) 20.

[31]Ibid; R C A White, 147.

[32]Ibid.

[33]County Court Rules 1981 (Ord. 19 R 2(3)).

[34]CCR 1981, Ord. 19 R 5(2); Richard Thomas "Small Claims - The New Arrangements" (1981) New Law Journal 429.

2.3 Preliminary Consideration

The preliminary consideration took the place of the pre-trial review which is now only held when the matter is to be referred to trial. It was intended, however, that this be more informal than the review. Where the defendant failed to appear at the initial hearing the Registrar could grant the plaintiff judgment after hearing evidence. At the hearing the Registrar gave directions as to the terms of reference of the arbitration and when it could take place.[35] While the pre-trial review or preliminary consideration provide an opportunity for mediation under the control of the Registrar, this is not the only purpose they serve. In his speech given at the opening of the new Wandsworth County Court on the 2nd of March 1973, Lord Hailsham of Marylebone, the Lord Chancellor, stated that the pre-trial review:

> "was designed primarily to help small claimants and their opposite numbers, the defendants to the small claims and particularly litigants in person whether the plaintiffs or defendants."[36]

In 1977 it was stated that "the pre-trial review has been a much more important innovation than the Small Claims Court procedure for determining actions".[37]

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[35]Richard Thomas, 429.

[36]Turner (1974) Australian Law Journal 347.

[37]W H Elliot "Small Claims" (Memorandum prepared for the International Congress on the Law of Procedure in Ghent) (1977).

The preliminary consideration provides a forum for preparing the parties for arbitration. Its purpose like that of the pre-trial review, is for the Registrar and the parties to discuss the dispute and determine how the action can best be dealt with.

In 1986 the Lord Chancellor set up a Civil Justice Review to improve the machinery of civil justice by means of reforms in jurisdiction, procedure and Court administration and to reduce delay, cost and complexity.[38] Part of the review was to investigate Small Claims procedure with a view to improve its efficiency. Touche Ross Management Consultants were approached to carry out a study of the Small Claims Court procedure in the County Courts to assist in determining what, if any, improvements could be suggested. During the study 861 cases from 20 different County Courts were taken into account and 29 Registrars and 408 litigants were interviewed. Of the litigants 247 were plaintiffs and 161 were defendants.[39]

After the findings of the consultants had been referred to the Lord Chancellor, a consultation paper was issued which included a summary of the results of the study and certain

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[38]Civil Justice Review, Consultation Paper No 2, Small Claims 1986.

[39]Touche Ross Management Consultants, "Study of Small Claims Procedure", (1986) paragraph 2.3, 3-4.

questions on suggestions for change.[40] 125 persons or instances submitted written representations in answer to the questions contained in the consultation paper. These included Registrars, Judges, representatives of consumer organisations and private individuals.[41] Subsequently on the 6th of February 1987 a conference on the consultation paper was held at the Institute of Advanced Legal Studies in London.[42]

During their investigation the Consultants obtained the Registrars' and litigants' views on certain aspects relating to the preliminary consideration. The Registrars were of the opinion that the purposes of the consideration were to:

> "1. Issue precise directions about evidence required and for the disclosure of any documentary evidence for the arbitration hearing.
> 2. Establish the time required for the arbitration hearing.
> 3. Fix the time scale for the preparation of evidence of any expert reports.
> 4. Ascertain whether the claim and defence are legally viable.
> 5. Ensure that the parties identify the issues and facts over which they differ and which must be proved at the arbitration.

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[40]Civil Justice Review, Consultation Paper No 2, Chapter 2 and Chapter 6.

[41]George Appelbey "Justice Within Reach : A Review of Progress in Reviewing Small Claims" (1987) 6 Civil Justice Quarterly 214, 219-220.

[42]Appelbey, 226.

6. Give the parties an opportunity to reach a compromise without completing the full legal process.
7. Settle simple cases quickly."[43]

While the first three objectives are common to pre-trial reviews and preliminary considerations the last four have specific relevance to Small Claims cases where one or both parties are unrepresented. According to the study the views of the Registrars could be divided into three categories:

(i) those who try as far as possible to avoid holding preliminary hearings;

(ii) those who hold preliminary hearings in all cases and who see the hearing primarily as a mechanism for ensuring that the parties are properly prepared for the arbitration hearing; and

(iii) those who hold preliminary hearings in all cases and see the hearings as an opportunity to resolve a significant portion of cases.[44]

2.4 Avoiding Preliminary Hearings

Those Registrars who do not hold preliminary hearings saw them as a waste of time where little was achieved. Parties

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[43]Touche Ross, 43-44.

[44]Touche Ross, 45.

often came to the hearing expecting that the matter would be disposed of. Accordingly all witnesses and evidence were brought to the hearing.[45] Of the written submissions to the Lord Chancellor following the publication of the consultation paper, 32 contributors were of the opinion that preliminary hearings served no purpose, 16 that they sometimes served a useful purpose, while 27 thought they were of no use at all.[46]

Many speakers at the conference including representatives of the Law Society, the Consumer organisations and certain Registrars were of the opinion that preliminary considerations should be the exception and cases should, wherever possible, be disposed of at a single hearing. The requirement of two hearings had an effect on the litigants who had to take time off work, spend time collecting documents and arrange for witnesses to be present. They were also effected by certain other psychological factors.[47] The same view was expressed by the National Consumer Council in 1979 and 1982.[48] According to Thomas participants are confused by the need to appear twice and this confusion

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[45]Touche Ross, 45.

[46]Appelbey, 220.

[47]Appelbey, 228.

[48]Richard Thomas "A Code for Small Claims : A Response to the Demand for Do-It-Yourself Litigation" (1982) 1 Civil Justice Quarterly 52.

caused resentment.[49] According to the view of these persons, preliminary hearings should only be held in matters involving complex issues or experts, or where further evidence was required or no other suitable method of preparing the parties for trial was available.[50]

2.5 Preliminary Hearings as a Preparation for a Full Hearing[51]

This category of Registrars saw their role as impartial third persons whose duty it was to adjudicate on facts presented and elicited by the parties themselves by way of the traditional adversary procedure. They did not take an active part in the hearing. In order to ensure a fair trial they gave directions as to the witnesses, documents and evidence required. According to Turner Registrars do not take sufficient steps to assist litigants who are undefended in explaining their rights or preparing them for trial.[52] From his observations:

> "there was little inclination on the part of Registrars to assume an intensive probing of plaintiffs on behalf of the unrepresented defendant. The limit that Registrar were prepared to go in

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[49]Thomas (1982) 1 Civil Justice Quarterly 59.

[50]Appelbey, 227-233; Thomas (1982) 1 Civil Justice Quarterly 59.

[51]Touche Ross 47.

[52]Turner, Australian Law Journal, 347.

> proffering advice to an unrepresented defendant was to suggest that they consult a solicitor or even the Citizen's Advice Bureau. Even when the defendant asked what was required for the hearing some Registrars thought it was not part of their function to further advise him.[53]

Turner concludes that this attitude "hardly resolves the difficulties of small claimants and defendants.[54]

2.6 Preliminary Hearings to Resolve Cases[55]

This group of Registrars took a more active part in the proceedings and where possible encouraged settlement. The Registrar used the opportunity to make an award where one party was in default or in other simple cases. The hearing also provided an opportunity for the parties to meet the Registrar directly who could explain what witnesses, documents or evidence was necessary. One Registrar at the conference on the 6th of February 1987 was of the opinion that preliminary hearings were indispensable. They encouraged settlement and were preferable to written directions which probably would not be read of understood by the parties.[56]

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[53]Turner (1980) Anglo American Law Review 161.

[54]Turner (1980) Anglo American Law Review, 162,

[55]Touche Ross, 46.

[56]Appelbey, 231.

Where judgment was entered against a defendant, the preliminary consideration provided a useful forum to discuss the manner of payment of the judgment debt and payment timetables.[57]

50% of the litigants interviewed by the consultants had indicated that a preliminary consideration had preceded the arbitration hearing. Of these, 32% stated that the consideration had been of assistance.[58] According to the study, the main reason for the litigants' experience that preliminary considerations had not been useful, was the lack of interest of the Registrars in making any meaningful contribution to the case at the consideration stage.[59] Neither had any explanation been given to the litigants of the purpose of the preliminary hearing.[60] It is therefore clear that the "role of the Registrars is crucial and the attitude to the parties will be always affect the accessibility of the Small Claims Court procedure for the unrepresented defendant".[61]

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[57]Turner (1980) Anglo American Law Review, 162.

[58]Touche Ross, 71.

[59]Touche Ross, 71.

[60]Ibid.

[61]R C A White, 148.

The study found that in Courts which followed the traditional procedure of having a preliminary consideration and an arbitration hearing, there was a longer period from the time of entering the defence to the final outcome than in those cases where the consideration was not held. According to the study, 50% of the cases were resolved where no preliminary consideration was held, within a period of six weeks from the date of the filing of the defence. In three courts 50% of the cases were finalised within 12 weeks.[62] On the average the finalisation of the dispute took 4 to 12 weeks longer where a preliminary consideration was held.[63] The Consultants were of the opinion that the two approaches of avoiding a preliminary hearing on the one hand and trying to resolve all cases thereat on the other have the same result in terms of time and expense to the parties.[64]

Whether or not this is so would depend upon the number of cases settled at or before the preliminary hearing and which never proceeded to arbitration. In 13 of the 20 Courts studied, 50% of the preliminary considerations were held within 8 weeks of the filing of the defence.[65] In 19 of the Courts the time taken between defence and preliminary

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[62]Touche Ross, 89.

[63]Touche Ross, 89 and 103-104.

[64]Touche Ross, 46.

[65]Touche Ross, 36.

consideration was 12 weeks.[66] If 75% of the matters set down for preliminary consideration are settled at the hearing, (as is quoted in respect of one Court)[67] then 37,5% of all matters could be resolved within 8 weeks of the filing of the defence. According to the study, 12% of the cases studied which had been referred to a preliminary consideration (7% of the total) were settled at the hearing or before the arbitration.[68]

Whelan points out an important fact in relation to the Consultant's findings on preliminary considerations. The cases studied were only those which according to the Registrar's diaries, had been set down for an arbitration hearing.[69] Although hearings may be set down immediately after receipt of a notice of defence, where, by virtue of the simplicity of the case, a preliminary consideration was unnecessary, this was an exception. Many cases were only set down at or after the preliminary hearing by the Registrar or at the request of the parties after receipt of a certificate

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[66]Touche Ross, 36.

[67]Touche Ross, 46.

[68]Touche Ross, 72.

[69]Christopher J Whelan "The Role of Research in Civil Justice Reform : Small Claims in a County Court" (1987) 6 Civil Justice Quarterly, 237 and 240-241.

of readiness.[70] Little account was taken of those cases which had not proceeded past the hearing of the preliminary consideration which had been settled or withdrawn between the receipt of a notice of defence and the preliminary hearing or at the preliminary hearing itself. Likewise, no account was taken of the cases which had been settled or withdrawn after the preliminary hearing but which had not been set down for the arbitration. There may be a number of reasons for the Registrar not setting the matter down for arbitration even where there is no settlement at the hearing. These would be because of the likelihood of settlement being reached, one of the parties indicating his intention not to proceed any further, or the failure of the participants to furnish a certificate of readiness.[71]

The study does not give any indication of the amount of cases which proceed to a preliminary consideration. Neither is there any data on the effect of the consideration on those litigants who do not proceed to arbitration or whose cases are not set down for an arbitration hearing.[72]

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[70]A certificate of readiness is a document sent by the parties to the Registrar wherein the Registrar is advised by the parties that they are ready to have the matter adjudicated on in an arbitration hearing.

[71]Whelan 241-242.

[72]Whelan, 241-242.

The study does not furnish any information on what conclusions can be drawn with regard to the usefulness of the preliminary consideration as many of the cases so referred were not considered by the consultants. What does appear from the study is that if the preliminary consideration is to be considered as a failure, this is largely due to the Registrar's failure to explain its purpose to the participants or to ensure that it is conducted in accordance with the purpose of its institution. This emerges from research conducted by Appelbey in 1977 where he concluded that although the pre-trial review was helpful to solicitors and the more intelligent litigants, they served little purpose in assisting the less educated unrepresented litigants.[73]

2.7 Alternatives to the Preliminary Consideration

Those who are of the opinion that justice would be better served by having only one hearing do suggest alternative means to achieve the objects of Small Claims Court procedure. However, it is important to note that they do not propose that the preliminary hearing be done away with in all cases. Circumstances may demand a preliminary consideration and in such cases the Registrar should have a discretion to order

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[73]George Appelbey (Small Claims in England and Wales) quoted in the Fourth Interim Report at 86 to 88.

one.[74] Other means proposed in order to achieve the objectives are:

1. A more active part by the court personnel.[75]

2. A more active role by the Registrar at an early stage.[76]

3. More use of documents and explanatory pamphlets.[77]

4. A change in the objectives and the manner of holding an arbitration hearing.[78]

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[74]Appelbey, (1987) 6 Civil Justice Quarterly, 220-221; 227-233.

[75]George Appelbey "Small Claims in the Birmingham County Court" (1985) 4 Civil Justice Quarterly, 203.

[76]Thomas (1982) 1 Civil Justice Quarterly, 56-58; Memorandum by the Council of the Law Society "The Law Society's Response to the Small Claims in the County Court Paper from the Civil Justice Review" (1986).

[77]Thomas (1982) 1 Civil Justice Quarterly 56-60; Appelbey (1987) 6 Civil Justice Quarterly 220-221; 228-231.

[78]Thomas (1982) 1 Civil Justice Quarterly 56-58.

2.7.1 A More Active Part by Court Personnel

Court personnel should be more willing to give legal advice to those seeking it and more assistance should be given in the drafting of the claim, defence and other documents. More attention by counter clerks and other personnel should be given to advising participants on evidence, witnesses and documents required at an early stage. The Clerks and other personnel could assist the Registrar in obtaining relevant evidence without the parties' involvement.[79]

2.7.2 A More Active Role by the Registrar

Use should be made of preliminary orders and directions issued to litigants. These could have the same content and cover the same ground as the directions given at a preliminary hearing.[80] This would require a detailed consideration of the issues of the case after receipt of the defence. Of the 125 submissions sent in reply to the consultation paper, 62 were of the opinion that use of written directions was preferable to a preliminary consideration.[81]

Included in the Council of the Law Society's response to the questions on change contained in the consultation paper, were recommendations that after receipt of the defence, the

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[79]George Appelbey (1985) 4 Civil Justice Quarterly, 203.

[80]Ibid.

[81]Appelbey (1987) 6 Civil Justice Quarterly, 18.

Registrar should consider the claim and defence with a view to deciding whether there should be an immediate final hearing, a pre-trial arbitration hearing, a paper arbitration without the need of a hearing, or whether the case was suitable for arbitration.[82]

The National Consumer Council's code of procedure for small claims contains proposals that preliminary orders and directions should serve a dual purpose. On the one hand they should contain information for use by the litigants in order to prepare their case, while on the other they should contain questions to be answered by the litigants for the benefit of the Court in determining the likely duration of the hearing. The code also proposes greater use of the Registrar's power to obtain relevant evidence at his own initiative.[83]

2.7.3 Use of Documents and Explanatory Pamphlets

Court documents such as the claim or defence should contain information advising the opposite litigant of his rights, duties and the next steps to be taken. The National Consumer Council also proposed an early disclosure of evidence. To this end the proposed claim and defence forms of the Council require the parties to give details of documents available and which they intend to use.[84]

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[82]Memorandum by the Council of the Law Society.

[83]Thomas (1982) Civil Justice Quarterly, 56-58.

[84]Thomas (1982) 1 Civil Justice Quarterly 56-60.

2.7.4 A Change in the Arbitration Hearing

One of the purposes of the preliminary consideration was to determine the possibility of a settlement. Where this is not possible the arbitration has an adjudicative function. Where there is only one hearing the National Consumer Council's Code proposes that the function of the arbitration hearing be both mediation and adjudication. Prior to the Registrar adjudicating it should be his duty to assist the parties in reaching a settlement.[85]

Notwithstanding the criticism levelled at the preliminary consideration, it has not been abandoned. The Civil Justice Review has, however, recommended that a more active role be played by the Registrar during the preliminary consideration and where possible avoid a further hearing.[86]

3. PRE-TRIAL PROCEDURE IN NORTHERN IRELAND

3.1 Introduction

Although the United Kingdom is a unitary state in a political sense, it has three legal systems; those of England and Wales, Northern Ireland and Scotland.[87]

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[85]Thomas (1982) Civil Justice Quarterly 56-60.

[86]George Appelbey (1988) 7 Civil Justice Quarterly 294, 297-298.

[87]W Cowan, H Ervine, "Small Claims : Recent Developments (continued...)

In April 1979 the Judicature (NI) Act came into operation.[88] It contained a special provision relating to small claims. In terms of section 97 of the Act, as amended:

> "Where in any action the amount claimed or the value of specific chattels claimed does not exceed £300, the Circuit Registrar shall save as otherwise provided by the County Court Rules, deal with the claim by way of arbitration in accordance with these Rules."[89]

Small claims in Northern Ireland are heard by four Circuit Registrars each having his own legal circuit who have jurisdiction to determine small claims by way of "arbitration".[90] The arbitration procedure is excluded in certain circumstances. Claims for damages for personal injuries, libel or slander, or motor vehicle accidents are excluded from the definition of "small claim". Claims relating to deceased estates, title to any lands and marital property are also excluded. There is, however, no restriction on the category of persons who have access to the

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[87](...continued)
in Scotland" (1986) 9 Journal of Consumer Policy 191.

[88]1978.

[89]Sub-Rule 3.

[90]D S Greer and A Mulvaney, "A Description and Evaluation of the Small Claims Procedure in Northern Ireland" (1985) 6.

procedure and the majority of claims are instituted by businesses or corporations for unpaid debts.[91]

3.2 Commencement of Proceedings

Proceedings are commenced by the claimant completing an application for arbitration and delivering the application together with two copies thereof to the County Court office.[92] Upon payment of the prescribed fee the application is issued by endorsing the date, time and place of the hearing on the original copies.[93] The applicant has the responsibility for the correct completion of the application. Court staff are not responsible for ensuring the validity of the claim or entitled to give any advice in connection with it.[94]

The County Court then serves the application on the respondent by means of first-class postal recorded delivery service and returns a copy to the applicant.[95] In 1982 the Rules were amended to allow the Chief Clerk to serve the application by ordinary first-class post where impractical

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[91]Greer and Mulvaney, 22.

[92]Ord. 26 (7)(i) County Court Rules (NI) 1981 (as amended).

[93]Ibid.

[94]This has been criticised. Greer and Mulvaney, 31.

[95]Ord. 26 (7)(ii) County Court Rules (NI) 1981.

to serve by recorded post.[96] Where the application is returned to the Court office by the postal service unserved, the office will usually make at least two further attempts to serve by post before resorting to personal service by the Civil Bill Officer.[97] The method of service has been criticised as there is a possibility that an award may be granted without the respondent having knowledge of the application.[98] Greer and Mulvaney maintain that the most important responsibility of the Court office in Northern Ireland is to ensure that the application is promptly served on the respondent.[99] The application, when served, is accompanied by a "notice of dispute" and an "acceptance of liability" which the respondent is required to return.[100] On receipt of the notice of dispute or acceptance of liability, the County Court office advises the applicant thereof.[101] No other formal proceedings are required.[102] Where no notice is received from the respondent within fourteen days of service of the application, the matter is

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[96]Greer and Mulvaney, 36.

[97]Ibid.

[98]Greer and Mulvaney, 35.

[99]Ibid.

[100]Ord. 26 (7)(ii) County Court Rules (NI) 1981.

[101]Ord. 26 (7)(xi) CCR (NI) 1981.

[102]Greer and Mulvaney, 8.

referred to the Circuit Registrar to be dealt with as an undisputed application.[103] The Circuit Registrar may, after hearing evidence in proof of the claim and quantum, grant such award as he thinks proper.[104] In many cases the notice of dispute is served out of time and sometimes only on the date of the hearing. It is not uncommon for the respondent to appear on the date of hearing to contest the claim. In these circumstances the matter is dealt with as a disputed claim even though there has been no compliance with the Rules.[105] If the applicant accepts liability but requires time to pay by instalments, he is enjoined to return the acceptance of liability form and appear on the date allocated for hearing. Many respondents however use the acceptance for liability form to state their means and how much they can afford to pay per week or month. Where this is done the Registrar will usually make an order in accordance with the offer in the absence of the respondent.[106]

There is no provision for a preliminary hearing or consideration in the Northern Ireland Small Claims procedure.

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[103]Ord. 27 (6)(xi) CCR (NI) 1981.

[104]Ibid.

[105]Greer and Mulvaney, 39.

[106]This form has been criticised as it does not request details of the respondent's means, nor whether he wishes to pay by instalments.

As in England, small claims are heard in the County Courts.

4. SMALL CLAIMS IN SCOTLAND : PRE-TRIAL PROCEDURE

4.1 Introduction

With effect from the 1st of January 1979 the Lord Advocate introduced an experimental procedure for dealing with small claims in Dundee.[107] Prior to implementation of the Dundee experiment there was no procedure specifically designed for small claims. Legislation did, however, provide for a summary cause procedure.[108] This procedure was a simplification of existing procedures. It did not normally involve written pleadings. Evidence was not recorded at the hearings.[109] The procedure could be used for claims under £1000 and the recovery of heritable and other moveable property where the value in dispute did not exceed £1000.[110] A summary cause is commenced by completing one of the ten different forms of summons set out in the Rules, depending on the nature of the claim. The completed summons is lodged with the Sheriff clerk who signs it and marks the day when

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[107]W C H Ervine "Small Claims in Scotland" (1983) 2 Civil Justice Quarterly, 215.

[108]Sheriff Court (Scotland) Act 1971 and the Act of Sederunt (Summary Cause Rules, Sheriff Court) 1976.

[109]W C Ervine "Small Claims in Scotland" 216.

[110]Ibid.

the case will be called.[111] Service of a copy of the summons normally takes place by recorded delivery post. In the absence of postal service only a solicitor or the sheriff's officers may serve the summons.[112] In a claim for payment the defender is informed in the summons that decree (default judgment) can be granted against him if he ignores the summons.[113] The summons also makes provision for the defender's reply. Where the defender admits to the claim or offers to pay in instalments, the pursuer (plaintiff) may lodge a request for decree (default judgment).[114] A decree may be granted in the absence of the parties.[115] Where the claim is disputed the matter proceeds to trial.[116] The procedure is appropriate for debt collecting.[117]

Many individuals had no knowledge of the procedure's existence. The procedure, although simpler than the other procedure available (the ordinary cause procedure) is too

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[111]Ibid.

[112]Ibid.

[113]Ibid.

[114]W C H Ervine, "Small Claims in Scotland", 217.

[115]Ibid.

[116]Ibid.

[117]Ibid.

complex for the normal layman to use.[118] If defended, the normal adversarial trial procedures relating to the rules of evidence were applied.[119] Legal representation was therefore essential.[120]

It was these factors that led to the implementation of the Dundee scheme.

The Dundee scheme devised in consultation with the Scottish Consumer Council, operated between 1979 and 1981. Participation in the scheme was voluntary. Jurisdiction was £500. Although individuals only were allowed to use this scheme, small businesses and tradesmen had access with the consent of the Sheriff clerk. Simple claim forms were available from a Sheriff clerk's and consumer organisations' offices. After completion of the claim form it, together with a form which provided for the defendant's consent and reply, were sent to the defendant. If the defendant failed to reply or consent no further participation was possible. The primary function of the adjudicator was to reach an agreed solution. Procedure at the hearing was informal and held in a private room. In terms of Rule 9 of the scheme:

> "The adjudicator will find out the facts by asking questions and will assist both

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[118] Ibid.

[119] Ibid.

[120] Ibid.

> parties on any legal points which arise in the course of the proceedings."[121]

Evidence could be given orally over the telephone and the rules of evidence did not apply. Although assistance other than help from a solicitor was not prohibited, all parties who used the scheme were unassisted.[122] The Dundee experiment led to the introduction of Small Claims Courts in Scotland.[123] The foundation of the Small Claims procedure is contained in the Law Reform (Miscellaneous Provisions) (Scotland) Act.[124] The Act contains the following provisions:

> "There shall be a form of summary cause process, to be known as the 'small claim', which, shall be used for the purposes of such descriptions of summary cause proceedings as are prescribed by the Lord Advocate by order.[125] No enactment or rule of law relating to the admissibility or corroboration of evidence before the Court of law shall be binding in a small claim."[126]

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[121]W C H Ervine, "Small Claims in Scotland", 217, 222.

[122]Ibid.

[123]W C H Ervine, "Designing a New Scheme for Scotland" (1986) New Law Journal 615.

[124](1985 C 73).

[125]Section 18 (2) (1985 C 73).

[126]Section 18 (3) (1985 C 73).

There was thus, as in England and Wales and in Northern Ireland, no special court created for dealing with small claims. Rather, a modified procedure was applied within the court structure. After a consultation paper was published by the Lord Advocate in 1987 Small Claims Rules were published which came into operation on the 30th of November 1988.[127] Features of the procedure in respect of small claims are:

1. It has no jurisdiction in actions for defamation, multiploiding and ailments.[128]

2. There are three types of action which may be brought by way of this procedure. These are:

   (a) actions for payment of money;

   (b) actions ad factum praestandum;

   (c) actions for recovery of immovable property where there is included an alternative for a claim of money not exceeding £750.[129]

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[127]Act of Sederunt (Small Claim Rules) 1988 No 1976 (S 188).

[128]Multiploiding is a type of interpleader action where there is a dispute as to ownership of immovable property.

[129]Statutory Instrument SI 1988 No 193.

The action ad factum praestandum does not include action for count, reckoning or payment.

3. The parties may consent to the small claims procedure applying to a claim in excess of £750. Section 37 (2)(c) of the Sheriff's Court Act now reads:

> "In the case of any cause which is not a small claim by reason only of any monetary limit applicable to the small claim, the Sheriff at any stage shall, on the joint motion of the parties to a cause, direct that the cause be treated as a small claim and in that case the cause shall be treated for all purposes (including appeal) as a small claim and shall proceed according."[130]

4. The Sheriff may stop the proceedings where the case involves a difficult question of law or a question of fact of exceptional complexity.[131]

5. Where the claim is less than £200, the pursuer (plaintiff) is not entitled to any costs or expenses. Expenses in other cases are limited to £75 except in those cases where a defender:

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[130]Amended by Act 73 of 1985.

[131]Section 37 (2B) of Act 73 of 1985 amending the 1971 Act. Compare Section 23 of the Small Claims Court Act 61 of 1984.

(a) has not stated a defence;

(b) having stated his defence has not proceeded with it; and

(c) has not proceeded in good faith.[132]

6. Legal representation is allowed.[133]

4.2 Commencement of Action

Action is commenced by way of summons.[134] The form of the summons is dependent upon the nature of the claim.[135] An attempt has been made to draft the rules, and the relevant forms in simple terms so as to be understandable to the layman.[136] The use of technical and legal expressions has been avoided as much as possible.

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[132]Rule 26, Act of Sederunt No 1976 (S 188).

[133]Rule 30 Act of Sederunt 1988 No 1976 (S 188).

[134]Rule 3, Rule 36 and Rule 37, 1988 No 1976 (S 188).

[135]Ibid.

[136]Consultation Paper, Small Claims Procedure in the Sheriff Court (1987) para 48.

Details are contained in the summons as to how they are to be completed.[137] Different rules are applicable to the different forms of summons.[138]

The date of the preliminary hearing and the last date when the defender may return a response are inserted by the Sheriff clerk who issues the summons.[139] Service can be effected either by the pursuer's solicitor, a Sheriff officer or the Sheriff clerk by sending it first-class ordinary post.[140] Summons may also be served personally on the defendant in any other manner applicable to other summary causes.[141]

Where a defender's address is unknown to the pursuer a charge shall be deemed to have been served on the defender if it is served on the Sheriff clerk of the Sheriff Court District where the defender's last known address is located and is displayed by the Sheriff on the walls of that court for the period of the charge. After the period specified the Sheriff

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[137]Forms 1 - 20 Appendix I 1988 No 1976, (S 188).

[138]Rule 3, Rule 36, Rule 37, 1988 No 1976 (S 188).

[139]Rule 3 (5) and Rule 4 1988 No 1976 (S 188).

[140]Rule 5 (1) 1988 No 1976 (S 188).

[141]Ibid.

clerk shall endorse a certificate on the charge certifying that it has been displayed.[142]

A pursuer who is not a partnership, a body corporate or acting in a representative capacity may require the Sheriff Court to affect service of the summons on his behalf.[143] Where the address of the defender is unknown the Sheriff may grant an order permitting service of the summons by publication in a newspaper or displaying it on the walls of court.[144]

After service of the summons the defender may admit the claim and pay in full, admit the claim and apply to pay in instalments either in writing or personally or through a representative on the date of the preliminary hearing, or deny the claim.[145] The pursuer at the time of the issue of the summons may intimate whether or not he will accept an offer to pay the debt in instalments should the defender admit liability.[146] Where a time to pay direction is not

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[142]Act of Sederunt (Amendment of Sheriff Court Ordinary Cause, Summary Cause and Small Claim, Rules) 1990 (SI 1990 No 661).

[143]Section 36A (1985 C 73).

[144]Rule 6 1988 No 1976 (S 188) (SI 1990 No 661).

[145]Rule 8 (SI 1988 No 1976).

[146]Rule 3 (1988) No 1976 (S 188).

open to the defender he is limited to either admitting or denying the claim.[147] Where the defender does not respond to the summons the pursuer may prior to the date of the preliminary hearing apply for a decree (default judgment).[148] Where the pursuer does not apply at least one day before the preliminary hearing the claim may be dismissed.[149] Where an offer to pay by instalments is made by the defender which is accepted by the plaintiff the Sheriff may grant decree on the date set for the preliminary hearing. No appearance by the pursuer or defender is required.[150] Where the defender denies liability he may, together with the response, file a defence.[151]

4.3 Preliminary Hearing

A preliminary hearing is held where the defender disputes the claim, where he admits the claim but wishes to make oral application for a time to pay direction or where a written application for a time direction has been made which is not accepted by the pursuer.[152] The parties are entitled to

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[147]Rule 8 (SI 1988 No 1976).

[148]Rule 10 (1) (1988 No 1976).

[149]Rule 10 (2) (SI 1988 No 1976).

[150]Rule 11 (SI 1988 No 1976).

[151]Rule 8 (2) (SI 1988 No 1976).

[152]Rule 12 (SI 1988 No 1976).

representation.[153] The matter may not go any further than a preliminary hearing depending on the nature and circumstances of the claim and the attitude of the parties.[154] The purpose of the preliminary hearing is to determine the facts and issues in dispute.[155] Admissions are made and evidence is not required to prove those facts which have been admitted.[156]

Where the Sheriff is satisfied that the facts are sufficiently admitted he may decide the claim on its merits.[157] Where the dispute of fact cannot be resolved at the preliminary hearing the Sheriff refers the matter to a main hearing. The preliminary hearing is held in public.[158]

In January 1985 Ervine wrote:

> "The proposal to have a preliminary hearing raises a difficult question. Because it involves two stages in the procedure it makes the procedure a little more complex and more expensive as two visits to the court will be necessary. On the other hand, a

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[153] Ibid.

[154] Infra.

[155] Rule 13 (5) (SI 1988 No 1976).

[156] Rule 13 (5) (SI 1988 No 1976).

[157] Rule 13 (6) (SI 1988 No 1976).

[158] Rule 19 (SI 1988 No 1976).

> carefully conducted preliminary hearing may dispose of some cases at that stage and make the disposal of others at the full and formal hearing speedier. If preliminary hearings are to be a feature of the scheme there must be adequate power for the Sheriff to dispose of the case at that stage, and their purpose must be made clear to the parties when they are invited to attend this hearing."[159]

The rules relating to preliminary hearings contain a framework within which the Sheriff can proceed in a speedy and informal manner. However, the success of the preliminary hearings will to a large extent depend on the Sheriff and his attitude towards the proceedings. Ervine states:

> "It is clear that whether the small claims procedure succeeds depends on how it is operated by the Sheriff. A good deal of discretion is given to the Sheriffs to determine how they handle cases. To a large extent the sympathy and imagination they bring to dealing with disputed cases, especially where the litigants represent themselves, will determine the success of the new procedure."[160]

As has been seen from the discussion of the systems in England and Wales, the role of the Presiding Officer in ensuring that justice is seen to be done during the course of the preliminary hearing cannot be understated.

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[159]W C H Ervine, "Scots Law Times" 25th January 1985 21 at 23.

[160]W C H Ervine, "A New Small Claims Procedure", The Scots Law Times, 3rd February 1989, 65, 69.

A feature of the small claims rules and the prescribed forms is their relative simplicity. An attempt has been made to make them understandable to the ordinary layman. The use of technical expressions has been avoided as much as possible.[161] Precise instructions as to the steps to be taken are contained in the service copies of the summons and the consequences of failing to comply are also explained.[162] Where an application for a time direction is possible the service copy contains provision for the furnishing of such personal and financial details as will be necessary for the Court to make an order without having to resort to any further evidence.[163] Forms relating to the manner of service are also prescribed.[164] Where discovery and production of articles and documents are required, forms are available for this purpose.[165]

The intention would appear to make the procedure as accessible as possible to the public and the man in the street.

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[161]Consultation paper Small Claims Procedure in the Sheriff's Court, supra.

[162]Rule 37, forms 1, 2, 19 and 20, (SI 1988 No 1976).

[163]Supra.

[164]Form 4, 5, 6, 7, 8.

[165]Supra.

5. SMALL CLAIMS IN THE USA : PRE-TRIAL PROCEDURE

5.1 Introduction

In the USA although different States have different methods of dealing with small claims, the different States have small claims procedures which have characteristics which are similar.[166] These include the following:

1. Small claims are generally defined with reference to a prescribed maximum jurisdictional amount which can be satisfied by an order for money or damages. Claims for restitution or an injunction are generally excluded.[167]

2. All Small Claims Courts are courts of law.[168]

3. The rules of evidence are relaxed and the presiding officer is given a discretion how the case is to be conducted.[169] Procedural steps are eliminated.[170]

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[166]Fourth Interim Report, 112.

[167]Ibid.

[168]Ibid.

[169]Ibid.

[170]Ibid.

4. The Court which has jurisdiction is the court of residence, employment or business of the defendant.[171]

5. The Clerk of the Small Claims Court performs a number of administrative and legal functions. The Clerk of the Court accepts filing of small claims cases, assists in completing the required forms, advises the plaintiff as to how the documents are to be served and what evidence will be required at the trial. The office also supervises the service of the required notices and documents upon the defendant and advises successful plaintiffs in regard to the enforcement and execution of judgments.[172] The administrative functions of the clerk include maintaining case files, arranging the trial roll and recording judgments and payments in satisfaction of judgments.[173]

6. In some jurisdictions only individual litigants are permitted to sue. This is, however, not a general rule.[174]

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[171]Fourth Interim Report, 113.

[172]Fourth Interim Report, 113-114.

[173]Ibid.

[174]Ibid.

7. Legal representation is generally allowed but discouraged.[175]

8. Jury trials in respect of small claims have generally been eliminated.[176]

9. The right of appeal is generally limited or excluded.[177]

10. The Presiding Officer has the right, after judgment is given, to give an instalment order if the defendant is not able to pay the instalment debt immediately.[178]

11. In a number of States the parties have the option of having their dispute determined by a court or by an arbitrator.[179] In other States small claims must be referred to an arbitrator.[180]

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[175]Ibid.

[176]Fourth Interim Report, 115.

[177]Ibid.

[178]Ibid; Fourth Interim Report, 116.

[179]Infra.

[180]Infra.

As an example of the small claims procedure in the USA, the position in New York is discussed briefly.

The Small Claims Division of the Civil Court of New York is part of the Unified State Court system.[181] It was first established in 1934 with a jurisdiction to determine claims not exceeding $50. With effect from the 1st of March 1981 their jurisdictional limit was raised to $1,500.[182] Only individuals may institute proceedings. Corporations, partnerships, associations, assignees and insurers may not be plaintiffs.[183]

5.2 Commencement of Proceedings

Proceedings are commenced by the completion of a notice of claim. This is normally done by the Clerk of the Small Claims Court. The plaintiff furnishes the clerk with details of his name and address, the defendant's name and address, the nature and amount of the claim and other facts relevant to the claim.[184] This is then reduced to a simple statement on a case card which the plaintiff signs.[185] Upon payment of the prescribed fee the details of the time and place of

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[181]Fourth Interim Report, 118.

[182]Ibid.

[183]Fourth Interim Report, 119.

[184]Fourth Interim Report, 120.

[185]Ibid.

hearing are endorsed on the notice of claim which is then issued by the clerk.[186] The notice of claim advises the defendant to appear on the date of hearing together with his witnesses and to bring all relevant accounts, documents and receipts.[187] He is also advised that default judgment may be granted if he fails to appear.[188] At the same time that the notice is issued, the plaintiff is given a notice advising him of the time and place of the hearing together with advice as to what witnesses and evidence he will require in order to prove his claim.[189] The notice of claim is served by the Clerk of the Court by registered mail.[190] If the notice is returned the plaintiff is advised. He is then responsible for the service of a notice which must be served personally on the defendant.[191] Service may not be affected by the plaintiff. A process server is generally enjoined to do so although other agents may be appointed.[192] Witnesses may be subpoenaed in order to give evidence.

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[186]Ibid.

[187]Ibid.

[188]Ibid.

[189]Ibid.

[190]Fourth Interim Report, 122.

[191]Ibid.

[192]Ibid.

6. PRE-TRIAL PROCEDURE IN THE REPUBLIC OF SOUTH AFRICA

To some extent the pre-trial procedure in South Africa is very similar to the pre-trial procedure of Small Claims Courts in the United States of America. Proceedings are instituted by a summons issued by the Clerk of the Court.[193] Before issuing the summons, the Clerk must be satisfied that a written letter of demand has been delivered or sent by the claimant to the defendant giving him fourteen days to satisfy the claim.[194] The letter of demand must contain particulars of the facts upon which the claim is based.[195] The plaintiff must prove service of the letter either by affidavit in the event of personal service or by the registered post receipt that the letter has been delivered to the defendant.[196] Once the Clerk of the Court is satisfied that the requirements of Section 29 (1) and Rule 8 have been complied with and provided the plaintiff is a natural person, he is obliged to issue summons and fix a date of hearing which is endorsed on the summons.[197] This date must not be within ten days of service of the summons.[198] The plaintiff is responsible for the completion of the

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[193]Section 29 of Act 61 of 1984.

[194]Ibid.

[195]Rule 8(1) of Act 61 of 1984.

[196]Rule 8(2) of Act 61 of 1984.

[197]Section 29 of Act 61 of 1984.

[198]Rule 9(a) of Act 61 of 1984.

summons.[199] The summons must be served personally by the plaintiff or his authorised representative or by a Messenger of the Court in terms of the Rules of the Small Claims Court.[200] Summons can either be served personally by the Messenger or at the residence, place of business or employment or work of the defendant, or the domicilium.[201] The Messenger may also serve the summons by registered post.[202] Where the Messenger has not served the summons on the defendant personally the Court may, if it has reason to doubt that the summons has come to the defendant's knowledge, treat such service as invalid.[203] The defendant is not obliged to file a defence and no further pleadings are required.[204] Unlike the English and Scottish small claims procedure, there is no provision for discovery or for the production of documents. Neither can the attendance of witnesses be secured as there is no provision to subpoena them.

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[199]Section 29 of Act 61 of 1984.

[200]Ibid.

[201]Rule 13(2) of Act 61 of 1984.

[202]Rule 13 (2)(f), Act 61 of 1984.

[203]Rule 13(2).

[204]Section 29(3), Act 61 of 1984.

7. CIVIL PROCEDURE IN THE PRIMARY COURTS OF ZIMBABWE

7.1 Introduction

In 1981 the Customary Law and Primary Courts Act[205] abolished the Courts which had previously dealt with customary civil disputes between Africans, and created new Courts and a new Court structure. Prior to 1981 there were in essence two sets of Courts which dealt with customary law issues. On the one hand there were the District Commissioner's Courts established to hear civil disputes in which the rights of Africans only were concerned, or which had been transferred from the Magistrate's Courts. An appeal lay from the District Commissioner's Court to the Court of Appeal for African civil cases. These courts functioned mainly in urban areas. There were also Tribal Courts consisting of Headman's and Chief's Courts with an appeal to the Tribal Appeal Court. The appeal to the Tribal Appeal Court was a final appeal.[206]

Only Customary Law was applicable. The Court's jurisdiction was limited to cases relating to family law and communal land matters.[207] The effect of the court structure was to deny

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[205]No 6 of 1981 (Zimbabwe).

[206]Andrew Ladley "Change in the Courts in Zimbabwe : The Customary Law and Primary Courts Act" (1982) 26 Journal for African Law, 95, 97.

[207]Ladley, 98.

urban Africans access to their own forums as except for one town there were no Tribal Courts in urban areas. There were only District Commissioner's Courts which had to "handle the disputes of the cramped thousands who lived there".[208] The District Commissioner's Courts were manned chiefly by Whites. The Chiefs of the Tribal Courts were not just judicial officers but also "the political and feudal lords and leaders of the people chosen on a hereditary basis and not a democratic basis".[209] This, according to Makumure led to "completely arbitrary decisions".[210] The system as it existed prior to 1981 commanded no respect. The District Commissioners, who were mostly Whites, were not judicial officers but administered judicial functions. They invariably did not have sufficient knowledge and understanding of African customs and traditions.[211] According to Ladley:

> "These courts adopted narrow views of customary law and did more to ossify than reform the law, in the light of changing social conditions."[212]

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[208]Ladley, 99.

[209]K Makumure "Comrades Courts and Village Courts : A Comparative Study" (1985) 3 Zimbabwe Law Review 34, 56.

[210]Makumure, 56.

[211]Makumure, 58.

[212]Ladley, 99.

The Chiefs had, by virtue of the mobility of the people and their move from their traditional homes, outlived their usefulness.

During the war, as a result of the populist and revolutionary socialist ideas of the National Liberation Movement, new forums arose.[213] All the tasks of government formerly performed by Chiefs and District Officers were taken over by the Zanu Village Committees. They formulated their own procedure but in general followed the methods the Zanu Comrades used when they charged someone with an offence. This was a self-criticism session in which the accused person criticised his own conduct.[214] Even customary law cases were treated as political cases. The trial procedure was aimed at reconciliation like that of the traditional customary court. However, while this was achieved by compromise in traditional procedures, it was achieved by self-criticism in the forums of the war. The aim of the Village Committees was to reform the person by having him perceive his own error. The Chiefs Courts were seen to be the enemy while District Commissioners had almost ceased functioning.[215]

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[213]Makumure, 57.

[214]Ibid.

[215]Robert B Seidman "The Individual in African Courts : Zimbabwe's New Primary Courts" in P N Nakirambudde (ed.) The (continued...)

> "With respect of Courts trying Customary Law cases the war left Zimbabwe with a marked gap between the law in the books and the law in action."[216]

The Village Committees were essentially Criminal Courts and imposed punishments such as lashes and whipping. After the war this led to a conflict between the Village Committees and the Magistrate's Courts, as those members of the Village Committees who imposed the punishments were then sentenced for assault in the Magistrate's Courts.[217] These Courts came to be known as "Kangaroo Courts" even by members of the new government.[218]

The purpose of the Customary Law and Primary Court Act was:

> "To provide a single hierarchy of Courts for Zimbabwe : To prevent African Law from falling into disrepute and disuse; and to re-establish legally constituted courts to administer African Customary Law, thereby removing the basis for the combined existence of 'Kangaroo Courts' which had sprung up during the war."[219]

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[215](...continued)
Individual in African Law : Proceedings of the First African Law Conference (1981).

[216]Seidman, 109.

[217]Makumure, 57.

[218]Makumure, 57.

[219]14 Cilsa 1981, 220, A note, editorial comment.

According to Seidman:

> "The law in the books prescribed administratively contested District Commissioner's Courts modelled more or less on the adversarial system, the Chief's and Headman's Courts that followed customary models. In their place, explicitly political institutions, the Zanu (PF) Village Committees acted as Courts. The Customary Law and Primary Courts Act of 1981, emerged as the government's answer to the problem it perceived."[220]

The Chiefs and Headmen were ineffective and had lost their usefulness and legitimacy. During the war many of the Chiefs had lost their lives and moved from their traditional homes in fear.[221] Likewise the Commissioner's Courts were seen as part of the White regime which had been overthrown.[222]

> "The Act provides a basis upon which Customary Law, (which had not been satisfactorily provided for in the Colonial Regime) could acquire a new life and a new respect in the new political order."[223]

The change in the name of the Tribal Court is also significant. Primary Courts are to be regarded as the basic forums in the judicial organisation of the new state of

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[220]Seidman, 110.

[221]Ladley, 101.

[222]Makumure, 58.

[223]Makumure, 54.

Zimbabwe.[224] There were two new Primary Courts created : the Village Courts with jurisdiction up to Z$500, and the Community Courts. The Primary Courts have jurisdiction only in those cases involving Customary Law.[225] From the Village Courts there is an appeal to the Community Courts. This appeal is a de novo hearing. There is an appeal from a Community Court hearing to a District Court which is something of a mixture of an appeal on the record and a re-hearing.[226] From the District Court there is an appeal to the Supreme Court.[227] The Presiding Officers of the Community Courts are members of the Public Service.[228] Although appointed by the Minister of Justice, the Presiding Officers of the Village Courts are in fact elected by a show of hands at public meetings in local government wards.[229] Ladley's observations are that in some areas the traditional Chiefs are elected as the Presiding Officers. However, generally speaking this was not the case. Both local party and community leaders were elected.[230] The Presiding

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[224]Makumure, 54.

[225]Ladley, 103-104.

[226]Ladley, 103-104.

[227]Makumure, 55.

[228]Ladley, 102-103.

[229]Ladley, 109.

[230]Makumure, 55.

Officers of the Village Courts are not Public Servants. The Presiding Officer of the Village Court sits with two Assessors.[231] The democratic appointment of the Presiding Officers is a break from the traditional position where the Chiefs were appointed on a hereditary basis.

7.2 Commencement of Proceedings in the Village Court

Proceedings are instituted in the Village Court by either laying a complaint before the Presiding Officer or if the Court is in session, before the Court, or if the defendant does not appear voluntarily by a summons drawn up by the Presiding Officer.[232] In this respect the procedure is similar to that which prevails in the lower courts of France and Germany.[233] The summons must be served by the Messenger who has a duty to advise the defendant of the complaint and of the date he is to appear in court. The summons is drafted in English, Tshona and Ndabele.[234]

7.3 Commencement of Proceedings in the Community Courts

Rule 5 of the Community Court Rules provides as follows:

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[231]Ladley, 109.

[232]Rules 3 and 4 (1) of the Village Court Rules published in Statutory Instrument 755 of 1982 as amended by Statutory Instrument 597/83.

[233]Supra.

[234]Rule 4(2) of the Village Court Rules and Form VC3.

"(5)(1) A plaintiff may commence a case in a Court by applying to the Court to issue summons against the defendant.

(2) A plaintiff shall apply for a summons during normal office hours to the Clerk of the Court which has jurisdiction for hear the matter.

(3) In his application for a summons, the plaintiff shall:

(a) state the nature of his claim, giving sufficient particulars to advise the defendant of:

(i) its nature; and

(ii) the day on, or the period during which occurred the act, omission or conduct giving rise to the claim; and

(iii) the place at which occurred the act, omission or conduct giving rise to the claim."[235]

In terms of Rule 5 (4) of the Community Court Rules it is the obligation of the Clerk to draft the summons. It is also he who signs the Community Court summons. The Community Court summons also contains other provisions for the assistance of the parties. Some of it is drafted in the three official languages of the Zimbabwe. Included in this section is the following provision:

> "In case of doubt you should consult the nearest presiding officer before the day on which the case is to be heard."

Also set out in the summons are the defendant's rights to answer the claim and advice to bring witnesses and evidence to the hearing. Provision is also made for the defendant to

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[235]Community Court (Civil) Rules 1981, Statutory Instrument 809 of 1981.

submit his defence in writing or endorse on the summons that the defence will be disclosed at the hearing. There is also provision for the endorsement by the Messenger of the Court of the fact that he has served the documents and explained the contents thereof to the defendant.

In terms of Rule 7 (3) of the Community Court (Civil) Rules

> "So far as practicable, the Messenger shall inform the defendant of the nature and grounds of the claim against him, the date and place at which he and his witnesses must appear to answer the claim, and the fact that he may file a written defence or counterclaim if he desires."

There is also provision in the Community Court Rules for a pre-trial hearing. At the pre-trial conference the Presiding Officer may:

1. interview each party separately;

2. require each party to declare evidence, particulars of witnesses and the evidence they will give;

3. require the parties to state the maximum offer or terms which they will accept in compromise of their claim; or

4. require the parties to state why the opponent's officer in compromise does not do justice.[236]

The pre-trial conference also serves the purpose of narrowing the issues between the parties. The function of the Presiding Officer at the pre-trial conference is also to do what he can in order to simplify the trial.[237]

8. COMMENT ON PRE-TRIAL PROCEDURE

According to Weller, Martin and Ruhnka the trouble spots the plaintiffs experience are the naming of the correct defendant, finding the address for service on the defendant, and knowing what type of proof must be brought to trial to prove their claim.[238] Even where the system makes provision for the early involvement of a Presiding Officer in an action under the small claims procedure, assistance from the Court personnel will be necessary. The greater the demand for information prior to the initiation of proceedings, the greater will be the need for such assistance. The potential litigant may require advice as to whether he has a possible claim. Once this is furnished and he desires to continue,

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[236]Rule 11 of the Community Court (Civil) Rules.

[237]Rule 11 (3) of the Community Court (Civil) Rules.

[238]Steven Weller, John A Martin and John C Runkha "In-Court Assistance to Small Claims Litigants" (1982) 1 Civil Justice Quarterly 62.

assistance in the formulation of the claim and the drafting of the necessary documents will be required. If evidence is also to be furnished simultaneously with the lodging of the claim, as Thomas proposes,[239] advice relating to the nature and details of the evidence will be necessary. The importance of the assistance of the office of the Clerk of the Court has been emphasised by Appelbey.[240] According to Appelbey the aims of the Small Claims Court procedure may include:

1. enabling people of average intelligence with no experience of the Courts to bring and defend actions on their own;

2. keeping attendances at court to a minimum and to dispose of cases expeditiously;

3. ensuring that the Court knows the real issues and that it be reasonably certain that all relevant facts will be brought out in evidence.

If these are to be achieved, advice from and the assistance of the Court personnel is necessary.[241]

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[239]Thomas (1982) Civil Justice Quarterly 52.

[240]G Appelbey "Small Claims in Birmingham County Courts" (1985) 4 Civil Justice Review 203.

[241]Appelbey 207.

According to Frame in New Zealand:

> "The task imposed on the Court officials is critical to the success of the Tribunals."[242]

Turner states:

> "The function of the Registrar is all important. He possesses much discretion and it has fallen on him to set the tone of the Tribunal. He has the express duty to assist the claimant who seeks help in completing the claim form."[243]

The duties of the personnel of the Small Claims Courts are often prescribed by legislation. Section 38 of the Small Claims Tribunal Act[244] requires the Registrar and his officials to assist in the completion of the forms, the lodging of the claim, applications for re-hearing, appeals and the enforcement of orders. The same applies in Australia.[245] In America the functions of the Clerk are also prescribed by legislation.[246]

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[242]Alex Frame (1982) New Zealand Law Journal 251, 252.

[243]Turner, (1980) Anglo American Law Review supra 172.

[244](1976) New Zealand.

[245]G D S Taylor "Special Procedures Governing Small Claims in Australia" in Mauro Cappelletti and John Weisner (eds.) Access to Justice (1979) 597, 641.

[246]Fourth Interim Report, 113.

Difficulties in finding the true defendant can arise for example where the defendant uses a trade name, has corporate personality or the claimant does not know who the true defendant is as he has only dealt with an agent.

In some jurisdictions it is the Registrar's or Clerk's function to ascertain the proper defendant or respondent. The claimant provides the name and address of the supposed defendant, but thereafter and before service on him, the Registrar or his assistants must take steps to ascertain whether the supposed defendant is in fact the true defendant. According to Taylor the process of finding the respondent serves two useful purposes:

> "1. The obligation of finding who is the legal person to be sued is in the hands of experts.
>
> 2. It absolves the claimant from investigating who is actually responsible for the wrong - a point which is often very difficult."[247]

According to Taylor it would be unfair to require the claimants to perform these functions.[248] The same obligation is placed on the Clerks of the Court in certain American States.[249] As has been seen, some systems impose a duty on the Clerk to ensure that the defendant is served

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[247]Taylor, 628.

[248]Ibid.

[249]Fourth Interim Report 113.

with a summons usually by registered mail. When summons is not served in this manner the Clerk advises the plaintiff whose duty it is then to ascertain the correct address of the defendant and to take steps either personally or through the Messenger or other official to serve the summons.[250] In Ireland, for instance, it is the responsibility of the County Court Office to ensure that the summons is served on the defendant.[251] In Scotland where the pursuer is not a partnership or body corporate the Sheriff Clerk is obliged to affect service on his behalf.

Included in the Clerk's functions may also be the power to protect the defendants from pressure or harassment by claimants. An example is the procedure in New York and Rhode Island where the Clerk may in such cases notify the plaintiff to appear before a Small Claims Court Judge in order for him to make a determination and deny the claimant further use of the Small Claims Court.[252] Some Judges of the Pro Se Small Claims Court in Chicago are of the opinion that the clerks

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[250]See for instance the position in Northern Ireland and Scotland.

[251]Supra.

[252]Paul C Deever III, Robert H Brownley, Charles Larry Lewis, Gregory J. Moodie, William H Pickering, "Special Project : Judicial Reform at the Lowest Level : A Model Statute for Small Claims Courts" (1975) 28 Vanderbilt Law Review 711, 775.

should be given some power to screen plaintiffs.[253] The clerks of the court in South Dakota are empowered to screen cases for evidentiary sufficiency and if there is insufficient evidence, bar the plaintiff from proceeding with his claim. In order to proceed thereafter the consent of the court is required.[254]

It is also the clerk's duty to assist defendants. Where the system provides for a compulsory reply from the defendant, the clerk is more likely to have contact with the defendant prior to the case, than where no reply is required. Where contact is made the clerk assists in the drafting of a reply and advice to the defendant of the evidence required.

Research by Weller, Martin and Ruhnka indicates that while representation of plaintiffs by attorneys made little difference to the likelihood of their success, representation of defendants at the trial did have a marked effect on the outcome of the case. According to Weller, Martin and Ruhnka, the reasons were:

1. Assistance provided to the plaintiffs. Because defendants only come to court on the day of the trial assistance is not furnished to them. Thus

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[253]Thomas L Eovaldi and Peter R Myers "The Pro Se Small Claims Court in Chicago : Justice for the Little Guy?" (1978) 72 North Western University Law Review 947 at 977.

[254]Eovaldi et al, 973.

the plaintiff usually has more knowledge of trial procedure and is better prepared.

2. To win in the Small Claims Court the defendant must either demonstrate that the plaintiff does not have a valid claim or establish a sound defence. This may require too much of the average defendant.

3. Instances of judicial indifference and aloofness can penalise inexperienced defendants who lack the knowledge to raise a defence.

4. Insufficient time is given to litigants to air their views.[255]

According to Weller, Martin and Ruhnka:

> "Increasing Court-provided assistance to litigants requires basic reconstructuring if defendants as well as plaintiffs are going to be helped. Steps in this direction should include more even-handed and non-threatening complaints, notice of a defendant's right to appear to question a claim or to request more time to pay, the name, address and telephone number of the court office to contact for assistance at the back of the complaint or in a separate notice basic information on how to defend a claim. Since most defendants do not presently make a special trip to court before the trial day, the emphasis must best be telephone assistance to defendants, or in more

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[255] Weller et al, 73.

> complex cases a pre-trial hearing before a legal officer which could be used to check that each side was aware of what types of proof would be required in a particular case."[256]

Litigants who reported that they understood the judicial process were more likely to be satisfied with their court experience than litigants who reported that they did not understand the process.[257] The quality of contact with the Court system was the major determinant of litigant satisfaction, according to Weller, Martin and Ruhnka. It even had a greater influence than winning a case.[258]

Adams is of the opinion that the Small Claims Court would function more efficiently in an adversary system which is characterised by "institutionalised counselling and advocacy".[259] There would be two divisions of the Small Claims Court, one for the plaintiffs, the other for defendants. The plaintiff's office would advise the plaintiff of the legitimacy of his claim and formulate the most feasible theory should he wish to proceed. The defendant's office would be contacted which would then

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[256]Weller et al, 65.

[257]Weller, Martin and Ruhnka, 73.

[258]Weller, Martin and Ruhnka, 68-70.

[259]George W Adams, "The Small Claims Court and Adversary Process. More Problems of Function and Form" (1973) Canadian Bar Review 583 at 614.

contact the defendant to discuss his position. The defendant's division would then formulate his defence if he has one. If not, then settlement negotiations between the two offices can take place.[260]

> "The proposal visualises a very human negotiation process with settlements providing time to pay and other creative outcomes possible in compromise. These settlements would only be with the consent of the parties. The proposal would ensure that defaults are not due to the ignorance or fear of the defendant."[261]

Where a settlement is not reached the matter will proceed to trial where the parties can be represented. Where counsel cannot be afforded, use of the personnel from the separate divisions will be possible.[262]

The need for effective in-court assistance was recognised by the Hoexter Commission. It accordingly recommended that legal assistants be salaried staff employed exclusively as such.[263] This recommendation was not accepted by the legislature. The lack of trained legal assistants is seen

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[260]Adams, 614-615.

[261]Adams, 614-615.

[262]Adams, 615.

[263]Fourth Interim Report, para 13.14.

to be a shortcoming of the existing system by Theron.[264] She recommends that these posts be occupied by legally qualified national servicemen or final year LLB students. The latter recommendation is one also supported by the Hoexter Commission.[265]

The lack of assistance to defendants was seen by the Hoexter Commission to be one of the drawbacks of systems in the United States of America. It thus made certain suggestions relating to how this could be avoided in South Africa. It envisaged that:

> "The plaintiff's notice of claim will expressly inform the defendant that pre-trial assistance and advice is available to him at the Small Claims Court and at the time of service of the claim the defendant will further be orally informed of this fact."[266]

Despite this, no such information is contained in the form of the summons. Neither is there any duty on the messenger to inform the defendant of his rights. This has been criticised by Theron.[267]

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[264]Lynette Theron "Die Howe vir Klein Eise - 'n Kritiese Ontleding" (1988) 105 SALJ 335 at 340.

[265]Fourth Interim Report, 181.

[266]Fourth Interim Report 199.

[267]Lynette Theron (1988) 105 SALJ 335.

The system tends to create the wrong impression in the minds of the court personnel who find it difficult in certain cases not to regard the plaintiff as their client. This may lead to plaintiff bias on their part which prevents objective effective advice being given to the defendant when it is sought. Continual assistance to the plaintiff results in more experience in this respect being obtained. Little experience however is obtained in assisting defendants, thus affecting the accuracy or usefulness of such assistance.

In order that the defendant receives legal assistance at an early stage, Theron suggests that a statement of defence or plea should be compulsory. She writes:

> "Die oplossing hiervoor kan wees dat die verweerder verplig word om voor die hofsaak 'n skriftelike verweer by die klerk van die hof in te dien. Die voordele hiervan verbonde is dat die verweerder gedwing word om aandag te skenk aan elke bewering van die eiser en dat die Kommissaris vooraf weet presis wat die geskilpunte is. Dit sal tot gevolg hê dat die verhoor aansienlik verkort word. 'n Verder voordeel hiervan sou wees dat wanneer die verweerder by die klerk van die hof opdaag, die kanse groter is dat hy met die regsassistente in aanraking kom."[268]

Theron's suggestion would have the desired effect where a detailed claim is lodged which requires a detailed reply, as is the case in Germany and France.[269] Most claims, however,

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[268]Theron 340-341.

[269]Supra.

are contained in a single sentence which sets out the cause of action very briefly. A reply to such a claim will not be of much assistance to the court. Its efficiency is also dependent upon knowing that a reply is necessary and how to formulate such a reply. While the educated may be able to comply with the requirements, this will not be the case with the uneducated or illiterate defendant. It is also likely that the defendant will not know that he has a defence and this will only come to light after a discussion of the facts with him. If it is brought to his attention that he is at liberty to approach the clerk or legal assistant to assist him in the formulation of his defence, the object of Theron's suggestion will be achieved. However, the purpose of not making the filing of a statement compulsory was to provide a system where the defendant would have to appear at court once only. The suggestion of Ison in this respect has merit. Ison is of the opinion that the Judge should seek out the defendant, explain his rights to him and obtain his version of the events. Thereafter he will be in a position to formulate any defence the defendant may have.[269a] In a system where the Commissioners are appointed solely for the hearing of the trial, this will be impractical or impossible. However, taking into account the Hoexter Commission's recommendations[270] a duty should be imposed on the Messenger of the Court to advise the defendant of his rights when

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[269a]Terence G Ison "Small Claims" (1972) 38 Modern Law Review 18.

[270]Supra.

serving the summons, and to obtain his attitude to the claim. At the same time he could record the defendant's defence, if any. To operate efficiently this will require personal service and legally trained messengers of court attached to the clerk's office. It is suggested that such messengers be appointed as legal assistants who could assist other litigants when not serving documents.

A provision similar to Rule 7(3) of the Community Court (Civil) Rules (Zimbabwe)[271] would be in accordance with the recommendations of the Hoexter Commission. However, in addition to the provision that the messenger shall inform the defendant of the nature and grounds of the claim against him and the date at which he and his witnesses must appear to answer the claim, there should be provision for the recording of the defence on the original of the summons to facilitate further proceedings at the trial.[272]

In a system as it exists in South Africa, where legal representation is prohibited and the purpose is to limit expenses and costs, all functions which would otherwise be performed by an attorney's office should be undertaken by the office of the Clerk of the Court. However, this is not presently the case in South Africa. The system has the following characteristics:

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[271]Supra.

[272]Terence G Ison "Small Claims" (1972) 38 Modern Law Review 18.

1. Although assistance is available, the ultimate responsibility of drafting the required documents lies with the parties.[273]

2. It is the plaintiff's duty to ensure that the summons is served. There is no such duty on the clerk.[274]

3. There is no duty on the part of the clerk to ascertain the identity of the defendant.

4. There is no discretion on the clerk to refer a matter to a Commissioner for a decision in terms of Section 23 of the Small Claims Court Act.[275] Thus the parties will have to wait until the trial before such decision is made.[276]

In those systems where the duty to draft the summons and particulars of claim is imposed on the clerk of the court, it is common to have a requirement that the plaintiff has to make a written application for a summons.[277] Potential

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[273]Section 29 Act 61 of 1984.

[274]Section 29 and Rule 8 of Act 61 of 1984.

[275]Act 61 of 1984.

[276]Section 23 of Act 61 of 1984.

[277]See the position in Zimbabwe, Northern Ireland, (continued...)

litigants find it easier to fill in an application which contains statements of the requirements in completing the document than a summons. Application forms similar to those in the Zimbabwe Community Court can be designed to facilitate their completion by the litigants. Assistance in their completion can be rendered at the clerk's office by the clerk or legal assistant. A requirement that the litigant must complete an application as well as a summons amounts to unnecessary duplication. Assistance in the drafting of a summons will again, in such a case, be necessary. Rather, the duty to draft the summons based on an application should rest solely on the clerk who will sign the document. The drafting of the summons can take place when the clerk is not otherwise rendering assistance. Certain hours could be set aside during which the public have no access, for the clerk to perform his administrative and other duties including the drafting and issuing of documents.

The forms prescribed in the Small Claims Rules of Scotland contain precise details of the defender's (defendant's) rights and duties.

The defenders are advised that they may contact the Sheriff Clerk and various advice bureaus if further advice is

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[277](...continued)
Scotland and to a certain extent England and Wales supra.

required. Details of the pre-trial procedure in Scotland have been discussed above.[278]

Provisions such as those contained in the Community Court (Civil) Rules and the Small Claims Rules of Scotland would benefit all parties concerned; the Commissioner in giving him a better picture of the dispute between the parties before the hearing, and the plaintiff and the defendant in that valuable assistance is easily made available to them.

Many adjournments arise out of the plaintiff's failure to prove that a summons has been served. Plaintiffs in many cases misunderstand the clerk with respect to their duties, expect the clerk to ensure service, do not realise that they have to retrieve the return of service from the messenger, or do not know what has to be done once a return of non-service is received. The majority of these problems can be eliminated by requiring that the clerk shall ensure that the summons is given to the messenger for service.[279]

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[278]Supra.

[279]As is the case in terms of Rule 7(1) of the Community Court (Civil) Rules (Zimbabwe).

The advantages that flow from the requirement that the clerk ascertain the true defendants cannot be over-emphasised.[280]

There are actions which plaintiffs sometimes wish to bring which disclose no cause of action. Notwithstanding this the clerk has no power to refuse to issue a summons. His duty is limited to advice, and where the plaintiffs refuse to follow the advice, the clerk will be obliged to issue summons no matter what his opinion is. Abuses of court procedure could therefore result. Likewise it may appear from the outset that a matter is not suitable for trial by the Small Claims Court. Notwithstanding this, if the plaintiff insists, the matter will have to proceed to trial. In such cases there should be a provision for the referral of the matter to a Commissioner by the clerk for his decision. This will save time, expense and the need for the defendant to appear at an abortive hearing.

A feature of the Small Claims Court Act which does not originate from any recommendation of the Hoexter Commission is the provision for a letter of demand. The origin of this provision is probably previous legislation dealing with small claims.[281] The purpose of the previous legislation seems to

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[280]As is the case in Northern Ireland. Rule 7(2) of Northern Ireland County Court Rules; D S Greer and Mulvaney, 31.

[281]Small Debts Recovery Act 1905 (Act 15 of 1905) (Cape); Petty Debts Recovery Ordinance 1906 (Ordinance 2 of 1906) (Orange River Colony); Section 56 of the Magistrates'

have been to provide a quick and inexpensive means of debt collection. These provisions related to actions for goods sold and delivered, work done and labour supplied, outstanding rent, actions on cheques or other claims where there had been an unconditional acknowledgment of debt.

The letter of demand serves a useful purpose in such proceedings particularly where it is coupled with other procedures which facilitate the collection of debts. Thus both Sections 57 and 58 of the Magistrate's Court Act[282] make provision for the obtaining of judgment without the need to institute action by the issue of summons where the debtor has acknowledged liability and consented to judgment.[283] Upon proof of postage of the letter of demand together with the acknowledgment and consent to judgment the clerk is empowered to grant default judgment. Where one is dealing with liquidated claims a letter of demand serves to place the debtor in mora and fixes a date from which interest can be determined. The amount of evidence required in matters involving liquidated claims is generally less than that required for illiquid claims. There is therefore

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[282]32 of 1944.

[283]See Introduction supra.

justification for the letter of demand to be regarded as the first document in the proceedings in certain circumstances.

The letter of demand required in terms of Section 29 of the Small Claims Court Act[284] does not fall within this category. It is required irrespective of the nature of the cause of action. The underlying purpose seems to have been to give the debtor an opportunity to pay without having to appear at a trial. However the provision of the requirement of the letter of demand has certain shortcomings:

1. It amounts to a "threatening complaint" which can create an atmosphere or cause an attitude which is not amenable to future contact or negotiation.

2. There is no mechanism provided for a number of possible reactions by the debtor to the demand. Other than paying the claimant upon receipt of the letter or ignoring it, the debtor may react or wish to react in a number of ways:

   (a) The debtor may consider that he has a valid defence and reply to the complaint setting out such defence. If the complainant is not prepared to accept the contents or disputes them, summons has to be issued. This, in

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[284]Act 61 of 1984.

certain circumstances, amounts to unnecessary duplication.

(b) The debtor may admit that he is partially liable but disputes certain aspects of the claim.

(c) The liability on the merits may be admitted but the quantum disputed.

(d) Liability and quantum may be admitted but the debtor may not be in a position to pay the amount in one lump sum.

A letter of demand, bearing in mind the purpose of the Small Claims Court Act, and the fact that even if undefended, the plaintiff has to prove liability and quantum, will only be justified where a mechanism exists for the various attitudes and contentions of the debtor. The form of the letter should be amended in the following respects:

1. It should not contain provisions which threaten the taking of further proceedings.

2. It should contain certain provisions which request the defendant to admit or deny liability in the amount claimed.

3. If liability is admitted in full there should be provision requesting the debtor to indicate his ability to pay the claim and the manner by which he proposes paying.

4. If liability in the amount claimed is denied, there should be provision for the debtor to declare how much is in dispute and why it is in dispute.

5. The debtor should be requested to indicate precisely what facts are in issue and why. In this respect the defendant should be requested to indicate the basis of his defence.

6. There should be a paragraph which indicates that the debtor has the right to approach the clerk of the court in order to discuss the contents of the complaint with him or the legal assistant and such provision should include an invitation for the debtor to do so.

7. It should be a requirement that a copy of the letter together with the debtor's comments thereon be returned to the clerk of the court.

8. Where the defendant does not reply or react to the letter of demand the claimant should be entitled to issue summons within fourteen days of the date

on which the defendant is deemed to have received the demand.

The notices of claim in England and Wales and Northern Ireland go some way to providing for the different attitudes of the defendant.[285] The forms provided for by the Northern Ireland Rules, namely the acceptance of liability and the notice of dispute have been criticised on the basis that:

1. the form does not provide the telephone number of the Registrar's office;

2. there is no provision indicating that the Registrar is available for guidance for queries;

3. many respondents do not know or understand the significance of the documents.[286]

The conclusion is drawn that the information about small claims procedure given to the respondent is less than adequate.[287] It therefore seems essential in order to be effective that the defendants or respondents must be encouraged to contact the clerk of the court or legal assistant.

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[285]Supra.

[286]Greer and Mulvaney, 38.

[287]Ibid.

The clerk of the court should be given authority to call the parties together in order to determine whether some agreement can be reached with regard to repayment. He should, it is submitted, also be given the authority to make an order to repay in instalments other than where an offer is made to do so.[288]

Again in respect of payment of a debt in instalments, the Scottish Small Claims Court Rules are simple, understandable and informative.[289] Provision should be made to the Small Claims Court Act for the letter of demand together with the comments thereon to form the basis of a mediation or pre-trial hearing presided over by the clerk of the court or legal assistant. The clerk or legal assistant should have the authority to hold a pre-trial or mediation hearing at the parties' request or at the instance of the clerk where it is deemed desirable. In this respect provisions similar to that contained in the Community Court (Civil) Rules (Zimbabwe) with the clerk or legal assistant as presiding officer should be incorporated into the Small Claims Court rules.[290]

The clerks' or legal assistants' functions need not be restricted to the assistance of the litigants. By virtue of

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[288]Section 40 Act 61 of 1984.

[289]Supra.

[290]See Section 11 of the Community Court (Civil) Rules (Zimbabwe) supra.

the provisions of Section 26(1) of the Small Claims Court Act,[291] he can be of valuable assistance to the Commissioner by obtaining documents such as statements or plans; bank statements; statements of witnesses who are unable or unwilling to give evidence at the trial; and recording telephone conversations with the relevant persons, witnesses or parties to the proceedings.

Despite Ison's hesitancy with a third party involving himself with the investigation of the case and issues,[292] the clerk can perform a valuable function as investigator on behalf of the Commissioner.

In those systems where a preliminary consideration, hearing or conference is provided for, the success of the preliminary consideration, hearing or conference is dependent upon the attitude of the Presiding Officer. The role of the Registrar has been criticised for his lack of involvement and negative attitude towards the preliminary consideration.[293] In order to be effective the Registrar or other person presiding at the preliminary hearing or conference must:

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[291]In terms of which the rules of evidence do not apply and the Commissioner may ascertain any fact in any manner in which he deems fit.

[292]Ison (1972) 38 Modern Law Review 18, 29.

[293]Terence G Ison "Small Claims" (1972) 38 Modern Law Review 18.

1. explain the purpose of the hearing to the parties;

2. determine the nature of the claimant's claim;

3. determine the facts in dispute;

4. discuss any possible defences with the defendant;

5. determine whether the defendant has any valid defence;

6. explain the defence to the defendant and the effects thereof to the plaintiff;

7. determine whether there are any witnesses who could assist in the final determination;

8. advise on the evidence that will be required to substantiate the parties' claims and cases;

9. explain to the parties how the relevant evidence can be obtained;

10. assist in the obtaining of the evidence, if this is possible;

11. determine whether any expert evidence is necessary;

12. if the defendant admits any liability, determine how satisfaction of the plaintiff's claim can best be facilitated without undue hardship to the defendant;

13. discuss arrangements for the payment of the defendant's admitted liability.

Those who regard a pre-trial hearing as unnecessary or undesirable propose that the Presiding Officer issue written directions to the parties at an early stage.[294] A pre-requisite for such a system is that the Presiding Officer's early involvement must be incorporated into the system. This is the system of England and Wales where the Registrar is a full-time employee whose offices are at the seat of the court. In addition to his judicial functions, the Registrar has certain administrative duties.[295] Written directions would best serve their purposes where they are issued and sent immediately after the close of pleadings. Thus the proposal by Thomas is that written directions be sent immediately after receipt of the defendant's defence.[296]

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[294]Richard Thomas "A Code of Procedure for Small Claims : A Response to the Demand for Do-It-Yourself Litigation" (1982) 1 Civil Justice Quarterly 52 at 59.

[295]N Birks : County Courts (ed.) Lord Hailsham of St Marylebone (ed.) Vol X Halsbury's Law of England (1975) 190.

[296]Thomas, 59.

The effectiveness of the written directions is also dependent upon the Presiding Officer's knowledge of the issues and the plaintiff's and defendant's cases. The more information received from the litigants prior to the issue of the directions, the more precise and definite the directions can be. Thomas is of the opinion that both the plaintiff and the defendant should be required to supply not only information regarding the facts in issue, but also details of evidence they intend to produce.[297] Where such information is not available the directions regarding possible defences, witnesses and evidence can only be of a general nature. Thus in order to cover possible contingencies they may have to be lengthy and involved. This will impose a duty on the parties to read the directions and comply with them. Parties, especially those uneducated or illiterate, may have difficulty in understanding the directions and will require assistance in understanding and complying with them. Likewise in order to be able to define the claim or lodge a defence they will have to have knowledge of the nature of their claim or defence as well as the evidence required. The more intelligent or educated litigants may be capable of furnishing such information. Where, however, this is not the case difficulties will arise if prior assistance is not available. The system as it exists in England and Wales, and that proposed by Thomas, can only function where the Presiding Officer's function is his permanent occupation, and where he is situated at the seat of the court. Where this

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[297] Ibid.

is not the case, other means of involvement and assistance are necessary.

In a system where the Presiding Officer is only part-time as is the case in South Africa, it will, it is submitted, be too much of a burden to expect such Presiding Officer in addition to holding a trial to also preside over a pre-trial conference. As has been stated above[298] there should be provision for the holding of a pre-trial conference by the clerk of the court or legal assistant.

Having discussed the pre-trial procedure in this chapter, the trial procedure followed in the different legal systems is discussed in the next chapter. Generally speaking, the trial procedure in respect of small claims in most countries is informal, more simple and more flexible than the procedure which exists in other courts.

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[298] Supra.

CHAPTER FOUR

TRIAL PROCEDURE IN SMALL CLAIMS

1. INTRODUCTION

The small claims procedure can only be successful and supported if during a trial the court itself guarantees and maintains the equality between the parties. This is the opinion of Fasching.[1] He states further that the procedure can only succeed if during the trial itself the Judge actively takes part in guiding the parties on the factual and legal points and by assisting in bringing all facts necessary to reach a conclusion before the court.[2]

In this chapter the trial procedure in small claims in the countries of the United Kingdom, New York City and South Africa are analysed and discussed. They are compared to the procedure which is followed in the traditional tribal courts. In addition, alternative forms of dispute resolution are discussed and compared to the Small Claims Court procedure. The role of the Presiding Officer is analysed. Finally suggestions are made for certain improvements.

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[1] H W Fasching "Small Claims Courts", supra, 368.

[2] Ibid.

2. TRIAL PROCEDURE IN ENGLAND AND IN WALES

At or after the preliminary consideration, if there is one, the arbitrator must fix a date for the dispute to be heard unless the parties consent to his deciding it on the statements and documents submitted to him. The Registrar must also give directions regarding the steps to be taken before and at the hearing as may appear to him to be necessary or desirable.[3] Where the Registrar is the arbitrator he has the same powers as he has under the provisions applicable to a pre-trial review.[4] Any hearings must be informal and the strict rules of evidence do not apply. At the hearing the arbitrator may adopt any method of procedure which he may consider to be convenient and which affords a fair and equal opportunity to each party to present his case.[5]

Despite the contents of the Small Claims Rules the procedure during an arbitration in terms of the Rules is relatively formal and has been described as adversarial by the courts.[6]

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[3]Halsbury's Laws of England, 4th Edition, (1990) Cumulative Supplement (ed. Elizabeth Heathfield and Peter Smith) para 273A.

[4]Ibid.

[5]County Court Rules 1981, Ord. 19 Rule 5(2).

[6]Chilton and Another v Saga Holdings PC (1986) 1 All ER 841 at 844 H.

In Chilton v Saqa Holdings PC[7] the Registrar of the County Court had refused to allow counsel for the defendant to cross-examine the plaintiff, who was unrepresented, and required the representative to direct all questions through him. The defendant appealed to the Court of Appeal. Despite the provisions of Rule 5(3) and 5(4) of Order 19[8] and the fact that in terms thereof the arbitrator could adopt any method of procedure which he considered to be convenient and fair, the Court of Appeal held that such refusal was improper. Donaldson, MR, stated:

> "The informality which is stressed by the rule and the requirement that the arbitrator may adopt any method of procedure which he considers to be convenient, covers the situation where, as often happens, a litigant in person is incapable of cross-examining but is perfectly capable in the time available for cross-examination of putting his own case. The Judge or Registrar then puts up the unrepresented party's complaints and puts them to the other side."[9]

In 1988 the Civil Justice Review body of England published its proposals and recommendations with regard to small claims procedure in England and Wales.[10] These included:

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[7]Ibid.

[8]Ibid.

[9]Chilton and Another v Saqa Holdings PC, supra, 844 H.

[10]George Appelbey, "Court Justice Review : Small Claims" (1988) 7 Civil Justice Quarterly 294.

1. There should be a more active role by the Registrars especially in those cases where the parties are unrepresented.[11]

2. Representation by lay representatives should be allowed, but Registrars and Judges should retain a discretion to restrict the involvement of corrupt and unruly representatives and where necessary to exclude them entirely.[12] Where such representation is denied the Registrar or Judge must furnish his reasons for doing so.[13]

3. Simplified and standardised forms should be used in the procedures.[14]

4. A form of arbitration should be worked out by the Bar and the Law Society to operate in close proximity to the County Court in order to allow the litigants an opportunity to have their matter referred to arbitration.[15]

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[11]Appelbey, 197.

[12]Ibid.

[13]Ibid.

[14]Ibid.

[15]Appelbey, 299.

5. Small claims should still be heard in the County Courts. However all reference to the procedure in respect of small claims should be to small claims and not to arbitration. Therefore all documents relating to the forms of summons and notices should only refer to small claims. Small claims should be dealt with separately.[16]

6. The procedure should be simplified. In this regard discovery and payments into court should not be part of the procedure. Informal applications should be allowed.[17]

7. There should be training for Registrars.[18]

8. Insofar as the conduct of a hearing is concerned, the Registrar should:

   (a) conduct the hearing according to the circumstances of each case and adopt an interventionist role, dispensing with the formal rules of evidence and procedure, and assume control of the questioning of the parties and their witnesses;

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[16]Appelbey, 300.

[17]Appelbey, 300.

[18]Appelbey, 301.

(b) give short reasons for any of his decisions;

(c) explain the legal terms he finds it necessary to use;

(d) explain that all questions should be directed through him.[19]

The proposals and recommendations of the Review Board indicate a recognition of the defects in the accessibility of the court to potential litigants. They contain steps which are necessary in order to ensure a fair and speedy trial and will, if implemented, go some way to improving the credibility of the system. As such they may provide useful guidelines in determining appropriate amendments to the Small Claims Court Act in South Africa and the procedure to be followed in our Small Claims Courts.

3. ARBITRATION IN NORTHERN IRELAND

The strict rules of evidence do not apply to the arbitration and the Circuit Registrar may adopt any method of procedure which he may consider to be convenient and to afford a fair and equal opportunity to each party to present his case.[20] The Circuit Registrar may also with the consent of the parties decide the case on the basis of statements and

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[19]Appelbey, 301.

[20]Ord. 26 (6) (a) County Court Rules (NI) 1981.

documents submitted by the parties.[21] Thus the position in Northern Ireland is very similar to the position in England and Wales.[22]

Circuit Registrars in addition to determining small claim disputes, have various other judicial and administrative functions.[23] Their duties, in addition to dealing with small claims, include:

1. Hearing any County Court action in which the amount claimed or the values of the specific chattels claimed, do not exceed £500. Those claims over and above £300 are subject to the normal court rules.

2. Hearing any undefended County Court action irrespective of the amount claimed.

3. Acting as a District Probate Registrar.[24]

Less than 25% of the Registrar's business is in fact dealing with small claims. The approach he adopts at an arbitration therefore is likely to be affected by his other work,

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[21]Ibid.

[22]Supra.

[23]Greer and Mulvaney, 46.

[24]Ibid.

especially his duties as County Court Judge.[25] Their attitude would seem that a small claims hearing must not be allowed to become too informal.[26] In general the rules of evidence are not relaxed to any great extent. Only one case is reported during a period of eight months where the Circuit Registrar obtained evidence telephonically.[27] The parties and witnesses are required to give evidence under oath and despite the fact that these hearings may take place in private[28] the majority of them take place in the county courtrooms used for other county court business.[29] Although the Registrar is entitled to inspect any property or thing concerning which any question may arise[30] this power is rarely exercised.[31] Again although he has the power to call for an expert report or to invite an expert to sit as an assessor[32] this is rarely used due to the costs involved.[33]

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[25]Greer and Mulvaney, 55.

[26]Greer and Mulvaney, 55.

[27]Greer and Mulvaney, 58.

[28]Ord. 26 (6)(3(b) County Court Rules (NI) 1981.

[29]Greer and Mulvaney, 47-48.

[30]Ord. 26 (6)(5) County Court Rules (NI) 1981.

[31]Greer and Mulvaney, 59.

[32]Ord. 26 (6)(5).

[33]Greer and Mulvaney, 59-60.

Witnesses may be subpoenaed to the hearing.[34] Some Registrars however do play an active part in the questioning of the parties to elicit the relevant information and assist the parties in the presentation of their case.[35] The questioning of the parties also serves the purpose of narrowing the issues.[36] Some parties feel that the Registrars interfere too much and do not permit them to have their say.[37] According to Greer and Mulvaney the system in Northern Ireland and in England and Wales is arbitration in name only.[38] The small claims procedure in England, Wales and Northern Ireland is nothing other than a simple form of adjudication.[39] There have been institutional tendencies, according to Greer and Mulvaney, to encourage assimilation of arbitration with ordinary court procedure. There have been institutional pressures to discourage the separate development of arbitration.[40]

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[34]Ord. 26 (6)(4) County Court Rules (NI) 1981.

[35]Greer and Mulvaney, 58.

[36]Ibid.

[37]Ibid.

[38]Greer and Mulvaney, 72-73.

[39]Ibid.

[40]D S Greer and A Mulvaney, 74.

The present system in Northern Ireland has been criticised.[41] According to Greer and Mulvaney the procedure presents a novel approach by referring to arbitration. However, in practice its development has been restricted by traditional County Court procedures.[42] A system specially designed for small claims needs to be developed.[43] This will require a separate judicature act for small claims and a set of procedures specifically devised for small claims rather than a modification of an existing code as is presently the case. According to Greer and Mulvaney what is required is "a general code of procedure which could be seen in its own right and not a series of exceptions to normal court procedures."[44]

The hypothesis that the adversary procedure must be applied to small claims needs to be considered.[45] The problem with its application is its assumption that the parties to a small claim are of equal strength as regards their capacity to prosecute their cases.[46] An adversary theory also requires a pre-trial procedure to clarify and delimit the matters in

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[41]Greer and Mulvaney, 72-76.

[42]Ibid.

[43]Ibid.

[44]Greer and Mulvaney, 75.

[45]Greer and Mulvaney, 79.

[46]Ibid.

issue between the parties. This does not exist in small claims procedures in Ireland.[47] Greer and Mulvaney come to the conclusion that "small claims theory conflicts with important elements of the adversary theory."[48] They suggest that a radical approach is required whereby the responsibility of prosecuting the case will be transferred to the Court.[49]

4. SMALL CLAIMS TRIAL PROCEDURE IN SCOTLAND

In Scotland witnesses may be called by either party to a small claim. There is, however, no provision for securing their attendance by subpoena or summons.[50] All evidence is given under oath. When a party relies on documents or articles to prove his claim he must lodge such documents or articles with the sheriff clerk at least seven days prior to the hearing. Only those documents and articles which have been produced either at the preliminary hearing or before the trial, or discovered may be used in evidence.[51] Any party to a small claim may apply for an order for recovery

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[47]Ibid.

[48]Ibid.

[49]Ibid.

[50]Rule 13 (5) (SI 1988 No 1976).

[51]Rule 17 (SI 1988 No 1976).

(production) of any documents or articles discovered by his opponent.[52]

The sheriff has certain powers in terms of the rules which have the effect of limiting the issues and ensuring that the matter proceeds expeditiously:

(a) he may inspect any object in issue and have inspections in loco;[53]

(b) he may "on the joint motion of the parties, if he considers it to be appropriate, remit to any suitable person to report on any matter of fact".[54] The report of the persons to whom the matter is remitted is final and conclusive with respect to the matter which is remitted.[55]

The purpose of the provisions of Rule 13 (9) and (10) are to deal with matters which the sheriff is not competent to deal with and which can only be determined by experts. The expert when the matter is referred to him performs the functions of arbitrator. It is to be noted that the payment of the fees

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[52]Rule 18 (SI 1988 No 1976).

[53]Rule 13 (1) and Rule 13 (8) (SI 1988 No 1976).

[54]Rule 13 (9) (SI 1988 No 1976).

[55]Rule 13 (10) (SI 1988 No 1976).

of the expert will have to be agreed upon before the matter will be remitted to the expert.

It was envisaged by the consultation paper that the sheriffs follow a more inquisitorial procedure than in other matters they deal with.[56] The hearing of the action is conducted in public and "in such manner as the sheriff considers best suited to the clarification of the issue before him; and shall, as far as practicable, be conducted in an informal manner".[57] The rules of evidence do not apply.[58]

The sheriff, when giving judgment (decree) must give a brief statement of his reasons. Where judgment is reserved the reasons must be given in writing within twenty-eight days of the trial.[59] Where a defendant does not appear at the hearing after filing a defence a special hearing is fixed. The defender is given notice to appear at the hearing in order to show cause why he did not appear at the hearing. If the defender does not appear at the special hearing or fails to show good cause for failing to appear, judgment

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[56]Lord Advocate and the Sheriff Court Rules Council : Consultation Paper : Small Claims : Procedure in the Sheriff Court : Detailed Proposals. (1987) para 50.

[57]Rule 19 (SI 1988 No 1976).

[58]Section 18 of the Law Reform (Miscellaneous Provisions) (Scotland) Act, Act 73 of 1985.

[59]Rule 25 (SI 1988 No 1976).

(decree) may be granted against him.[60] The sheriff is empowered to condone a non-compliance with the rules and to make any order he deems appropriate in the circumstances.[61] As is the case with respect to pre-trial procedure, the intention of the procedure in Scotland is to make the procedure as accessible as possible to the public and to the man in the street.

5. TRIAL PROCEDURE IN RESPECT OF SMALL CLAIMS IN NEW YORK CITY AND THE USA

In New York the parties have a choice to have their matter determined by either small claims adjudication or by arbitration.[62]

At the calendar call the litigants present are advised in open court that they have a choice between having the case tried in open court by a judge or by an arbitrator.[63] They are advised that there is a right of appeal against the decision of the judge but no such right in the case of the

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[60]Rule 23 (SI 1988 No 1976).

[61]Rule 34 (SI 1988 No 1976).

[62]Fourth Interim Report 124; Austin Sarat "Alternatives in Dispute Processing Litigation in the Small Claims Court" (1976) 10 Law and Society 339 at 352.

[63]Fourth Interim Report 125; Sarat 352.

arbitrator's award.[64] Where either party objects to arbitration the matter is heard by the Presiding Judge.[65] In the Small Claims Court only individuals can institute action. Business partnerships and companies are excluded. The judges of the Small Claims Court rotate and regularly serve in civil courts where the style of judging is more traditional. When they preside over small claims they tend to follow the traditional procedure.[66] On the other hand, the arbitrators are lawyers who serve once a month. The difference between the Small Claims Court and arbitration include differences in the setting in which the proceedings occur, the procedure employed and the style of decision-making.[67] Arbitrators engage "in mixed arbitration". They go to some lengths in attempting to work out a mutually agreeable compromise. The litigants are encouraged to express their feelings as well as explain the facts of the dispute. When compromise fails the arbitrator shifts from mediation to adjudication.[68] There are other differences between the procedure in the Small Claims Court and the arbitration hearings:

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[64]Ibid.

[65]Ibid.

[66]Sarat 352.

[67]Ibid.

[68]Sarat 352-354.

1. There is no right to appeal from a decision of an arbitrator.[69]

2. Adjudication in the Small Claims Court takes place in public while arbitration occurs in private.[70]

3. The role of the third party intervenor is more specialised.[71]

4. Adjudication takes place in a large courtroom. Deference is required by the judge. He is separate from the parties and sits in an elevated position. Arbitration on the other hand takes place in a small room where the parties and the arbitrator sit at a single table.[72]

5. The Small Claims Court is a court of record. This is not the case in respect of the arbitration hearing.[73]

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[69]Sarat 352.

[70]Ibid.

[71]Sarat 352-354,

[72]Sarat 354.

[73]Ibid.

6. The rules of evidence apply in the court where parties give evidence sequentially. This is not the case in arbitration.[74]

7. By virtue of the difference in the approaches between the courts and arbitration and the emphasis on mediation, there is a wider concept of relevance in arbitration than to adjudication.[75] According to Sarat, the parties' choice is between privacy and publicity, formality and informality, and the narrower or broader view of relevance.[76]

In Pennsylvania in the United States there is a system of compulsory arbitration with regard to small claims. The purpose of the institution of this procedure was to eliminate the backlog of other courts: reduce the time delay; expedite the processing of small claims; relieve the courts of small cases; and, to "save the claimants both time and expense by reason of greater flexibility in fixing the exact day and hour for the hearing".[77] Each matter is heard by a panel of three arbitrators who are members of the Bar. They

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[74]Sarat 355.

[75]Ibid.

[76]Ibid.

[77]Maurice Rosenberg and Myra Schubin "Trial by Lawyer Compulsory Arbitration of Small Claims in Pennsylvania" (1961) 74 Harvard Law Review 448 at 454.

are appointed by the clerk of the court from a list of consenting attorneys within ten days after the case is at issue. The hearings take place within a few weeks of the appointment. Awards have to be filed within twenty days of the date of the hearing. The hearings generally take place at the offices of the chairman of the Board. The award has the effect of a final judgment. No record of the proceedings is kept. There is a right to appeal as a matter of course. This amounts to a trial de novo in court. While in some districts the rules of evidence apply, this is not the case in other districts.[78]

Arbitrated cases are disposed of more quickly and more easily than during the pre-arbitration period. While cases had to wait between twenty-four and thirty months for trial in pre-arbitration days, arbitration hearings are generally held within five months.[79] There is doubt, however, over the fairness of the procedure. This arises out of the informality of the procedure; the lack of courtroom safeguards; and the lack of training and experience of the arbitrators. The effect of the procedure was not only to save time and expense, but also to introduce a forum to litigants who would otherwise not have instituted actions.[80]

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[78]Rosenberg and Schubin 451-452.

[79]Rosenberg and Schubin 455-456.

[80]Rosenberg and Schubin 463-464.

6. ARBITRATION PROCEEDINGS IN ENGLAND AND WALES

Amongst other factors, it was the existence of the voluntary schemes in England and the County Court procedure in relation to small claims in England that led Macnab to conclude:

> "We see therefore that in the United Kingdom direct use was made of arbitration in dealing with small claims.[81] The success of the Westminster and Manchester arbitration schemes and the fact that the official small claims matters in the United Kingdom are dealt with by arbitration give a further indication that inevitably arbitration and small claims are linked."[82]

However the "arbitration" procedure in the county courts is different from the procedure followed at the voluntary schemes, or those of arbitration in Pennsylvania or New York referred to above:[83]

According to Greer and Mulvaney a distinction must be drawn between the procedure in Northern Ireland and England on the one hand, and the procedure followed at what is referred to by them as a consumer tribunal on the other.[84] Consumer tribunals provide a simplified system of dispute resolution designed exclusively for consumer clients. Their explicit

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[81]Macnab 110.

[82]Macnab 110.

[83]Supra.

[84]Greer and Mulvaney 72.

function is to resolve any dispute by mediation, and only in the event of this failing, by adjudication. Legal representation is generally prohibited. There is usually no appeal and arbitrators are not necessarily bound by rules of law. New Zealand is an example of a country where these tribunals exist.[85] Section 15 (1) of the New Zealand Small Claims Tribunals Act[86] provides that the primary function of the tribunal is to attempt to bring the parties to a dispute to an agreed settlement. In terms of Section 15 (4), the dispute is to be determined according to the substantial merits and justice of the case, having regard to the law. The referee is not bound to give effect to strict legal rights or obligations.[87] The right of appeal is restricted in terms of Section 17 of the Act. The majority of the referees of these tribunals have no legal training. As opposed to consumer tribunals, Small Claims Courts provide a simplified procedure of adjudication with no power to mediate. Legal representation is permitted, but discouraged, and the Presiding Officer is generally legally qualified. The general law is applicable no matter how complicated or complex the matter may be. There is usually also no limitation on the type of claimant who has access to the court. Greer and Mulvaney classify the Small Claims Court

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[85]Alex Frame "Small Claims Tribunals in New Zealand" (1982) New Zealand Law Journal 251.

[86]1976.

[87]Frame, 252.

procedure in Northern Ireland and England under this category.[88]

Writing before the Small Claims Courts came into existence in South Africa, Macnab stated:

> "It is submitted that our Small Claims Court procedures as envisaged by the Hoexter Commission are too formal and that the atmosphere of our Small Claims Court will not be very unlike that of an ordinary Magistrate's Court. Furthermore, Small Claims Courts have a tendency to feed upon themselves and are soon overcrowded."[89]

He also suggested that it was:

> "Somewhat difficult to imagine that our Small Claims Commissioners who have to be experienced and trained in the adversarial process, will be able, initially at any rate, to train their attitudes; especially presiding over a tribunal which has to all intents and purposes the atmosphere of an ordinary court."[90]

In my opinion Macnab makes certain fundamental errors and incorrect assumptions. The provisions of the Small Claims Court Act[91] created a forum which has features of both the

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[88]Greer and Mulvaney 73.

[89]Macnab 113.

[90]Macnab 114.

[91]61 of 1984.

true Small Claims Court as defined by Greer and Mulvaney and the Consumer Tribunal referred to above. Features they have in common with the Consumer Tribunal are the prohibition of legal representation; the absence of any obligation to keep a record; the absence of a right of appeal; the absence of evidentiary rules; the appointment of commissioners from the ranks of the profession who perform their functions part-time and without pay; the active role they take in the determination of the dispute; and the exclusion of corporate persons from having access to the courts as claimants.

On the other hand, the fact that oral evidence taken at the proceedings must be under oath; the obligation to apply the law; the duty to adjudicate; the obligation to hold a hearing in public; and the absence of a duty to mediate are characteristics of the type of forum referred to by Greer and Mulvaney as the Small Claims Court.

However, it would seem that the Small Claims Courts of South Africa are closer to the Consumer Tribunals than Greer and Mulvaney's true Small Claims Courts.

The atmosphere of a Small Claims Court, contrary to the assumption of Macnab, is far more informal than other courts. Very few of the Commissioners are robed and casual dress is permitted. The places where the hearings take place are smaller than the normal Magistrate's Courts in most cases and the parties sit closer to the Presiding Officer. In general, parties are permitted to sit while giving evidence. The

Commissioner proceeds informally and many cases evolve into a discussion between the Commissioner and the parties. The argument that the Commissioners will be unable to change their attitudes by virtue of their training in the adversarial process has little basis. The same could be said about the arbitrators of New York and Pennsylvania, as in New York the Commissioners are selected from a panel of volunteer attorneys. The criticism of Sarat was aimed at the judges of the Small Claims Court whose experience in traditional courts which are obliged to follow traditional procedures, affects their ability to change while adjudicating in Small Claims Courts.[92] Many of the practitioners appointed as commissioners have far more experience in holding informal discussions, conferences and consultations than they do appearing at a trial. This experience is invaluable in indicating the approach which should be taken by a commissioner.

A hearing in terms of the Small Claims Court Act[93] can be as informal as a private arbitration hearing. Although there seems no obligation to do so, a commissioner may adopt the role of a mediator at a Small Claims Court hearing. Even if the courts do become overcrowded, the solution would be to appoint additional commissioners and increase the frequency of Small Claims Court sessions. In any event the arbitrators of the contemplated arbitration hearings would in all

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[92]Sarat 353.

[93]Sections 26-28 of Act 61 of 1984.

probability have to be drawn from the same ranks as the Small Claims Court commissioners.

7. VOLUNTARY ARBITRATION SCHEMES

Under Section 124 of the Fair Trading Act in England[94] the Director-General of Fair Trading has a duty to encourage trade associations to prepare codes of practice.[95] Many trade organisations in England have adopted codes of practice that prescribe standards which their members undertake to follow. Such codes often include provisions for arbitration in the event of a dispute arising between the consumer and the provider of the goods and services. Likewise a contract between the provider of the services and the consumer may contain an arbitration clause.[96]

The Chartered Institute of Arbitrators provides a national small claims arbitration service for the settlement of disputes between its subscribers and their customers. There

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[94]1972

[95]Richard Thomas "Alternative Dispute Resolution - Consumer Disputes" (1988) 7 Civil Justice Quarterly 206 at 208.

[96]Margaret Rutherford "Documents only Arbitrations in Consumer Disputes" in Ronald Bernstein (ed.) Handbook of Arbitration and Practice, 217-218 (1987).

are, however, certain differences between the service and other arbitrations:

1. Generally speaking the arbitration proceeds on documents only. In certain circumstances and with the consent of the disputants, the matter may be referred to oral evidence.[97]

2. The costs are paid by the Institute of Arbitrators. The exception is where the parties have agreed that arbitration will not be confined to a consideration of documents only.[98]

3. The arbitrator is appointed by the President, Vice-President or Registrar of the Institute.

4. The rules are "not designed to accommodate disputes in which, in the opinion of the arbitrator, issues are unusually complicated, the proper resolution of which is likely to require a hearing and oral evidence."[99]

5. The rules are designed for two parties only.[100]

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[97]Rutherford 217-218.

[98]Rutherford 217-218.

[99]Rutherford 217-218.

[100]Rutherford 217-218.

Under the codes the trader accepts an obligation to submit to arbitration if the consumer pursues that option.[101] Usually the codes provide that the consumer must first pursue his claim with the trader concerned. If this fails contact with the local advice office is recommended.[102] If the dispute is not resolved at this level the trade association will attempt to conciliate.[103] If conciliation fails most codes offer independent arbitration as an alternative to court proceedings.[104]

The procedure for such arbitration is simple and informal. A claim form together with the supporting documents is submitted to the Institute within certain prescribed time limits. After the Institute has forwarded a copy of these documents to the respondent, the respondent likewise has a specified time period within which to reply by sending his defence and supporting documents. A copy thereof is then sent to the claimant for his comments.[105] The arbitrator has the power to hold inspections in loco or appoint technical advisers to furnish him with a report. The arbitrator is obliged to apply the law and has no obligation

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[101]Thomas 207.

[102]Thomas 208.

[103]Ibid.

[104]Ibid.

[105]Rutherford 217-218.

to mediate. By virtue of the nature of the proceedings mediation is almost impossible.[106] The disadvantages of documents only arbitration are, inter alia, its limited application, lack of direct contact between the arbitrator and disputants, and the inability to deal with certain disputes as they arise. A documents only arbitration is not suitable for complex issues of facts or law or where the dispute cannot be resolved on the facts. Where a dispute of fact does arise it cannot be dealt with immediately.[107] Although the arbitrator has the power to request the provision of further documents or information which will assist in his decision, this can lead to certain time delays. While the provider of services may not have any difficulty in the preparation of the documents and the formulation of his defence, claimants may have difficulty in complying with the prescribed requirements or the formulation of the claim.[108] Provision for their assistance by the administrative officers of the Institute is therefore required.[109] Despite these disadvantages the scheme provides a useful, inexpensive service with little

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[106]Rutherford 217-218.

[107]Ibid.

[108]Ibid.

[109]Rutherford 226.

inconvenience to the parties for the expeditious determination of consumer disputes.[110]

8. DOCUMENTS ONLY ARBITRATION IN THE SMALL CLAIMS COURT OF SOUTH AFRICA

Although perhaps not envisaged by the legislature, it is submitted that a documents only hearing is not incompetent in the Small Claims Court. Although Section 7 (2) of the Small Claims Court Act[111] provides that a person shall appear in person, this should be interpreted in its context. The purpose of Section 7 was to create a forum for natural persons only, and to prohibit legal representation. In terms of section 26 (1) and in (2) of the Act, the Commissioner may ascertain the relevant facts in any manner he may deem fit, and documentary evidence may be submitted without formality. Thus it is submitted that there is no prohibition against a Small Claims Court Commissioner deciding the dispute on the papers only with the consent of the parties. In such a case the parties take the risks associated with documents only resolution. Even in the absence of the appearance of the defendant, the court may not grant default judgment without proof of the plaintiff's claim.[112] Where the defendant has, despite his failure to appear, submitted written evidence in

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[110] Ibid.

[111] 61 of 1984.

[112] Section 35 of Act 61 of 1984.

the form of affidavits, reports or otherwise, it will be the duty of the Commissioner to take these into account before reaching his decision. Certain difficulties may be encountered with regard to the weight to be attached to such evidence, and how to weigh this against the oral evidence of the plaintiff. Unless there is proof that his failure to appear is without cause, where the Commissioner is unable to decide, it should be his duty to adjourn the matter in order to allow the defendant an opportunity to confirm his evidence and comment on that of the plaintiff's.

Documents only arbitration would be useful where the defendant is not resident, employed or does not carry on business in the court from which the summons has been issued.

9. MEDIATION OF SMALL CLAIMS

Scott-Macnab is of the opinion that mediation has relevance in small claims procedure in South Africa.[113] Mediation can be distinguished from negotiation which is an attempt to reach settlement by the parties involved without the intervention or assistance of a third person. According to Scott-Macnab mediation can have the effect of stabilising cross-cultural differences.[114] Where Small Claims Courts are to operate on an ad hoc basis in rural areas, such as

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[113]D Scott-Macnab "Mediation Prior to Small Claims Court Litigation : A Human Approach" (1987) De Rebus 619.

[114]Scott-Macnab 621.

envisaged in the Hoexter Commission report,[115] a mediation procedure would be useful to anticipate the hearings. In such areas mediation should be easy to implement as rural communities are used to resolving disputes informally in their own traditional manner.[116]

10. CUSTOMARY CIVIL PROCEDURE

The civil procedure of tribal or customary courts is presently governed by legislation in most countries.[117] However this legislation, in the main, preserves the traditional procedure of the trial.[118] Although there are certain differences between various tribes, there are in most, tribal courts of different grades.[119] While some are

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[115]Fourth Interim Report 201.

[116]Scott-Macnab 621.

[117]See Section 12 of the Black Administration Act 38 of 1972 and Chief's and Headman's Court Rules promulgated in Government Notice No 2082 of 29 November 1967; The Ciskeian Administrative Authorities Act 37 of 1984; The Kwa Ndebele Traditional Hearings of Civil and Criminal Cases of Ilingwenyama, Amakhosi, Amakhosana and Induna Act, 27 of 1984.

[118]See Rule 1 of the Chief's and Headman's Rules and the Kwa Ndebele Act.

[119]B R Mqeke "Traditional and Modern Law of Procedure and (continued...)

courts in the true sense, others are no more than conciliatory organs which have no power to enforce their judgments.[120] The family court or council consists of the adult males of a clan whose function it is to consider and attempt to settle family and other disputes.[121] The traditional sub-headman's court of the Nguni likewise had no power to enforce its judgments and in the event of reconciliation or settlement failing the matter had to be referred to the Chief's or Headman's Court[122] Characteristics of traditional judicial procedure are its flexibility, informality and simplicity.[123]

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[119](...continued)
Evidence in the Chief's Courts of the Ciskei" (1986) unpublished LLM Thesis, 16-22; B R Mqeke "Traditional and Modern Law of Procedure and Evidence of the Cape Province : A Re-Appraisal" (1982) Speculum Juris 47 at 49-50; A C Myburgh and M W Prinsloo "Indigenous Public Law in the Kwa Ndebele" Chapter 4; B J van Niekerk "Principles of the Indigenous Law of Procedure and Evidence as Exhibited in Tswana Law" in A G M Sanders (ed.) South Africa in Need of Reform (1981).

[120]Mqeke LLM thesis, 17-18; Myburgh and Prinsloo 111-112.

[121]Ibid.

[122]Mqeke LLM thesis 18.

[123]Max Gluckman "Ideas and Procedures in Customary Law" 22; C R M Dlamini "Wither a Lay Justice in South Africa?" (1985) Speculum Juris 1; Mqeke LLM thesis 22; Myburgh and

11. CUSTOMARY TRIAL PROCEDURE

Traditionally the parties to a civil action were the agnatic groups represented by the family heads.[124] Before any evidence is led the head of the family or other senior member of the family indicates the nature of the claim.[125] Thereafter the aggrieved person is allowed the opportunity of giving evidence which is given in detail and generally without interruption. After the evidence of the aggrieved person, the alleged wrongdoer or defendant gives evidence in a similar manner.[126] There are no pleadings in traditional procedure and therefore the evidence of the plaintiff and the defendant given before witnesses serves to indicate the dispute in question and the nature and content of the issues. The procedures are open to the public who have a right to question the parties at any stage. Questions, however, in traditional procedure are usually put to the parties after they have given their versions. It is improper to interrupt the evidence unnecessarily. The evidence is presented to the

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[124]Van Niekerk 134.

[125]Van Niekerk 130.

[126]J G Krige "Some Aspects of Lovedu Judicial Arrangements" (1939) 13 Bantu Studies 113.

Court and the distinction between examination in chief and cross-examination does not exist.[127]

After the evidence of the parties to the dispute, the witnesses of the plaintiff and defendant are given the opportunity to give their evidence. Although it is usual for the plaintiff's witnesses to give evidence first, the Presiding Officer has the discretion to call the witnesses in any order that he deems fit.[128] The Presiding Officer and his assessors play an active role in the proceedings. Legal representation was unknown in traditional courts and is prohibited in existing courts.[129] Accordingly the Presiding Officer takes the place of counsel in questioning the parties and assists the parties needing such assistance.[130] The Presiding Officer has two duties: firstly, to determine where the fault lies, and secondly, to lay down "consequential orders which ensure satisfaction for the parties and the public".[131] The Presiding Officer's duty extends beyond deciding on the facts given by the parties. He has a duty to ascertain the truth and the

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[127]Krige 120.

[128]Van Niekerk 134.

[129]See for example Section 10 of the Kwa Ndebele Act; Rule 5 of the Rules of Chief's and Headman's Courts.

[130]Gluckman 23.

[131]Gluckman 24.

underlying reason for the dispute. The principles of natural justice are strictly adhered to and the parties are given an opportunity of stating their case as fully as possible.[132] Default judgment was unknown in traditional procedure. By virtue of Rule 2 of the Chief's and Headman's Rules, default judgment is presently possible in these courts. In Kwa Ndebele the provisions of Rule 2 have been repealed. In terms of Section 15 of the Kwa Ndebele Act it is an offence for the defendant not to appear at the trial.

Characteristic of the traditional procedure is its reconciliatory nature and conciliatory approach.[133] There is an "underlying desire to promote reconciliation of the contesting parties rather than merely to rule on the overt act which they may have brought to Court."[134] Van Niekerk states that it is more important that the parties to a suit settle the dispute to their mutual satisfaction than a court come to the conclusion on a point of law.[135] According to Krige the legal aspect of a satisfactory judgment is "less important than its human aspect and knowledge of human nature not legal acumen is the first requisite."[136]

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[132]Mqeke LLM thesis 23.

[133]Gluckman 22; Dlamini 1-3; Van Niekerk 130.

[134]Gluckman 22.

[135]Van Niekerk 130.

[136]Krige 119.

The civil procedure of the trial courts is closely related to the nature of the tribal society. Epstein states that the procedure is "consistent at every point with, and must be understood in terms of, the social structure of tribal communities."[137]

The tribal community was a homogenous entity with simple technologies and little specialisation. The members of the community were involved in multiplex and permanent relationships. It was therefore essential that harmony in the community be maintained and restored. Essential to this is the settlement of the dispute to the satisfaction of the parties and the community itself. The traditional procedure reflects this approach. The legislature has also recognised the importance of reconciliation in the courts of the Chiefs and the Headmen. This is clear from Section 12 of Act 38 of 1927. While the body of this section makes provision for the hearing and determination of civil disputes by Chiefs, Headmen and Chiefs' Deputies, the heading of the section refers to "settlement of the civil disputes" by such persons.

Many of the disputes are settled by family councils. Certain family matters go no further. These councils have a role

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[137]A L Epstein "The Administration of Justice and the Urban African" (1953) 25; see to S E van der Merwe "Accusational and Inquisitorial Procedures and Restricted Systems of Evidence" in Sanders (ed) South Africa in Need of Reform 141.

similar to that of an arbitrator.[138] In matters other than those related to the family, an attempt at settlement is usually made between the family groups involved. Where the matter is referred to a formal court without first being considered by the family groups, the court will often refer the matter back for their consideration.[139] According to Mqeke the family council "constitutes the hallmark of the administration of justice in African societies" and he argues for their statutory recognition as dispute settlement organs.[140]

While the conciliatory function of the customary courts is important, it must not be considered that reconciliation and attempts at settlement are the only duties of the Presiding Officer.[141] Traditional procedure can be divided into the pre-trial, the trial and the post-trial stages.

At the pre-trial stage reconciliation is important. This is indicated by the fact that many disputes are either settled before proceedings are instituted or referred back to the

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[138]Mqeke LLM thesis 18; Myburgh and Prinsloo 112.

[139]Van Niekerk 132.

[140]Mqeke LLM thesis 78.

[141]J van Velsen "Procedural Informality, Reconciliation and False Comparisons" in Max Gluckman (ed.) Ideas and Procedures African Customary Law 146; Myburgh and Prinsloo 121-122.

families where no attempt at settlement has been made. Attempts at reconciliation will also be made at a trial before a headman. Matters referred to the customary courts may not be strictly legal matters and therefore will not be capable of the same resolution as legal matters. The headman or chief as political and social head or leader will attempt to restore social harmony to the parties in such matters. Where reconciliation or settlement is impossible in a legal dispute (for example where there is a dispute of fact) the court will have to try the issues and determine the dispute. Reconciliation is not part of this process.

After the determination of the dispute, reconciliation may again be important. Thus where the merits have been tried and determined, the second issue relating to how the wrong may be righted must be resolved or determined. Again the means to restore harmony are important. Thus at this stage the court may again exercise its conciliatory function. If it cannot be agreed how the aggrieved person or his family may be compensated, the court will again have to make a determination.[142]

In traditional or customary courts as has been stated above, the legal issues are secondary to the restoration of harmony and social equilibrium to the community. This is important in a society where the parties to a dispute are involved in multiplex or permanent relationships with each other which

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[142]Van Velsen 146-149.

may have different facets. A legal determination will not necessarily satisfy the parties to a dispute which may continue having a disruptive effect on their relationship and their relationship with the community. Where permanent relationships between the parties do not exist the need for reconciliation is not as important.

12. THE LAW OF EVIDENCE IN CUSTOMARY LAW

> "Law is a formal reflection of a people's culture".[143]

This statement applies to the customary law of evidence. The nature and content of the evidence and the manner of its presentation at a tribal court is related to the court's role in the society.[144] Questions concerning the relevance of evidence are determined with reference to the conciliatory function of the court and its objects to restore social harmony and promote peaceful co-existence among the community. Thus relevance has a wider content than in other

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[143]B R Mqeke LLM thesis 28.

[144]A N Allot "Evidence in Customary Law" in Les Editions de La Librairie Encyclopedique Tole XVII pages 64-79 quoted in E Cotran and N M Rubin (ed.) Readings in African Law (1970) 82-90.

courts and is not determined solely by the legal issues involved.[145]

> "Each dispute is viewed within the context of a wider system of social relationships. Accordingly any evidence which can throw some light on the behaviour of the parties within the framework of their total relationship is not merely admissible, but deliberately sought by the courts. Viewed in the light of the judges conception of their task, such evidence is of the most immediate relevance. The concept of relevance, indeed, is never absolute but has to be understood as a function of the judicial task as this is concerned in a particular society, in relation to a particular type of relationship within which such dispute has arisen."[146]

The Court sees its task as to seek the truth. The tribal court has been compared to an "historian" who seeks his evidence anywhere and everywhere, admitting documents even if they are self-incriminating or were not drafted under oath, not disqualifying those who are interested in the matter, nor even spouses of villains and paying scant deference to the rule against hearsay.[147] There is no theory of evidence and there are no technical rules governing

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[145]Allot supra; A L Epstein "Judicial Techniques and the Judicial Process" (1954) 20-21, 23.

[146]Epstein op cit 21.

[147]J D Krige "Some Aspects of Lovedu Judicial Arrangements" (1939) 13 Bantu Studies 126.

its inadmissibility.[148] The indigenous system of evidence is like that of the continent: A neat example of brevity and clarity".[149] The following are characteristics of the evidence of the traditional courts:[150]

12.1 Oral Evidence

There are no pleadings in traditional procedures. Evidence of the parties is required in order to determine the nature of the issues and the dispute in question. Writing was unknown to the parties. According to Mqeke written communications between the parties are now received in seduction and pregnancy cases.[151]

12.2 Real Evidence

An example is that in adultery cases the claimant has to show that a personal possession such as an item of clothing or a knobstick has been taken from the defendant. This taking of the personal possession is not confined to cases of adultery.[152] The possessions of persons taken from them while committing some other offence are also used as exhibits. Weight is also given to the giving of tokens or

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[148]Myburgh and Prinsloo, Chapter V.

[149]Van der Merwe 145.

[150]Mqeke LLM thesis 29.

[151]Ibid.

[152]Mqeke LLM thesis 32; Van Niekerk 137.

symbols at the time of certain transactions. For example, the Shona custom of the tender of a proposal token. An agent of the family of the man proposing marriage will tender some object or money to the woman's family. Acceptance of the object or money brings a binding agreement of marriage into effect. The proposal token is the proposal of marriage itself and not an expression of goodwill.[153] Where there is a dispute these tokens or symbols can be produced in order to show the relationship between the parties.[154] An exhibit often proves decisive. The showing of the weapon used in an assault, and the display of the injuries received are important factors which weigh heavily with the court.[155]

12.3 Circumstantial Evidence

This is also of importance to prove a fact.[156] This is evident from the weight attached to the tokens referred to above. Likewise the production of the proposal token can be used as evidence of a communication of the marriage proposal.[157]

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[153]Allot 86.

[154]Allot 85.

[155]Myburgh and Prinsloo 138.

[156]Allot 85; Mqeke LLM Thesis 32; Myburgh and Prinsloo 138.

[157]Allot 86.

12.4 Opinion Evidence

Expert witnesses such as potters or woodcutters may be called.[158] In disputed paternity cases opinion evidence relating to the degree of physical resemblance of the child to the father is admitted. In seduction cases evidence of women who inspected the girl in order to see whether intercourse had taken place is allowed.[159] In matters where no precedent exists the advice and opinion of experts from neighbouring tribes in intricate cases has been requested.[160]

12.5 Judicial Notice

The taking of judicial notice of facts is more common in customary law than in Anglo-American systems. Van Niekerk states that this can be explained by the close-knit community life where people generally have an intimate knowledge of each other's lives.[161]

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[158]Myburgh and Prinsloo 138; Van Niekerk 137.

[159]Mqeke LLM thesis 31.

[160]Mqeke 31.

[161]B J van Niekerk "Principles of Indigenous Law of Evidence and Procedure as Exhibited in Tswana Law" in A J M Sanders (ed.) Southern African in Need of Law Reform 136-138.

12.6 Inspections In Loco

Observations recorded at inspections in loco are taken into account when relevant.[162] An example is the inspection of crops which have been damaged.[163]

12.7 Presumptions

Presumptions are based on notions of probability or social policy. There are no irrebuttable presumptions in customary law.[164] The effect of these presumptions is to fix the onus of proof on the party against whom the presumption operates.[165] Presumptions are conclusions which the court would tend to draw on the basis of "its knowledge of custom, or the values in attributes accepted in tribal culture".[166] According to Epstein such considerations play an important part in guiding the court to a decision.[167]

12.8 Absence of Exclusionary Rules

As has been stated above, there are no exclusionary rules of evidence and the courts do not decide on technical points.

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[162]Van Niekerk, 137.

[163]Myburgh and Prinsloo 139.

[164]Krige 128; Allot 84.

[165]Allot 84.

[166]A L Esptein "The Administration of Justice and the Urban African" (1953) 29.

[167]Ibid.

> "There is no theory of relevance and admissibility : hearsay, confessions under torture, the results of devination and ordeals, evidence as to character, the appearance of a child in questions of paternity and unsworn statements are all admitted."[168]

The issue the court has to decide is not one of admissibility but rather of sufficiency and weight. The weight depends upon its context and the impression it leaves after being tested by various methods such as the examination of witnesses.[169] Hearsay evidence may be viewed with suspicion and little weight may be attached to its contents. According to Myburgh hearsay evidence in Ndebele law is not taken into account to ascertain a fact but may serve to explain a witness' knowledge of a matter or to give a court a notion of what questions to put.[170]

12.9 Privilege

Krige maintains that there is nothing to prevent spouses from giving evidence against each other.[171] It has, however been suggested that it is unthinkable that a tribal court composed of Xhosa traditionalists would compel a spouse to give evidence against the other unless it is a case by one

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[168]A C Myburgh "The Bantu-Speaking Peoples of Southern Africa" in W D Hammond (ed.) (1962) 300.

[169]Ibid.

[170]Myburgh and Prinsloo 138.

[171]Krige 126.

spouse against the other.[172] To compel one spouse to give evidence against another will create disharmony within the family, the very relationship the court sees its duty to preserve. It seems therefore that marital privilege thus has its place in customary law. On the other hand it would seem as though there is no privilege against self-incrimination.[173]

13. CUSTOMARY LAW IN PRESENT DAY CONDITIONS

The role of the customary courts has changed with the changing circumstances. Historically the tribal communities were homogenous units where the Presiding Officer not only exercised judicial but also administrative and other functions. The communities were small and it was likely that the headman had knowledge of any dispute prior to the initiation of proceedings. The chief or headman saw his duty as not only making a determination on the right or wrong of a dispute but also to restore social equilibrium and harmony. With the change in circumstances have come changes in certain aspects of customary procedure. Nowadays the chiefs or headmen may not have prior knowledge of the parties to, or the nature of, the dispute. Pressure of work also has the effect that there is more active involvement by the Presiding Officer in attempting to ascertain the relevant facts and more interruptions are likely than previously. Where needed

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[172]Mqeke LLM thesis 31.

[173]Krige 126.

an attempt to curtail proceedings is made by the Presiding Officer.[174] Industrialisation, modernisation and the move from rural to urban areas and the greater political and social awareness amongst others have affected traditional social relations and the solidarity of the community.[175] Members of the same family or tribe may be separated from one another and lack any permanent relationship with another.[176] The chief or headman may not command the same respect or loyalty as he had previously. These factors have an important effect on the efficacy and efficiency of customary courts and the procedure they follow.[177] Customary courts today are also influenced by Western courts and the laws of procedure and evidence found in other courts of the Republic.[178]

In using traditional judicial procedure as a model to evaluate the desirability for mediation or conciliation procedures, and their possible success in the Small Claims Court, it is essential to remember that "the principles of procedure represent a system of values shaped by the course

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[174]Epstein "The Administration of Justice and the Urban African" 25.

[175]Dlamini 3-7.

[176]Ibid.

[177]Ibid.

[178]Ibid.

of the political, sociological and cultural history of the people".[179] They reflect "the ethical ideological and political ideas which characterise a society".[180] The difference between the environment within which the customary and the Small Claims Court function is great. The relationship between members of an industrialised society which may give rise to a dispute may bear no resemblance to the relationship between members of a tribal society. The civil procedure which will accommodate the needs of a tribal community will not be appropriate in a modern industrialised society which has different values. Even the type of disputes common to a modern sophisticated society may not be the same as that of a tribal community.

Macnab envisages that small claims will be heard by unofficial informal tribunals manned by community-minded attorneys, advocates and other professionals at which direct use of mediation will be made.[181]

14. MEDIATION IN THE SMALL CLAIMS COURT

A mediation hearing can take place at different stages of the proceedings and can be in respect of all or some of the

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[179]Van der Merwe 141.

[180]V J Habscheid "The Fundamental Principles of the Law of Civil Procedure" 17 Cilsa (1985) 1 at 2.

[181]Macnab LLM thesis 119.

issues in dispute. The hearing can take place prior to adjudication and can be a pre-requisite to the trial on the one hand or an option thereto on the other. Where the parties have an election to attend a mediation or adjudicative hearing the parties may have a further election to refer the matter to trial in the event of mediation failing.[182] On the other hand there may be some systems where the choice between mediation and adjudication is final. If mediation is chosen and fails, there can be no referral to trial.[183]

Mediation and adjudication can be different processes which take place within the same hearing. In such cases there may be an obligation on the Presiding Officer to attempt conciliation before adjudication. This is the situation in New Zealand:

> "The primary function of a tribunal is to attempt to bring the parties to a dispute to an agreed settlement."[184]

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[182]McEwan and Maiman (1981) 33 Maine Law Review 237 at 243-245; Neil Vidmar "The Small Claims Court : A Reconceptualisation of Disputes and an Empirical Investigation" (1984) 18 Law and Society Review 517 at 523-525.

[183]Ibid.

[184]Section 15 (1) The Small Claims Tribunal Act 1976.

The usual pattern of a hearing is for the disputants to first give an initial statement. Thereafter a specific period is provided for negotiation during which the Presiding Officer assists in the process.[185] The data analyzed by Frame indicates that 13% of the matters referred to a hearing are settled thereat.[186]

It is intended to deal with conciliation and mediation in Australia, certain States of the United States of America and England.

14.1 Conciliation and Mediation in Australia

Conciliation is an integral part of the Small Claims Court in the states of Australia that have special Small Claims Court tribunals.[187] Conciliation also occurs where there are special small claims procedures in the existing court structure.[188] In terms of the Acts of Parliament constituting the special tribunals conciliation is the primary function of the referees.[189]

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[185]Alex Frame (1982) New Zealand Law Journal 251 at 252.

[186]Ibid.

[187]G D S Taylor "Small Claims : Australia" in Mauro Cappelletti and John Weiner (eds.) Access to Justice (1979) Vol 2, 598.

[188]Taylor 654.

[189]Ibid.

In Victoria the initial attempt at conciliation takes place in the absence of a referee who after hearing the plaintiff's and defendant's initial stance leaves the courtroom after making certain suggestions to allow the parties to negotiate in private. On his return he may either assist in the mediation, adjourn the proceedings to allow further conciliation, or continue with adjudication. In other states conciliation takes place in the presence of the referee. Conciliation and adjudication merge in the same proceedings.[190] Conciliation is not restricted to the commencement of proceedings but can take place at different stages of a hearing where there is a certain amount of role switching between the referee as mediator and adjudicator. Conciliation and mediation require that the parties be at ease with each other, or, if not amicable, willing to discuss the issues with one another. This may only be possible after some or most of the evidence has been heard which has indicated the parties' stand and which may be used by the referee on which to base his comments and opinions.

The incidence of settlement and conciliation is largely dependent upon the referee's attitude to the proceedings and his sensitivity to the parties. Those who place an emphasis on settlement often look to points or hints which may lead to mediation or conciliation as the case unfolds. There is a danger of bias where both roles are played simultaneously by the referee. A stance taken in attempting settlement may

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[190]Taylor 642-643.

be read as taking the part of one or other of the parties and indicative of what the final outcome will be. Some referees emphasise to the parties that although it is their duty to promote settlement, if this fails and they have to adjudicate their judgment would be dispassionate and divorced from the ideas and suggestions made in the attempted settlement.[191] One Adelaide Magistrate is reluctant to use conciliation. His reasons are:

1. The parties' expectations : if parties have gone thus far they expect judgment.

2. Temptation to force the parties into a settlement they do not want rather than go into court and hear the evidence again.

3. The statements of the Magistrate may be legally biased when it comes to the hearing.[192]

Taylor is of the opinion that the first point has not been tested and in any event disappears when conciliation and adjudication merge. The second reason is only possible where adjudication and mediation are separate.[193] Taylors observations of the third reason indicates that it is

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[191]Taylor 652.

[192]Taylor 656.

[193]Taylor 657.

unlikely that the Presiding Officer will be biased. Where there is a legal obligation to conciliate proceedings which would otherwise indicate bias it does not necessarily mean that such arose in the conciliation proceedings. Taylor's observations were that approximately 20% to 30% of the cases referred to arbitration were settled.[194]

14.2 Conciliation and Mediation in North America

Conciliation as an alternative to adjudication or as a procedure to go hand in hand therewith has been debated by American writers.[195] In such hearings the parties are encouraged to express their feelings as well as telling the facts of the matter in dispute. The object is to increase mutual understanding.[196] According to these writers the conciliation model has two advantages:

1. It aims at amicable resolution of a dispute rather than at fault finding and an either/or decision.

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[194]Taylor 657-658.,

[195]Barbara Yngvesson and Patricia Hennessey "Small Claims, Complex Disputes : A Review of Small Claims Literature" (1975) 9 Law and Society Review 219 at 260.

[196]Yngvesson 260.

2. Parties to a dispute are provided an opportunity for self-expression which may in itself be an important factor in settling the dispute.[197]

Cayton states:

> "The writer has always been of the opinion that small claims procedure and conciliation procedure should be embraced in the same tribunal. Both procedures have their basis in informality; both are repugnant to the outmoded technicalities and subtleties of pleadings and procedure which have helped to reduce trials to the absurdity of a game."[198]

The combination of the functions of judge and conciliator in one role, however, creates a major problem. A different perspective is required of each role. The role of a judge is one of "disinterested aloofness" while a mediator or conciliator is required to "work through the dispute" and to have an active role in attempting to facilitate a settlement. Mediation and adjudication have different aims. Mediation aims at optimum settlement for both parties while adjudication aims at a decision. The facts sought by the two

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[197]Ibid.

[198]Nathan Cayton "Small Claims and Conciliation Courts" (1939) Annals of the American Academy 57 at 59.

procedures are different.[199] According to Eckhoff the differences between a judge and mediator are:

1. The Judge's activity is related to the level or norms rather than the level of interests.

2. His task is not to attempt a reconciliation but to reach a decision as to which party is right.

3. The mediator should preferably look forward toward the consequences which may follow from the alternative solutions and must work on the parties to get them to accept a solution. The judge looks back to the events which may have taken place and to the norms concerning acquisition of rights and responsibilities which are connected to the events. When he has done this, his task is complete.

4. The judge does not have to be an adaptable negotiator with the ability to convince or find constructive solutions.

Eckhoff is accordingly of the opinion that:

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[199]Torslen Eckhoff "The Mediator and the Judge" 10 (1966) Acta quoted in Vikeim Aubet (ed.) Sociology of Law (1969) 175.

> "It is difficult to combine the role of the judge and the role of the mediator in a satisfactory way. By mediating one may weaken the normative basis for a later judgment and perhaps also undermine confidence in one's impartiality as a judge, and by judging first one will easily reduce the willingness to compromise the party who was supported in a judgment and will be met with suspicion of partiality on the other."[200]

According to one writer:

> "The conciliation courts carried the seeds of their failure within themselves for they asked of judges that they perform for which, as a group they were neither well trained nor well suited, a function which is anti-thetical in their judgment habits."[201]

A conciliator must, in McFadgen's opinion, not be the ultimate decision-maker and must be suited for an active role.[202] McFadgen advocates a compulsory pre-trial mediation hearing presided over by a trained mediator who is not the adjudicator in the same case. The aim of the hearing will be:

1. to endeavour to effect amicable settlement of the dispute;

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[200]Eckhoff quoted in Yngvesson 261.

[201]Yngvesson 265.

[202]Yngvesson 261.

2. to define the issues if settlement is not possible;

3. to otherwise prepare the parties for trial, in particular to advise on the sort of evidence the court will look to, which evidence is relevant and how the evidence may be obtained.[203]

Its importance is that even in cases which cannot be mediated it will serve an important function in clarifying the issues, martialling evidence and identifying those cases which are complex. Only if mediation fails should the parties be permitted to proceed to adjudication. McFadgen estimates that approximately one-third of the cases will be dispensed with during the hearings.[204]

It would thus seem that McFadgen's idea of a pre-trial conference or mediation hearing is the same idea behind the preliminary consideration in arbitration proceedings in England and Wales and the small claims procedure in the sheriff's courts of Scotland.

14.2.1 Mediation in Los Angeles

An experiment in mediation has been conducted in the Small Claims Court in Los Angeles. Prior to the hearing of

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[203]Yngvesson 265.

[204]Yngvesson 265.

defended cases litigants see volunteer attorneys, known as settlement officers, who clarify the issues and attempt to achieve a pre-trial settlement. If a settlement is reached it is made an order of court after the judge is satisfied that the parties do wish to settle. If mediation fails the trial proceeds in the normal manner.[205]

14.2.2 Mediation in Maine and Ontario

In Maine and Ontario mediation hearings are adjunct to Small Claims Courts and take place prior to adjudication.[206] In Maine the parties to a dispute generally have an election whether to proceed to mediation or adjudication. Where mediation fails the matter is referred to adjudication.[207]

In Ontario on the other hand, where both parties are present, the matter is, with few exceptions, automatically referred to a pre-trial hearing.[208] The mediation hearings are

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[205]Fourth Interim Report 142.

[206]Criag A McEwan and Richard J Maiman "Small Claims Mediation in Maine : An Empirical Assessment" (1981) 33 Maine Law Review 237.

[207]McEwan and Maiman 33 Maine Law Review 243-245.

[208]Neil Vidmar "The Small Claims Court : A Reconceptualisation of Disputes and an Empirical Investigation" (1984) 18 Law and Society Review 517 at 523-525.

informal and on the average take between twenty and forty minutes. This is usually longer than a trial, which on the average lasts about 14.5 minutes.[209] The persons presiding at the hearings are not lawyers but have experience in Small Claims Court work.[210] Traditionally the concept of mediation is linked to studies of dispute resolution in small scale societies.[211] In these societies there are close-knit communities where members are involved in permanent or continuous (multiplex) relationships. These relationships lead to inter-dependence of the members and any dispute will not only likely affect the immediate parties thereto but also other members of the society. The cause of the dispute is therefore sought by the mediator who does not restrict the enquiry to the disputes of fact.[212] Mediation in these societies

> "derives some power from its public character and from continuing consensus that reinforce the settlement and thus

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[209]McEwan and Maiman (1981) 33 Maine Law Review 255; Craig A McEwan and Richard A Maiman "Mediation in Small Claims Court : Achieving Compliance through Assent" (1984) 18 Law and Society Review 11 at 17.

[210]Vidmar 18 Law and Society Review 524.

[211]McEwan and Maiman (1984) 18 Law and Society Review 13.

[212]McEwan and Maiman (1984) 18 Law and Society Review 13.

> supports informal controls such as gossip or slurring to enforce it."[213]

This does not occur in industrialised societies. Lon L Fuller states:

> "It is fairly obvious that mediation has scarcely any role to play in human relations fluidly organised on what may be broadly described as the market principle."[214]

In these societies, unlike in small scale societies, the desire or not to live or work amicably together need not exist.[215]

It is within an industrialised fluid society with comparatively little control over its members that the Small Claims Court and mediation hearings adjunct thereto function. In such societies parties to a dispute rarely have permanent or continuous relationships. The type of dispute is likewise linked to simplex rather than multiplex relationships and in most cases only the immediate parties are affected thereby. In may instances Small Claims Court cases involve binary legal issues; that is if the appropriate evidence is produced or the appropriate law determined, in legal terms

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[213]McEwan and Maiman (1981) 33 Maine Law Review 266.

[214]Lon L Fuller "Mediation - Its Forms and Functions" (1971) 44 Southern California Law Review 314.

[215]Vidmar (1984) 18 Law and Society Review 523.

the one party will be totally in the right.[216] Mediation connected to Small Claims Court disputes differs substantially from other forms of mediation. Although on occasion broad issues are dealt with, the hearings do not concern deep mediation. The mediators do not attempt conciliation or explore non-legal issues which may be the cause of the dispute.[217]

The focus is on issues relating to the amount of the claim and the responsibility for it. Little attempt is made to reconcile personal conflicts.[218] Suggestions at settlement, with few exceptions, involve the payment of money.[219]

There is little difference between the form of proceedings in both Small Claims Courts and mediation hearings. Both are informal and accommodative.[220]

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[216]Neil Vidmar "Assessing the Effects of Case Characteristics and Settlement Forums on Dispute Outcomes and Compliance" (1987) 21 Law and Society Review 155 at 160.

[217]McEwan and Maiman (1981) 33 Maine Law Review 255.

[218]McEwan and Maiman (1981) 33 Maine Law Review 255.

[219]McEwan and Maiman (1981) 33 Maine Law Review 266; McEwan and Maiman (1984) 18 Law and Society Review 35-36.

[220]McEwan and Maiman (1984) 18 Law and Society Review 13.

The difference between adjudication and mediation in the context of small claims lies in the consent and the nature and degree of participation by the parties. The success of mediation depends upon the continued participation and the consent of the disputants. The parties, during the course of the mediation, shape their own settlement.[221]

The study of the Small Claims Court in Maine revealed a difference in attitude between judges at trials and mediators. Judges, even where the proceedings had been informal, showed little interest in how payment of the amount has to be made or the judgment debt recovered. Much of the mediator's time, however, was spent in determining time payment schedules or how the amount was to be recovered.[222] Between 50% to 65% of mediated claims are settled.[223] The choice between mediation or adjudication is related to the parties' perception of the claim. Mediation was less likely where the plaintiff believed that he or she had a clearcut case.[224]

The success of mediation is also to some extent dependant upon the nature of the claim. The results of McEwan and

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[221]McEwan and Maiman (1984) 18 Law and Society Review 13.

[222]McEwan and Maiman (1981) 33 Maine Law Review 252.

[223]McEwan and Maiman (1981) 33 Maine Law Review 250; Vidmar (1987) 12 Law and Society Review 523.

[224]McEwan and Maiman (1983) 33 Maine Law Review 249.

Maiman indicate that claims relating to bills and private sales are the most likely to lead to successful mediation. This can probably be due to two factors. On the one hand the defendant admits liability and the hearing relates only to the determination of a time payment schedule. On the other hand the defendant has a counterclaim of his own which is conducive to compromise.

Where however there are conflicting versions of fact or distrust or hard feelings between the parties, mediation is less successful. Thus traffic accidents were the least likely of cases to be successfully mediated. So too the success rate in relation to consumer complaints about services or products are lower than the average.[225]

While claims by a tenant against a landlord were amongst the most successfully mediated, claims against a tenant were amongst the least successful. In these cases there is less likely to be any concessions by the defendant or admitted liability on his part. According to McEwan and Maiman the mediation process has three important affects:

1. There is a greater chance that the mediated outcome will be a compromise between the plaintiff and the defendant. The amount awarded is more likely to be only a portion of the claim than in adjudicated claims.

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[225]McEwan and Maiman (1981) 33 Maine Law Review 250.

2. The defendant is more likely to pay than when judgment is given.

3. More of the parties who used mediation regard the outcome as fair than those who proceeded to trial.[226]

This is as a result of the participatory, consensual nature of the settlement. The defendants feel more of an obligation to pay in accordance with a settlement than an outcome imposed upon them. Adjudication constrains both the information presented at court by virtue of evidentiary and procedural rules and the range of solutions which usually relate to the payment of money.[227] The interaction in mediation has a strong normative character.

Vidmar while not denying that the mediation process has an effect on compliance, the participants' perception thereof, or the outcome, is of the opinion that the results of the McEwan and Maiman study are exaggerated.[228]

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[226]McEwan and Maiman (19810) 33 Maine Law Review 254 268; McEwan and Maiman (1984) 18 Law and Society Review 40 47.

[227]McEwan and Maiman (1984) 18 Law of Society Review, 40.

[228]Vidmar (1984) 18 Law and Society Review 545 549; Vidmar (1987) 21 Law and Society Review 155 163; Vidmar "An (continued...)

According to Vidmar case characteristics are an important factor in determining the outcome of the case and compliance therewith. It is incorrect to assume that the plaintiff is successful if the outcome is a portion of the claim. Likewise it is incorrect to assume that any compromise is due to the mediation process.[229]

Vidmar reconceptualises the nature of a dispute. The true nature of a dispute must take into account the degree and extent of admitted liability. Where the defendant partially admits the claim but disputes the balance, the dispute relates only to the difference between the two amounts. A dispute is therefore equal to the plaintiff's claim less the defendant's admitted liability. The outcome must be measured with reference to the formula:

$$\text{Outcome} = \frac{(\text{Award} - \text{Admitted Liability})}{(\text{Claim} - \text{Admitted Liability})}$$

Where the result is less than 50% the defendant has come out better. Where the outcome is greater than 50% the plaintiff has "won".[230] Using the criterion indicating the percentage

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[228](...continued)
Assessment of Mediation in a Small Claims Court" (1985) 31 Journal of Social Issues 127 144.

[229]Vidmar (1984) 18 Law and Society Review 517; Vidmar (1985) 41 Journal of Social Issues 134 137.

[230]Vidmar (1984) 18 Law and Society Review 516 522.

of the claim and applying it to the data of the Ontario Small Claims Court as McEwan and Maiman did in Maine, a conclusion can be drawn that mediation tends to lead to intermediate outcomes, whereas adjudication does not (63% as opposed to 31% of the cases). When however account is taken of admitted liability characteristics in mediated hearings, results show that 58% of the no liability cases involved all or nothing outcomes while only 27% of the partial liability cases resulted in such outcomes. Where settlements occurred after the hearing but before trial the results were further apart. 82% of these cases involved all or nothing outcomes as opposed to 32% in the case of partial liability cases.[231]

To some extent this is supported by McEwan and Maiman who state:

> "Obviously the all or nothing image of adjudication is, in this instance, overdrawn as is the split the difference image of mediation. In practice, this contrast between mediation and adjudication outcomes is not quite as sharp as in theory ... There appears to be more give and take in adjudication and more emphasis on right and wrong in mediation than has generally been recognised."[232]

Vidmar however does not deny that mediation has a part in determining outcome. The mediator is seen as a catalyst.

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[231]Vidmar (1985) 41 Journal of Social Issues 135 136; Vidmar (1984) 18 Law and Society Review 538 541.

[232]McEwan and Maiman (1981) 33 Maine Law Review 254.

His role and attitude do affect the outcome of the hearing. Likewise the adjudicator's role and the nature of the dispute do affect the outcome of the trial.

In no liability cases the referee (the mediator) is not as active as in partial liability cases. The hearing centres around the defendant's obligation with reference to the facts in dispute or the appropriate law.

In partial liability cases the referee is more active, frequently:

> "becoming an accountant in determining the amount or facilitating discussion between the parties where no prior discussion has taken place. The admitted liability and consensus hypothesis may be complimentary rather than contradictory."[233]

McEwan and Maiman found that defendants in cases which were referred to trial after mediation were more successful than defendants who chose not to mediate.[234] The outcome of an adjudicative hearing was found by Vidmar to more likely be an all or nothing result than a compromise. In no liability cases 78% involved all or nothing outcomes while in partial

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[233]McEwan and Maiman (1984) 18 Law and Society Review 139.

[234]McEwan and Maiman (1981) 33 Maine Law Review 257.

liability matters all or nothing outcomes resulted in 69% of the cases.[235]

In seeking an explanation for this, Vidmar gives the opinion that one reason is the difference in approach of an adjudicator. He regards his functions differently from that of a mediator.[236]

A further possibility is that the defendants who proceed to trial are more definite or optimistic than those who have successfully mediated.

Many of the cases, even if the defendant admits part of the claim, involve all or nothing situations or binary issues. Questions of right and wrong are clearly defined. If a certain fact is found to have been proved or a legal principle or law applies, one party will be right and entitled to succeed. In small claims people are usually involved in one time uniplex relationships and have a narrow conception of the dispute.

According to Vidmar:

> "In such instances accommodative outcomes are unlikely except where the factual or legal issues are complex or muddled or when the transaction costs of one or

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[235]Vidmar (1985) 41 Journal of Social Issues 136.

[236]Vidmar (1985) 41 Journal of Social Issues 142.

> both parties are large in relation to the costs of litigation."[237]

Explaining the high rate of all or nothing outcomes in no liability cases in mediation, Vidmar states that in such cases mediators are more likely to take a legalistic approach with regard to the issues. The tendency was not to conduct deep mediation or analyse the cause of the dispute but to attempt to resolve the dispute on the facts presented. In such cases the mediator would play the part of adjudicator.[238] McEwan and Maiman state:

> "We can conclude from Vidmar's data on outcome in combination with our own that:
> (1) Consensual processes - especially mediation are more responsive to the admitted liability dimension of cases than is adjudication.
> (2) Forum types should not be confused with the processes that occur in them, and indeed in particular types of cases some mediators may judge and some judges may mediate; and
> (3) The procedure that is adopted for hearing a case has a substantial effect on the character of its hearing."[239]

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[237]Vidmar (1987) 21 Law and Society Review 160.

[238]Craig A McEwan and Richard J Maiman "The Relative Significance of Dispute in Forum and Dispute Characteristics for Outcome and Compliance" (1986) 20 Law and Society Review 439 at 443.

[239]McEwan and Maiman (1986) 20 Law and Society Review 443.

14.2.3 Compliance

Vidmar acknowledges that the form of procedure does have an affect on the rate of compliance with the settlement or judgment. However, according to him, case characteristics can also pay a role:

> "Psychological forces are seen to wherein the defendant's commitment prior to the case going to mediation rather than as a result of the forces that arise out of the mediation process itself. A sample of cases indicated that the success rate of compliance in respect of partial liability cases was much higher than in no liability cases."[240]

In respect of mediated outcomes compliance rates for both no liability and partial liability cases settled was high. However this was not the case in adjudicated cases. The compliance rate of partial liability cases was much higher than no liability cases. This according to Vidmar lends support to McEwan and Maiman's hypothesis on compliance.[241]

According to Vidmar participants' satisfaction does not depend upon cases characteristics or the nature of the dispute. Rather satisfaction is dependant upon the perceptions of litigants and whether the proceedings are regarded as fair.[242]

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[240]Vidmar (1985) 41 Journal of Social Issues 137.

[241]Ibid; Vidmar (1987) 21 Law of Society Review 161-162.

[242]Vidmar (1985) 41 Journal of Social Issues 136.

15. MEDIATION IN ENGLAND

In England there are various community-based mediation schemes.[243] These are largely privately financed.[244] One such scheme is the Sandwell Mediation Scheme which commenced operating in 1984.[245] The Scheme is aimed at settling neighbour disputes.[246] Mediators are chosen from local volunteers.[247]

Originally it was envisaged that face-to-face meetings would be arranged between neighbours. However this was found not to be feasible as the disputants were reluctant to discuss the issues. Accordingly each party to the dispute was interviewed separately and independently.[248] The effect of the scheme has been disappointing.[249] This is as a result of a number of reasons which include the following:

1. the parties were not willing to compromise;

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[243]Richard Young "Neighbour Dispute Resolution : Theory and Practice" (1989) 8 Civil Justice Quarterly 319.

[244]Ibid.

[245]Ibid.

[246]Ibid.

[247]Richard Young 324.

[248]Richard Young 322.

[249]Richard Young 325-327.

2. many regarded their neighbours as unreasonable and unapproachable;

3. the residents of the area covered by the scheme did not have interdependent relationships;

4. there was a lack of informal social pressure to compromise their positions;

5. many parties had no faith in the mediators and the scheme itself and did not understand the nature of the process.[250]

It follows from the study of the Sandwell Mediation Scheme that if mediation is to be successful the parties to a dispute must be advised of the purpose of mediation and the role of the mediator. The mediator must be seen to be fair and impartial. It is also clear that the mediation will fail unless the parties are willing to discuss the issues with each other and reach a compromise. This is unlikely in a society or neighbourhood which is not community minded, where its members or residents have little or no interest in one another, and where social pressures to reach a settlement are absent.

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[250] Ibid.

16. MEDIATION IN THE COMMUNITY COURTS OF ZIMBABWE

The aims of reconciliation and restoration of social harmony which are the essence of traditional customary procedure have been entrenched by the Community Court (Civil) Rules. It is the court's duty to assist in resolving disputes amicably. Rule 4(3) reads:

> "Consistently with customary law it is imperative that a principle object of litigation lies in reaching an amicable solution which restores social harmony. Presiding Officers shall, at every stage of the proceedings, seek to use their influence to find an amicable compromise solution to litigation."[251]

As has been seen[252] in order to facilitate a settlement the Presiding Officer may hold a pre-trial conference. The pre-trial conference serves as a means by which parties are enjoined to discuss their relative positions. In the pre-trial conference the parties may be required to state the maximum offer or terms which they will accept in compromise of their claim and be required to state why their opponent's offer in compromise does not in their opinion do justice.[253]

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[251]Statutory Instrument 809/81.

[252]supra

[253]Rule 11 Statutory Instrument 809/81.

17. MEDIATION IN SOUTH AFRICA

Mediation in respect of small claims can be useful as an alternative to or as a process preceding or following adjudication. Its usefulness is dependant upon the parties, their relationship, their willingness to reach a compromise or agreement, their education, their understanding of the dispute, the nature of the dispute and the jurisdiction of the court and its powers.[254]

Adjudication is best suited to parties to a bipolar or binary dispute where the law is certain and where an award of money as damages is appropriate. The Small Claims Court is not suited to a dispute involving complex issues of law or fact where the Commissioner's decision is dependant upon a choice of competing legal propositions or an assessment of conflicting expert opinions. Despite Section 23 of the Small Claims Court Act[255] which empowers the court to stop the proceedings in such situations, the process of mediation where the factual issues can be resolved together with the experts, if any, can achieve far more than adjudication. In such cases a compromise will be more acceptable to the parties than the risk of leaving the outcome to a third person whose choice between two alternatives will leave one the loser.

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[254] supra.

[255] 61 of 1984.

Even if a complex matter were to proceed to Small Claims Court adjudication, the outcome would face the problems of inadequate time available, the impatience of the Commissioner, adjournments to allow the Commissioner time to analyse the facts and research the law, and inadequate presentation of the cases by the parties.

The Small Claims Court is not suited to matters other than those where an award of damages is competent or suitable. In addition it may not be possible to place a value on the dispute thereby not making it possible to institute a claim in the Small Claims Court. An example is a dispute between neighbours where one neighbour or his child creates a noise or other disturbance which affects his neighbours. An interdict is not competent in these circumstances.[256] For this reason and for the reason that neighbours have to some extent a continuous multiplex relationship, mediation is far more suitable than Small Claims adjudication.[257]

Likewise a dispute between neighbours in relation to other nuisances is better suited to mediation. An example hereof is a dispute relating to continual subsidence or the redirection of the flow of water onto a neighbour's property. Although a claim for damages is possible each time the

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[256]Section 16 (g) of Act 61 of 1984 as amended by Section 2 of the Small Claims Court Amendment Act 63 of 1989.

[257]However, for the success of this type of mediation, see Richard Young and the Sandwell Project referred to above.

subsidence or nuisance occurs, this would result in the plaintiff having to continually institute action each time the damage occurred unless the matter is otherwise resolved. An interdict is probably the most appropriate remedy. However this would not be competent in the Small Claims Court.[258] Continuous acts which give rise to different claims are also better suited to mediation. If the institution of an action does not lead to a cessation of the activity giving rise to the dispute, the underlying cause must be resolved. As adjudication involves only a determination of the facts relevant to the dispute, it is not suited to resolving disputes of this nature. Mediation is far more suitable to the resolution of this type of dispute.

Mediation would also serve a useful purpose where the dispute arises out of a misconception or lack of understanding of the legal position. If the legal position were explained to the parties, the dispute in such circumstances could probably be settled. Although perhaps not falling within the definition of mediation, a pre-trial hearing serves a useful purpose in those cases where the hearing at the trial will be expedited if the parties were advised of the evidence required, the witnesses to bring, and how to prepare for trial. The issues themselves can be limited or defined.[259]

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[258]By virtue of Section 2 of the Small Claims Court Amendment Act 63 of 1989.

[259]See the position in Zimbabwe above.

Persons involved in cases where there are allegations of non-compliance with their respective obligations are also, in certain circumstances, more amenable to mediation than adjudication. In such a case the plaintiff may be suing for non-payment while the defendant alleges that goods sold were defective. In such cases the defendant may admit partial liability. A compromise therefore may be likely. It may also be wise to proceed by way of mediation for another reason. The proof of the claim or defence may depend upon evidence of a technical nature which may lead the Commissioner to consider the issues as too complex to try.

Mediation is often associated with labour-related disputes. The suggestion may be that labour disputes should be subjected to mediation. However mediation is normally associated with disputes of interests, i.e. wage disputes or disputes concerning conditions of service. Where disputes of rights are in issue, (such as disputes relating to dismissals), arbitration is a better suited method. The labour-related claims of domestic employees are all related to their dismissal. Accordingly they are not in general suited to mediation. Many employees are unwilling to mediate even if their case is weak, and would rather leave the decision to the Commissioner. This would seem to be as a result of the lack of trust the employee has for the employer and a feeling of inadequacy in the bargaining situation. Some of these cases may be suitable for mixed arbitration where the Presiding Officer attempts conciliation or settlement and only adjudicates if conciliation fails. Mixed

arbitration can also be used to explain to the parties their rights and obligations and the requirements with regard to witnesses and evidence. At the hearing the matter may be adjourned in order to allow the parties an opportunity to prepare properly for trial or to attempt to settle having been given new perspectives.

The research of McEwan and Maiman and Vidmar[260] indicates a difference in approach to admitted liability or partial liability cases by an adjudicator on the one hand and a mediator on the other. A mediator is far more involved in attempting to work out a solution to the liquidation of the indebtedness or the satisfaction of the judgment debt than an adjudicator.

Mediation hearings are important to determine the extent of the admitted liability and thereafter how the admitted amount can best be paid without placing too much of a burden on the creditor or creating too much hardship for the debtor.

That this was regarded as important by the legislature is clear from the provisions of Sections 39 and 40 of the Small Claims Court Act that provide for the court to grant payment orders. However, the Act falls far short of what is necessary. The order in terms of Section 39 can only be made if the judgment debtor is present at the hearing. Many defendants do not appear as they admit liability and feel

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[260] supra.

that their presence serves no purpose. There is no provision in the Act to subpoena these persons in order to hold a financial enquiry. Likewise there is no provision for the defendant to offer to liquidate his indebtedness in a financial hearing before judgment is obtained. Although Section 40 provides for an offer by a debtor after judgment, there is no provision for assistance or an explanation at the time the offer is made. Without such provision its effectiveness is reduced. Likewise there is no provision similar to that contained in the Magistrate's Court Act in terms of which the court may make an order merely on the proof of receipt of an offer made by the defendant to liquidate his indebtedness in instalments.[261] These aspects are dealt with more fully in the subsequent chapter on enforcement of judgments in the Small Claims Court.[262]

The Act contains no reference to the Commissioner's function as mediator. Although secondary to his functions as investigator and adjudicator, some importance was attached to this function by the Hoexter Commission.[263] A possible indirect reference to a mediator is contained in Section 4 (2) which provides for a private hearing inter alia, at the request of the parties "for reasons considered sufficiently by the court". Even here, however, the Act does not reflect

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[261]Section 58 and 59 of Act 32 of 1944 as amended.

[262]Infra.

[263]Fourth Interim Report 185 and 200.

the aims of the Commission. Private hearings were regarded as important by the Commission[264] and were to be held if the parties requested it. By adding the requirement that sufficient reasons had to be furnished and inserting this into a section which, in addition to the above, grants the court power to order hearings to be heard in camera where it is "in the interest of the administration of justice or of good morals", it is unlikely that the request of the parties per se can be sufficient reasons. By virtue of the ejusdem generis rule there is, it is submitted, even some doubt that the desire of the parties to mediate could be sufficient reason as defined in the section.

It is submitted that there should be a duty on the Commissioner to determine what steps have been taken in order to settle the dispute between the parties and to determine why no attempt to settle the issue has been made if this is the case. Where the Commissioner considers that a settlement is possible he should advise the parties hereof and give them an opportunity to attempt to negotiate a settlement.

18. PROCEDURE AND EVIDENCE IN THE SMALL CLAIMS COURT

It is clear from the provisions of the Small Claims Court Act that provided it is relevant all evidence from whatever source is admissible in the Small Claims Court.[265]

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[264]Fourth Interim Report 185.

[265]Section 26 (1) and (2) of Act 61 of 1984.

Admissibility is not dependent upon any formal evidentiary rules. Whether or not evidence is relevant or not will depend upon the nature and content of the dispute and the issues to be proved or established.[266]

The Commissioner, like his counterpart in West Germany, or the Presiding Officer of a tribal or customary court, is entitled to take into account hearsay and opinion evidence as well as evidence as to character.[267] He is also entitled to rely on his own observations, prior knowledge, informal inspections, personal enquiries or evidence given in other cases.[268]

Questions relating to the onus of proof do not form part of the rules of evidence and therefore the Commissioner is bound by the laws relating thereto. The incidence of the burden on each issue is a matter of substantive law.[269]

The admissibility of hearsay, opinion or other evidence will be determined by its relevance.[270] This will be determined

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[266]I M Bredenkamp "Die Hof vir Klein Eise en die Reëls vir Bewyssreg" (1990) De Rebus 772.

[267]I M Bredenkamp 772.

[268]Ibid.

[269]Tregea v Godart 1939 AD 16 at 32.

[270]I M Bredenkamp 772.

by the cause of action and the nature of the dispute between the parties. Only evidence relevant to the dispute can be taken into account.[271] Unlike a chief or headman who can take into account all factors relevant to the restoration of harmony between the parties, the Commissioner has no such power. Whether his decision will restore harmony or the social equilibrium is irrelevant to the Commissioner's functions. Where the cause of action has been amended or substituted by the parties, or the Commissioner with the parties' consent, or upon one party's application, the relevance will be related to the amended or substituted cause of action.

The probative value will have to be weighed by taking into account its nature, the reason for its submission, the availability of better evidence and the reason why better evidence has not been produced. Documents can be handed in by persons who are not the authors thereof. Likewise even if not formally produced they may be taken into account. Not only may the Commissioner take such evidence into account but in certain circumstances a refusal to take such evidence into consideration which would otherwise be inadmissible, may amount to a gross irregularity in the proceedings and therefore reviewable. Difficulties may be experienced in weighing oral evidence given at a hearing against hearsay or other documentary evidence. In such a case it will be the duty of the Commissioner to put the contents of the

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[271] Ibid.

documentary or written evidence to the person present at the hearing for his comments. It will, it is submitted, also be imperative that where disputed, the reasons for the disagreement will have to be obtained by the Commissioner. Obviously in such cases the version of the person not giving oral evidence cannot be tested. Accordingly in many cases the oral direct evidence will prevail over the hearsay evidence. However the mere fact that it is hearsay evidence does not mean that its probative value is secondary to that of the direct testimony.

As the purpose of the procedure in the Small Claims Court is to achieve a cheaper and speedier method of determining the issues between the parties, any decision relating to the admissibility and relevance of the evidence must take this purpose into account. Where a fair hearing is possible without the need for oral evidence, there will be no need for the hearing of such, especially where this may result in the delay of the finalisation of the dispute. However the leading of oral evidence can, in many cases, facilitate a speedier and more fair hearing than would otherwise be the case. Any facts in dispute which require clarity can thereby be resolved without delay. The existence of a dispute of fact will be an important factor in determining whether secondary evidence should be refused in favour of direct oral evidence. Where a dispute of fact exists on the documents before the court, it will be impossible for the Commissioner to come to a just decision thereon and he should insist on oral evidence. However the Commissioner in such cases, can

confine himself to questioning of the parties on the dispute only, thereby enabling a quicker decision and finalisation of the matter.

The Small Claims Court Act makes no provision for interrogatories or commissions de bene esse. In the Supreme Court or Magistrate's Court these are exceptions to the rule that evidence must be given at the trial.

The provisions of Section 26 (1) of the Small Claims Court Act make is unnecessary for any such provisions. Section 26 (1) is wide enough to include the concept of interrogatories and commissions de bene esse. Although the Commissioner of the Small Claims Court has no power to order interrogatories or commissions de bene esse, there can be no objection to the statements of witnesses being taken by an approved third party appointed by the litigants and being transmitted to the Commissioner. The formalities relating to the procedures which have to be complied with in the other courts are not required in the Small Claims Court. Even statements not taken by an approved third party may be submitted.

As appears from a discussion of German law, orders of evidence can serve a useful purpose in certain circumstances. Such procedures as have been seen have been suggested by Thomas with regard to Small Claims Court procedures in the County Courts in England.[272]

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[272]Richard Thomas "A Code of Procedure for Small Claims (continued...)

Since the establishment of Small Claims Courts in 1985 the law of evidence relating to hearsay in other courts of law changed as a result of the promulgation of the Law of Evidence Amendment Act[273] The Court has in terms of the provisions of this Act a discretion to admit hearsay evidence which would otherwise be inadmissible.[274] Whether or not hearsay evidence would be admissible is, in the final analysis, dependant on whether the Court is of the opinion that such evidence should be admitted in the interests of justice.[275]

It is submitted that for the following reasons the provisions of the Law of Evidence Amendment Act[276] do not have any effect on the Small Claims Court hearings:

1. The provisions of Section 3 of the Law of Evidence Amendment Act do not apply to the Small Claims Court.[277]

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[272](...continued)
: A Response to the Demand of Do-It-Yourself Litigation" (1982) 1 Civil Justice Quarterly 52.

[273]Act 45 of 1988.

[274]Section 3 (1)(c) of Act 45 of 1988.

[275]Ibid.

[276]45 of 1988.

[277]By virtue of the opening phrase of Section 3 (1) of
(continued...)

2. In proceedings before courts other than Small Claims Courts, the general rule is still that hearsay evidence is inadmissible.[278] In proceedings before the Small Claims Courts all evidence is admissible provided it is relevant.[279] The fact that the evidence is hearsay may have a bearing as to the weight to be attached to it or its probative value.

3. The provisions of the Law of Evidence Amendment Act apply only to hearsay evidence. They do not apply to evidence which is inadmissible on any other ground other than hearsay.[280]

Thus opinion evidence or evidence as to character remains inadmissible in respect of any proceedings in the Supreme or Magistrate's Courts. This is not the case in the Small Claims Court.[281]

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[277](...continued)
Act 45 of 1988 which reads "Subject to the provisions of any other law ..."

[278]Section 3 (1) Act 45 of 1988.

[279]Section 26 (1) of Act 61 of 1984.

[280]Section 3 (2) of Act 45 of 1988.

[281]Section 26 (1) and (2) of Act 61 of 1984.

19. NATURE OF PROCEEDINGS IN THE SMALL CLAIMS COURT

The proceedings in a Small Claims Court are in the nature of an enquiry.[282] The conduct of the proceedings is left solely in the hands of the Commissioner.[283] He has the right to determine which witnesses are to be called, and their order, which evidence is to be led and which questions the parties are entitled to ask.[284] When he considers that he has sufficient evidence to come to a decision, he has the right to stop the proceedings.[285]

However notwithstanding the control he has, his powers are not unlimited. Any discretion exercised must be exercised judicially. His decisions must be objective and considered. The proceedings remain subject to the principles of natural justice. There is a duty on the Commissioner to ensure that the parties are given a fair hearing.[286] Whatever decision is made in terms of Section 26 or 28 of the Small Claims Court Act therefore must only be made after the application of the audi alterem partem rule.[287]

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[282]See Section 26, 27, and 28 of Act 61 of 1984.

[283]See Section 26 (3) and Section 27 (2) Act 61 of 1984.

[284]Section 27 (2) Act 61 of 1984.

[285]Section 27 (2) Act 61 of 1984.

[286]Smit v Seleka en Andere 1989 (4) SA 157 (O).

[287]Ibid.

It is fundamental to the principles of natural justice that each party be given an opportunity to state his case and to answer the case against him. In order to answer the case against him, the party must be given time to prepare.

In determining whether sufficient notice of the action has been given to the defendant the court ought to consider whether sufficient details have been given in the prescribed letter of demand and summons to advise him of the case he has to meet. Where the letter and summons do not properly or fully reflect the plaintiff's case, the defendant will, it is submitted, be entitled to an adjournment to prepare his defence.[288] It is accordingly important that the letter and summons contain sufficient details to inform the court and the defendant of the case he has to meet. Likewise there will be circumstances where the plaintiff will be entitled to an adjournment in order to prepare an answer to the defence of the defendant.

Where documentary evidence is relied upon by a party, copies of such documents should be given to the other party in order to allow him an opportunity to prepare for trial. Where the practice is simply to file these documents with the court, it may be improper for the court to refuse an adjournment in order to allow the defendant an opportunity to consider the documents.

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[288]Conclusion drawn from the case of Smith v Seleka en Andere Ibid.

All documents which come into the possession of the court and which may have a bearing on the trial or its outcome must be disclosed to the parties. A finding on evidence or facts not disclosed to one of the parties constitutes a gross irregularity. Where parties submit documents or copies thereof directly to the clerk of the court, the contents thereof should be communicated to the other party before the trial. In fact, where reliance is placed by one party on certain documents, such party should be obliged to furnish copies to his opponent.

As stated above it would not seem irregular for the Commissioner to rely on his own observations, prior knowledge, informal inspections, personal enquiries or evidence given in other cases. However, in these cases there is the danger that an impression could be created that the information is obtained behind the back of an interested party. Care should therefore be taken to explain to the parties what information the Commissioner has or wishes to rely on and which has not been submitted by the parties or the witnesses, in order to grant them an opportunity to comment thereon. Where the Commissioner relies on documentary evidence it will be his duty to explain the contents and importance of the documents to the litigants and to ascertain whether they have any objections to their admissibility.

Although the litigants have no right to question or cross-examine each other or the witnesses, a Commissioner's failure

to allow a party to ask questions will, it is submitted, amount to a gross irregularity where the refusal results in the failure of a proper hearing taking place. Whether or not it will be proper for a Commissioner to refuse the asking of any questions would depend upon the circumstances of the case taking into account the principles of natural justice.

The lack of any provision entitling the defendant to claim his costs or expenses can result in injustice. It cannot be assumed that every plaintiff who institutes action in a Small Claims Court is entitled to succeed or that every defendant cited has no valid defence. In fact the existence of the Small Claims Court Act gives the plaintiff an opportunity to take action in those cases where action would otherwise not be taken because the plaintiff feels he does not have a strong enough case. The possibility of injustice arises out of the fact that while implementing the recommendations of the Hoexter Commission with regard to costs the legislature did not implement its recommendations with regard to the Court's jurisdiction.[289] The jurisdiction of the Small Claims Court is similar to that of the Magistrate's Court. In addition to persons residing, carrying on business or being employed within the Court's area the Small Claims Court has jurisdiction inter alia over any person if the cause of action arose wholly within the court's area.[290]

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[289]Fourth Interim Report 198-199.

[290]Section 4 (1)(d) Act 61 of 1984.

It is not uncommon for the cause of action to arise in the area where the defendant does not reside, is employed, or carries on business. Examples are where the cause of action arises while the defendant is on holiday; where the defendant has moved since the cause of action arose; or where in the case of a company, management is situated at its head office but the cause of action arises in an area where a branch is situated.

The effect of Section 14 (1)(d)[291] is to grant a Small Claims Court jurisdiction over persons whose residence or place of business or employment is far removed from the seat of the court. If the defendant has a good defence and wishes to defend the case, it is safest for him to travel to the seat of the court. This however has to take place at his own expense. Further expenses have to be incurred if the case is adjourned for some or other reason.

While recommending that the costs claimable should be limited to a filing and service fee payable by the plaintiff the Hoexter Commission also recommended that the jurisdiction of the Small Claims Court should be limited to the place of residence, employment or business of the defendant.[292]

The Act therefore requires amendment. The Commissioner must either be granted authority to make a cost order in favour

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[291]Act 61 of 1984.

[292]Fourth Interim Report 182; 184 and 198.

of such a defendant or else the jurisdiction of the Small Claims Court must be limited so as to exclude the provisions of Section 14 (1)(d).

As they stand, the provisions of Section 14 (1)(d) require a flexible approach by the Commissioner. To insist on the defendant's appearance in cases where he is not located within the court's jurisdiction seems to be injust. The Commissioner should be more amenable to the receipt of written evidence and submissions than in those cases where the defendant has easy access to the court. Interrogatories could be sent by the Commissioner or clerk of the court. Where a dispute of fact cannot be clarified on the written evidence sent by the defendant, the Commissioner should make use of the telephone in order to put the plaintiff's version to the defendant and obtain further evidence from the defendant. The defendant should not be penalised by virtue of his absence from the area of the court, and his presence at the court should not be insisted upon unless the matter cannot be resolved by the submission of written evidence or the receipt of answers obtained telephonically by the Commissioner. All written communications should be translated into the home language of the defendant or plaintiff and if need be be sent to the clerk of the court or messenger of the court for the district where the defendant or plaintiff resides or is employed so that what is required to be explained can be translated to the party.

Where telefax and telex machines are available these can serve a useful purpose. The need for the presence of a company representative from the company's head office may be avoided by the use of such machines or methods of communication.

20. PRIVILEGED COMMUNICATIONS IN THE SMALL CLAIMS COURT

> "It is submitted that the combination of an inquisitorial procedure and free system of evidence should not give the Small Claims Court Commissioner untrammelled access to all information. At the time of writing the detailed rules which regulate the practice and procedure in the Small Claims Courts were not yet available. But it is inconceivable that procedural privileges which exist in terms of our ordinary law of evidence will be abolished for purposes of Small Claims Court hearings. No procedural and evidential system has an absolute right to all information."[293]

No rules have to date been promulgated regulating the exclusion of evidence by virtue of the claim of privilege. Neither the parties nor the Commissioner have the power to compel the giving of evidence in a Small Claims Court. Accordingly the likelihood of the Commissioner being faced with the problem of excluding privileged information is less

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[293]S E van der Merwe "The Inquisitorial Procedure and Free System of Evidence in Small Claims Courts : An Examination of Principles" (1985) De Rebus 445 at 449.

than that of his counter-parts in the other courts of law.[294] However there is a possibility that "without prejudice" communications will be submitted; or an attorney, despite ethical considerations will be prepared to disclose information conveyed to him by a client or ex-client; or a wife may wish to testify against her husband or vice versa; or State documents may be tendered in evidence.

The problem the Commissioner may be faced with is whether he should consider this evidence which could otherwise be privileged in the Supreme or Magistrate's Courts if relevant and if he deems it fit to do so.

Certain text book writers consider the law relating to privileged information to be part of the law of evidence.[295] In Naidoo v Marine and Trade Insurance Company Limited,[296] Trollip JA stated:

> "According to various statutes in South Africa our Courts are in effect enjoined to apply the 'without prejudice' rule as expounded by the English Courts. The reason is that questions relating to the admissibility which includes 'without prejudice' communications are now governed by Section 42 of our Civil

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[294]I N Bredenkamp, supra 772.

[295]S H W Schmidt "Bewysreg" 2 ed. (1982) 1; John Sopinka and Sydney N Lederman "The Law of Evidence in Civil Cases" (1985) 156.

[296]1978 (3) SA 666 (A).

> Procedure and Evidence Act, 25 of 1965. That section applies the relevant law of evidence which was in force in the Republic on the 31st May 1961."[297]

Section 42 of the Civil Procedure and Evidence Act[298] reads:

> "The law of evidence including the law relating to the competency, compellability, examination and cross-examination of witnesses which was in force in respect of civil proceedings on the 30th May 1961, shall apply in any case not provided for by this Act or any other law."

It could it is submitted be argued that the Civil Procedure and Evidence Act does not apply to Small Claims Courts as at the time of its promulgation Small Claims Courts had not been established. It is submitted however that one must look at the common law of privilege and the nature of the Small Claims Courts in order to determine whether the law relating to privilege applicable to other courts is also applicable to the Small Claims Courts.

If the laws relating to privileged communications or information are "rules of evidence", as referred to in Section 26 of the Small Claims Court Act, then the Commissioner is empowered to disregard them and to take the

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[297]Naidoo v Marine and Trade Insurance Company Ltd 677 F-G.

[298]Act 25 of 1965.

information into account if relevant and if he deems it fit to do so.[299] The difficulty of what meanings are to be attributed to "rules of evidence" as used in various statutes relating to administrative tribunals has been referred to by Enid Campbell where she writes:

> "Lawyers' understandings about the province of the law of evidence, as revealed by the subject matter of the texts on evidence, cannot, it is submitted, control the meaning to be attributed to the 'rules of evidence' in statutes governing administrative tribunals."[300]

and quotes from Mahadervan v Mahadervan[301] where it is stated that:

> "It is not everything that appears in a treatise on the law of evidence that is to be classified internationally as adjective law, but only provisions of a technical or procedural character - for

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[299]The provision provides as follows: "Subject to the provisions of this chapter, the rules of the Law of Evidence shall not apply in respect of the proceedings in a court, and a court may ascertain any relevant fact in such manner as it may deem fit."

[300]Enid Campbell "Principles of Evidence and Administrative Tribunals" in Enid Campbell and Louise Waller (eds.) Well and Truly Tried : Essays on Evidence in Honour of Sir Richard Eggleston (1982) 39-40.

[301](1964) P.233.

> instance rules as to the admissibility of hearsay evidence or what matters may be noticed judicially."[302]

Campbell is of the view that the purpose of excluding the rules of evidence is to indicate that they are not bound by the technical evidentiary rules which apply in a court of law and especially those which historically have their origin in jury trials. The same principles do not necessarily apply to the laws relating to the compellability of witnesses and their privileges[303] although there are some statements made obiter which may indicate the contrary.[304]

Although the text books include the rules relating to privileged information in the exclusionary rules of evidence, such rules are distinguished from other exclusionary rules of evidence:

> "At the outset a distinction must be drawn between evidence which is excluded by reason of incompetency and evidence excluded because of privilege. Hearsay, opinion and character evidence as a general rule, are excluded because of their inherent unreliability, lack of probative worth and susceptibility to fabrication. These are all dangers relating to the adversary method of ascertaining the truth. The

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[302]Mahadervan v Mahadervan 243.

[303]Campbell 39-40.

[304]Wajnberg v Raynor (1971) VR 665 at 678.

> exclusionary rule of privilege, however, rests upon a different foundation."[305]

The rules relating to privileged information have a different source from the other exclusionary rules.[306]

> "Dit is moontlik om die reëls rakende privilegie ook as uitsluitingsreëls te beskou mits die fundamentele verskille in gedagte gehou word."[307]

The purpose of the exclusion of privileged communications is because of considerations of policy purporting to protect the basic rights inherent in certain social relationships.[308] The exclusion is "based upon social values external to the trial process."[309] The same policy considerations would apply to proceedings brought in the Small Claims Court. Although including the exclusionary rules relating to privilege in the law of evidence, Schmidt is of the opinion that communications which would be privileged in our courts of law are also privileged in administrative proceedings

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[305]Sopinka and Lederman 156.

[306]S J van Niekerk, E van der Merwe, A J van Wyk, and G A Barton "Privilegies in die Bewyssreg" (1984) 54.

[307]Van Niekerk et al 5.

[308]Van Niekerk et al 5.

[309]Sopinka and Lederman 156.

despite the fact that the tribunals are not bound by the rules of evidence.[310]

In Baker v Campbell[311] Dawson J with regard to legal professional privilege, stated:

> "To view legal privilege as being no more than a rule of evidence would, in my view, inhibit the policy which supports the doctrine. In my view, the doctrine of legal professional privilege is in the absence of some legislative provision restricting its application, applicable to all forms of compulsory disclosure of evidence."[312]

In Heiman, Maasdorp and Barker v Secretary for Inland Revenue[313] it was held that the rules relating to legal professional privilege are applicable to administrative tribunals and inquiries in terms of the Income Tax Act.[314]

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[310]Schmidt 624. As to the exclusion of rules of evidence in administrative proceedings, see Barlow v Licensing Court for the Cape 1924 (AD) 472.

[311](1983) 57 ALJR 749.

[312]Baker v Campbell 782 G-I.

[313]1968 (4) SA 160 (W).

[314]Act 58 of 1962.

In the American Case of Matter of City Council of New York v Goldwater[315] it was held that privileged communications between a doctor and patient which were protected by a New York statute were not subject to disclosure in proceedings before a legislative committee.

The exclusion of privileged communications on the basis of State interest would seem to apply to proceedings before administrative tribunals.[316] Likewise, as the privilege attached to "without prejudice" communications has its origin in public policy,[317] the same rules applicable to other privileged information should also apply to them.

Although the indigenous or customary law of evidence is characterised by the absence of technical rules of evidence, the communications between spouses, even if they are only partners to a customary union, are regarded as privileged and a chief will not compel one spouse to give evidence against another.[318]

Like administrative tribunals, Small Claims Courts are not bound by the rules of evidence. However, the Small Claims

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[315]New York November 26, 1940 quoted in a case note (1941) 54 Harvard Law Review 705 (author unknown).

[316]Minister of Justice v Alexander 1975 (4) SA 530 (A).

[317]Naidoo v Marine and Trade Insurance Co Ltd supra.

[318]supra.

Court, unlike the administrative tribunals, is it is submitted a Court of law.[319] Accordingly there are strong reasons for the rules relating to privileged information applicable in other courts to be applicable to proceedings before a Small Claims Court. The "rules of evidence" referred to in Section 26 (1) of the Small Claims Court Act[320] exclude the rules relating to privileged information which have a different source from other exclusionary rules.

It is submitted that a Commissioner faced with the problem of the admissibility of privileged information is bound by the same considerations as his counter-part in the Supreme or Magistrate's Courts and accordingly he may not have reference to this evidence in arriving at his decision.

21. ROLE OF THE PRESIDING OFFICER IN THE SMALL CLAIMS COURT TRIAL

> "That the adjudicator takes an active part in proceedings is fundamental to all Small Claims procedures. The directions that he inform himself of the facts or that he shall enquire into the claim, that he be able to seek other evidence or make other investigations and that he can conciliate all require intervention. The absence of legal representation makes intervention

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[319]P Ellis "Symposium oor Howe vir Klein Eise" (1984) De Rebus 495.

[320]Act 61 of 1984.

> essential if the proceedings are to operate efficiently."[321]

It is the adjudicator's duty to elicit each parties' case and probe that of the other. He must look at the evidence as both lawyer for the plaintiff and defendant.[322] He must be "both the devil's advocate and counsel for the litigants".[323] He must further uncover the facts, question the witnesses and the parties and ensure that potential claims and defences are asserted. It has been suggested that the success of the Small Claims Court is dependant to a large extent on the judges' willingness to participate actively.[324] Judges in some Small Claims Court are regarded as chief fact-finders and protectors of the confused.[325]

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[321]G D S Taylor "Special Procedures Governing Small Claims in Australia" in Mauro Cappelletti and John Weisner (eds.) Access to Justice (1979) 597 at 641.

[322]Taylor 648.

[323]Paul C Deever III, Robert H Brownlee, Charles L Lewis, Gregory J Moonie, William H Pickering "Special Project : Judicial Reform at the Lowest Level : A Model Statute for Small Claims Courts" (1975) 28 Vanderbilt Law Review 711 at 775.

[324]Deever et al 775.

[325]John M Steadman, Richard S Rosenstein "Small Claims Consumer Plaintiffs in the Philadelphia Municipal Court, an (continued...)

Certain writers also see the adjudicator as having a duty to attempt conciliation.[326]

Ison proposes a system in which justice can be administered "on the spot".[327] There should be no requirement that the claim be in writing. A prospective claimant should be entitled to explain his claim verbally to the judge. The first contact with the defendant need not be the service of process. The judge immediately after receipt of the complaint should be entitled to telephone the person against whom the complaint lies in order to ascertain whether the matter can be determined telephonically.[328]

> "The modus operandi of a Small Claims Judge should approximate more closely to that of a police detective or an inspector of weights and measures than that of a High Court Judge."[329]

It would be the judge's duty to ascertain whether the defendant has a possible defence. In order to do this a list

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[325](...continued)
Empirical Study" (1973) 121 University of Pennsylvania Law Review 1309 1323.

[326]Ibid.

[327]Terence G Ison "Small Claims" (1972) 38 Modern law Review 18 29.

[328]Ison 28.

[329]Ison 29.

of possible defences should be furnished to the defendant. There should be no system of default judgments and if the defendant cannot, or is not, prepared to appear before the judge then he should make a personal call to the defendant. Ison is of the opinion that no judgment should be entered against a non-business defendant until:

1. He has been given a list of possible defences to the particular type of claim.

2. The judge has made a sufficient enquiry into the facts including a personal discussion with the defendant to satisfy himself that there is no defence.

> "It should be assumed that a non-business litigant is ignorant of possible defences and it should be the Judge's responsibility to ensure that this is done."[330]

As an alternative Ison proposes that the Judge be assisted by a field investigator. However, he is of the opinion that such an arrangement will be unworkable. His reasons are:

1. "There would be a tremendous loss of time, inefficiency and expense involved in the process of communication between the Judge and investigator." In addition the investigator will

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[330] Ibid.

not always know what evidence is required or wanted by the Judge.

2. Ison doubts whether suitably qualified field investigators will be available.

3. It would be difficult to enforce the requirement that a judge must speak to every defendant.[331]

In order to be successful Ison's system must involve a Judge who is permanently involved at the seat of the court whose full-time function is to assist in, and adjudicate on, small claims.

In a system where Presiding Officers are appointed on an ad hoc basis or are appointed to deal only with the dispute, it will be impossible for the adjudicator to preform all of these functions.

The functions of a Small Claims Court adjudicator, or Presiding Officer should, in order to be effective, approximate the functions of a judicial officer in Germany as defined in Sections 139 and 279 of the German Code of Civil Procedure.[332] However what must be borne in mind is that even in Germany lawyers play an important role in determining the nature and content of the evidence.

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[331]Ibid.

[332]See above and chapter on German Civil Procedure.

It cannot be expected that lay litigants will be capable of performing these functions and accordingly these will, to some extent have to be performed by the Presiding Officer of the Small Claims Court.

Section 14 (a) of the proposed legislation dealing with Small Claims in Tennessee attempts to incorporate all the adjudicator's duties into a legislative enactment, in a system where the adjudicator's employment is not solely related to the determination of small claims disputes or where he is appointed solely to adjudicate on a dispute before him. It reads:

> "The role of the Judge is to be an active inquisitor and conciliator. He shall have the duty to conduct an informal hearing, and develop all the facts in a particular case. The Judge may take testimony, raise defences, or claims of which the parties may be unaware, disregard rules of pleadings and evidence, summon any party to appear as a witness in the suit upon his own motion, and do all other acts which in his discretion appear necessary to effect a correct judgment and speedy disposition of the case. As conciliator he shall attempt to conciliate disputes and encourage fair settlements amongst the parties."[333]

Some American writers have observed:

> "We cannot over-emphasize that the Judges must assist litigants in developing their cases at trial. The small claims process differs from regular civil

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[333]Deever et al 791.

> process in that formal pre-trial procedures used to focus on the legal issues and to identify the applicable evidence in a case (such as responsive pleadings and pre-trial discovery) have been omitted and these issues are left to be worked out at the trial. Active and flexible assistance to litigants in developing cases at trial will be necessary for many litigants and cannot be completely replaced by institutionalised pre-trial assistance."[334]

The importance of assistance by the Presiding Officer can be seen from research conducted by William O'Barr and John M Conley.[335]

The opportunity to tell the Court their story in everyday terms without constraints of the rules of evidence enhances the litigants' litigation satisfaction. Documentary evidence is handed in and real evidence produced which would otherwise be inadmissible. In addition expressions of opinions which would otherwise be inadmissible are admitted. A clearer and more detailed situation can therefore be displayed. O'Barr and Conley found that where no constraints on evidence exist,

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[334]Steven Weller, John A Martin and John C Ruhnka "In Court Assistance to Small Claims Litigants" (1982) 1 Civil Justice Quarterly 62.

[335]William M O'Barr and John M Conley "Litigant Satisfaction vs Legal Adequacy in Small Claims Court Narratives" (1985) 19 Law and Society Review 661; William M O'Barr and John M Conley "Lay Expectations of the Civil Justice System" (1988) 22 Law and Society Review 137.

the litigants respond with substantial narratives which often go beyond the facts that the court is empowered to adjudicate.[336] By allowing the admission of hearsay evidence the rhetorical force of the account is enhanced.[337] The lack of constraints also allows the evidence to proceed chronologically.[338]

Despite this, however, where the witnesses or litigants were permitted to give long narratives they failed to deal with the issues of blame or responsibility. O'Barr and Conley state:

> "The assessment of responsibility for the damage he has suffered is accomplished only to the extent that the listener can draw inferences from the facts recounted. In this respect his approach might be characterised as inductive. He does not lay out a theory of the case for testing. Rather he presents the facts he considers relevant and expects them to lead to a conclusion."[339]

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[336]O'Barr and Conley (1985) 19 Law and Society Review 1675 1677.

[337]O'Barr and Conley (1985) 19 Law and Society Review 1680.

[338]O'Barr and Conley (1985) 19 Law and Society Review 1681.

[339]O'Barr and Conley (1985) 19 Law and Society Review 1685-1686.

Plaintiffs tell about the problems that have brought them to court but they often fail to place the blame or responsibility on any person.[340]

As opposed to this, a lawyer would have led evidence which would have been organised around a hypothesis of who was responsible. The issue of responsibility would have been addressed directly.[341]

According to O'Barr and Conley where a Presiding Officer plays an active role in eliciting and directing testimony a different result can occur. In those cases where the Presiding Officer adopts a theory of responsibility and develops the case in order to test a theory a more correct assessment of the evidence is possible. By questioning the litigants in order to extract the relevant evidence, he can then test the hypothesis of responsibility which he has developed against the evidence.[342]

O'Barr and Conley observe:

> "These cases highlight the critical role of the Magistrate. They suggest that

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[340]O'Barr and Conley (1985) 19 Law and Society Review 1689.

[341]O'Barr & Conley (1985) 19 Law and Society Review 1687.

[342]O'Barr and Conley (1985) 19 Law and Society Review 1693-1694.

> most of the problems encountered by lay litigants, whether substantive or stylistic, can be resolved by a Magistrate who has the time, inclination and ability to intervene. The role of the Small Claims Magistrate like that of a Judge or Jury in a formal court, is to apply the law to the facts. However the Small Claims Court Magistrate must not only perform this evaluative function but must also develop the hypothesis to be evaluated."[343]

A further finding of O'Barr and Conley was that lay litigants are ill-prepared to make an affirmative presentation at the trial.[344] They see the court as one that will recognise the justice of their position and find and punish the wrongdoer, rather than as a largely passive tribunal that renders judgment on the basis of the facts before it. An active role of the court can to some extent eliminate some of the misconceptions and problems the litigants may have.[345]

The active role of the court has been criticised.[346] According to Adams the inquisitorial process does not permit

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[343]O'Barr and Conley (1985) 19 Law and Society Review 1696-1697.

[344]O'Barr and Conley (1988) 22 Law and Society Review 159.

[345]Ibid.

[346]George W Adams "The Small Claims Court and the Adversary Process : More Problems of Function and Form" (1973) Canadian Bar Review 583.

the decision-maker to remain passive or refrain from formulating a premature and possibly erroneous working hypothesis.[347]

> "In fact it forces him to formulate a working theory in order to effectively investigate the facts, distinguishing the relevant from the irrelevant."[348]

The answer to this criticism is that without forming a hypothesis justice will be impossible as the litigants themselves will not be capable of developing a theory of responsibility. Although in certain cases such formulation by the Presiding Officer may promote biased cases, in many instances this will not be the case. In those cases where there is no question of bias the formulation of a hypothesis results in substantial justice between the parties. Furthermore, in most cases because of the very limited information available to the court before the trial commences, the Presiding Officer will only be able to form or develop a hypothesis after the parties have furnished a lengthy narrative, especially where the defence may only be revealed at the trial. Without such a narrative there would be no factual information on which to base the hypothesis. Accordingly the likelihood of a premature hypothesis is reduced.

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[347]Adams, 597.

[348]Ibid.

It is submitted that there is a heavy duty on the Small Claims adjudicator to ensure that justice is done because in the words of Moulton:

> "If one is to look after these particular courts it must be the Small Claims judges themselves for the rest of the legal professions is scarcely aware of their existence."[349]

22. ROLE OF THE COMMISSIONER IN SOUTH AFRICA

Before discussing the sections of the Act which relate to the Commissioner's functions during the course of the trial, it is necessary to refer to the parts or portions of the Hoexter Commission Report dealing with the procedure of the trial and the Commissioner's functions. This will enable us to determine whether the Act has achieved its aims and objects and encompassed the essence of the Commission's recommendations.

The need for a Small Claims Court procedure arose out of the characteristics and drawbacks of the other court procedures in South Africa.[350] These were:

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[349]Beatrice A Moulton "The Prosecution and Intimidation of the Low Income Litigants as Performed by the Small Claims Court in California" (1969) 21 Stanford Law Review 1657.

[350]See Chapter 1.

1. The expense of the ordinary courts.[351]

2. The period of the time between the institution of action and the final hearing.[352] According to the Hoexter Commission: "Delay in litigation has always been, and remains, an unmitigated evil".[353]

3. Poverty.[354]

4. Ignorance of rights, duties and court procedures.[355]

5. The psychological effects of having to appear in a courtroom.[356]

These factors lead to a denial of justice. In order to achieve its aims and objects therefore, the forum must provide a swift, inexpensive and efficient method of adjudication.

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[351]Fourth Interim Report 12.

[352]Ibid.

[353]Ibid.

[354]Fourth Interim Report 13.

[355]Ibid.

[356]Ibid.

A Small Claims Court system must be accessible, quick, inexpensive, simple and informal and fair.[357] The separate phases of the common law trial should be fused into one integrated inquiry conducted by an adjudicator who performs the functions of mediator, counsel for the plaintiff, counsel for the defendant and presiding judicial officer.[358] The procedure should be simple enough for a layman to present his case without representation.

The chief function of the Commissioner was seen by the Hoexter Commission to be the active investigation of the facts of the dispute. He was to have fulfilled all the functions referred to above.[359] In performing his adjudicative functions he was likened to an arbitrator.[360]

There are only two provisions of the Act which deal directly with the Commissioner's functions. Section 26 (1)[361] provides:

> "Subject to the provisions of this chapter, the rules of the law of evidence shall not apply in respect of the proceedings in a court, and

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[357]Fourth Interim Report 17.

[358]Ibid.

[359]Fourth Interim Report 179.

[360]Ibid.

[361]Act 61 of 1984.

> a court may ascertain any relevant fact in such manner as it deems fit."

Although they are related there are, it is submitted, two separate and distinct provisions in this sub-section. The first relates to the provision that the rules of evidence do not apply in the trial. Thus hearsay evidence, opinion evidence and the Commissioner's own personal knowledge, subject to certain precautionary rules, can be taken into account, and statements can simply be handed in at the hearing. The second provision, in addition to referring to the type of evidence which can be taken into account, also deals with the court's inherent power to ascertain any relevant facts. This power and its function will be discussed in detail below.[362]

Section 26 (3)[363] reads:

> "A party shall not question or cross-examine any other party to the proceedings in question or a witness called by the latter party but the Presiding Officer shall proceed inquisitorially to ascertain the relevant facts and to that end he may question any party or witness at any stage of the proceedings. Provided that the Commissioner may in his discretion, permit any party to put a question to any other party or witness."

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[362]Infra.

[363]Act 61 of 1984.

The provisions of the Small Claims Court Act with regard to the Commissioner's functions will now be discussed taking into account the recommendations of the Hoexter Commission.

23. INFORMALITY, SIMPLICITY AND FAIRNESS

While the Hoexter Commission recommended that the proceedings should be informal and fair, there is no reference to informality or fairness in the Act. However, the fact that the rules of evidence do not apply, that evidence can be submitted orally or in writing,[364] and the provisions of Section 26 (3) are, to some extent, indicative that the proceedings are intended to be informal.

The Small Claims Court is an adjudicatory body which deals with civil claims between litigants. It has the power to grant and enforce its judgments.[365] These characteristics show that the Small Claims Court is a court of law and the Commissioner performs a judicial function.

In Publications Control Board v Central News Agency,[366] Rumpff JA (as he then was) stated:

> "It is, of course, firmly established in our law that when a statute gives

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[364]Section 26 (2) Act 61 of 1984.

[365]See Sections 36 to 44.

[366]1970 (3) SA 479 (A).

> judicial or quasi-judicial powers to affect prejudicially the rights of a person or property, there is a presumption, in the absence of express provision or a clear intention to the contrary, that the power so given is to be exercised in accordance with the fundamental principles of natural justice."[367]

In S v Moroka[368] Holmes JA stated:

> "The test for fundamental fairness must be applied with due regard to the nature of the tribunal or body."[369]

And in Bell v Van Rensburg[370] Baker AJ stated:

> "Dit is 'n algemeen gesproke, stellig reg om te sê dat die vereistes van natuurlike geregtigheid van die omstandighede van die saak, die aard van die ondersoek, die reëls waarvolgens die regulasies handel, die onderwerp waarmee gehandel word ens. afhang."[371]

Fundamental to fairness is:

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[367]Publications Control Board v Central News Agency 488 H - 489 A.

[368]1969 (2) SA 394 (A).

[369]At 398 D.

[370]1971 (3) SA 693 (C).

[371]At 727 A.

1. Notice of the intended action.

2. The need for a hearing.

Not only do the Small Claims Court Act and Rules provide for notice of a hearing, but also for a letter of demand which must contain particulars upon which the claim is based together with the amount claimed.[372]

The summons must contain particulars of the nature and the amount of the claim and must give the defendant ten days notice of the trial. Provision is made in the Act and Rules for the personal appearance of the litigants at the trial.[373]

24. THE COMMISSIONER AS COUNSEL FOR THE PARTIES

The provisions of the Small Claims Court Act and the Rules do not contain any reference to the Commissioner's functions as counsel for the plaintiff or defendant, or adjudicator. Even the reference to his chief function as investigator is ambiguous.

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[372]Rule 10 and Section 29 (1) and Rule 8 of Act 61 of 1984.

[373]Section 7 (2), 7 (4), Section 35, Rule 10, Annexure/Form 1.

If the Commissioner is supposed to function as counsel, this must be inferred from the provisions of Section 7 (2) of the Act. This, however, simply provides for the personal appearance of a party in the court and the prohibition of representation. No direct reference to the Commissioner's function as counsel is contained in the sub-section. Neither is there any provision dealing with the Commissioner's duty to assist the parties.

Wiechers[374] refers to legal representation in administrative hearings as follows:

> "Regsverteenwoordiging van die onderdaan word nie as 'n wesenlike bestanddeel van die vereiste van aanhoring gestel nie. Eintlik behoort die aard van die voorverrigtinge en die aangeleentheid waarvoor die administratiewe optrede gaan hierdie deurslag te gee."[375]

According to Wiechers if the dispute is factual only, legal representation would not be required.[376] However, where the dispute involves technical matters or difficult legal questions or has serious consequences, fairness would demand legal representation:

> "By die beoordeling van die vraag of regsteenwoordiging toegelaat moet word

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[374]Marinus Wiechers "Administratiewereg" (1982) 220-221.

[375]Ibid.

[376]Ibid.

> of nie, moet daar nie vasgesteek word by die formele vraag of die met sodanige regsteenwoording veroorloof nie, maar die wesenlike vraag gestel word of die onderdaan is agenome die aard en omvang van die administratiewe voorverrigtinge en die moontlike uitwerking daarvan of die onderdaan se regte en voorregte werklik in die geleentheid gestel is, om sy saak na behore te stel."[377]

In a civil claim in a Small Claims Court legal as well as factual issues are relevant. The Small Claims Court is a forum presided over by a legally qualified practitioner or academic where legal rights and duties are determined. There is therefore reason that in the absence of the prohibition thereof, the litigants would be denied a fair trial and an opportunity to present their case properly if legal representation were denied. As representation is prohibited, in order to ensure a fair trial, the function which would otherwise be performed by counsel falls to be performed by the Commissioner.[378]

Thus, notwithstanding that there is no express provision for it, there is, it is submitted, a duty on the Commissioner to act as counsel for the litigants.

For the sake of clarity and certainty, however, it is submitted that specific provisions for such functions be made in the Act.

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[377]Wiechers 221.

[378]Smit v Seleka supra.

25. THE COMMISSIONER'S ROLE AS ADJUDICATOR

The only reference to the Commissioner's function as adjudicator is to be found in Sections 2 (1)(a) and 2 (2)(a) of the Act. These sections, however, do not refer directly to such functions but rather indicate the nature of the Small Claims Court. They give the Minister of Justice or Magistrate the power to establish for an area or district, a court for the adjudication of disputes. The object of the sections does not seem to have been to give the Commissioner adjudicatory functions but to define the manner in which courts may be established. Even the reference to adjudication seems secondary. Further indications of the adjudicatory functions of the Commissioner are found in Sections 34 and 35 which set out the court's power to grant judgment and define the various judgments or orders the court is empowered to grant.

A characteristic of Section 35 which has no counterpart in the Magistrate's Court, and which is a consequence of a recommendation of the Hoexter Commission is the fact that judgment can only be granted in default, once the plaintiff has proved his case, both on the merits and in respect of the quantum.

An indirect indication of the Commissioner's adjudicatory function is contained in Section 4 (1) of the Act which provides for the proceedings to take place in open court. Proceedings in open court are usually associated with

adjudication while private proceedings are associated with mediation.[379]

26. THE COMMISSIONER'S ROLE AS INVESTIGATOR

In terms of Section 26 (3) the Presiding Officer "shall proceed inquisitorially to ascertain the relevant facts".

The remainder of Section 26 (3) which prohibits the questioning or cross-examination of the parties or witnesses by the litigants can be interpreted merely to refer to the power or function of the Commissioner to question the litigants as opposed to the litigants performing such functions. The active role of the Commissioner in this respect relates solely to the questioning of the parties.

Van Loggerenberg states:

> "Uit die bewoording van Artikel 26 (3) asook uit die Wet as 'n geheel, is dit duidelik dat die wetgewer aan die Kommissarisse 'n beherende funksie oor die wyse waarop die ondervraging tydens die verhoor geskied wil verleen. Die Kommissarisse tree dus bloot leidingewend en ondervragend op."[380]

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[379]Fourth Interim Report 185 and 200.

[380]D van Loggerenberg "Die Hof vir Klein Eise : Adwersitief of Inkwisitories" (1987) De Rebus 343 345.

This, according to him, is the correct interpretation of Section 26 (3) based on the ejusdem generis rule.

According to Parker the Commissioner has a controlling function over the manner in which the proceedings are to be conducted.[381]

The main reasons for Section 26 (3) whereby the Commissioner plays an active role are according to Parker:

1. Individual litigants do not know how to present their cases.

2. A passive role will lead to lengthy trials.

3. The Commissioner should encourage and promote a settlement between the parties.[382]

Another interpretation of Section 26 (3) is, however, possible. This interpretation takes into account the Hoexter Commission's recommendation that:

> "While combining the roles of mediator, counsel to the plaintiff, counsel for the defendant and Presiding Judicial Officer, the chief duty of the

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[381]Parker "The Role of the Commissioner in the Small Claims Court" unpublished LLB thesis (1986).

[382]Ibid.

> adjudicator must be the active investigation of the dispute."[383]

This is also the adjudicator's position as envisaged by Ison and one which prevails in Australia.[384]

The interpretation of van Logerenberg and Parker ignores this aspect. It also fails to take into account the provisions of Section 26 (1) which as has been stated above, makes provision for the court to ascertain any relevant fact in such manner as it may deem fit.

Proceeding "inquisitorially" is one method which may be used by the Commissioner. The alternative interpretation is that the words "the Presiding Officer shall proceed inquisitorially to ascertain the relevant facts" are peremptory. They place a duty on the Commissioner to investigate the facts and do not merely relate to the manner of proceeding. In a system where there is no legal representation and the Commissioner has to act as counsel for both parties simultaneously, the only method to ensure that the interests of both parties are served equally, and a conflict avoided, is to search for the truth. Substantive justice rather than procedural justice is of prime importance.

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[383]Fourth Interim Report 179.

[384]See above.

In dealing with the functions of the District Commissioners as judicial officers of courts established in terms of the then Rhodesian African Affairs Act,[385] the president of the African Appeal Court stated:

> "This Court has repeatedly emphasised that a judicial officer must not always be content to sit passively during the giving of evidence, holding himself aloof from all contact with the witness. His duty is to get to the truth of the dispute. In cases where the procedure of examination, cross-examination and re-examination is skilfully and thoroughly carried out by the parties and their lawyers, the need for him to intervene and ask questions himself may dwindle and even vanish. In such extreme cases, he can afford to, and should, preserve his judicial aloofness because the investigation of the truth which is the ultimate purpose of all court procedure is being properly carried out by others. But where, as is invariably the case in District Commissioner's Courts, that investigation is not properly carried out by others, the Presiding Officer must forego the advantage of detachment from the witnesses, and himself search for the truth by questioning them. If the task of examination is not undertaken by either party or by the Presiding Officer, virtually every case where conflicting evidence is led would have to end in a judgment of absolution from the instance, and the reason would be that the established machinery for proper investigation of the truth of the matter, namely the procedure of probing the witnesses' evidence by questioning has not been put into use."[386]

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[385]14 of 1927 (Rhodesia).

[386]Peter Netenzi v Timothy Mapango 1975 AAC 36, 37.

If the chief function of the Commissioner is the active investigation of the facts in dispute the questioning of the parties is merely a method of investigation. Such interpretation is justified in view of the words "and to that end[387] he may question any party or witness at any stage of the proceedings".

26.1 The Nature of Proceedings in the Small Claims Courts : Adversarial or Inquisitorial

As has been stated above, van Loggerenberg is of the opinion that despite the Commissioner's duty to proceed "inquisitorially" the procedural system prescribed by the Small Claims Court Act is adversary in nature.[388]

Characteristics of the adversary model of civil procedure are the litigant's rights to:

(a) decide whether to institute, defend or withdraw an action;

(b) determine the nature and limits of the action;

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[387]My underlining.

[388]Van Loggerenberg (1987) De Rebus 343.

(c) determine what witnesses to call and evidence to adduce.[389]

The importance of deciding the nature of the proceedings is in determining the limits within which the Commissioner may operate without rendering any decision he makes reviewable. The question to be determined is whether the Commissioner commits a gross irregularity if he:

(a) refuses to hear a matter as the summons does not disclose a cause of action;

(b) himself reconstructs the cause of action to fit the facts proved at the trial without the consent of the parties thereto; or

(c) takes into account evidence not adduced by the parties or calls a witness without the consent of the parties.

The differences between an adversary model and an inquisitorial model arise, according to van Loggerenberg, out of ideological differences. In countries which follow the inquisitorial procedure the maintenance and promotion of the interests and policies of the State are of prime importance.

> "Die beskerming van die ideologiesie oogmerke (en kenmerke) van die Staat, en

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[389]Van Loggerenberg 343.

> die opvoeding van die individu word as primêr funksies van die burgelike litigasie proses gesien."[390]

The provisions of the Civil Procedure Code of the old German Democratic Republic are indicative of this attitude. Article 2 (1) of the Code read:

> "The courts are bound to protect the socialist state and the social order, to safeguard and enforce legally guaranteed rights and interests and to promote, by a highly effective judicial procedure, socialist relations within the community life of the citizens."[391]

Van Loggerenberg states:

> "Indien die burgelike prosesreg egter gemik is op die beskerming en handhawing van die Staat se belange en oogmerke, en individuele regte slegs beskerming geniet in sovere dit deel vorm hiervan, sal die inkwisitoriese stelsel aanvending vind."[392]

According to Parker:

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[390]Van Loggerenberg 344.

[391]Karl-Heinz Beyer "The New Civil Procedure of the GDR" (1978) Law and Legislation in the German Democratic Republic 1-2/77 14 69.

[392]Van Loggerenberg LLD thesis 27.

> "The model must always be viewed with regard to the structure of the State and the ideologies within the State."[393]

Van Loggerenberg has called the inquisitorial system a socialistic system because it inter alia protects the ideological framework of the State. Where the maintenance and promotion of the interests and ideologies of the State are not the legal system's main concern, it would seem according to van Loggerenberg that the system will not be inquisitorial.[394]

Before discussing the relevant provisions of the Small Claims Court Act, it will be useful to compare those systems which are classified as adversarial even though the judge takes an active part in the proceedings and those proceedings which are classified as inquisitorial.

To begin, the procedures of the former West Germany and the Former German Democratic Republic (GDR) will be compared. Reference to other systems will also be made.

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[393]E H Parker "The Small Claims Court : A Critical Evaluation" (1986) thesis submitted in partial fulfilment of the LLB in the Faculty of Law, University of Port Elizabeth 15.

[394]Proceedings at a conference on the reform in the Magistrate's Courts : A proposed alternative procedure for the adjudication of civil cases : unpublished 25 April 1987 160.

Like the pleadings of the West German procedure, the pleadings of the GDR must contain complete statements of fact on which the parties rely together with documents intended to be relied on. In addition details of the evidence must be furnished. In terms of Article 12 of the Civil Procedure Code of the GDR:

> "(1) In his action the plaintiff shall:
> (i) completely state his address, occupation and place of work as well as the defendant's address:
> (ii) name the invoked court;
> (iii) formulate and substantiate his motions; and
> (iv) offer evidence and enclose the documents in his possession.
>
> (2) In addition the plaintiff shall state:
> (i) the defendant's occupation and place of work;
> (ii) what has been done to overcome the conflict and why a settlement has not been possible;
> (iii) whether and what class of working people, voluntary mass organisations, social court or State organ has so far been active in the matter and may be able to contribute towards settling the matter.
>
> (3) The action must be signed."[395]

The judge in the Democratic Republic, like that of the Federal Republic had the duty to attempt to conciliate and work out an appropriate settlement. In terms of Article 45 (2):

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[395]Karl-Heinz Beyer 69.

> "The Court is bound to examine whether the litigation can be ended by a settlement. It shall assist the parties in reaching a settlement."

The judges of the two Republics had similar duties in relation to ensuring the matter was disposed of as expeditiously as possible.[396]

Article 32 has provisions similar to those provisions regulating the West German Judge's duty to call for a pre-trial hearing. That the litigants or their legal representatives have less control than their West German counterparts is clear from the provisions of Article 42 (2) which provides for the hearing to be conducted by the presiding judge.

The presiding judge also has more control over the contents of the action. Thus in terms of Article 28 (1) there is a duty on the court to examine whether the facts contained in the action appear suitable to justify the motion.

The aim of many of the systems of the countries of Eastern Europe is to ensure that the parties can follow the procedures without the need for legal assistance. They are therefore simple. There is a duty on the Presiding Officer to assist the parties where required.

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[396]Article 32 of the Code of the Democratic Republic.

According to Stalev the equality of the proceedings is explicitly recognised.[397] Accessible inexpensive informal and speedy judicial defence is guaranteed. So too is self-representation and assistance by the court. The little man is guaranteed a fair trial.

Stalev states:

> "For the little man the accessibility of the procedure, the legal aid, the abolishment of compulsory representation and the assistance of the court are all guarantees for the actual exercise of the right of action, of his right to be heard and to produce evidence or to appeal the judgment - in a word, for his real equality before the court."[398]

Likewise the rights of the citizens of the Soviet Union are also protected. In both the Soviet and other law of Eastern European countries, the procurator has a right to bring a civil action.[399] This is unknown in West Germany where it was solely up to the parties to protect their interests.

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[397]Zhivko Stalev "Fundamental Guarantees of Litigants in Civil Proceedings : A Survey of the Laws of the European People's Democracies" in Mauro Cappelletti and Denis Tallan (eds.) (1973) Fundamental Guarantees of the Parties in Civil Litigation 368.

[398]Stalev 369.

[399]John N Hazard, William E Butler and Peter Maggs "The Soviet Legal System" (1977) 138.

Stalev however is of the opinion that this cannot be regarded as a limitation on the principles of party initiative which like in the Federal Republic play an important role.[400] Rather, it is a guarantee that the violated right will not remain unremedied due to the failure of the interested parties to exercise their rights to bring an action. Even if the procurator institutes action the court summonses the interested party to attend.[401]

Article 30 (1) of the Civil Procedure Code of the GDR entitles the plaintiff to withdraw an action prior to final judgment. If withdrawn prior to service the judge decrees the closing of the proceedings. If such withdrawal occurs after service, a copy must be served on the defendant and on the procurator, if he has stated his intervention or, if he has an independent right to sue. The defendant has then a right to move to continue the proceedings within two weeks. After judgment the withdrawal is only effective with the consent of the defendant.

According to Stalev the Court cannot change the cause of action of the plaintiff. He points out that even in Soviet law there is a strong division whether the judge can change the case or award more than that claimed. The present view

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[400]Stalev 384.

[401]Ibid.

is that he cannot.[402] In the democracies the judge is only empowered to advise the plaintiff to change the cause of action.[403]

There is a duty to prevent party error : this duty aims at preventing an undesired omission or a detrimental proceeding and at creating a proceeding which will be useful to the party and justice. The duty to assist does not aim at forcing the parties to exercise or not to exercise rights over which they can freely dispose according to the principle of party initiative.[404]

> "Socialist civil procedure is well aware that no official initiative of the Court - even the most active can substitute for the parties in search of the truth."[405]

The judges of the socialist countries have the power to search for the objective truth. Article 54 of the GDR Civil Procedure Code states:

> "The Court states on what facts evidence is to be taken, names the evidence and informs the parties on it. Evidence shall be examined in the course of the

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[402]Stalev 405.

[403]Stalev 406.

[404]Stalev 395.

[405]Stalev 396.

> hearing. The evidence shall be recorded in the Minutes."

In terms of Article 18 of the Fundamental Principles of Civil Procedure of the USSR and of the Union Republics:

> "Evidence shall be presented by the parties and by other persons participating in the case. If the evidence is insufficient, the court shall propose to the parties and to other persons participating in the case that they present supplementary evidence or it shall gather such evidence on its own initiative."[406]

> "Only by searching assiduously for the truth can the judge escape partiality, objectively unwillingly admitted under the adversary system, namely of giving the victory to the stronger party in a trial by combat due to judicial passivity."[407]

According to Stalev the principle of officiality or the court's right to institute action on its own initiative, peculiar to socialist procedure does not limit or exclude the active participation of the parties in civil proceedings or the right to be heard. Both principles are not only harmonised but, in addition, the power and duty of the court to act ex officio is used mainly to facilitate and strengthen the rights of the parties to be heard.

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[406]Hazard et al; 138.

[407]Stalev 397.

> "This is why the most important embodiments of the principles of officiality are the questions put to the parties, the clarification of the burden of proof, and the advice on how to exercise their procedural rights in order to be heard most efficiently."[408]

In socialist countries the court has the power to call witnesses and/or evidence ex officio and this is the difference between these systems and the adversary systems where the judge has an active role.

Judges in West Germany have no power to call witnesses not referred to by the parties. However it would appear that these judges can take other evidence into account.[409]

Bauer states:

> "The question here is whether, in determining the facts of the case, the judge may resort to evidence not adduced by the parties. While it is a matter of course in all proceedings to which the inquisitorial principle is applied, that the judge is not subject to any restrictions in his choice of evidence, in civil proceedings it was originally the evidence proffered by the parties which was most decisive. However, current regulations allow the judge more freedom in civil proceedings too; he may consider all evidence ex officio

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[408]Stalev 393.

[409]F Bauer "The Active Role of the Judge" (1976) Law and State 31 38.

> with the exception of witnesses' testimony."[410]

Although classified as an adversary system where the judge plays an active role, West German civil procedure is according to van Loggerenberg aimed at the material truth rather than the formal truth.[411]

According to Ziedler:

> "The power and indeed the duty of the judge under Section 139 (of the Civil Code of Procedure of the Federal Republic) means the courts' duty is to discover the truth, however deeply it may be concealed, to clarify the case and to lead the parties towards a full and effective expedition of their respective positions."[412]

According to Stalev:

> "The extent to which the principle (of objective truth) governs socialist civil procedure and predetermines the contents of its rules can be illustrated by the difference between the meaning of the duty to tell the truth in Bulgarian civil procedure and the meaning of the same duty in the civil procedure of the German Federal Republic."[413]

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[410]Ibid.

[411]Van Loggerenberg LLD thesis 27.

[412]Ziedler 55 Australian Law Journal 390 393-394.

[413]Stalev 403.

In West Germany the words used are much stronger. Article 3 of the Bulgarian Code reads:

> "The parties are bound to tell before the Court only the truth."

Article 138 of the West German code reads:

> "The parties shall make their declarations about the actual facts fully and completely and in accordance with the truth."

Stalev maintains that the reason herefor is because the procedures are governed by opposite principles. Article 138 is governed by the principle of formal truth, while Article 3 is governed by the principle of material truth.[414]

Article 138 is valid only for the allegations which the party is willing to invoke. According to the dominant theory in practice the party does not violate the duty to tell the truth if he passes over in silence some fact relevant to the issue.[415]

It is clear therefore that there is a difference between the judicial roles in adversarial and inquisitorial systems. The inquisitorial judge is an investigator who must search for the truth. The same cannot be said of the active judge in

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[414]Stalev 403-405.

[415]Stalev 404.

West Germany. Notwithstanding this however, there are certain principles which are in essence adversarial in nature found in the so-called socialist inquisitorial systems. The rights of the individual are important and party autonomy has an important role. Although the courts of the inquisitorial system can refuse to accept a settlement in certain circumstances, this is only when such settlement is not in accordance with the socialist law.

Although the Soviet system has been classified as inquisitorial, this is open to doubt. Kiralfy states:

> "The Soviet system falls half-way between the accusatory and inquisitorial methods. In procedure by pure inquisition all material and testimony is collected by various examiners on the initiative of the public and the decision may be taken on these documents by another person. In the extreme accusatory procedure the conduct of the truth is in the hands of the parties and the judge acts as a rather passive referee of the procedure. In the Soviet system the parties have the option to bring proceedings, bear the initial burden of proof, file or make statements, retain advocates, ask for witnesses, decide whether or not to appeal, and may cross-examine each other. However also officious features are present; the case may be started by a public procurator if the party does not and the case may be undertaken by various public bodies. The court may assist on further evidence, appoint an expert on its own initiative, go beyond the facts made out by the parties and the amount of the claim (although there is doubt about this)[416] although it may not decide a separate cause of action not referred to by the parties. The

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[416]Stalev 406.

> court need not allow the plaintiff to abandon the claim or the defendant to concede it, may refuse to allow leave to settle a claim on terms acceptable to the parties. The parties are responsible for conducting the case but do not enjoy an exclusive authority over it. The judge takes an active role in the trial and may question witnesses."[417]

From the above it is clear that although the court has a duty to seek the objective truth this is only in relation to the cause of action referred to by the parties. Any other facts are irrelevant.

The West German and the so-called inquisitorial systems seem to be closely linked. Ziedler states:

> "Today it may be questionable whether the rule of party presentation is still an effective rule."[418]

If it is van Loggerenberg's contention that a system can only be classified as inquisitorial if its primary purpose is to maintain and promote the State's interests, ideologies or policies, then it is submitted that he is incorrect. No doubt systems which promote these factors are inquisitorial. However, the converse need not be true. If the object is not primarily to promote or maintain these factors it does not

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[417]Kiralfy "Soviet Civil Procedure" in E J N Feldbrugg Encyclopedia of Soviet Law (1973).

[418]Ziedler 393.

mean that the system therefore cannot be classified as inquisitorial.

Habscheid has stated:

> "However if one wishes to establish the relationship cited above (protection of individual rights equals adversary principle, protection of public interests equals inquisitorial principle) one also runs the risk of reaching conclusions which no longer correspond to the substance of law."[419]

The essence of an inquisitorial system is the duty of the Presiding Officer or other official to investigate on his own initiative in the search for the truth. Thus it would seem that the voluntary arbitration schemes in England had elements of the inquisitorial system as there was a duty on the scheme itself to elicit the relevant facts.[420]

The system proposed by Ison with regard to small claims is, it is submitted, in many respects inquisitorial in nature. It is the judge's duty to pursue the truth. Even where the defendant does not wish to appear before him it is the duty of the judge to seek him out and to discuss possible defences with him. The judge has a duty to the parties to ensure that

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[419]W J Habscheid "The Fundamental Principles of Law of Civil Procedure" 14 Cilsa (1984) 11.

[420]supra.

they understand their rights and obligations and to assist in their exercising them.[421] According to Ison:

> "The primary guide rule should be the responsibility for reaching the just conclusion of a case rests on the court, not on the litigant.[422] ... The essence of the proposal is that the judge should be allowed to proceed in any way he thinks fit in a particular case until he has carried the enquiry to a point he feels that the investigation has been sufficiently thorough for a conclusion to be safely reached."[423]

The reasons for Ison's proposals were not to further the interests of the State, but rather to protect the individual consumer.[424] The County Courts had largely become collection courts where claims of sellers and finance companies were enforced "regardless of their legitimacy".[425] Claims by buyers hardly existed. A seller was far more likely to enter a defence than a purchaser.

The court was seen to be a means where if the seller took action the system would itself determine the legitimacy and

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[421]Ison (1972) 38 Modern Law Review 18 27-31.

[422]Ison 27.

[423]Ison 28.

[424]Ison 18-22.

[425]Ison 18.

validity of the plaintiff's claim and assist in the assertion of a defence if it existed.

Where the buyer had a claim the court would then assist him in bringing his claim against the seller.[426] The system rather than being described as socialist can be described as paternal where the court acts as guardian for the little man.

27. THE NATURE OF THE PROCEEDINGS IN THE COMMUNITY COURTS IN ZIMBABWE

The system proposed in the Civil Rules of the Community Courts in Zimbabwe is also paternal in nature. It seeks to protect the parties and provides a means for their assistance. Although it is the plaintiff's choice whether or not to institute action, it is the clerk who signs and issues the summons and who hands it to the messenger. The messenger also has certain duties with regard to the defendant.[427]

While the Small Claims Court Act and Rules, which as has been seen[428] contain few specific provisions relating to the functions of the Commissioner the Zimbabwe Community Court

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[426]Ison, 80.

[427]supra.

[428]supra.

rules[429] contain specific provisions dealing with the Presiding Officer's duty as counsel for the parties, mediator and adjudicator.

Seidman has written:

> "With respect to procedure, (the Act), moved away from the traditional model of the adversarial Court towards a model that imposed on the judge obligations to take positive action to protect individual rights and to seek conciliation and reconciliation."[430]

The nature of the proceedings in the community courts are discussed with regard to their informality, simplicity and fairness as well as the Commissioner's duties as adjudicator and investigator.

27.1 Informality, Simplicity and Fairness in the Community Courts

In terms of Section 17 (1) of the Act[431] proceedings in the primary courts (the County Court and Village Court) shall be

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[429]Promulgated in terms of the Customary Law and Primary Court Act 6 of 1981 (Zimbabwe).

[430]Robert Seidman "The Individual in African Courts; Zimbabwean New Primary Courts" in P Takirambudde (ed.) Proceedings of the First All-African Law Conference (1981).

[431]Act 6 of 1981 (Zimbabwe).

conducted "in as simple and informal manner as is reasonably possible, as in the opinion of the presiding officer, seems best fit to do substantial justice". The aims of the Community Courts are further listed in Rule 4 of the Community Courts:

> "The Community Courts have it as their great objective to do justice between individuals. To that end the presiding officers shall endeavour to simplify procedures, make them understandable to the individual parties, no matter how poorly educated in the ways of the Courts".[432]

It is also clear that the speedy resolution of disputes is one of the primary aims. Thus there is a duty on the presiding officers to ensure that the parties in the Court use the Rules to expedite judicial business and in terms of Rule 4 (6) the Courts "shall view with disfavour claims whose consequences delay the prompt solution to litigation". A fair trial is also specifically provided for in the Rules. In terms of Rule 12 (1) (b) there is a duty on the Court to ensure that each party receives reasonable time to prepare his case and a fair opportunity to present it.

27.2 The "Mutonqi" or Presiding Officer as Counsel for the Parties

The presiding officer's role as Counsel for the parties is also clearly provided for. There is a duty on the Court to ensure that the litigant understands each stage of the

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[432]Rule 4 (1) Statutory Instrument 809 of 1981.

proceedings and "that an unrepresented party does not become a victim of his own lack of knowledge or ability to invoke judicial procedures".[433] There is also a duty on the Court to inform the parties of the nature of the proceedings, and of the nature of every allegation made against them.[434] To this end the Court is obliged to ask certain questions of the parties prior to the trial. These include asking the plaintiff whether he adheres to the claim, putting the claim to the defendant and ensuring that the defendant understands the claim. There is also a duty to call upon the defendant to admit or deny the facts alleged in the claim, record the defendant's plea and any counter-claim, and record the plaintiff's reply to any counter-claim.[435]

27.3 <u>The "Mutongi" or Presiding Officer as Adjudicator</u>

It is clear that the "Mutongi" has an adjudicatory role from his power to grant judgments and make orders.[436]

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[433]Rule 4 (2) Statutory Instrument 809/81.

[434]Rule 12 (1) Statutory Instrument 809/81.

[435]Rule 13 (2) Statutory Instrument 809/81.

[436]Section 12 of the Act and Rule 23 (2) Statutory Instrument 809/81.

27.4 The "Mutongi" or Presiding Officer as Investigator

The rules provide for the leading of evidence and the cross examination of the parties and witness by their opposition.[437] The rules also provide for the re-examination of the parties. Thus the adversarial method at the trial is still maintained. However the presiding officer is given a more active role that in traditional adversarial systems. In terms of Rule 15 (5) the presiding officer may question any witnesses and in terms of Rule 15 (6) "a presiding officer may, at his own instance, receive the evidence of a person whom he believes is likely to give material evidence". To this extent, the presiding officer has even greater power than the presiding officers of West Germany.[438]

The "Mutongi" is not bound by the rules of evidence.[439] The Court may ex officio take steps to join an interested person as co-plaintiff or co-defendant or join separate action.[440]

Thus, although there are adversary elements, there are many similarities between the Community Court rules and the procedure of the inquisitorial systems which are inconsistent with adversary principles. Again the object of these

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[437]Rule 15 Statutory Instrument 809/81.

[438]Fritzbauer "The Active Role of the Judge" (1986) Law and State 31 38.

[439]Rule 10 (3) Statutory Instrument 809/81.

[440]Rule 10 (3) Statutory Instrument 809/81.

provisions was not to further the interests of the State but rather to ensure a fair trial for the uneducated or illiterate members of the community.

28. THE NATURE OF THE PROCEEDINGS OF THE SMALL CLAIMS COURT

There is no doubt as a creature of statute the Small Claims Court and its officers have only those powers that are either conferred by the Act or, have not been excluded by the common law. To this extent van Loggerenberg is correct.[441]The Act does not give the Commissioner the power to amend a summons or other document mero motu. Neither can he decide on a different cause of action. Likewise he has no power to ignore a settlement. He has the power, however, to refuse to allow the withdrawal of an action.[442]

However the object of the Act was to create a system protective of the litigants' rights and is to this extent paternal, while prohibiting legal representation. It is imperative that the principles of natural justice are complied with in the Small Claims Courts. Natural justice not only demands that the parties be given an opportunity to contravert any allegation against them, or to make representations, but also before requiring them to exercise these rights, that they understand their rights and

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[441]Van Loggerenberg 1987 De Rebus 343.

[442]Section 30 (1) Act 61 of 1984.

obligations. There is therefore an obligation on the Commissioner to ensure that the parties know what case they are required to prove or meet and where not to explain the course they should take. Thus, although the Commissioner has no power to alter or amend a summons, or cause of action mero motu, there is in my opinion a duty to advise the plaintiff that the facts proved do not support the cause of action as it stands. Furthermore there is a duty on the Commissioner to advise the plaintiff that unless the cause of action is amended, he will not succeed. Only after the plaintiff has with full knowledge of his rights, expressed his intention not to amend, will the Commissioner be entitled to find against him. The Commissioner's failure so to advise the plaintiff will amount to a gross irregularity. The same would apply where the Commissioner considers that the plaintiff should be awarded more than the amount claimed. In such a case it will be the Commissioner's duty to advise both plaintiff and defendant of his attitude. It is unlikely that the plaintiff will refuse to apply for such amendment after the advice furnished to him. Although the defendant may object, this in practice should have no effect if the Commissioner has considered all the relevant facts.

Although many of the Sections of the Small Claims Court Act[443] refer to the need for applications to be made by the parties, such Sections must be interpreted taking into consideration the object of the Act. Most litigants do not

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[443]61 of 1984.

know their rights and cannot be expected to know them. Accordingly the right or need to make an application will have to be conveyed and explained to them. To the extent that it can be assumed that the parties will accept the Commissioner's suggestions and recommendations, it may not be necessary formally to advise of all the implications of the application. The applications for amendments, judgments by default, dismissals of action etc., will take place informally with the Commissioner taking the lead in making suggestions and recommendations to the parties. This paternalistic approach necessary in interpreting the Small Claims Court Act has been ignored by Van Loggerenberg. Although the Commissioner, as his counter-part in West Germany, can only make suggestions the difference between the systems must be remembered. In the Federal Republic, the parties' representatives play an important role. The absence of representation in the Small Claims Court is an important difference. An aspect of importance is that although the ultimate responsibility for the contents of the summons or other document lies with the litigant, in many cases the action is instituted upon the advice of the Clerk or legal assistant, who is an official provided for that purpose by the Small Claims Court Act. Likewise the drafting of the Particulars of Claim is in many cases done by the Clerk or legal assistant. To penalise a plaintiff in such cases for not drafting his Particulars of Claim correctly without advising him of the defects will be inconsistent with the purpose and objects of the Act. The Commissioner's duty is not only that of adjudicator, but being the only person who

is able during the hearing to furnish assistance, he must also fulfil the role of joint advisor to both parties.

If Section 26 (3) of the Small Claims Court Act had been the only provision dealing with the Commissioner's powers, then there would be some merit in Van Loggerenberg's opinion that:

> "Gevolglik is dit duidelik dat die begrip inkwisitoriaal soos wat in Artikle 26 (3) gebruik word, 'n ander betekenis as 'inkwisitories' in bovermelde sin moet hê. In die lig van die euisdemgeneris reël kan gesê word dat die wetgewer met die begrip inkwisitoriaal niks meer as bloot ondervragend bedoel het nie. Eers genoemde begrip vorm dus del van of is 'n specie van die genus ondervraging of vraagstelling".[444]

Van Loggerenberg comes to the conclusion that the contents of Section 26 (3) merely confer a duty on the Commissioner to control the manner of questioning the proceedings.[445] However the position could have been achieved without the phrase: "But the presiding officer shall proceed inquisitorially to ascertain the relevant facts". The position would have been the same had Section 26 (3) read:

> "A party shall not question or cross-examine the other party to the proceedings or a witness called by the latter party, but the presiding Commissioner shall proceed to ascertain the relevant facts by questioning the parties or witnesses."

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[444]Van Loggerenberg 1987 De Rebus 345.

[445]Ibid.

The legislature must have intended something additional by inserting the word "inquisitorially". This is further substantiated by the phrase "and to that end" which exists in Section 26 (3). It would therefore seem that the questioning of the parties and witnesses is something in addition to proceeding inquisitorially. It is also to be noted that Section 26 (3) applies only to the oral evidence of the parties or their witnesses. Section 26 (2) is also of assistance in interpreting the functions and powers of the Commissioner. It reads:

> "Evidence to prove or disprove any fact in issue may be submitted in writing or orally".

It is framed in the passive tense. It does not refer by whom the evidence is to be submitted. Obviously oral evidence can only be submitted by a party to the proceedings or a witness. However the same cannot be said of written evidence. Thus written evidence submitted by a party not called as a witness prior to the proceedings or by the clerk of the court can be taken into account. Written evidence could be submitted to the clerk who merely places it in the Court file. As has been stated before, documents such as police statements, plans, bank statements etc., may be of utmost importance to a decision of the matter. It is also important to consider the purpose of the Small Claims Court. Its purpose is to provide a speedy, cheap and expeditious procedure for the average layman without the need for legal representation. To cater for such a system clerks and legal assistants have been introduced. There is no better method of providing a

speedy and expeditious service than for the clerk to perform the functions an attorneys' office would otherwise perform. However of utmost importance in determining the Commissioner's powers, functions and duties, is Section 26 (1) which provides:

> "Subject to the provisions of this Act the rules of evidence shall not apply in respect of the proceedings in a Court and the Court may ascertain any relevant fact in such manner as it may deem fit".

Van Loggerenberg's opinion fails to take into account the second part of this Section. His opinion would be justified had Section 26 (1) merely referred to the fact that the rules of evidence are not applicable. However the Section goes further. The Court's power to ascertain any relevant fact in such manner as it deems fit must by virtue of the word "and" after the comma be interpreted independently of the first part of the Section. Van Loggerenberg seems to be of the opinion that it can only be interpreted in relation to the Court's power to take into account evidence which would otherwise be inadmissible.[446] The latter part of the Section does not refer specifically to the type of evidence which may be taken into consideration. It must therefore mean something different.

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[446]Van Loggerenberg 1987 De Rebus 343.

As has been stated above, an inquisitorial system is one where the presiding officer's duty is to investigate the facts and seek the objective truth. However it is to be remembered that even in socialist countries, the presiding officer has no authority to raise new issues which are irrelevant to the cause of action or the facts in dispute.[447] It is essential to take the provisions of the Hoexter Commission into account in interpreting the Act.

> "The Commission envisages the procedure to be adopted at the trial in the Small Claims Court to be an arbitration conducted in an informal atmosphere by the adjudicator who will assume an active inquisitorial role.[448] The procedure in the Small Claims Court will be inquisitorial and not adversarial. While combining the roles of mediator, counsel for the plaintiff, counsel for the defendant, the arbitrator, the chief function of the adjudicator will be the active investigation of the facts in dispute".[449]

The Commission therefore envisaged that the Commissioner would be an investigator. It also appears that evidence taken over the telephone was contemplated by the Commission[450] This appears to be a characteristic which according to Van Loggerenberg belongs to the inquisitorial

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[447]See Stalev and Kiralfy above.

[448]Fourth Interim Report 128

[449]Fourth Interim Report 200.

[450]Fourth Interim Report 161-162.

model.[451] It is therefore clear that the reference to the Court's power to "ascertain any relevant fact in such manner as it may deem fit" gives the Commissioner the authority to take into consideration evidence not referred to by the parties and cannot be interpreted so as to only refer to the Court's power to question in terms of Section 26 (3). The Commissioner's function as Counsel of the plaintiff and defendant and joint advisor, places him in a position where the only way he can avoid a conflict of interests or partiality is to search for the objective truth. Any other manner of proceeding would be improper. In his search for the objective truth it will be necessary to take into account facts not referred to by the parties. Although one method of proceeding is to suggest to the parties what evidence is required the individual litigants may not have the means or the knowledge of how to obtain the relevant evidence. While a suggestion to a legal representative in West Germany may have the desired effect, the same cannot be said with regard to the parties in the Small Claims Court. The search for evidence could be time-consuming and create unnecessary delays. It is it seems, implied in the contents of Section 26 (1) that the Commissioner can himself search for the truth without reference to the parties. Implied in the sub-section is the presumption that the parties will consent to the Commissioner's assistance in obtaining the evidence required for a proper decision.

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[451]Van Loggerenberg 1987 De Rebus 344.

The exercise of his power however is always subject to the audi alterem partem principle and the parties' rights to comment on the content of the evidence which the Commissioner himself has obtained. Thus the Commissioner may himself, or through the clerk, request reports, plans, statements, records etc., which are relevant and deemed necessary. Even statements taken from persons not called as witnesses, or records of consultations will be admissible. However there will be a duty on the Commissioner to put the contents hereof to the parties.

The Act does not give the Commissioner the power to subpoena or summon witnesses to give evidence. Although a party has the right to call a witness there is no method of enforcing such witness' attendance at the trial. Neither is there any provision for taking evidence on commission etc. The reason for this seems to flow from the provisions of Section 26 (1). If Section 26 (1) is not to be interpreted as incorporating the power to take evidence on commission into account then there would be a serious lacuna in the Act. Circumstances where evidence on commission would have been required must have been contemplated by the legislature especially at the outset where only a few Courts existed in the Republic. Codes of civil procedure in both West Germany and the socialist countries have detailed provisions dealing with evidence of persons who do not give evidence at the trial.[452] West Germany Civil Procedure draws a distinction

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[452]See for example Article 54 of the Code and Civil (continued...)

between the Judges' power to take into account other evidence ex officio on the one hand and the power to call witnesses not referred to by the parties on the other.[453] With regard to the power of district officers in the former Rhodesia to call witnesses, prior to the coming into force of the Customary Law and Primary Court Act of 1981, the President of the African Appeal Court stated:

> "The lower Court is a creature of statute. It cannot act outside the powers and the functions conferred by the Statute. The procedural provisions of the rules of the lower Courts do not confer authority to call a witness".[454]

Thus even in a Court where it has been held that it is the Court's duty to assist the parties, the Courts have held that the power to call witnesses does not exist.

Section 26 (1) is wide enough to include statements of persons not called as witnesses. Even if such statements are taken by the Clerk or the Commissioner extra-curially these may be taken into account. The Commissioner may be faced with a problem where a witness may be willing to give evidence, but the parties object to his being called. Is the

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[452](...continued)
Procedure of the old German Democratic Republic.

[453]F Bauer 38.

[454]Schaap P. Chomunormwa Mhlanga vs Nberikwazbo Nherere 1973 AAC (v).

Commissioner in these circumstances entitled to call him as a witness notwithstanding the objections? The object of the Act was to create a forum for the benefit of those parties who could not afford access to other Courts. In so doing it created a procedure where the function of the Commissioner is to hold an enquiry. Whereas in other Courts of law the proof of facts is left in the hands of the parties assisted by their legal representatives, in the Small Claims Court the Commissioner may take into account his own observations, knowledge and experience. It is submitted therefore that the parties cannot object to the Commissioner taking these facts into account provided the audi alterem partem rule is complied with.

The facts which the Commissioner may take into account are those which he deems necessary. His role is to investigate the relevant facts. His function is therefore to search for the truth. The Act does not lay down what facts the Commissioner has to base his decision with regard to the exercise of his discretion in terms of Section 26 (1). The Commissioner is entitled to ascertain any relevant fact in any manner which in his opinion is considered appropriate. He is not bound by any opinion of the parties to the action. His decision in this respect will only be reviewable if he is not bona fide in the exercise of his discretion.[455] Accordingly it is submitted that notwithstanding the parties'

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[455]Schidiack vs Union Government (Minister of Interior) 1912 AD 642.

objection thereto, the Commissioner may take into account evidence of a witness who is called by him.

29. COMMENT ON CIVIL PROCEDURE AND THE ROLE OF THE PRESIDING OFFICER IN THE SMALL CLAIMS COURT

The Small Claims Court Act introduced a hitherto unknown and foreign procedure to Commissioners who have been trained in the tradition of the adversary procedure. Precise guidelines and clarity are therefore it is submitted necessary. It is submitted that the Act [456] lacks clarity in certain respects. Many of the recommendations of the Hoexter Commission were implemented. However some were not.[457] Certain provisions do not specify the procedure to be followed or the duties of the Commissioner in sufficient detail.[458] This may lead to confusion and uncertainty.

Despite there being no link between the report of the Hoexter Commission[459] and the Community Court (Civil) rules, the latter's provisions embody most, if not all of the Commission's recommendations with regard to the procedure to

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[456]Act 61 of 1984.

[457]Supra.

[458]Supra.

[459]Fourth Interim Report.

be followed and the role of the presiding officer[460] There is however a vast difference between the provisions of the Zimbabwean Community Court (Civil) rules and the South African Small Claims Court Act and Rules. The Community Court rules are characterised by detailed and specific provisions while there are very few contained in the Small Claims Court Act. The provisions of the Community Court Rules relating to the role of the presiding officer could serve as a useful guide to Commissioners in South Africa. A consistent approach by he Commissioners would result.

The Customary Law and Primary Courts Act[461] and the Community Court Rules were introduced in order to foster greater trust in the legal system which had up until then existed in Rhodesia/Zimbabwe[462]. It would therefore be appropriate to look at that country's laws in order to determine how access to the law by the man in the street can best be achieved.

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[460]The only difference would seem to be the emphasis on mediation and conciliation.

[461]Act 6 of 1981 (Zimbabwe).

[462]Supra.

CHAPTER FIVE

ENFORCEMENT AND RECOVERY IN THE SMALL CLAIMS COURT

1. INTRODUCTION

Most people who institute action in the Small Claims Court do so for one purpose: To recover an amount of money they consider the defendant owes them. A judgment in their favour without the necessary means to obtain satisfaction thereof is "a phyrric victory"[1] and may result in the disuse of and lack of confidence in the Small Claims Courts.

The complex recovery procedure of the Small Claims Court has been criticised by a number of writers.[2] Eovaldi and Meyers state: "For litigants who must use the formal collection process the outcome is bleak .... Litigants lack knowledge of the procedure for the collection of judgments and even the more knowledgeable eventually give up their efforts because of the complexity of the procedures".[3] Steadman and Rosenstein write: "As is widely known the procedure in collecting a judgment from an unwilling debtor is

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[1]Deever et al (1975) 28 Vanderbilt Law Review 711 784.

[2]Deever et al 784.

[3]Thomas Eovaldi and Peter R Myers: "The pro se Small Claims Court in Chicago: Justice for the Little Guy" (1978) 72 North Western University Law Review 947 991.

frustrating, expensive and often unrewarding".[4] The study of recovery rates and successful use of the procedures is complicated by the lack of information available. There is nothing to prevent settlement without the Court's or clerk's knowledge. Likewise there is little information received from those responsible for assisting in the recovery.

It has been suggested that a method should be adopted to ensure notification to the Court in all cases resulting in partial or complete satisfaction of the judgment. This notice should be sanctioned by a criminal penalty in the event of non-compliance. An alternative would be to require all settlements to be made through the Courts.[5] A satisfactory solution to recovery procedures has not been found. While the procedures in respect of the adjudication of Small Claims have been simplified this has in general not been so with recovery.

The enforcement and recovery procedures of the countries of the United Kingdom and South Africa are discussed and analysed in this chapter. Thereafter the South African system is compared to the system of enforcement and recovery

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[4]Steadman and Rosenstein 1325; See also A Mulvaney and D S Greer "Small Claims: The Northern Ireland Experience" (1987) Civil Justice Quarterly 56 65.

[5]Carl L Pagter, Robert McClosky and Mitchell Reins "The California Small Claims Court" (1964) 52 California Law Review 876 890.

of the customary Courts in Zimbabwe. The advantages of the Zimbabwean system where the clerk of the Court has a far more active role are stressed. Suggestions for improvement to the South African system are made with specific emphasis on greater simplicity and more involvement on the part of the Court's staff.

2. ENFORCEMENT OF JUDGMENTS IN ENGLAND AND WALES

There are no special procedures for the enforcement of small claims judgment debts in England and Wales. The manner of enforcement of awards of small claims arbitrations is the same as that of any other county court debts.[6] The methods of enforcement are oral examinations of the debtor, time to pay orders, warrants of execution, garnishee procedures, attachment of earnings orders, and warrants of committal.[7]

2.1 Examination of Judgment Debtor

When an order or judgment requires payment of a sum of money an ex parte application may be made by the judgment creditor, to the Court of the district where the judgment creditor resides or carries on business for an order that the judgment

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[6]M Birks "County Courts in Lord Hailsham of St Marylebone" (ed) Volume 10 Halsbury's Law of England (1975) 419.

[7]Halsbury's Law of England 190-293.

debtor attend Court to be examined as to his means.[8] The hearing can take place before a Registrar.[9]

2.2 Time to Pay Order

The Court may order that the judgment debt be paid in one lump sum forthwith, or a fixed period or by way of instalments payable at such times the County Court may specify.[10] Where there is an unsatisfied judgment or order either the creditor or debtor may apply on notice to the other party to the Court who granted the order for a time to pay order.[11]

2.3 Warrants of Execution

Warrants can be issued for the whole amount of the judgment debt or if payable in instalments for the amount in arrears only.[12] The plaintiff may deliver a notice of levy in the prescribed form to the debtor wherein the amount to be levied is stated.[13] Prior to the sale in execution the sale must

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[8]Emlyn Wiliams "ABC Guide to Practice of the County Courts: (1987) 57.

[9]Halsbury's Law of England 204.

[10]Halsbury's Law of England 190.

[11]Halsbury's Law of England 192.

[12]Halsbury's Law of England 209.

[13]Halsbury's Law of England 214.

be advertised by the registrar.[14] The sale must be by public auction.[15]

2.4 Garnishee Proceedings

Debts owed by third parties to the execution debtor can be attached.[16] Garnishee proceedings are brought by way of affidavit by the creditor . On the information contained in the affidavit the registrar issues a garnishee summons on which the date of hearing is endorsed.[17] The summons must be served on the garnishee and the judgment debtor personally.[18]

2.5 Attachment of Earnings

Application for an order may be made by the person to whom payment is required to be made under the original order. The application and affidavit are filed and served on the debtor who has eight days to file his reply.[19] The application is heard in chambers. It may proceed in the absence of the

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[14]ibid.

[15]ibid.

[16]Halsbury's Law of England 228.

[17]ibid.

[18]Ibid.

[19]Emlyn Williams 21.

creditor provided he has filed an affidavit[20] Once granted the order is served on the debtor and his employer. The order comes to an end on the making of an order for the committal of the debtor. When a warrant is issued for the commitment for the enforcement of the debt the employer is notified that he may stop making deductions from the debtors pay.[21]

2.6 Warrant of Committal

A warrant may be issued by a judge against any person who refuses or neglects to do any act required by an order or judgment.[22] If an order is not complied with the registrar may issue a notice requiring the respondents to attend the Court on a day to show cause why a warrant of committal should not be issued.[23] A committal order operates as an order for the issue of a warrant of committal and a copy of the order must be served on the person to be committed.[24]

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[20]Ibid.

[21]Ibid.

[22]Emlyn Williams 60.

[23]Halsbury's Law of England 253.

[24]Emlyn Williams 61.

2.7 Criticism of the Enforcement Procedure in England and Wales

Studies undertaken by the Queen Mary College, University of London and Touche Ross Consultants at the request of the Lord Chancellor's Department indicated that the warrant of execution dominated enforcement in consumer debt cases in the County Court.[25] Most warrants of execution were part warrants.[26] [27] The low secondhand value of household goods and equipment and the relatively high costs of seizure have the effect that for the most part goods are not seized or sold.[28] Rather the warrant procedure operates on the threat of seizure.[29] The warrant procedure has been criticized by all parties concerned: creditors complain that it is not effective enough; bailiffs that they do not have the necessary powers or incentives to make the procedure effective; the Court's administration because of the

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[25]Jane Phipps "Warrant of Execution in the Recovery of Consumer Debt in the County Court. A lost opportunity for change?" (1990) 8 Civil Justice Quarterly 234 237-238.

[26]Ibid.

[27]Part warrants are issued where there are instalment orders and the debtor has fallen into arrears. The warrant may be for a minimum figure, one monthly instalment, or any part of the balance above that figure.

[28]Phipps 234.

[29]Ibid.

manpower required; and the debtors because of the deception which uses the threat of seizure to enforce payment.[30] Reform, according to Phipps was therefore necessary.[31] The popularity of the warrant of execution procedure compared to other enforcement procedures was due to a number of factors.[32] Each enforcement procedure has a qualification condition. An attachment of earnings order requires that the debtor be employed and earning an income above the protected earnings rate; while a charge order would only be successful if the debtor had an interest in property or shares. In the case of a warrant of execution the requirement was that the debtor owned non-exempt goods or chattels.[33] Most judgments go by default.[34] A requirement for effective enforcement is up to date information about the debtor.[35] The difference between the warrant of execution and other enforcement procedures is that the information confirming the qualifying conditions need not be presented when the procedure is requested and can take place without prior application or

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[30]Phipps 235.

[31]Ibid.

[32]Phipps 241-247.

[33]Phipps 241.

[34]Phipps 243.

[35]Phipps 247.

hearing.[36] Hearings are expensive and knowledge of the qualifying condition was paramount.[37] The gathering of information on debtors was not liked by creditors. They found such an exercise expensive, unreliable and ineffective.[38] Oral enforcement procedures in addition to being time-consuming and relatively expensive are harder to fit into a streamlined enforcement department.[39]Creditors therefore sought improvement in greater powers being given to bailiffs.[40]

As part of the Lord Chancellor's Civil Justice Review the debt enforcement procedure in the County Courts was investigated.[41] According to the review body the following considerations should form the basis of the debt recovery system in the County Courts.

1. The system should aim to recover as much as possible of the debt quickly, simply and cheaply.

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[36]Ibid.

[37]Ibid.

[38]Phipps 248-249.

[39]Phipps 251.

[40]Ibid.

[41]I R Scott "Civil Justice Review : Enforcement of Debt" (1987) 6 Civil Justice Quarterly 194.

2. Creditors should be able to obtain adequate information about the debtor's circumstances.

3. Maximum information should be available about debtors on public files.

4. There should be machinery for bringing together multiple debts.

5. Debtors should not be subjected to unwarranted hardship and the period of repayment should not last indefinitely.[42]

The review body however was of the opinion that the responsibility to obtain information about the debtor and to bring enforcement proceedings should remain that of the creditor.[43] It was not the Court's function or purpose to render assistance in respect of the enforcement system. This should be the function of separate agencies who could co-operate closely with the Courts.[44] In order to recover as much and as quickly as possible it was recommended by the Review Body that the creditor

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[42]I R Scott "Debt Enforcement" (1988) 7 Civil Justice Quarterly 302 303.

[43]I R Scott (1987) 6 Civil Justice Quarterly 195-196.

[44]Ibid.

> should have a flexible choice of enforcement procedures and should be entitled to bring more than one simultaneously.[45] The review saw the need for advice to debtors but held the view that this was the function of lay representatives and advice agencies.[46]

The establishment of an enforcement of judgements office (EJO) similar to the institution in Northern Ireland was not approved of by the review body as it would not improve the situation.[47] The procedure would be more expensive, would still be staff intensive, and would not improve the creditor's recovery rate.[48] According to Phipps, the Civil Justice Review was a lost opportunity for change. It failed to distinguish between the way the enforcement system would or should be used in the interests of all parties and the way it is used in the interests of one party only.[49]

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[45]Ibid.

[46]Ibid.

[47]I R Scott (1988) 7 Civil Justice Quarterly 302; Phipps 257-258.

[48]Phipps 258.

[49]Phipps 261.

3. ENFORCEMENT OF JUDGMENT DEBTS IN NORTHERN IRELAND

In terms of the Enforcement of Judgments Act[50] a central Enforcement of Judgments office (EJO) came into being in 1971.[51] It is only through this office that a judgment creditor can enforce his judgment. The awards of the circuit registrars in respect of small claims are enforced through the EJO. Prior to enforcement the judgment creditor must obtain a certificate of award from the County Court which granted the judgment.[52] Thereafter the certificate together with a notice of intent to enforce a money judgment is sent to the Enforcement Office with the prescribed fee. After the certificate and notice have been issued copies of the documents are returned to the judgment creditor and sent to the judgment debtor by post giving him 10 days to comply with the award.[53] If the award is not satisfied within 10 days of receipt of the notice the judgment creditor may apply to the EJO for the enforcement of the judgment.[54] Simultaneously with an application for enforcement the judgment debtor may apply for an attachment of earnings order.[55] The Enforcement of Judgment Office may enforce a judgment by a

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[50](NI) 1969.

[51]Greer and Mulvaney 65.

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[53]Ibid; Greer and Mulvaney 96.

[54]Greer and Mulvaney.

[55]Ibid.

wide variety of methods including instalment orders, orders of seizure of goods, or discharging land, stocks and shares, the disposal of funds following an order and the attachment of earnings.[56] The Enforcement of Judgment Office is responsible for ascertaining the name and address of the employer of the judgment debtor when requested to do so.[57] After the application for the enforcement of a judgement debt has been processed an enquiry into the financial circumstances of the debtor is held. The debtor may be summonsed to the Enforcement of Judgment Office in order for the enquiry to be held.[58] Usually however the debtor is interviewed at his home or place of business.[59] The enforcement officer who holds the enquiry will complete a report giving details of the debtor's assets and liabilities. The Enforcement Office may order the debtor to pay by way of instalments.[60] Where the debtor fails to co-operate with the enforcement officer he may be summonsed to appear before him at the Enforcement Office to give evidence as to his financial position under oath.[61] A warrant for the debtor's arrest may be issued in order to bring him to the office in

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[56]Greer and Mulvaney 65.

[57]Greer and Mulvaney 97.

[58]Ibid.

[59]Ibid

[60]ibid

[61]Ibid.

order to attend the enquiry.[62] The enforcement procedure in Northern Ireland has been criticized for the following reasons:

1. Expense

   Not only must the creditor pay a fee to enable a notice of intention to proceed to be sent by the enforcement office but where this has no results, pay a further fee based on a percentage of the amount at stake in order to proceed to enforcement.[63] These fees are out of proportion with the application fee payable to the County Court office.[64]

2. Delay

   The EJO has a reputation of being slow in the enforcement of awards.[65] There was however according to Greer and Mulvaney no evidence to prove this.[66]

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[62]Ibid.

[63]Greer and Mulvaney 65.

[64]Ibid

[65]Greer and Mulvaney 66.

[66]Ibid

3. Complexity

Despite the attempts at simplifying the procedure the enforcement of judgments is still a complex business.[67]

In the opinion of Greer and Mulvaney there should be greater participation and assistance in the enforcement procedure by the legal profession.[68] More finances should be made available for this purpose.[69]

In 1985 the Lord Chancellor set up a Committee to consider whether any changes in the law and practice relating to the enforcement of judgments was desirable.[70] The Report of the Committee was published in 1988.[71] Included in its recommendations where the following:

1. In order to obtain and gather information relating to debtors more effectively and efficiently and expeditiously a self completion questionnaire be made use of.[72]

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[67]Ibid.

[68]Ibid

[69]Greer and Mulvaney 67.

[70]Greer and Mulvaney 68.

[71]Phipps 256.

[72]Phipps 257.

2. The EJO maintain its practice and powers to select enforcement procedures.[73]

3. The system of first-come-first-serve for the distribution of assets in enforcement be replaced by a system of asset sharing.[74]

4. The responsibility for ascertaining the debtors means remains with the enforcement office.[75]

The experience in Northern Ireland suggests that much of the enforcement activity in the County Courts is unnecessary and a waste of resources as many of the debtors could pay their judgments if the terms accurately reflected their ability to do so and the alternatives to not pay were made clear and were realistic.[76]

4. RECOVERY OF DEBTS AND ENFORCEMENT PROCEDURES IN SCOTLAND

The procedures for the enforcement of Court decrees for debt are contained in the Debtors (Scotland) Act[77] and the Act of

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[73]Ibid.

[74]Phipps 258.

[75]Phipps 259.

[76]Phipps 260-261.

[77]1987.

Sederunt (Proceedings in the Sheriff Court under the debtors (Scotland) Act 1987.[78] [79] The rules relating to the enforcement of the judgement debt are easy to understand. They are written in simple terms and are aimed at providing a procedure which can be applied by a layman without the need for legal representation.[80] Prescribed forms are designed for each application which may be brought. These forms are comprehensive and detailed.[81] They are framed in the first person.[82] Precise instructions of each step which has to be taken are contained and are simply and clearly stated.[83] Prescribed footnotes are detailed in both the rules and the

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[78]1988 (SI 1988 No 2013 S 192).

[79]Roger Bland "Progress in the Introduction of Small Claims Procedure in Scotland" (1987) 6 Civil Justice Quarterly 199 200.

[80]SI 1988 (2013 (S 192)).

[81]There are 64 forms in total relating to time to pay directions and variations thereof; pondings (attachments), warrant sales (sales in execution), variation of orders of attachment, applications for release of attached goods, extension of time periods for holding the goods, restoration of attached goods.

[82]Ibid

[83]Ibid

forms.[84] Those forms which are prescribed for the more complicated procedures or applications contain directions that should the applicant or party have difficulty they may approach a citizen advice bureau, a solicitor or even the Sheriffs office itself.[85] The rights of the judgment debtor or other persons who could be affected by any order or decree of a sheriff are explained in the service copy of the document.[86] Service may either be recorded delivery post or by an officer of the Court.[87] An aspect of the Scottish poinding (attachment) and warrant of sale (sale in execution) procedure is the emphasis on the rights of the execution debtor. The execution debtor may for example apply for the release of certain goods or article from attachment if such

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[84]Ibid.

[85]See for example forms 10 to 17.

[86]See for example Section 26 and Form 21 of SI 1988 No. 2013 (S192). In terms of Section 30 of the Debtors (Scotland) Act 1988 a notice to the debtor of an application for a warrant of sale (sale in execution) must be sent to him. The service copy of the notice details the debtors rights to object to the application, the grounds of objection and the steps to be taken if the debtor intends to object. At any application the judgment debtor may appear in person or be represented.

[87]See for example Section 26 (7) SI 198 No. 2013 (S192).

attachment is unduly harsh;[88] apply for the restoration of attached articles[89]; and object to an application for a warrant sale.[90] The Act of Sederent[91] also makes provision for debtors' applications for time to pay orders where none has been made by the sheriff in order to give the debtor an opportunity to pay the debt in instalments[92] or variations of time to pay directions[93] where the circumstances of the debtor have changed.[94] Poindings and warrants of sale are not the only enforcement or recovery procedures in Scotland. There is also provision for arrestment (garnishee) orders and maintenance arrestment orders;[95] variations thereof and applications related thereto.[96] Arrestment and maintenance arrestment orders are directed to the debtor's employer in

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[88]Section 16 and form 10 SI 1988 No.2013 (S192)

[89]Section 21 and form 15 SI 1988 No 2013 (S192)

[90]Section 30 Debtors (Scotland) Act 1987 and form 21 SI 1988 No. 2013 (S192).

[91]SI 1988 No 2013 (S192).

[92]Section 5 SI 1988 No 2013 (S192).

[93]Section 4 SI 1988 No 2013 (S192).

[94]The application may be brought by either creditor or debtor.

[95]Chapter IV SI 1988 No 2013 (S192).

[96]Ibid.

terms of which he is obliged to pay a certain amount of the debtor's monthly or weekly income to the Sheriff's Court.[97] Where the employer or debtor has any objections to the arrestment, he may make an application for a variation or rescission of the order.[98]

The sections and forms relating to arrestment orders are couched in simple, non-technical terms. However the procedure relating to arrestment is more complicated than the procedure for warrants and sale in execution.[99] It would seem that an attempt has been made to make the enforcement and execution procedure more accessible to the public and more effective. Generally speaking an average layman would find it possible to proceed without legal representation.

Where the interested party has difficulty in completing the forms or otherwise requires legal assistance the sheriff court is available to furnish such assistance.[100]

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[97]Section 38-40, 42-45 SI 1988 No. 2013 (S192).

[98]Sections 40 and 46 SI 1988 No. 2013 (S192).

[99]Compare Part III and Part IV of SI 1988 No. 2013 (S192).

[100]See for instance forms 1-10 SI 1988 (S192).

5. ENFORCEMENT AND RECOVERY IN TERMS OF THE SMALL CLAIMS COURT ACT 61 OF 1984

Chapter VII of the Small Claims Court Act[101] makes provision for the enforcement of judgments of the Small Claims Court. In terms of Section 39 the Court, after judgment, is obliged to enquire into whether the judgment debtor is able to comply with the judgment without delay. If the judgment debtor is unable to pay the Court may conduct an enquiry into the financial position of the judgment debtor and his ability to pay the judgment debt and whatever costs are payable.[102] Following the enquiry a Court may:

1. Order the judgment debtor to pay the debt and costs in instalments.

2. Authorise the issue of a warrant of execution against the property of the defendant.

3. Authorise the issue of a warrant and make an order to pay in instalments.

4. Suspend the execution of the warrant and the order on such conditions as to security or otherwise as the Court may determine.[103]

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[101]61 of 1984.

[102]Section 39 (1) of Act 61 of 1984.

[103]Section 39 (2) (a), (b) and (c) of Act 61 of 1984.

The judgment debtor may where no instalment order has been issued within 10 days of the judgment make a written offer to the judgment creditor to pay the judgment debt and costs in instalments.[104] If this offer is accepted the clerk of the court at the request of the judgment creditor may order the judgment debtor to pay the judgment debt and costs in accordance with his offer.[105] The order has the same effect as an order in terms of Section 39.[106] Where judgment has been granted or an order made in terms of Section 39 and the judgment debtor fails to pay the money in terms of the judgment or order, the judgment creditor may enforce the debt by execution against the debtor's moveable property or immovable property where the proceeds of the sale in execution of the moveable property are insufficient to satisfy the judgment debt.[107] No further steps are available in the Small Claims Court in order to enforce the judgment debt. If there is a nulla bona return in respect of the warrant of execution, or if the judgment debt is not satisfied by a sale in execution, the judgment creditor will have to proceed in the Magistrate's Court if further steps

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[104]Section 40 of Act 61 of 1984.

[105]ibid.

[106]ibid.

[107]Section 41 Act 61 of 1984.

to recover the debt are to be taken.[108] In May 1989 certain amendments to Chapter 7 of the Small Claims Court Act were published.[109] The amendments relating to the recovery procedure have not come into operation to date.

In terms of these provisions a warrant of execution will no longer be a competent mode of enforcement of the judgment debt in the Small Claims Court. If the judgment debt remains unpaid or if the instalments order is not complied with, the judgment creditor will have to proceed in the Magistrate's Court in order to recover payment.[110]

The effect of the provisions of the Act relating to execution[111] is not only that there will be a duplication of enforcement procedures[112] but legal expenses will probably

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[108]Section 44 of Act 61 of 1984.

[109]Small Claims Court Amendment Act 63 of 1989.

[110]Section 5 and 6 of Act 63 of 1989.

[111]Section 41 and 44 of Act 61 of 1984.

[112]If the Small Claims Court has granted an order in terms of section 39 of Act 61 of 1984 a further order in terms of Section 65 A of Act 32 of 1944 will have to be made. Likewise a further warrant of execution may have to be issued.

have to be incurred in taking steps to recover the debt.[113] In addition to the financial enquiry and warrant of execution procedure available to the judgment creditor in the Small Claims Court, the judgment creditor has further means of execution in the Magistrate's Court.[114] In the Magistrate's Court, emolument attachment orders in respect of the debtor's monthly or weekly income may be applied for on notice to the judgment debtor and his employer.[115] Garnishee orders or orders in respect of debts owed to the execution debtor are also competent.[116] These debts may be attached and become payable to the execution creditor.[117] The Magistrate's Court may also authorise a warrant for the judgment debtor's arrest and detention for contempt of court where he has failed to attend a financial enquiry to which he was

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[113]The procedure and requirements of the Magistrate's Court Act Rules are too technical and intricate for a layman to follow and comply with. See for instance Section 65A to Section 65M and Section 66 of the Magistrate's Court Act 32 of 1944.

[114]Section 65A to Section 65E and Rule 45 Act 32 of 1944 (inquiry into the financial position of the debtor and related matters); Section 66 and Rules 39 to 43 Act 32 of 1944 (warrant of execution).

[115]Section 65J Act 32 of 1944.

[116]Section 72 of Act 32 of 1944.

[117]Section 65A Act 32 of 1944.

summonsed or where no good cause can be furnished by the debtor for his failure to pay the judgment debt.[118]

The procedure relating to committal to prison in respect of debts has been criticised by the South African Law Commission.[119] Their criticism is that many debtors who are imprisoned for contempt of court are imprisoned without attending a financial enquiry and in fact for not attending such enquiry.[120] According to the Commission arguments in favour of retaining the warrant of committal procedure were arguments for the retention of a form of civil imprisonment.[121] A judgment against a defendant for the payment of a sum of money was an authorisation by the court of the plaintiff to recover the judgment amount from the defendant. It was not an order to pay by the court.[122] The Commission endorsed the view "that a judgment debtor should in principle not be held liable in his person (his life and liberty) for the payment of a debt. A judgment debtor should indeed be held liable in the aggregate of his means for the payment of his debt; execution in respect of a debt should,

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[118]Section 65A Act 32 of 1944.

[119]South African Law Commission : Report on Committal to Prison in Respect of Debt (1986).

[120]Report on Committal to Prison in Respect of Debt 35

[121]Ibid.

[122]Ibid.

however, be limited to his means."[123] The report[124] recommends a change in emphasis. Not only are the rights of the creditor to be taken into account. The right to recover the judgment debt and the enforcement procedures must take the interests of all parties into account. The debtor's financial position is the one essential factor to take into account in any action taken for enforcement of judgment debt.[125] Where the debtor does not attend a financial enquiry he should be brought before the Court by means of a warrant.[126]

Instead of a warrant of committal for 90 days being authorised where the judgment debtor fails to attend a financial hearing as is presently the case, the Commission has recommended that a warrant for the debtor's arrest be authorised in terms of which he must be brought to court within 48 hours.[127] In terms of the recommendation only where the debtor has wilfully failed to attend a financial enquiry should the court be empowered to sentence him for contempt of court and then only to a fine not exceeding

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[123]Ibid.

[124]Report into Committal to Prison in Respect of Debt.

[125]Report into Committal to Prison in Respect of Debt 37.

[126]Ibid.

[127]Report into Committal to Prison in Respect of Debt, Schedule C, 7.

R100,00 or imprisonment for a period not exceeding 30 days.[128]

6. COMMENT ON ENFORCEMENT AND RECOVERY PROCEDURES IN THE SMALL CLAIMS COURT

Simplified recovery procedures are required. According to Ruhnka, Weller and Martin:

> "The Court can simplify and improve the collection process in a number of ways. We would recommend that the judges be empowered to conduct an examination of assets immediately after judgment, so that a winning litigant need not take the extra step of bringing the losing party back into court if he refuses to pay. Court personnel should be trained in the collection process so that they can tell the litigants the steps that need to be taken."[129]

The recovery of a judgment debt can be facilitated in a number of ways:

1. Assistance by the commissioner.

2. Assistance by the Court personnel.

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[128]Report into Committal to Prison in Respect of Debt Schedule C, 8.

[129]John C Ruhnka, Steven Weller and Johan A Martin, "Small Claims Courts : A National Examination" (1978) quoted in the Fourth Interim Report at 171.

3. A simplified procedure.[130]

6.1 Assistance by the Commissioner

Mediators are more likely to be concerned about payment of the amount settled than adjudicators about payment of the judgment debt.[131] Much of the time spent by mediators is working out time payment schedules and discussing payment. They are also more likely to point out the seriousness of the obligation to pay and the consequences of failure to comply with the terms of the settlement.[132] Procedures resembling mediation are more likely to lead to payment than adjudicative procedures.[133] The judgments granted in respect of those cases where the Commissioner regards the pronouncement of the judgment as his final duty are less likely to be complied with than those where he explains the consequences of the judgment to the debtor and the debtor's obligations in connection therewith. The assertion of the seriousness and explanation of the outcome does install a sense of obligation in the judgment debtor. It is however also informative. Frequently after judgment is granted the

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[130]Infra.

[131]McEwan and Maiman (1981) 33 Maine Law Review 237.

[132]McEwan and Maiman (1981) 33 Maine Law Review 252.

[133]McEwan and Maiman (1984) 18 Law and Society Review 11 39.

judgment debtor is ignorant of the consequences of the judgment debt and of his obligation to pay.

In terms of section 34 (e) of the Small Claims Court Act, the court may grant an order 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 debt. Proper use of this device can facilitate the recovery of the debt and so avoid the necessity of the creditor having to take further steps for its recovery.

Even where no financial enquiry has been held in terms of section 39, or where no order has been made in terms thereof, Commissioners can assist in the recovery of the debt by explaining to the debtor that the amount is payable immediately and of the consequences of his failure to pay. This will include an explanation that a warrant of execution can be issued and his property attached in the event of non-payment.

A greater success rate can also be facilitated by making an order suspending the consequences of the judgment pending payment of the judgment debt or other obligation imposed by the court. In cases of default judgment an explanation to the judgment creditor of the steps to take for recovery will also improve the creditor's chances of success.

6.2 Assistance by the Court Personnel

Legal advice and assistance at the Small Claims Court should be available. The advice should include assistance in the drafting of the notices and other documents relating to execution as well as advising the creditor of the appropriate steps to be taken.

In the Birmingham County Court the largest amount of time spent in assisting the public concerned difficulties in the enforcement of judgments.[134] In terms of Rules 3 and 5 of the Small Claims Court Act, the clerk of the court and legal assistant may give advice in relation to any action and may draft any process in connection with it. It could be argued that advice after judgment is not advice relating to the action. Accordingly Rule 5 should be amended to include advice relating to the enforcement and recovery procedures available.

Recovery of judgment debts granted by default are less likely than recovery of other judgment debts.[135] Vidmar's statistics reflect that only 11% of the defaulted cases studied resulted in full payment of the judgment debt. In another 34% of the cases there was partial payment. This can be compared to 51% of the disputed cases which resulted in full recovery and a further 13% of the disputed cases which

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[134]George Appelbey "Small Claims in Birmingham County Court" (1985) 4 Civil Justice Quarterly 203 206.

[135]Neil Vidmar (1984) 18 Law and Society Review 515.

resulted in partial recovery.[136] In Northern Ireland about 60% of the disputed cases resulted in full recovery while another 5% in partial recovery.[137]

6.3 Simplifying Procedure

The formal collection procedures relating to Small Claims Court judgments in South Africa are complex. Rules 17, 18, 19, 20 and 21 relate to the collection of the judgment debt. Where use of section 39 and section 40 of the Act has not been made, recovery is only permissible by the attachment and sale of the property attached.[138] The Hoexter Commission recommended that the execution against the debtor's moveable property should be implemented.[139] The legislature went further, however, and rules relating to the execution, the attachment and the sale of immoveable property have been promulgated. It is surprising that while the court's jurisdiction is only R1 500,00 procedures involving immovable property should have been contemplated. In order to comply with the rules relating to the collection procedures:

1. a warrant must be issued by the clerk;[140]

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[136]Vidmar (1984) 18 Law and Society Review 530.

[137]Greer and Mulvaney 57 61.

[138]Section 41 Act 61 of 1984.

[139]Fourth Interim Report 186.

[140]Section 41 and Rules 17-21 Act 61 of 1984.

2. this must be handed to the messenger of the court;[141]

3. the messenger must trace the debtor, serve the warrant and attach the property;[142]

4. the judgment debtor has to draft and prepare sales notices which must be sent to the messenger and if the value of the property attached is more than R100,00 to a newspaper for publication;[143]

5. a date of sale must be arranged between the judgment creditor and the messenger of the court;[144]

6. the property must be sold by public auction.[145]

Where the debtor cannot be traced or there is otherwise a nulla bona return, the warrant must be re-issued and the procedure repeated.[146] In the case of an attachment of

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[141]Rule 17 Act 61 of 1984.

[142]Rule 19 Act 61 of 1984.

[143]Rule 19(8) Act 61 of 1984.

[144]Rule 19(7) Act 61 of 1984.

[145]Rule 19(7) Act 61 of 1984.

[146]Rule 18 Act 61 of 1984.

immovable property further notices have to be drafted and served on other persons including the mortgagee, other holders of real rights, the Registrar of Deeds, and newspapers where such notices have to be published in both official languages.[147] In addition the sale must be advertised in the Government Gazette. Complicated conditions of sale must also be drafted which have to be open for inspection.[148] It is an impossible task for the unrepresented layman to comply with these provisions. The execution creditor feels cheated if, after having obtained judgment, he is told that in order to recover the judgment debt legal advice will have to be sought. Theron comes to the conclusion that:

> "Al die voordele verbonde aan hierdie informele litigasie word sodoende uitgewis. Soos mag dit self gebeur dat die koste verbonde aan tenuitvoerlegging hoër is as die omvang van die vonnisskuld."[149]

It is only after an attempt at attachment has failed that the creditor is entitled to take the matter further and then only in the Magistrate's Court.[150] The further proceedings will

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[147]Rule 20 Act 61 of 1984.

[148]Rule 20 Act 61 of 1984.

[149]Lynette Theron "'n Kritiese Ontleding van die Howe vir Kleineise in Suid-Afrika" unpublished LLB thesis (1986) 43.

[150]Section 44 Act 61 of 1984.

necessitate the appointment of an attorney to recovery the debt.

7. ENFORCEMENT AND RECOVERY PROCEDURES IN THE COMMUNITY COURTS OF ZIMBABWE

Compared to the enforcement and recovery provisions of the Small Claims Court Act, the provisions of the Community Court (Civil) Rules of Zimbabwe create a simple procedure of enforcement. As opposed to the provisions of the Small Claims Court Act where the onus is on the judgment creditor to take steps to enforce the judgment, the clerk of the Community Court is central to the success of the enforcement of the judgment debt. It is the clerk, who after issuing it at the judgment creditor's request, must deliver the warrant to the messenger of the court. At the same time the clerk directs the messenger to attach so much of the property as is required to satisfy the judgment debt.[151] After attachment, and if the judgment debt is not liquidated, the clerk "shall dispose of the property in a manner which he deems most expedient in the interests of the parties concerned."[152] He also has a duty after disposal of the property to attach to the writ a statement of the result of the execution, showing the disposal of the amount recovered

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[151]Rule 27 (2) Community Court (Civil) Rules.

[152]Rule 27 (2) Community Court (Civil) Rules.

and attaching receipts, if any.[153] Although the judgment creditor has the duty of preparing conditions of sale for the immovable property attached, and of appointing the legal practitioner to transfer the property after its sale, the clerk plays an important role regarding the attachment and sale of the immovable property. It is he who arranges a time and place for the sale of the property. It is also his responsibility to advertise the sale in the Gazette and newspapers. The clerk is responsible for issuing a certificate stating whether or not the sale was duly and properly conducted.[154] The sale also takes place in the presence of the clerk.[155] The Zimbabwean system which provides for the administrative and complicated functions relating to the enforcement of judgment debts to be performed by an expert or someone especially appointed for the purpose makes sense. It is to be preferred to a system where the functions have to be performed by a layman who in all probability will have to appoint a lawyer to proceed on his behalf. He will have to bear the expense of the lawyer performing these functions. When one is dealing with small claims it is conceivable that the legal costs and expenses related to the recovery of the debt may approximate or even exceed the judgment debt. Accordingly the provisions of the Zimbabwe Community Court (Civil) Rules have many advantages

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[153]Rule 27 (13) Community Court (Civil) Rules.

[154]Rule 28 (8) and (9) Community Court (Civil) Rules.

[155]rule 28 (13) Community Court (Civil) Rules.

over and are to be preferred to, the provisions of the Small Claims Court Act. Provided the clerk and his staff are adequately trained and effective, litigant satisfaction in a system as it exists in the Community Courts in Zimbabwe is likely to be greater than that in the Small Claims Court.

8. RECOMMENDATIONS FOR IMPROVEMENTS IN ENFORCEMENT PROCEDURES

The enforcement procedures in the Small Claims Court can be improved by making provisions which impose a duty on the clerk of the court to take steps to enforce recovery of the judgment debt.

While there is a provision for the holding of a financial enquiry where the judgment debtor is present at the hearing, there are few provisions relating to the assistance of the creditor where judgment by way of default is obtained.

There is no provision for the holding of an enquiry in these circumstances. If litigant satisfaction is to be enhanced, provision for the holding of financial enquiries should be made where default judgment has been obtained. Although the Presiding Officer's function in this regard will be mainly administrative, such enquiry can serve an important purpose, especially where the defendant has no attachable assets. In terms of the present legislation the creditor's only recourse

in such cases is to take further proceedings in the Magistrate's Court.[156]

The Hoexter Commission was of the opinion that a requirement that the judgment debtor pay the judgment directly into court would facilitate recovery by not only taking the sting out of payment to the winner but also that it would "add some aura of judicial authority to the responsibility to pay".[157]

The Small Claims Court Act however provides that payment must be made directly to the creditor.[158] Also recommended was that after judgment a judgment satisfaction plan be arranged. Important to the success of the judgment satisfaction plan was the issue of a provisional writ by the clerk which would be enforceable upon the failure of the debtor to comply with the order.[159] Important in this respect is that at the time of the hearing the judgment debtor would be obliged to furnish a list and description of all his assets to facilitate attachment in the event of the debtor's failure to comply with the instalment order.[160]

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[156]Section 44 of Act 61 of 1984.

[157]Fourth Interim Report 200.

[158]Section 38 of Act 61 of 1984.

[159]Fourth Interim Report.

[160]Ibid.

While section 39 provides for a financial enquiry and the court to make orders such as the issue of a provisional writ, there is no means of compelling the debtor to provide a list of his attachable property at the time of the enquiry.

9. RECOMMENDATIONS

It is submitted that the enforcement and recovery procedures in the Small Claims Court can be simplified in the following manner:

1. Execution should only be peremptory in respect of movable property. The creditor, however, should have the right to execute against immovable property if he wishes.

2. Where default judgment has been obtained, there should be provision requiring the judgment debtor to appear before the clerk of the court or Commissioner for the purposes of a financial enquiry.

3. At the financial enquiry in terms of section 39, or otherwise, the debtor should be obliged to furnish a list of all his assets. These could then only be disposed of by him with the consent of the creditor or upon application to the court.

4. Garnishee orders upon ex parte application of the creditor should be competent subject to the judgment debtor's right to appear.

5. The clerk should be the central figure in any enforcement procedures, and it should fall to him to ensure that all the recovery steps have been taken.

6. The messenger of the court should be obliged to attempt to ascertain the financial position of the debtor where the debtor has failed to pay the judgment debt within 10 days of the judgment.

7. The clerk should be entitled to make an order to pay in instalments on information supplied by the judgment debtor in his absence where such information has been furnished to the messenger of the court.

8. Upon the certificate of the clerk of the Small Claims Court that all else has failed, the judgment creditor should be entitled to apply to the court for a warrant for the debtor's arrest in order for him to be brought to court for the purposes of holding a financial enquiry. Provisions similar to those recommended by the Law Commission should be applicable to the enforcement of small claim debts.

With the incorporation of these suggestions, it is submitted that the Small Claims Court will enjoy greater credibility. It will, it is submitted, become not only a court but also an agency which will not only serve the purpose of ensuring that its judgments and orders are legal, but also that they are effective.

CHAPTER SIX

CONCLUSION

1. INTRODUCTION

At the end of 1987 and during 1988 certain data relating to the actions instituted in and cases heard by the Small Claims Court, Durban, during this period were analysed. The information was obtained from the following sources:

1. A record book in which details of all actions instituted in the Small Claims Court were kept.

2. A study of approximately 33% (466) of the case records of 1987 and 477 of the case records of case numbers 1 to 500 of 1988.

3. Statistics recorded by the Commissioners.

1.1 The Record Book

For the year 1987 and for the cases 1 to 500 studied in 1988 details of every action instituted were recorded in a record book kept by the clerk of the court. The following details were recorded in this book.

1. the case number;
2. the plaintiff's name;
3. the defendant's name;
4. the cause of action;
5. the amount of the claim;

6. the date of the issue of summons;
7. the date of hearing.

In addition, in respect of the cases studied in 1988, details of the plaintiff's and defendant's gender and where possible, their occupation, were also obtained. No record of the numbers of letters of demand was kept. There are a number of reasons for this. While the clerk drafted a number of these, a number were drafted by the claimants themselves after advice given by the clerk. In addition a number were drafted without any advice from the clerk of the court after advice given by other instances. A number were drafted by, or with the assistance of, the Legal Aid Clinic at the University of Natal, Durban. Any record of the letters of demand would therefore be an inaccurate reflection of their number.

1.2 Case Study

Case files relating to the years 1987 and 477 files of 1988 were analysed in order to ascertain the following details:

1. the nature of the claims instituted;
2. the outcome of the case;
3. the nature of the parties with regard to whether they were individuals or businesses;
4. the race groups of the plaintiffs and defendants.

Details of whether individual plaintiffs were suing for a business debt in their own name could not accurately be ascertained from the case study. These details were only

apparent in those cases where plaintiffs were cited as businesses. The details reflected in the case study were compared with the details reflected in the record book which was used as a cross-reference or check. There were some differences found, relating mainly to the classification of the causes of action and the nature of the claims.

In certain cases while being classified as a particular cause of action by the clerk, it appeared from the case record itself that the cause of action had been incorrectly recorded. In such a case the cause of action as perceived from the case record was taken. In some cases by virtue of the scant particulars reflected in the summons it was difficult to ascertain the precise nature of the claim. These cases were, however, only a small percentage (approximately 5%) and so should not have had a dramatic effect on the accuracy of the results.

1.3 Bench Statistics

In January and February 1987 the Small Claims Court sat on four evenings a week, Monday to Thursday. From March 1987 there were two courts sitting four evenings a week. All cases requiring an interpreter were set down in one court. There were two permanent interpreters who were employed in this court. On the average six cases were set down per court per evening. The records of 1988 are those of the first six months, January to the end of June 1988. The Commissioners at the end of each sitting recorded the following details with regard to the sitting:

1. the number of the judgments recorded after the evidence;
2. the number of default judgments granted;
3. the number of adjournments;
4. the number of settlements;
5. the number of applications heard;
6. the time spent in each sitting.

In respect of the judgments granted after evidence, there was no distinction drawn between judgments for the plaintiff, judgments for the defendant or the dismissal of the plaintiffs' claims. The record of the settlements cannot be said to be an accurate reflection of either the total number of settlements or the number of settlements which took place at the hearing. Cases which had been settled some time before the set down date were not placed on the roll for hearing. Some however where knowledge of the settlement came to the clerk only shortly before the date of the trial, had already been set down for trial. In these cases the Commissioners were advised on the date of the hearing that a settlement had been reached. Some of these were recorded by the Commissioner and reflected in the statistics.

During the period a number of cases were set down on more than one occasion. The reasons for this were numerous. They included adjournments for obtaining additional evidence, matters which were reinstated after being struck off the roll, there being no one present at the first hearing; no proof of service or adjournments by consent, etc.

Table A contains data represented as a percentage indicating the time of each sitting of the Court.

TABLE A

TIME IN MINUTES										
0-30	30-60	60-90	90-120	120-150	150-180	180-210	210-240	240-270	270-310	310+
7,9	20,06	27,35	22,18	22,18	12,46	9,11	3,03	0,61	0,61	0,33

The average number of cases set down for a sitting was 6. In 55% of the cases the Commissioner sat for less than 1½ hours. In 77,5% of the occasions the roll was completed in less than two hours. 90% of the sittings took less than 2½ hours to complete and in less than 1% of the sittings the Commissioner had to sit for longer than 3 hours. 69,7% of the sittings took between 30 minutes and 2 hours to complete. The average time taken per case therefore, including default judgments and applications, was 15 minutes.

Table B below is a summary of how the cases were disposed of during the year 1987 and up to June 1988. For the first two months of 1987 there was only one court sitting. Thereafter two courts sat. The figures in the table are expressed as percentages.

TABLE B

	JUDGMENT	DEFAULT JUDGMENT	SETTLEMENTS RECORDED	CONSENT TO JUDGMENT	ADJOURNMENTS	STRUCK OFF	APPLICATIONS
1987	32,1	11,0	4,8	1,0	16,7	30,8	3,4
1988	34,0	13,3	4,1	1,0	17,1	27,8	3,0

The figures for 1987 and 1988 are almost the same.

2. CATEGORIES OF CLAIMS

Cases were broken down into thirteen types or categories of claims. These were claims for work done and services rendered, defective goods sold, defective performance, money lent, motor vehicle collisions, rent, the return of lessee's deposit paid in terms of a lease agreement, property damaged or lost, goods sold and delivered, damages as a consequence of personal injuries, other breaches of contract, wages and claims against insurance companies. Under the category of other breaches of contract were also included claims which could not be fitted into any other category such as claims for misrepresentation, unjust enrichment and disputes between neighbours. The majority of this category, however, were claims for cancellation of the contract together with restitution, the defendant having failed to perform in terms of a bilateral agreement.

Table C indicates the percentage proportion of the cases studied for each type of claim. For example, in respect of work done and services rendered in 1987 there were 82 cases studied of the total of 466. This amount represents 17,6% of the total cases studied. This can be compared to 10,3% for the year 1988. This category in 1988 numbered 49, 49 of 477 is equivalent to 10,3%.

TABLE C

CAUSE OF ACTION	PERCENTAGE 1987	PERCENTAGE 1988	NUMBER 1987	NUMBER 1988
WORK DONE/SERVICES RENDERED	17,6	10,3	82	49
DEFECTIVE GOODS SOLD	6,2	7,3	29	35
DEFECTIVE PERFORMANCE	5,8	7,3	29	35
LOAN	7,2	3,8	34	18
MOTOR VEHICLE ACCIDENT	11,6	15,7	54	75
RENT	4,6	2,7	21	13
RETURN OF DEPOSIT	1,7	2,9	8	14
INSURANCE CO.	0,8	0,4	4	2
PROPERTY DAMAGED/LOST	3,2	6,3	15	30
DOGBITE/ASSAULT	1,5	1,7	7	8
GOODS SOLD AND DELIVERED	6,7	5,2	31	25
OTHER BREACH OF CONTRACT	12,7	18,4	69	88
WAGES	20,4	17,6	95	84
TOTAL	100,0	99,8	466	477

In 1987 the claim for wages by a domestic employee against his or her employer represented the largest individual category. In 1988 this category was second to the category of other breaches of contract. While in 1987 20,4% of all claims studied were brought by domestic employees, figures for 1988 indicate a reduction of almost 3% (17,6%). Included in this type of claim were not only claims for wages, but also for damages following the claimant's dismissal and claims for sick and leave pay. Excluding the general category of other breaches of contract, the second and third largest categories of claims were for work done and services rendered and claims for damages as a consequence of motor vehicle collisions. In 1987 they represented 17,6% for work done and services rendered and 11,6% for motor vehicle collisions.

In 1988 15,7% of the cases studied were for motor vehicle collisions while 10,3% were for work done and services rendered.

Approximately 80% of the cases classified under the heading of other breaches of contract were actually for breaches of contract. Of these the majority were claims for cancellation and restitution following non-performance by the defendant. The most common example was where payment of the purchase price had been made by the plaintiff but the goods purchased were not delivered. This can be distinguished from the category of defective goods sold where the goods, although of poor quality, were actually delivered.

2.1 Consumer Related Claims

Table D is an analysis of the consumer related claims. The first part indicates consumer plaintiff related claims, while the second part concerns consumer defendant related claims. The analysis excludes the general category of other breaches of contract.

TABLE D

PART A CONSUMER PLAINTIFF	% 1987	% 1988
Wages	20,4	17,6
Defective goods sold	6,2	7,3
Defective performance	5,8	7,5
Return of deposit	1,7	2,9
Insurance claims	0,8	0,4
	33,9	36,7
PART B CONSUMER DEFENDANT	% 1987	% 1988
Word done/services rendered	17,6	10,3
Loan	7,2	3,8
Rent	4,6	2,7
Goods sold and delivered	6,7	5,2
	36,1	22,0

From Table D it would seem that consumer plaintiff related claims increased in 1988, while consumer defendant related claims decreased. This, although not conclusive, is indicative that the Small Claims Court was becoming more popular with the man in the street or the individual litigant and less popular in relation to business related claims. The Small Claims Court seemed to have lost its popularity as a forum for debt collection in 1988.

3. DEBT COLLECTION

In South Africa comparatively few businesses use the court to collect their debts. The fact that only natural persons may institute action eliminates many potential claimants. A further reason why businesses do not use the Small Claims Court is that the Magistrate's Court provides and easier and quicker method of obtaining default judgment. There is no

need for the plaintiff to appear in the Magistrate's Court in order to obtain default judgment.[1] In the Small Claims Court on the other hand, the plaintiff has to prove his case despite the failure of the defendant to appear.[2]

4. OUTCOME

Table E is an analysis of the outcomes for 1987 and 1988. The amounts recorded are percentages of the total.

TABLE E

	Judgment for Plaintiff %	Dismissed %	Struck off or adjourned sine die %	Settled %
1987	41,4	12,0	31,3	15,2
1988	39,6	14,0	34,4	11,9

Only 41,4% of the cases analysed for 1987 resulted in judgment in favour of the plaintiff. This was less for 1988 (39,6%). While 12% of the cases in 1987 ended in dismissal or judgment in favour of the defendant, this increased in 1988 to 14%. More than one-third of the cases in 1988 were struck off the roll or adjourned. Just under one-third (31,3%) were adjourned or struck off the roll in 1987. The recorded settlements for 1988 were 4% less than those of 1987.

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[1]Rule 12 of the Magistrate's Court Act 32 of 1944.

[2]Section 35 Act 61 of 1984.

The main reason for adjournments was the striking from the roll as a consequence of the non-appearance of both or one of the parties. A certain number were also adjourned where notwithstanding the absence of the defendant, the plaintiff could not prove service of the summons. Adjournments also occurred where the court lacked jurisdiction.[3] Although there are differences between the results of 1987 and 1988, the differences are not major. Generally the differences range between 1,8% (in respect of judgments for the plaintiff) and 3,5% (in respect of those cases settled).

Table F represents the results of the study with regard to outcome expressed as a percentage for the years 1987 and 1988.

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[3]Although 15,2% of the cases in 1987 and 11,9% of the cases in 1988 were recorded as settled, the actual settlement figure is probably more. One of the reasons for the failure of both parties to attend the hearing is the satisfactory settlement of the matter before that date. Not all settlements were recorded. Without interviewing all those persons who did not attend the trial, an accurate proportion of the number of settlements could not be made.

TABLE F

CAUSE OF ACTION	JUDGMENT FOR PLAINTIFF		DISMISSED/ABSOLUTION		STRUCK OFF/ADJOURNED SINE DIE		SETTLED	
	1987	1988	1987	1988	1987	1988	1987	1988
WORK DONE/SERVICES RENDERED	24,4	32,6	12,2	16,3	39,0	36,7	24,4	14,3
DEFECTIVE GOODS SOLD	37,9	37,1	13,8	17,1	27,6	25,7	20,7	20,0
DEFECTIVE PERFORMANCE	66,7	30,5	7,4	13,9	3,7	38,9	22,2	16,7
LOAN	55,9	50,0	5,9	--	20,6	33,3	17,6	16,7
MOTOR VEHICLE ACCIDENT	53,7	40,0	16,7	14,7	16,7	21,3	12,9	10,7
RENT	66,7	69,0	--	23,1	23,8	7,7	9,5	--
RETURN OF DEPOSIT	37,5	42,8	--	21,4	37,5	28,6	25,0	7,1
INSURANCE CO.	25	--	25,0	--	50,0	50,0	--	50,0
PROPERTY DAMAGED/LOST	26,7	50,0	46,7	16,7	20,0	16,7	6,7	16,7
DOGBITE/ASSAULT	71,4	50,0	--	37,5	28,5	--	--	12,5
GOODS SOLD AND DELIVERED	48,3	40,0	3,2	12,0	32,3	40,0	16,3	8,0
OTHER BREACH OF CONTRACT	40,7	47,8	10,2	8,0	35,6	33,0	13,5	11,4
WAGES	31,6	28,6	14,7	15,5	45,3	48,8	8,4	7,1
TOTAL	41,4	39,6	12,0	14,0	31,3	34,4	15,2	11,9

Although there are differences between the various types of claims in respect of the two years, many are approximately the same. A comparison between the categories forming the majority of the claims (wages, other breaches of contract and motor vehicle collisions) does indicate a relatively small difference. The greatest difference in respect of these categories between the years 1987 and 1988 is in respect of motor vehicle collisions (judgment for the plaintiff 13,7%). The differences, it would seem, could partly be due to the few numbers available in respect of the different categories.

5. SUCCESS RATE

Table G reflects the types of claims where the plaintiff succeeded in obtaining judgment in more than 50% of the cases.

TABLE G

The numbers in brackets represent the figure for 1988 and 1987 respectively.

1987		1988
Personal injury	71,4	(50,0)
Defective performance	66,7	(30,5)
Rent	66,7	(69,2)
Loan	55,9	(50,0)
Motor vehicle collisions	53,2	(40,0)
1988		1987
Rent	69,2	(66,7)
Loan	50,0	(55,9)
Personal injury	50,0	(71,4)
Property lost or damaged	50,0	(26,6)

A comparison between 1987 and 1988 does indicate various similarities. Of the five categories over 50% in 1987, three in 1988 also had results over 50%. Of the four in 1988 with 50% or more success rate, three were the same category in 1987. The vast difference between the 1987 and 1988 figures for claims for defective performance is not easily explained. The answer may be that in 1988 many of the claims were settled. The percentage of this type of claim which was adjourned, struck off or recorded as settled, amounts to 54,6% in 1988 as opposed to 25,9% in 1987. Many cases adjourned or struck off were probably settled.

The differences in personal injury claims or claims in respect of damaged or lost property could be by virtue of the limited numbers recorded in 1987 for these types of claims.

At first sight the success rate of plaintiff instituting claims for goods sold and delivered (48% in 1987 and 40% in 1988) appears lower than expected. However, when one takes into account the percentages struck off or adjourned (32,3% in 1987 and 40% in 1988) together with the recorded settlements (16,1% in 1987 and 8% in 1988) it is likely that the plaintiff received payment in the majority of cases. The percentage of those plaintiffs who were successful in recovering amounts lent is, taking into account the percentage struck off, adjourned or settled, likely to be greater than 55,9% and 50% which was recorded.

The statistics of 1987 relating to claims for work done and services rendered are of interest. There were as many settlements recorded as successful judgments. The amount of cases which ended in judgment for the defendant, absolution or the dismissal of the plaintiff's claim was half of those where judgment was granted to the plaintiff. The number of cases struck off (39%) was likewise proportionately high. The statistics in relation to this category for 1988 are somewhat different. As opposed to 24,4% of successful plaintiffs in 1987, the success rate in 1988 was 32,6%. The number of settlements recorded (14,3% as opposed to 23,4% in 1987) was less than 1987's figures. The proportion adjourned was approximately the same. However there are common

features. The success rate of plaintiffs is below average and the proportion adjourned or settled above the average. These statistics, it is submitted, are due to some extent to the dynamics of this type of claim, the defendant's attitude to the claim and counter allegations of defective or imperfect performance and the parties' willingness to accept compromises.[4]

By virtue of the provisions of the Basic Conditions of Employment Act[5] only certain categories of employees are entitled to institute civil claims without initially complying with various statutory provisions. The effect of the legislation is to greatly reduce the number of employees suing their employers for wages, salaries and other emoluments. The cases falling within the wage category were all in respect of claims by domestic employees. All the plaintiff were Blacks. A characteristic of this type of claim is the relatively low success rate the plaintiffs (31,6% compared to the mean of 41,4% in 1987; 28,6% compared to the mean of 39,6% in 1988) and the high success rate of the defendants (14,7% compared to the mean of 12% in 1987; and 15% compared to the mean of 14% in 1988). Also characteristic is the relatively low settlement rate recorded (8,4% compared to the mean of 15,2% in 1987; 7,1% compared to the mean of 11,9% in 1988).

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[4]See the results of McEwan and Maiman in (1981) 33 Maine Law Review 231 250.

[5]Act 3 of 1983.

The reasons for these results to some extent are attributable to the following:

1. The uncertainty of the law on certain aspects concerning this type of claim.

2. The institution of action where no cause of action lay.

3. The failure of claimants to distinguish between a claim which would be maintainable in the Industrial Court but which has no basis in the other courts such as the Unfair Labour Practice.

4. The possibility of unrecorded judgments.

However characteristic of plaintiffs in respect of these claims was their unwillingness to attempt to negotiate a settlement. They would rather have a decision go against them than attempt to settle. The probable reason for this is the lack of trust that the employees had for employers, their feeling of inadequacy, and their inability to bargain.[6]

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[6]Information obtained from various litigants claiming wages in the Small Claims Court in Durban during this period.

6. THE RACE OF THE LITIGANTS

Table H indicates the breakdown of plaintiffs and defendants into various groups for cases heard in 1987. Table I represents the same breakdown for 1988.

TABLE H

1987		
	PLAINTIFF	DEFENDANT
White	241	239
Black	188	55
Indian	35	73
Coloured	4	7
Business	14	107
	482	482

TABLE I

1988		
	PLAINTIFF	DEFENDANT
White	215	210
Black	207	68
Indian	66	77
Coloured	22	24
Business	5	130
	509	509

Table J is a comparison between the years 1987 and 1988 expressed as a percentage.

TABLE J

	PLAINTIFF		DEFENDANT	
	1987 %	1988 %	1987 %	1988 %
White	50,0	42,4	50,0	41,3
Black	39,0	39,8	11,4	13,4
Indian	7,2	12,9	15,1	15,1
Coloured	0,8	4,2	1,4	4,7
Business	2,9	0,9	22,2	25,2

There is little difference between the figures of 1987 and 1988 in respect of Whites and Black, Indians as defendants, and businesses as defendants. The differences between the numbers in respect of Indian, Coloured and business plaintiffs could be due to the relatively small numbers in respect of these categories. In respect of 1987 certain of the Coloureds could have been classified as White as accurate figures in respect of Coloureds were not recorded.

Within the race groups the division was that set out in Table K. The percentages expressed are percentages in relation to the number of the race group and not the total number of the litigants.

Except for Blacks, most of the cases involved parties of the same race group. Again in respect of all race groups except for Blacks, the second highest group sued was the business defendant. There were accordingly relatively few actions brought between persons of different cultures. The reason for the difference in respect of Blacks was by virtue of the

claims by domestic employees. In 1987 50,5% of the cases involving Black plaintiffs were wage related claims connected with domestic employed. In 1988 the percentage was 40,6%.

TABLE K

PLAINTIFF	V DEFENDANT	1987 %	1988
White	White	58,0	52,7
White	Business	27,0	35,3
		85,0	88,0
Black	White	49,9	45,3
Black	Business	14,8	13,4
Black	Black	27,9	27,4
		92,6	86,1
Indian	Indian	59,2	54,5
Indian	Business	29,2	33,3
		88,4	87,8
Coloured	Coloured	100,0	54,5
Coloured	Business	--	18,2
		100,0	72,7

7. GENDER OF LITIGANTS

For 1988 details of the gender of the parties was also recorded. These are set out in Table L.

TABLE L

PLAINTIFF					
RACE	MALE	%	FEMALE	%	TOTAL
White	144	70,0	71	30,0	215
Black	87	40,6	120	59,4	207
Indian	54	81,8	12	18,2	66
Coloured	19	63,6	8	36,4	22
	294	58,2	211	41,8	505

DEFENDANT					
RACE	MALE	%	FEMALE	%	TOTAL
White	139	66,2	71	33,8	210
Black	49	72,1	19	27,9	68
Indian	67	87,0	10	13,0	71
Coloured	15	62,5	9	37,5	34
	270	71,2	109	28,8	379

Other than Black plaintiffs the majority of the plaintiffs and defendants of the respective race groups were males. There were 18,8% more Black females than Black males who were plaintiffs. This is due to the domestic employee phenomenon.

8. RACE AND SUCCESS RATE

Of the various race groups the Whites were the most successful. Table M indicates the breakdown in respect of the totals expressed as a percentage.

TABLE M

Expressed as a percentage. The figures represents plaintiffs.

	JUDGMENT FOR PLAINTIFF	DISMISSED/ABSOLUTION	ADJOURNED/STRUCK OFF	SETTLED
WHITES				
1987	52,8	10,3	29,0	8,3
1988	41,5	13,2	29,2	16,0
BLACKS				
1987	38,5	12,8	39,9	8,5
1988	36,9	13,9	41,2	9,6
INDIANS				
1987	48,5	21,2	18,2	15,1
1988	35,1	21,1	33,3	10,5

What is noticeable about Table M is the difference in success rates between 1987 and 1988. Other than the tendency expressed earlier that there were more consumer plaintiff related cases in 1988 and fewer business related claims there is little reason for the difference.

Figures in respect of defendants in those cases studied in 1988 were also recorded. No such figures are available for 1987.

Table N is the same as Table M except that it is in respect of defendants.

TABLE N

	JUDGMENT FOR PLAINTIFF	DISMISSED/ABSOLUTION	ADJOURNED/STRUCK OFF	SETTLED
WHITES	40,5	12,1	36,2	11,2
BLACKS	35,4	14,5	43,6	7,3
INDIANS	35,1	22,8	35,1	7,4
BUSINESS	41,8	14,2	26,9	17,2

What appears from Table N is that business defendants are the least successful in respect of the categories of defendants. Although White plaintiffs are the most successful of the litigants, White defendants are the least successful of the individual litigants.

9. AGE AND OCCUPATION OF PLAINTIFFS

Table O is a summary of the data relating to the ages of the claimants who instituted action in the Small Claims Court in Durban.

TABLE O

AGE GROUP IN YEARS	%
21 - 30	26,4
30 - 40	32,8
40 - 50	17,4

Table P reflects the occupations with the most number of plaintiffs.

TABLE P

OCCUPATION	%
Unemployed	18,4
Tradesman	12,1
Clerical/Secretarial	11,3
Businessman/Manager/Supervisor	10,4
Labourer	8,4
Domestic Employee	8,4
Teacher/Professional	7,6
Housewife	7,4
Pensioner	6,3

Of interest is the type of person who sought the aid of the Small Claims Court. It appears from Table P that the Small Claims Court is attracting the persons intended to be attracted to the Court. The lower class (unemployed,

domestic employee and labourer) together with the pensioners represent 41,5% of the total number of claims. Those occupations generally classified as middle class (tradesmen and clerical) represent 23,4% of the total claims. The upper middle class type of occupation (professional/ teacher, self-employed) represent 10,7% of the total claims.

The categories of salesman/representative or businessman/ manager/supervisor cannot be classified under middle class or upper middle class as the plaintiffs in this group represent a wide range of these types of employment.

10. AMOUNTS

Data of the amounts of the claims was also recorded. The amounts represent the amount claimed. In 1987 the jurisdiction of the court was R1 000,00, while in 1988 the jurisdiction was increased to R1 500,00. Table Q represents a summary of the data. The figures represent the percentage of the total recorded.

TABLE Q

	0-100	100-200	200-400	400-600	600-800	800-1000	1000-1200	1200-1500	1500
1987	16,1	20,7	20,2	11,7	11,7	10,3			
1988	9,3	15,2	23,4	15,6	10,4	8,9	5,6	4,0	8,6

Data was also taken relating to the proportion of cases in 1987 where the plaintiff claimed R1 000,00 being the maximum

of the court's jurisdiction. 12,5% of all cases were for claims of the maximum amount. It is also of interest to note that the proportion of claims for R1 500,00 being the present maximum is greater than the proportion for both claims for the range R1 000,00 - R1 200,00 and for the range R1 200,00 - R1 500,00.

The highest proportion of claims was for the range R200,00 - R400,00 while the second highest proportion was for claims of R100,00 - R200,00. In 1987 57% of the claims were for less than R400,00. In 1988 the proportion was 48%. Only 18,2% of the claims in respect of actions instituted in 1988 were for the range R1 000,00 - R1 500,00. Of this 8,6% was for the maximum claim.

From the above a conclusion can be drawn that most of the claims can be categorised as small claims. It can also be concluded that many persons are prepared to abandon part of their claim in order to bring the claim within the jurisdiction of the Small Claims Court (12,5% in 1987; 8,6% in 1988).

One hundred judgments of cases where judgment was given in 1988 were perused. Of these 59 were for the amount claimed. The amounts of the judgment compared to the amounts claimed are represented in Table R below.

TABLE R

	PERCENTAGE OF AMOUNTS CLAIMED										
	0-10	10-20	20-30	30-40	40-50	50-60	60-70	70-80	80-90	90-100	100
NUMBER	2	2	2	5	0	8	2	7	6	7	59

The above figures do indicate that most of the judgments granted are equal to the amount claimed. There are however numerous cases where the percentage of the judgment is low compared to the amount claimed. This could be as a consequence of the plaintiff failing to prove his damages, a misconception of the legal position on the plaintiff's part or the amount he is entitled to claim; or the fact that there is a counter-claim.

11. CONCLUSIONS

The low percentage of the judgments granted compared to some of the amounts claimed (see Table R above) could be eliminated by proper legal advice prior to the institution of action and advice given during the course of the proceedings.

There does appear to be a difference between the figures in Table B above and those figures in Table D regarding the percentage of successful judgments. One of the reasons could be that Table D refers to cases 1 - 500 while Table B refers to matters decided up to the end of June 1988. At that stage the cases determined were up to case numbers higher than 500.

The judgments in Table B above also included judgments in favour of the defendants and cases which had been dismissed.

A comparison between those matters adjourned and struck off indicates that there are almost twice as many cases struck off the roll than adjourned. Whereas adjournments were granted at the request of one of the parties, or at the request or instance of the court, matters were struck off the roll where neither party appeared at the hearing or where there was no proof of service of the summons on the defendant in those cases where the defendant only appeared. Although the failure of both parties to appear could have been as a result of a settlement, this did not apply in the majority of cases.

In general the reasons for the adjournment or striking from the roll of matters were the following:

1. The failure of the plaintiff to deliver the summons to or retrieve it from the messenger of the court before or after service. This can in part be attributed to a lack of communication between the clerk of the court and the plaintiff and the latter's expectation that the clerk would perform this function. It is also due to a lack of appreciation on the part of the plaintiff of his obligations imposed by the Act.

2. The failure of the plaintiff to attend on the date of hearing. Again this can be as a consequence of the plaintiff's failure to realise the need to appear. However, certain plaintiffs did experience difficulty in arriving at court on time by virtue of their reliance on public transport. Some of these, after arriving, discovered that their case had been struck off the roll or adjourned.

While the nature of the defendants has an important bearing on their success rate, the success of the defendants is also to a large extent dependent upon the nature and education of the plaintiff. To a large extent the relative success of the Black and Indian defendants is related to the lack of success of plaintiffs of these race groups. This is especially so bearing in mind the relative absence of cross-cultural disputes (other than domestic employee related claims). It is also to be noted that business defendants are more likely to settle than other defendants.

It is apparent that notwithstanding the fact that many cases adjourned or struck off the roll could have been settled, the success rate of plaintiffs is relatively low.

It can, it is submitted, be assumed that generally speaking Whites are more educated than Indians, who are in turn more educated than Blacks. It is clear, it is submitted, that the more educated the plaintiff is, the greater his chances of

success will be. The system should therefore be such that it caters adequately for the less educated.

A characteristic of the Small Claims system in South Africa is the fact the responsibility for instituting or defending a claim lies with the litigants. It is also his duty to ensure that his case is properly presented at the hearing.

Methods of dealing with the number of adjournments and low success rate include the following:

1. A change in attitude by the Commissioner whose function it is to take an active role in the proceedings.[7]

2. More in-court assistance to the litigants by members of the court staff.[8] In this regard greater use should be made use of the personnel of the Magistrate's Courts. Prosecutors should be appointed as legal assistants and Magistrates should ex officio have the same powers as the clerk of the Small Claims Court and its legal assistants.

3. A change in the system in order to place more responsibility on the officers of the court

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[7]See Chapter 4 above.

[8]See Chapter 3 above.

including the clerk, legal assistant and the messenger of the court.[9]

4. The provision of a forum or opportunity at which the litigants can be advised of their rights and obligations as well as what evidence needs to be led at the hearing. Such forums should also provide an opportunity for negotiation or mediation.[10]

5. The provision of assistance in certain documents, for example the defendant's rights explained in the summons.[11]

12. RECOMMENDATIONS RELATING TO SMALL CLAIMS PROCEDURE

Despite there being no link between the report of the Hoexter Commission and the Civil Rules of the Zimbabwe Community Court, the latter's provisions embody most, if not all, of the Hoexter Commission's recommendations with regard to the role of the Presiding Officer. However, there is a vast difference between the provisions of the Zimbabwean Community Court Rules and the South African Small Claims Court Act and Rules. The Community Court Rules are characterised by

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[9]See Chapter 3 and 5 above.

[10]See Chapter 4 above.

[11]See Chapters 3, 4 and 5 above.

detailed and specific provisions while there are very few contained in the Small Claims Court Act. The need for specificity and precision is perhaps greater in the Community Courts than the Small Claims Courts. While the Commissioners of the Small Claims Court have, in general, at least five years' practical experience, the Presiding Officers of the Community Courts need only have "O" levels and undergo six months' practical training.[12] A detailed guide is therefore necessary for these Presiding Officers.

The procedure in the Small Claims Courts is intended to be simple and informal. Any detailed provisions, it could be argued, would introduce unnecessary formalism. On the other hand, the absence of any guidelines may lead to uncertainty. Each Commissioner may have a different approach. This could lead to confusion and inconsistency.

The Small Claims Court Act introduced a hitherto unknown and foreign procedure to Commissioners who have been trained in a traditional, the adversary, procedure. Guidelines and check lists therefore are not only useful but necessary. The provisions of the Community Court Rules relating to the role of the Presiding Officer would serve as a useful guide. They will not, it is submitted, introduce unnecessary formalism.

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[12]Robert Seidman "The Individual in African Courts : Zimbabwean New Primary Courts" in P.N. Takiranbudde (ed.) Proceedings of the First All African Law Conference (1981) 110.

A consistent approach by the Commissioners will result. The Community Court Rules ensure a fair and proper trial.

It is true that the establishment of the Primary Courts of Zimbabwe arose out of the circumstances existing specifically in Zimbabwe at the time of independence in 1980.[13] Notwithstanding this, it is submitted that the events leading up to their establishment and the procedures they now follow have relevance in South Africa.

Informal forums have arisen in the Black townships of South Africa as alternatives to the State courts as a result of the largely ineffective administration of justice in the townships.[14] They include unofficial courts operating under the authority of tribal or nation state representatives in the townships appointed by chiefs and headmen; informal courts and vigilante groups working within Community Councils or Ward Committees; gangs and various other cultural movements.[15] Some arose during the 1980's because the State courts were distrusted and considered instruments in the hands of the apartheid regime.[16] These courts were inseparably committed to the Black majorities' freedom

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[13]supra.

[14]G J van Niekerk "People's Courts and People's Justice in South Africa" (1988) De Jure 292 293.

[15]G J van Niekerk 294.

[16]G J van Niekerk 295.

struggle. The aims of these courts were to unite the people in their struggle and to educate them about their political objectives. Their approach was therefore conciliatory and violence was strongly renounced.[17] Other forums furthered the aims and political ideals of their leaders only. Harsh punishments were administered and floggings and execution by necklacing were not uncommon.[18] It was partly due to the harsh punishment policy of the Nyanga East Youth Brigade Court that led to its loss of legitimacy. The proceedings in these types of courts were semi-private and conducted in camera : the judge was the interrogator and the proceedings were marked by undercurrents of coercion. It was seldom that the accused in these courts was unpunished.[19] It is not my intention to discuss these forums.

Many of the courts were established to alert wrongdoers to the consequences of their actions and especially the damage

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[17]G J van Niekerk 295 296.

[18]Sandra Burman and Wilfried Schärf "Creating Peoples Justice. Street Committees and Peoples Courts in a South African City" (1990) 24 Law and Society Review 693 726-729; John Hund and Malebo Kotu-Rammopo "Justice in a South African Township : The Sociology of Makgotla" (1983) 16 Comparative and International Law Journal of South Africa 179.

[19]Burman and Schärf 727 733; Hund and Kotu-Rammopo 191-193.

they were doing to the liberation and community struggle.[20] They were therefore similar to those of the liberation movements in Zimbabwe prior to independence.[21] These forums enjoyed popular support and confidence.[22] It is therefore essential that their role in society and the proceedings they have adopted be examined more thoroughly.

The objects of the alternative forums included the settling of disputes between township residents. The street committees in Cape Town deal with domestic disputes between spouses or parents and children and disputes between neighbours. Disputes concerning the custody of children are also dealt with by these committees.[23] Certain peoples courts in the PWV area deal with similar problems.[24]

The procedure of these "courts" shows a strong similarity to indigenous procedure. Hearings are informal, free of technicalities and inquisitorial in nature. The Presiding Officer plays an active part in eliciting evidence and the

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[20]Burman and Schärf 727-733.

[21]See Makamure 1985 Zimbabwe Law Review above 55-56.

[22]G J van Niekerk 297.

[23]Burman and Schärf 708.

[24]Jeremy Seekings "Popular Courts and Popular Politics" in Glen Moss and Ingrid Obery (eds.) South African Review 5 (1989) 119 126-129.

parties involved are examined thoroughly.[25] During the course of the proceedings considerable time is devoted to hearing both sides of the case and the audi alterem partem principle is strictly adhered to.[26] When facts are in dispute in matters which have come before the street committees, they will often go much further than conventional courts to try and obtain all the facts.[27] Burman and Schärf report a paternity dispute where the child was sent for blood tests in order to determine who the father was.[28] The emphasis in the street committees in Cape Town as well as other peoples courts is on mediating between the parties and seeking acceptable solutions.[29]

Peoples courts are likely to play an important role in a new democratic society.[30] According to Maduna the peoples courts would ensure quick, inexpensive and impartial dispensation

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[25]G J van Niekerk 296.

[26]Burman and Schärf 710.

[27]Ibid.

[28]Burman and Schärf 711.

[29]Ibid; Wilfried Schärf "The Role of Peoples Courts in Transitions" in Hugh Corder (ed.) Democracy and Judiciary (1989) 167 175-178.

[30]Pennuell Maduna "Paralegals and Access to Justice in a Future South Africa" (1990) 2 Rights "A Lawyer's for Human Rights Publication" 21 23.

dispensation of justice in an atmosphere of mutual trust and goodwill.[31] Their purpose therefore would be similar to that of the present Small Claims Courts.[32] Their procedure, however, would be based more on conciliation and reconciliation and would serve as popular forums to "resolve and settle disputes through negotiation".[33]

It is not suggested that the Small Claims Courts should take over the functions of the peoples courts. They have different aims and for the most part deal with different kinds of disputes.[34] Neither is it envisaged by the African National Congress that the peoples courts will take the place of State courts.[35] What is clear, however, is that the alternative forums have gained momentum and could, if those involved in them are properly trained, gain popular support.[36]

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[31]Ibid.

[32]supra Chapter 1; Fourth Interim Report 125.

[33]Maduna 23.

[34]Many disputes in the popular forums are domestic or labour disputes.

[35]Maduna refers to the resolution of disputes by negotiation and by litigation.

[36]G J van Niekerk 297.

According to Dlamini one of the three determinants of a citizen's access to justice is his confidence in the legal system.[37] [38] The adversary system, together with a restricted system of evidence, is diametrically opposed to the indigenous system and the procedure of the alternative forums. Although the Small Claims Court Act[39] provides for an inquisitorial system and a free system of evidence, the procedure is foreign to most Commissioners. It is therefore submitted that knowledge of the procedure of the popular alternative forums of the townships which have grown up out of the need to administer day to day justice, will provide useful information on what the procedure should be in the Small Claims Courts.

In a new South Africa greater recognition will have to be given to the peoples courts as alternative forums of dispute resolution including judicial sanction of settlements and agreements reached through them.[40] Where settlements and agreements relating to small claims have been reached these

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[37]C R M Dlamini "The Influence of Race on the Administration of Justice in South Africa" (1988) 4 South African Journal on Human Rights 37 38.

[38]The other two determinants are knowledge of the law and ability to bring an action.

[39]61 of 1984.

[40]Maduna 23.

should have the same effect as a judgment of the Small Claims Court and be enforceable as such.[41]

13. FINAL CONCLUSIONS AND RECOMMENDATIONS

When first established, the Small Claims Court was intended to be a community project. State funding was to be kept to a minimum.[42] In the foreword to "You in the Small Claims Court" the Minister of Justice stated:

> "The community accepted responsibility for these courts with only a thin umbilical cord of responsibility running through the Department of Justice to the Minister."[43]

At the same time the Minister expressed the opinion that the establishment of the Small Claims Courts would reaffirm the principles of equality before the law and accessibility to everybody.[44]

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[41]D Scott-MacNab "Mediation Prior to Small Claims Litigation : A Human Approach" (1987) De Rebus 619 621.

[42]Department of Justice : Report for the period 1st July 1985 to 30th June 1986 4.

[43]S A S Strauss "You in the Small Claims Court" (1985) (v).

[44]Ibid.

However, without greater State involvement in the running of the courts, full acceptance or accessibility will not be possible. This will entail greater financial involvement on the part of the State; rules will have to be promulgated which will specify the duties of the Commissioners in greater detail; Small Claims Court forms will have to be simplified; Commissioners, clerks and legal assistants will require training, and courses and lectures will have to be held. Alternative methods of dispute resolution especially Small Claims Court mediation will have to be encouraged; and greater power will have to be given to the clerks and legal assistants to assist the parties in reaching settlement, both with regard to the merits and also the methods of recovery once judgment has been given. Finally, more account will have to be taken of the popular informal dispute resolution forums and mechanisms which exist in our country. Only then will it be possible to say that the Small Claims Court is truly one with a human face.

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